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OF THE

PHILIPPINES

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JANUARY 12, 2016

SUPREME COURT
MANILA
2017

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DETERMINED IN THE

SUPREME COURT OF THE PHILIPPINES

EN BANC

[A.C. No. 10910. January 12, 2016]
(Formerly CBD Case No. 12-3594)

ANTERO M. SISON, JR., *complainant, vs.* **ATTY. MANUEL N. CAMACHO,** *respondent.*

SYLLABUS

1. **LEGAL ETHICS; ATTORNEYS; MUST ALWAYS CONDUCT THEMSELVES WITH HONESTY AND INTEGRITY IN ALL THEIR DEALINGS.—** Those in the legal profession must always conduct themselves with honesty and integrity in all their dealings. Members of the Bar took their oath to conduct themselves according to the best of their knowledge and discretion with all good fidelity as well to the courts as to their clients and to delay no man for money or malice. These mandates apply especially to dealings of lawyers with their clients considering the highly fiduciary nature of their relationship. In the practice of law, lawyers constantly formulate compromise agreements for the benefit of their clients. Article 1878 of the Civil Code provides that "[s]pecial powers of attorney are necessary in the following cases: xxx (3) To compromise, to submit questions to arbitration, to renounce the right to appeal from a judgment, to waive objections to the venue of an action or to abandon a prescription already acquired xxx."

2. **ID.; ID.; ENTERING INTO A COMPROMISE AGREEMENT WITHOUT THE WRITTEN AUTHORITY OF THE CLIENT**

VIOLATES RULE 1.01 OF THE CODE OF PROFESSIONAL RESPONSIBILITY (CPR) WHICH STATES THAT "A LAWYER SHALL NOT ENGAGE IN UNLAWFUL, DECEITFUL CONDUCT."— In line with the fiduciary duty of the Members of the Bar, Section 23, Rule 138 of the Rules of Court specifies a stringent requirement with respect to compromise agreements, to wit: Sec. 23. Authority of attorneys to bind clients. – Attorneys have authority to bind their clients in any case by any agreement in relation thereto made in writing, and in taking appeals, and in all matters of ordinary judicial procedure. **But they cannot, without special authority, compromise their client's litigation, or receive anything in discharge of a client's claim but the full amount in cash.** In the case at bench, the RTC decision, dated May 26, 2011, awarded MDAHI approximately ₱65,000,000.00. When Paramount Insurance offered a compromise settlement in the amount of ₱15,000,000.00, it was clear as daylight that MDAHI never consented to the said offer. As can be gleaned from Atty. Camacho's letter, MDAHI did not sign the conforme regarding the compromise agreement. Glaringly, despite the lack of a written special authority, Atty. Camacho agreed to a lower judgment award on behalf of his client and filed a satisfaction of judgment before the RTC. The said pleading also failed to bear the conformity of his client. Although MDAHI subsequently received the payment of ₱15M from Paramount Insurance, it does not erase Atty. Camacho's transgression in reaching the compromise agreement without the prior consent of his client. For entering into a compromise agreement without the written authority of his client, Atty. Camacho violated Rule 1.01 of the CPR, which states that "[a] lawyer shall not engage in unlawful, dishonest, immoral or deceitful conduct." Members of the Bar must always conduct themselves in a way that promotes public confidence in the integrity of the legal profession.

3. ID.; ID.; IT IS NOT PREMATURE TO RULE ON THE CHARGE AGAINST RESPONDENT FOR HIS FAILURE TO ACCOUNT THE MONEY OF THE CLIENT PENDING RESOLUTION OF THE CRIMINAL CASE FILED AGAINST HIM; THE PRESENT CASE IS ADMINISTRATIVE IN CHARACTER, REQUIRING ONLY SUBSTANTIAL EVIDENCE.— The Court is of the view that it is not premature to rule on the charge against Atty. Camacho

for his failure to account for the money of his client. The pending case against him is criminal in nature. The issue therein is whether he is guilty beyond reasonable doubt of misappropriating the amount of ₱1,288,260.00 entrusted to him by his client. The present case, however, is administrative in character, requiring only substantial evidence. It only entails a determination of whether Atty. Camacho violated his solemn oath by failing to account for the money of his client. Evidently, the adjudication of such issue in this administrative case shall not, in any way, affect the separate criminal proceeding. In disciplinary proceedings against lawyers, the only issue is whether the officer of the court is still fit to be allowed to continue as a member of the Bar. The only concern of the Court is the determination of the respondent's administrative liability. The findings in this case will have no material bearing on other judicial action which the parties may choose to file against each other. While a lawyer's wrongful actuations may give rise at the same time to criminal, civil, and administrative liabilities, each must be determined in the appropriate case; and every case must be resolved in accordance with the facts and the law applicable and the quantum of proof required in each.

4. ID.; ID.; LAWYERS ARE NOT ENTITLED TO UNILATERALLY APPROPRIATE THEIR CLIENTS' MONEY FOR THEMSELVES BY THE MERE FACT THAT THE CLIENTS OWE THEM ATTORNEY'S FEES.— Atty. Camacho did not even deny making that request to MDAHI for additional docket fees and receiving such amount from his client. Rather, he set up a defense that the said amount formed part of his attorney's fees. Such defense, however, is **grossly contradictory** to the established purpose of the ₱1,288,260.00. In its Payment Request/Order Form, it is plainly indicated therein that MDAHI released the said amount only to be applied as payment for additional docket fees, and not for any other purposes. Consequently, the lame excuse of Atty. Camacho is bereft of merit because it constitutes a mere afterthought and a manifest disrespect to the legal profession. Atty. Camacho is treading on a perilous path where the payment of his attorney's fees is more important than his fiduciary and faithful duty of accounting the money of his client. Well-settled is the rule that lawyers are not entitled to unilaterally appropriate their clients' money for themselves by the mere fact that the clients

owe them attorney's fees. Moreover, Atty. Camacho failed to issue a receipt to MDAHI from the moment he received the said amount. In *Tarog v. Ricafort*, the Court held that ethical and practical considerations made it both natural and imperative for a lawyer to issue receipts, even if not demanded, and to keep copies of the receipts for his own records. Pursuant to Rule 16.01 of the CPR, a lawyer must be aware that he is accountable for the money entrusted to him by the clients, and that his only means of ensuring accountability is by issuing and keeping receipts.

5. ID.; ID.; A LAWYER'S FAILURE, TO RETURN UPON DEMAND, THE FUNDS HELD BY HIM ON BEHALF OF HIS CLIENT GIVES RISE TO THE PRESUMPTION THAT HE HAS APPROPRIATED THE SAME FOR HIS OWN USE IN VIOLATION OF THE TRUST REPOSED IN HIM BY HIS CLIENT.— The fiduciary nature of the relationship between the counsel and his client imposes on the lawyer the duty to account for the money or property collected or received for or from his client. Money entrusted to a lawyer for a specific purpose but not used for the purpose should be immediately returned. A lawyer's failure, to return upon demand, the funds held by him on behalf of his client gives rise to the presumption that he has appropriated the same for his own use in violation of the trust reposed in him by his client. Such act is a gross violation of general morality as well as of professional ethics. It impairs public confidence in the legal profession and deserves punishment.

6. ID.; ID.; ULTIMATE PENALTY OF DISBARMENT IS JUSTIFIED IN CASE AT BAR; RESTITUTION OF THE AMOUNT APPROPRIATED IS ALSO PROPER.— In this case, Atty. Camacho entered into a compromise agreement without the conformity of his client which is evidently against the provisions of the CPR and the law. Moreover, he deliberately failed to account for the money he received from his client, which was supposed to be paid as additional docket fees. He even had the gall to impute that the money was illicitly given to an officer of the court. The palpable indiscretions of Atty. Camacho shall not be countenanced by the Court for these constitute as a blatant and deliberate desecration of the fiduciary duty that a lawyer owes to his client. The Court finds that Atty. Camacho's acts are so reprehensible, and his violations of the

CPR are so flagrant, exhibiting his moral unfitness and inability to discharge his duties as a member of the Bar. His actions erode rather than enhance the public perception of the legal profession. Therefore, in view of the totality of his violations, as well as the damage and prejudice they caused to his client, Atty. Camacho deserves the ultimate penalty of disbarment. Further, he must be ordered to return the amount of ₱1,288,260.00 to MDAHI, which he received in his professional — capacity for payment of the purported additional docket fees. Disciplinary proceedings revolve around the determination of the respondent-lawyer's administrative liability, which must include those intrinsically linked to his professional engagement.

APPEARANCES OF COUNSEL

Ibaro B. Relamida, Jr., for complainant.
Manuel N. Camacho for respondent.

D E C I S I O N

***PER CURIAM*:**

In his verified affidavit-complaint,[1] dated September 17, 2012, filed before the Integrated Bar of the Philippines Commission on Bar Discipline *(IBP-CBD),* complainant Atty. Antero M. Sison, Jr. *(Atty. Sison),* president of Marsman-Drysdale Agribusiness Holdings Inc. *(MDAHI),* charged respondent Atty. Manuel Camacho *(Atty. Camacho)* with violation of the Code of Professional Responsibility *(CPR).* He accused Atty. Camacho of violating Rule 1.01, for dishonestly entering into a compromise agreement without authorization, and Rule 16.01, for failure to render an accounting of funds which were supposed to be paid as additional docket fees.

Complainant's position

Atty Sison alleged that Atty. Camacho was the counsel of MDAHI in an insurance claim action against Paramount

[1] *Rollo,* pp. 2-8.

Life & General Insurance Corp. *(Paramount Insurance),* docketed as Civil Case No. 05-655, before the Regional Trial Court, Makati City, Branch 139 *(RTC).* The initial insurance claim of MDAHI against Paramount Insurance was ₱14,863,777.00.

On March 4, 2011, Atty. Camacho met with Atty. Enrique Dimaano *(Atty. Dimaano),* corporate secretary of MDAHI, and proposed to increase their claim to ₱64,412,534.18 by taking into account the interests imposed. Atty. Camacho, however, clarified that the increase in the claim would require additional docket fees in the amount of ₱1,288,260.00, as shown in his hand-written computation.[2] MDAHI agreed and granted the said amount to Atty. Dimaano which was evidenced by a Payment Request/Order Form.[3] On **May 27, 2011,** Atty. Dimaano gave the money for docket fees to Atty. Camacho who promised to issue a receipt for the said amount, but never did.[4]

Atty. Sison later discovered that on **May 26, 2011,** the RTC had already rendered a decision[5] in favor of MDAHI granting its insurance claim plus interests in the amount of approximately ₱65,000,000.00.

On August 11, 2011, Atty. Camacho sent a letter[6] to MDAHI recommending a settlement with Paramount Insurance in Civil Case No. 05-655 in the amount of ₱15,000,000.00 allegedly to prevent a protracted appeal with the appellate court. MDAHI refused the offer of compromise and did not indicate its conforme on the letter of Atty. Camacho. Surprisingly, even without the written conformity of MDAHI, Atty. Camacho filed the Satisfaction of Judgment,[7] dated August 15, 2011, before the

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[2] *Id*. at 9-10.

[3] *Id*. at 10-12.

[4] *Id*. at 31 and 208.

[5] *Id*. at 13-27.

[6] *Id*. at 28.

[7] *Id*. at 29-30.

RTC stating that the parties had entered into a compromise agreement.

On August 18, 2011, Atty. Sison met with Atty. Camacho to clarify the events that transpired.[8] He asked Atty. Camacho whether he paid the amount of ₱1,288,260.00 as additional dockets fees, and the latter replied that he simply gave it to the clerk of court as the payment period had lapsed.

Disappointed with the actions of Atty. Camacho, Atty. Sison sent a letter,[9] dated August 24, 2011, stating that he was alarmed that the former would accept a disadvantageous compromise; that it was against company policy to bribe any government official with respect to the ₱1,288,260.00 given to the clerk of court; and that MDAHI would only pay ₱200,000.00 to Atty. Camacho as attorney's fees.

Respondent's Position

In his verified answer,[10] dated October 30, 2012, Atty. Camacho denied all the allegations against him. He stressed that he had the authority to enter into the compromise agreement. Moreover, the alleged docket fees given to him by MDAHI formed part of his attorney's fees.

He further stated in his position paper[11] that the judgment debt was paid and accepted by MDAHI without any objection, as duly evidenced by an acknowledgment receipt.[12] Thus, there was no irregularity in the compromise agreement.

With respect to the amount handed to him, Atty. Camacho averred that he filed a Motion to Compel Plaintiff to Pay Attorney's Fee on September 13, 2011 before the RTC. The Court granted

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[8] *Id*. at 4.

[9] *Id*. at 31-32.

[10] *Id*. at 80-92.

[11] *Id*. at 164-170.

[12] *Id*. at 146.

the said motion in its April 12, 2012 Order[13] stating that the amount of ₱1,288,260.00 was considered as part of his attorney's fees.

On July 6, 2012, the RTC issued an Order[14] resolving the motion for reconsideration filed by both parties in favor of Atty. Camacho. In the said order, the RTC opined that only ₱300,000.00 was previously paid to Atty. Camacho[15] as attorney's fees. Based on the foregoing, Atty. Camacho asserted that the amount of ₱1,288,260.00 which he received, truly formed part of his unpaid attorney's fees. He stressed that the said RTC order had attained finality and constituted *res judicata* on the present administrative case. He added that MDAHI disregarded the RTC order as it filed an estafa case against him concerning the amount of ₱1,288,260.00.

Report and Recommendation

After the mandatory conference on January 24, 2013 and upon a thorough evaluation of the evidence presented by the parties in their respective position papers, the IBP-CBD submitted its Report and Recommendation,[16] dated April 1, 2013 finding Atty. Camacho to have violated the provisions of Rule 1.01 and Rule 16.01 of the CPR and recommending the imposition of the penalty of one (1) year suspension from the practice of law against him. In its Resolution No. XX-2013-474,[17] dated April 16, 2013, the Board of Governors of the Integrated Bar of the Philippines *(Board)* adopted the said report and recommendation of Investigating Commissioner Eldrid C. Antiquiera.

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[13] *Id*. at 193-195.

[14] *Id*. at 196-201.

[15] In the parties' agreement, dated June 30, 2005, MDAHI agreed to pay Atty. Camacho a contingency attorney's fee of 20% of the judgment award less the ₱300,000.00 acceptance fee previously paid. See *id*. at 165 and 190.

[16] *Id*. at 229-231.

[17] *Id*. at 228.

Aggrieved, Atty. Camacho filed a motion for reconsideration[18] before the Board reiterating that the compromise agreement was valid because MDAHI did not reject the same and that the amount of ₱1,288,260.00 formed part of his attorney's fees.

In his Comment/Opposition,[19] Atty. Sison countered that Atty. Camacho never denied that he filed the satisfaction of judgment without the written authority of MDAHI and that there was a pending estafa case against him before the Regional Trial Court, Makati City, Branch 146, docketed as Criminal Case No. 13-1688, regarding the ₱1,288,260.00 handed to him.

In its Resolution No. XXI-2014-532,[20] dated August 10, 2014, the Board adopted the report and recommendation[21] of National Director Dominic C.M. Solis. The Board partially granted the motion for reconsideration and dismissed, without prejudice, the charge regarding the failure to account for the money, because it was premature to act on such issue due to the pending criminal case against the Atty. Camacho. Accordingly, the penalty of one (1) year suspension imposed was lowered to six (6) months suspension from the practice of law.

Hence, the case was elevated to the Court.

The Court's Ruling

The Court finds that Atty. Camacho violated Rules 1.01 and 16.01 of the CPR.

Entering into a compromise agreement without written authority of the client

Those in the legal profession must always conduct themselves with honesty and integrity in all their dealings. Members of the

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[18] *Id*. at 232-234.

[19] *Id*. at 248-251.

[20] *Id*. at 262.

[21] *Id*. at 263-268.

Bar took their oath to conduct themselves according to the best of their knowledge and discretion with all good fidelity as well to the courts as to their clients and to delay no man for money or malice. These mandates apply especially to dealings of lawyers with their clients considering the highly fiduciary nature of their relationship.[22]

In the practice of law, lawyers constantly formulate compromise agreements for the benefit of their clients. Article 1878 of the Civil Code provides that "[s]pecial powers of attorney are necessary in the following cases: xxx (3) To compromise, to submit questions to arbitration, to renounce the right to appeal from a judgment, to waive objections to the venue of an action or to abandon a prescription already acquired xxx."

In line with the fiduciary duty of the Members of the Bar, Section 23, Rule 138 of the Rules of Court specifies a stringent requirement with respect to compromise agreements, to wit:

> Sec. 23. Authority of attorneys to bind clients. — Attorneys have authority to bind their clients in any case by any agreement in relation thereto made in writing, and in taking appeals, and in all matters of ordinary judicial procedure. **But they cannot, without special authority, compromise their client's litigation, or receive anything in discharge of a client's claim but the full amount in cash.**
>
> [Emphasis and Underscoring Supplied]

In the case at bench, the RTC decision, dated May 26, 2011, awarded MDAHI approximately ₱65,000,000.00. When Paramount Insurance offered a compromise settlement in the amount of ₱15,000,000.00, it was clear as daylight that MDAHI never consented to the said offer. As can be gleaned from Atty. Camacho's letter, MDAHI did not sign the conforme regarding the compromise agreement.[23]

Glaringly, despite the lack of a written special authority, Atty. Camacho agreed to a lower judgment award on behalf of his

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[22] *Luna v. Galarrita,* A.C. No. 10662, July 7, 2015.

[23] *Rollo*, p. 28.

client and filed a satisfaction of judgment before the RTC. The said pleading also failed to bear the conformity of his client.[24] Although MDAHI subsequently received the payment of ₱15M from Paramount Insurance, it does not erase Atty. Camacho's transgression in reaching the compromise agreement without the prior consent of his client.

For entering into a compromise agreement without the written authority of his client, Atty. Camacho violated Rule 1.01 of the CPR, which states that "[a] lawyer shall not engage in unlawful, dishonest, immoral or deceitful conduct." Members of the Bar must always conduct themselves in a way that promotes public confidence in the integrity of the legal profession.[25]

Failing to account for the money of the client

Atty. Camacho was also charged with violation of Rule 16.01 of the CPR, which provides for a lawyer's duty to "account for all money or property collected or received for or from the client."

Here, Atty. Sison alleged that MDAHI gave Atty. Camacho the amount of ₱1,288,260.00 as payment of additional docket fees but the latter failed to apply the same for its intended purpose. In contrast, Atty. Camacho invoked the July 6, 2012 Order of the RTC which declared the MDAHI allegation as unsubstantiated, and claimed that the said amount formed part of his attorney's fees. The Board, on the other hand, opined that it was still premature to decide such issue because there was a pending estafa case, docketed as Criminal Case No. 13-1688, filed by MDAHI against Atty. Camacho involving the same amount of ₱1,288,260.00.

The Court is of the view that it is not premature to rule on the charge against Atty. Camacho for his failure to account for the money of his client. The pending case against him is criminal

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[24] *Id*. at 29-30.

[25] *Cerdan v. Gomez,* 684 Phil. 418, 428 (2012).

in nature. The issue therein is whether he is guilty beyond reasonable doubt of misappropriating the amount of ₱1,288,260.00 entrusted to him by his client. The present case, however, is administrative in character, requiring only substantial evidence. It only entails a determination of whether Atty. Camacho violated his solemn oath by failing to account for the money of his client. Evidently, the adjudication of such issue in this administrative case shall not, in any way, affect the separate criminal proceeding.

In disciplinary proceedings against lawyers, the only issue is whether the officer of the court is still fit to be allowed to continue as a member of the Bar. The only concern of the Court is the determination of the respondent's administrative liability. The findings in this case will have no material bearing on other judicial action which the parties may choose to file against each other. While a lawyer's wrongful actuations may give rise at the same time to criminal, civil, and administrative liabilities, each must be determined in the appropriate case; and every case must be resolved in accordance with the facts and the law applicable and the quantum of proof required in each.[26]

Delving into the substance of the allegation, the Court rules that Atty. Camacho indeed violated Rule 16.01 of the CPR. When Atty. Camacho personally requested MDAHI for additional docket fees, the latter obediently granted the amount of ₱1,288,260.00 to the former. Certainly, it was understood that such amount was necessary for the payment of supposed additional docket fees in Civil Case No. 05-655. Yet, when Atty. Sison confronted Atty. Camacho regarding the said amount, the latter replied that he simply gave it to the clerk of court as the payment period had lapsed. Whether the said amount was pocketed by him or improperly given to the clerk of court as a form of bribery, it was unmistakably clear that Atty. Camacho did not apply the amount given to him by his client for its intended legal purpose.

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[26] *Saladaga v. Astorga,* A.C. Nos. 4697 & 4728, November 25, 2014.

Atty. Camacho did not even deny making that request to MDAHI for additional docket fees and receiving such amount from his client. Rather, he set up a defense that the said amount formed part of his attorney's fees. Such defense, however, is **grossly contradictory** to the established purpose of the ₱1,288,260.00. In its Payment Request/Order Form,[27] it is plainly indicated therein that MDAHI released the said amount only to be applied as payment for additional docket fees, and not for any other purposes. Consequently, the lame excuse of Atty. Camacho is bereft of merit because it constitutes a mere afterthought and a manifest disrespect to the legal profession. Atty. Camacho is treading on a perilous path where the payment of his attorney's fees is more important than his fiduciary and faithful duty of accounting the money of his client. Well-settled is the rule that lawyers are not entitled to unilaterally appropriate their clients' money for themselves by the mere fact that the clients owe them attorney's fees.[28]

Moreover, Atty. Camacho failed to issue a receipt to MDAHI from the moment he received the said amount. In *Tarog v. Ricafort,*[29] the Court held that ethical and practical considerations made it both natural and imperative for a lawyer to issue receipts, even if not demanded, and to keep copies of the receipts for his own records. Pursuant to Rule 16.01 of the CPR, a lawyer must be aware that he is accountable for the money entrusted to him by the clients, and that his only means of ensuring accountability is by issuing and keeping receipts.

Worse, on **May 26, 2011,** the RTC already rendered its decision in Civil Case No. 05-655, adjudging MDAHI entitled to an insurance claim in the amount of approximately ₱65,000,000.00. From that date on, there was no more need for additional docket fees. Apparently, still unaware of the

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[27] *Rollo,* p. 11.

[28] *Luna v. Galarrita, supra* note 22, citing *Almendarez, Jr. v. Atty. Langit,* 528 Phil. 814, 819-820 (2006) and *Schulz v. Flores,* 462 Phil. 601, 613 (2003).

[29] 660 Phil. 618 (2011).

judgment, MDAHI subsequently released the money for additional docket fees to Atty. Dimaano, who handed it to Atty. Camacho on **May 27, 2011.** Despite a decision having been rendered, Atty. Camacho did not reject the said amount or return it to his client upon receipt. Instead, he unilaterally withheld the said amount by capriciously invoking the payment of his attorney's fees.

The fiduciary nature of the relationship between the counsel and his client imposes on the lawyer the duty to account for the money or property collected or received for or from his client. Money entrusted to a lawyer for a specific purpose but not used for the purpose should be immediately returned. A lawyer's failure, to return upon demand, the funds held by him on behalf of his client gives rise to the presumption that he has appropriated the same for his own use in violation of the trust reposed in him by his client. Such act is a gross violation of general morality as well as of professional ethics. It impairs public confidence in the legal profession and deserves punishment.[30]

Administrative penalty

A member of the Bar may be penalized, even disbarred or suspended from his office as an attorney, for violation of the lawyer's oath and/or for breach of the ethics of the legal profession as embodied in the CPR. The practice of law is a profession, a form of public trust, the performance of which is entrusted to those who are qualified and who possess good moral character. The appropriate penalty for an errant lawyer depends on the exercise of sound judicial discretion based on the surrounding facts.[31]

In *Luna v. Galarrita,*[32] the Court **suspended** the respondent lawyer for **two (2) years** because he accepted a compromise agreement without valid authority and he failed to turn over the payment to his client. In the case of *Melendrez v. Decena,*[33]

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[30] *Foster v. Agtang,* A.C. No. 10579, December 10, 2014.

[31] *Id*.

[32] *Supra* note 22.

[33] 257 Phil. 672 (1989).

the lawyer therein was **disbarred** because he entered into a compromise agreement without the special authority of his client and he drafted deceptive and dishonest contracts. Similarly, in *Navarro v. Meneses III,*[34] another lawyer, who misappropriated the money entrusted to him by his client which he failed and/or refused to account for despite repeated demands, was **disbarred** because his lack of personal honesty and good moral character rendered him unworthy of public confidence.

In this case, Atty. Camacho entered into a compromise agreement without the conformity of his client which is evidently against the provisions of the CPR and the law. Moreover, he deliberately failed to account for the money he received from his client, which was supposed to be paid as additional docket fees. He even had the gall to impute that the money was illicitly given to an officer of the court. The palpable indiscretions of Atty. Camacho shall not be countenanced by the Court for these constitute as a blatant and deliberate desecration of the fiduciary duty that a lawyer owes to his client.

The Court finds that Atty. Camacho's acts are so reprehensible, and his violations of the CPR are so flagrant, exhibiting his moral unfitness and inability to discharge his duties as a member of the Bar. His actions erode rather than enhance the public perception of the legal profession. Therefore, in view of the totality of his violations, as well as the damage and prejudice they caused to his client, Atty. Camacho deserves the ultimate penalty of disbarment.

Further, he must be ordered to return the amount of ₱1,288,260.00 to MDAHI, which he received in his professional capacity for payment of the purported additional docket fees. Disciplinary proceedings revolve around the determination of the respondent-lawyer's administrative liability, which must include those intrinsically linked to his professional engagement.[35]

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[34] 349 Phil. 520 (1998).

[35] See *Pitcher v. Gagate,* A.C. No. 9532, October 8, 2013, 707 SCRA 13, 25-26.

WHEREFORE, Atty. Manuel N. Camacho is found guilty of violating Rule 1.01 and Rule 16.01 of the Code of Professional Responsibility. For reasons above-stated, he is **DISBARRED** from the practice of law and his name stricken off the Roll of Attorneys, effective immediately.

Furthermore, Atty. Manuel N. Camacho is **ORDERED** to return to Marsman-Drysdale Agribusiness Holdings Inc. the money intended to pay for additional docket fees which he received from the latter in the amount of ₱1,288,260.00 within ninety (90) days from the finality of this decision.

Let a copy of this decision be furnished the Office of the Bar Confidant to be entered into the records of respondent Atty. Manuel N. Camacho. Copies shall likewise be furnished the Integrated Bar of the Philippines and the Office of the Court Administrator for circulation to all courts concerned.

SO ORDERED.

Sereno, C.J., Carpio, Velasco, Jr., Leonardo-de Castro, Brion, Peralta, Bersamin, del Castillo, Villarama, Jr., Perez, Mendoza, Reyes, Perlas-Bernabe, Leonen, and *Jardeleza, JJ.,* concur.

EN BANC

[A.M. No. CA-15-31-P. January 12, 2016]
(Formerly OCA I.P.I. No. 13-218-CA-P)

COMMITTEE ON SECURITY and SAFETY, COURT OF APPEALS, *complainant, vs.* **REYNALDO V. DIANCO -Chief Security, JOVEN O. SORIANOSOS - Security Guard 3, and ABELARDO P. CATBAGAN - Security Guard 3,** *respondents.*

SYLLABUS

1. POLITICAL LAW; ADMINISTRATIVE LAW; PUBLIC OFFICERS; REVISED RULES ON ADMINISTRATIVE CASES IN THE CIVIL SERVICE (RRACCS); A DECISION RENDERED BY THE DISCIPLINING AUTHORITY WHEREBY A PENALTY OF SUSPENSION FOR NOT MORE THAN THIRTY (30) DAYS OR A FINE IN AN AMOUNT NOT EXCEEDING THIRTY (30) DAYS' SALARY IS IMPOSED, SHALL BE FINAL, EXECUTORY AND NOT APPEALABLE UNLESS A MOTION FOR RECONSIDERATION IS SEASONABLY FILED; CASE AT BAR.— Under Section 45, Rule *9* of the Revised Rules on Administrative Cases in the Civil Service *(RRACCS),* "a decision rendered by the disciplining authority whereby a penalty of **suspension for not more than thirty (30) days** or a fine in an amount not exceeding thirty (30) days' salary. is imposed, **shall be final, executory and not appealable** unless a motion for reconsideration is seasonably filed x x x." The records do not show that respondent Sorianosos ever filed a motion for reconsideration to the January 6, 2014 memorandum suspending him for thirty (30) days; thus, the CA's decision on Sorianosos' administrative liability (and penalty) had become final, executory, and unappealable. **In fact, the records show that Sorianosos has served his 30-day suspension and reported back to work on January 13, 2014.** The administrative case with respect to respondent Catbagan had also become final, executory, and unappealable, as Catbagan filed no motion for reconsideration to the CA's memorandum informing him of his penalty of reprimand. The termination of the administrative case against respondents Sorianosos and Catbagan is confirmed by the 1st Indorsement dated October 31, 2013, of CA Presiding Justice Reyes to the Office of the Court Administrator, which referred, for appropriate action, that part of Assistant Clerk of Court Abella's August 8, 2013 Report **pertaining only to the finding and recommendation on respondent Reynaldo V. Dianco's liability.** It is the procedure before the CA to refer to the Court reports on administrative cases involving their employees where the recommended penalty is more than thirty (30) days suspension.

2. ID.; ID.; ID.; ID.; PENALTY OF DISMISSAL IMPOSED ON RESPONDENT DIANCO REDUCED TO ONE (1) YEAR SUSPENSION WITHOUT PAY WITH DEMOTION AND TRANSFER; APPLICABLE MITIGATING CIRCUMSTANCES WERE CONSIDERED AND FOR HUMANITARIAN CONSIDERATIONS.— In exercising the discretion granted by Section 48, Rule 10 of the RRACSS to the disciplining authority in the imposition of penalties, we reconsider the dismissal of respondent Dianco in view of mitigating circumstances that were not considered and properly appreciated. We apply to respondent Dianco's case the mitigating circumstances of admission of infractions, commission of the offense for the first time, almost thirty (30) years of service in the Judiciary, and restitution of the amount involved. Due to his health condition and close to retirement age, we shall also afford him humanitarian consideration so as to mitigate the penalty and remove him from the severe consequences of the penalty of dismissal. We note that, in previous cases, the Court has imposed lesser penalties in the presence of mitigating factors such as the respondent's length of service, the respondent's acknowledgement of his or her infractions and feeling of remorse, respondent's advanced age, family circumstances, and humanitarian and equitable considerations. In *Judge Isidra A. Arganosa-Maniego v. Rogelio T. Salinas,* we suspended the respondent who was guilty of grave misconduct and dishonesty for a period of one (1) year without pay, taking into account the mitigating circumstances of: first offense, ten (10) years in government service, acknowledgment of infractions and feeling of remorse, and restitution of the amount involved. x x x Notably, in his manifestation before this Court, Dianco admitted that his involvement in the present administrative case had strained his relations with his colleagues in the Security Division. This manifestation is very timely as part of the mitigated penalty — aside from his suspension — is his demotion and transfer to another post within the Court of Appeals. **Thus, upon reconsideration of our Decision, we impose upon respondent Reynaldo V. Dianco the lesser penalty of one (1) year suspension without pay and demotion to the position of Information Officer II (Grade Level 15) at the Information and Statistical Division of the Court of Appeals. The demotion and transfer are justified by the nature of his offense (which is**

incompatible with the responsibilities of his position as Chief of Security) and by his strained relations with the CA Security Division that resulted from the commission of the offenses charged.

R E S O L U T I O N

BRION, *J.*:

For resolution are the motions for reconsideration filed by respondents Reynaldo V. Dianco, Joven O. Sorianosos, and Abelardo P. Catbagan of our decision dated June 16, 2015 in Administrative Matter *(A.M.)* No. CA-15- 31-P.[1]

The Court *en banc* adjudged respondent Dianco guilty of **serious dishonesty and grave misconduct,** respondent Sorianosos guilty of **less serious dishonesty and simple misconduct**, and respondent Catbagan guilty of **simple neglect of duty.** In determining the proper penalties, the Court considered the applicable extenuating, mitigating, aggravating, and/or alternative circumstances and imposed the following: (*a*) upon respondent Catbagan, **suspension of one (1) month and one (1) day** with stern warning; (*b*) upon respondent Sorianosos, **suspension of nine (9) months** with stem warning; and (*c*) upon respondent Dianco, **dismissal from the service** with accessory penalties of cancellation of eligibility, perpetual disqualification for reemployment in the government service, and forfeiture of retirement benefits except accrued leave credits.

The respondents separately filed their motions for reconsideration on September 2, 2015; September 4, 2015; and September 9, 2015.

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[1] Formerly OCA I.P.I. No. 13-218-CA-P, entitled *"Committee on Security and Safety, Court of Appeals, complainant, v. Reynaldo V. Dianco -Chief Security, Joven O. Sorianosos – Security Guard 3, and Abelardo P. Catbagan – Security Guard 3."*

The Motions for Reconsideration

Catbagan's Motion for Reconsideration

Respondent Abe1ardo P. Catbagan maintains that he should not have been administratively sanctioned because he was not aware of and was not privy to the manipulations and intercalations made by Dianco and Sorianosos on the Liquidation Report of the CA Security Guard excursion. Also, he maintains that he did not neglect his only duty as Food Committee Head, *i.e.,* to distribute meal stubs to the participants of the excursion, which he had done with the assistance of his superior Ricky R. Regala, now CA Acting Chief of Security.

Attached to Catbagan's motion for reconsideration is an affidavit[2] executed by Regala stating that Catbagan's only duty was to distribute the food stubs at the excursion, and that he voluntarily offered his assistance to Catbagan due to the number of participants. Regala also stated in his affidavit that Catbagan had no participation or knowledge of the manipulations made on the Liquidation Report.

Sorianosos's Motion for Judicial Clemency

Respondent Joven O. Sorianosos points out that **he had already been penalized and that he had served the penalty of thirty (30) days suspension without pay.** The penalty was imposed on him by the CA pursuant to a memorandum issued by the CA Executive Clerk of Court. He contends that his 30-day suspension was not merely preventive but was a penalty, and that he would be penalized twice for the same act with the issuance of our June 16, 2015 Decision in this case.

In any event, respondent Sorianosos appeals to this Court to lessen the penalty that we imposed upon him. He alleges that a suspension of nine (9) months, without pay, would take a heavy toll on his family who subsists on his meager salary as CA Security Guard (SG) 3. He adds that, aside from the stroke

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[2] Dated September 2, 2015; *rollo,* unpaged.

that he suffered in 2012, he is also diagnosed with diabetes, which alone costs him ₱5,000.00 a month for his maintenance medicines.

Also, that he has two children: one in college, and the other, in high school, and they still depend on him for support; his wife also is soon scheduled to undergo radiation therapy for thirty (30) days because of a growing head tumor.

Dianco's Motion for Reconsideration

Respondent Reynaldo V. Dianco asks for this Court's compassion, understanding, and generosity to reconsider the penalty of dismissal that we imposed upon him.

Dianco humbly requests that the Court extend to him the same understanding and generosity previously afforded the respondents in the following administrative cases: *Rayos v. Hernandez,*[3] *Concerned Taxpayer v. Doblada, Jr.,*[4] *Vidallon-Magtolis v. Salud,*[5] *In re: Delayed Remittance of Collections of Teresita Lydia Odtuhan,*[6] *Executive Judge Contreras-Soriano v. Salamanca,*[7] and *Judge Isidra A. Arganosa-Maniego v. Rogelio T. Salinas.*[8] He particularly cites *Disposal Committee, Court of Appeals v. Janet Annabelle* C. *Ramos*[9] where the Court imposed the penalty of one (1) year-suspension without pay to the respondent who was found guilty of dishonesty and falsification of official document.

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[3] G.R. No. 169079, August 28, 2007, 531 SCRA 477.

[4] A.M. No. P-99-1342, September 20, 2005, 470 SCRA 218.

[5] A.M. No. CA-05-20-P, September 9, 2005, 469 SCRA 439.

[6] 445 Phil. 220 (2003).

[7] A.M. No. P-13-3119, February 10, 2014, 715 SCRA 580.

[8] A.M. No. P-07-2400 (Formerly OCA IPI No. 07-2589-P), June 23, 2009, 590 SCRA 531.

[9] A.M. No. CA-14-30-P (Formerly OCA IPI No. 13-214-CA-P), December 10, 2014.

Dianco further requests that, as in *Disposal Committee, Court of Appeals,* the Court consider in his favor the mitigating circumstances of: admission of offense, feeling of remorse and sincere apologies, promise not to commit the same or similar offense in the future, willingness to reform, the fact that this is his first offense, his long years of unblemished satisfactory service,[10] and the restitution of the amount involved.

He adds that he is almost fifty-three (53) years of age[11] and only seven (7) years shy of retirement; and that, with his old age and failing health due to diabetes, hypertension, and the previous removal of his gall bladder, it would be difficult, if not impossible, for him to find employment in the private sector.

Ultimately, Dianco appeals to the Court's leniency as his family heavily relies on his salary for their medical and daily needs and expenses. Also, he financially supports the education of his seven (7) year-old nephew, and extends financial assistance to his relatives.

In a manifestation[12] dated October 15, 2015, Dianco expressed his willingness to be transferred to another division in the CA, in the event that the Court would favorably act on his motion for reconsideration and orders his reinstatement in the service.

Our Ruling

We RECONSIDER our Decision of June 16, 2015, and GRANT the respondents' motions for reconsideration.

We recall that the institution of the present administrative case resulted from the padding of the food bill and violation on the prohibition of drinking alcohol committed by respondents former CA Chief of Security Reynaldo V. Dianco and Security

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[10] Respondent Dianco started working in the government in December 1984, and with the Court of Appeals in November 1986, as per his Service Record attached to his Motion for Reconsideration.

[11] Respondent Dianco's birthdate is November 16, 1962.

[12] *Rollo,* unpaged.

Guard (SG)3 Joven O. Sorianosos during the CA Security Guards' excursion on March 19, 2011, at the Village East Clubhouse in Cainta, Rizal. SG3 Abelardo P. Catbagan was included as respondent in the case because he allegedly neglected his duties as Food Committee Head of the said excursion, which enabled Dianco and Sorianosos to manipulate the entries on the food concessionaire's receipt.

Dismissal of the case with respect to Catbagan and Sorianosos

After an exhaustive review of the records, **we find that the present administrative case is already closed and terminated with respect to respondents Catbagan and Sorianosos.**

We find that, in two (2) separate memoranda[13] dated November 5 and 6, 2013, respondents Sorianosos and Catbagan were informed of the Investigation Report of the Committee on Security and Safety on the incidents of the March 19, 2011 CA Security Group excursion.

The memoranda included the **penalty recommendations**[14] of CA Assistant Clerk of Court Virginia C. Abella, **which were approved by the CA Committee on Ethics and Special Concerns and CA Presiding Justice Andres B. Reyes, Jr:**

RECOMMENDATIONS

RE: RESPONDENT SG3 JOVEN O. SORIANOSOS

Simple Dishonesty is a less grave offense punishable by suspension of one (1) month to six (6) months for the first offense; six (6) months and one (1) day to one (1) year suspension for the second offense; and dismissal from the service for the third offense (Sec. 2C, Resolution No. 060538); while simple misconduct is punishable by suspension of one (1) month and one (1) day to six (6) months for the first offense; and dismissal from the service for the second offense under Sec. 46, D (2) Rule 10, RRACCS).

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[13] *Rollo,* pp. 347-349, and 351-353.

[14] In a Report and Recommendation dated August 8, 2013; *id.* at 2-34.

The following mitigating circumstances are appreciated in his favor, namely: (1) twenty (20) years length of service; (2) admission; (3) apology; (4) first offense; (5) having been a two-time most outstanding guard of the month; and (5) for humanitarian consideration.

In view of all the foregoing considerations, it is most respectfully recommended that a **suspension for thirty (30) days without pay** be imposed on respondent SG3 Joven O. Sorianosos with a stern warning that a commission of a similar offense shall be dealt with more severely.[15] (emphasis supplied)

x x x x x x x x x

RE: RESPONDENT SG3 ABELARDO P. CATBAGAN

Simple neglect of duty is a less grave offense punishable by suspension of one (1) month and one (1) day to six (6) months for the first offense; and dismissal from the service for the second offense under Section 46 D.1., Rule 10, RRACCS.

There being no aggravating circumstances but with the following mitigating circumstances, namely: (1) admission; (2) fifteen (15) years of length of service; (3) first offense; and (4) humanitarian consideration, it is most respectfully recommended that the penalty of **REPRIMAND** be imposed on respondent SG3 Abelardo P. Catbagan with a stern warning that a repetition of similar offense will be dealt with more severely.[16]

Subsequently, in a memorandum[17] dated January 6, 2014, the CA, through Executive Clerk of Court Teresita R. Marigomen, **suspended respondent Sorianosos for thirty (30) days suspension without pay**, from December 13, 2013 to January 11, 2014.

Under Section 45, Rule 9 of the Revised Rules on Administrative Cases in the Civil Service *(RRACCS)*, "a decision rendered by the disciplining authority whereby a penalty of

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[15] *Id.* at 348.

[16] *Id.* at 353.

[17] *Id.* at 393.

suspension for not more than thirty (30) days or a fine in an amount not exceeding thirty (30) days' salary is imposed, **shall be final, executory and not appealable** unless a motion for reconsideration is seasonably filed x x x."

The records do not show that respondent Sorianosos ever filed a motion for reconsideration to the January 6, 2014 memorandum suspending him for thirty (30) days; thus, the CA's decision on Sorianosos' administrative liability (and penalty) had become final, executory, and unappealable. **In fact, the records show that Sorianosos has served his 30-day suspension and reported back to work on January 13, 2014.**[18]

The administrative case with respect to respondent Catbagan had also become final, executory, and unappealable, as Catbagan filed no motion for reconsideration to the CA's memorandum informing him of his penalty of reprimand.

The termination of the administrative case against respondents Sorianosos and Catbagan is confirmed by the 1st Indorsement[19] dated October 31, 2013, of CA Presiding Justice Reyes to the Office of the Court Administrator, which referred, for appropriate action, that part of Assistant Clerk of Court Abella's August 8, 2013 Report **pertaining only to the finding and recommendation on respondent Reynaldo V. Dianco's liability.** It is the procedure before the CA to refer to the Court

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[18] *Id.* at 395.

[19] *Id.* at 1; The 1st Indorsement stated:

Respectfully referred to the Court Administrator, Hon. Jose Midas P. Marquez, Supreme Court, for appropriate action, the enclosed Report and Recommendation dated August 8, 2013 of the Assistant Clerk of Court and the records on Administrative Case No. 05-2011-ABR with the recommendation of the imposition of the penalty of six (6) months suspension without pay on respondent Reynaldo V. Dianco, duly approved by the Committee on Ethics and Special Concerns, which I hereby adopt as my own.

ANDRES B. REYES, JR.
Presiding Justice

reports on administrative cases involving their employees where the recommended penalty is more than thirty (30) days suspension.

The OCA, however, reviewed the entirety of Assistant Clerk of Court Abella's August 8, 2013 Report and submitted to this Court, as part of its recommendation the re-docketing of the complaint as a regular administrative matter against *all* of the three respondents; hence, our June 16, 2015 Decision in this case not only with respect to respondent Dianco, but also included respondents Catbagan and Sorianosos.

Our Ruling on Dianco's Motion for Reconsideration

In our June 16, 2015 Decision, we found respondent Reynaldo V. Dianco guilty of serious dishonesty and grave misconduct, offenses that are grave in nature and which, under the Revised Rules on Administrative Cases in the Civil Service, warrant the imposition of the penalty of dismissal even for the first offense. Due to the gravity of the offenses charged and the fact that respondent Dianco's infractions do not only carry administrative but also criminal consequences *(i.e.,* falsification of an official document), we imposed on him the penalty of dismissal from the service, a penalty that has no minimum, medium, and maximum period.

In exercising the discretion granted by Section 48, Rule 10 of the RRACSS to the disciplining authority in the imposition of penalties, we reconsider the dismissal of respondent Dianco in view of mitigating circumstances that were not considered and properly appreciated.

We apply to respondent Dianco's case the mitigating circumstances of: admission of infractions, commission of the offense for the first time, almost thirty (30) years of service in the Judiciary, and restitution of the amount involved. Due to his health condition and close to retirement age, we shall also afford him humanitarian consideration so as to mitigate the penalty and remove him from the severe consequences of the penalty of dismissal.

We note that, in previous cases, the Court has imposed lesser penalties in the presence of mitigating factors such as the respondent's length of service, the respondent's acknowledgement of his or her infractions and feeling of remorse, respondent's advanced age, family circumstances, and humanitarian and equitable considerations.

In *Judge Isidra A. Arganosa-Maniego v. Rogelio T. Salinas,*[20] we suspended the respondent who was guilty of grave misconduct and dishonesty for a period of one (1) year without pay, taking into account the mitigating circumstances of: first offense, ten (10) years in government service, acknowledgment of infractions and feeling of remorse, and restitution of the amount involved.

In *Alibsar Adoma v. Romeo Gatcheco and Eugenio Taguba,*[21] we suspended one of the respondents for one (1) year without pay, after finding him guilty of grave misconduct, dishonesty, and conduct prejudicial to the best interests of the service. The respondent was a first-time offender.

And, in *Horacia B. Apuyan, Jr. and Alexander O. Eugenio v. Alfredo G. Sta. Isabel,*[22] we imposed the same penalty of one (1) year suspension without pay to the respondent who was a first-time offender of the offenses of grave misconduct, dishonesty, and conduct grossly prejudicial to the best interests of the service.

Notably, in his manifestation before this Court, Dianco admitted that his involvement in the present administrative case had strained his relations with his colleagues in the Security Division. This manifestation is very timely as part of the mitigated penalty – aside from his suspension – is his demotion and transfer to another post within the Court of Appeals.

Thus, upon reconsideration of our Decision, we impose upon respondent Reynaldo V. Dianco the lesser penalty of one (1) year suspension without pay and demotion to the

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[20] *Supra* note 8.

[21] A.M. No. P-05-1942, January 17, 2005, 448 SCRA 299.

[22] A.M. No. P-01-1497, May 28, 2004, 430 SCRA 1.

position of Information Officer II (Grade Level 15) at the Information and Statistical Division of the Court of Appeals. The demotion and transfer are justified by the nature of his offense (which is incompatible with the responsibilities of his position as Chief of Security) and by his strained relations with the CA Security Division that resulted from the commission of the offenses charged.

WHEREFORE, we **GRANT** the motions for reconsideration filed by respondents Reynaldo V. Dianco, Joven O. Sorianosos, and Abelardo P. Catbagan, and **ORDER** the following:

1. The administrative case against respondents Joven O. Sorianosos and Abelardo P. Catbagan is hereby **DISMISSED** and declared **CLOSED and TERMINATED**. Thus, the CA is ordered to reinstate respondents Sorianosos and Catbagan to their former positions, if they have not yet been so reinstated, and to pay them back salaries, including allowances and bonuses they ought to have received, during the period of their suspension by reason of our June 16, 2015 Decision; and

2. The penalty of dismissal of service imposed upon respondent Reynaldo V. Dianco is hereby **REDUCED** to **suspension of one (1) year without pay and demotion**, with stern warning that a repetition of the same or similar acts will warrant a more severe penalty. Upon his return from suspension, he is demoted and permanently ordered to assume the position of Information Officer II (Grade Level 15) at the Information and Statistical Division of the Court of Appeals.

SO ORDERED.

Sereno, C.J., Carpio, Leonardo-de Castro, Peralta, Bersamin, del Castillo, Villarama, Jr., Perez, Mendoza, Reyes, Perlas-Bernabe, Leonen, and *Jardeleza, JJ.,* concur.

Velasco, Jr., J., no part.

EN BANC

[G.R. No. 174471. January 12, 2016]

PEOPLE OF THE PHILIPPINES, *petitioner, vs.* **JERRY PEPINO *y* RUERAS and PRECIOSA GOMEZ *y* CAMPOS,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; CRIMINAL PROCEDURE; ANY OBJECTION TO THE PROCEDURE FOLLOWED IN THE MATTER OF ACQUISITION BY A COURT OF JURISDICTION OVER THE PERSON OF THE ACCUSED MUST BE OPPORTUNELY RAISED BEFORE HE ENTERS HIS PLEA, OTHERWISE, THE OBJECTION IS DEEMED WAIVED.— We point out at the outset that Gomez did not question before arraignment the legality of her warrantless arrest or the acquisition of RTC's jurisdiction over her person. Thus, Gomez is deemed to have waived any objection to her warrantless arrest. It is settled that [a]ny objection to the procedure followed in the matter of the acquisition by a court of jurisdiction over the person of the accused must be opportunely raised before he enters his plea; otherwise, the objection is deemed waived. x x x At any rate, the illegal arrest of an accused is not sufficient cause for setting aside a valid judgment rendered upon a sufficient complaint after a trial free from error. Simply put, the illegality of the warrantless arrest cannot deprive the State of its right to prosecute the guilty when all other facts on record point to their culpability. It is much too late in the day to complain about the warrantless arrest after a valid information had been filed, the accused had been arraigned, the trial had commenced and had been completed, and a judgment of conviction had been rendered against her.

2. ID.; EVIDENCE; CREDIBILITY OF WITNESSES; OUT-OF-COURT IDENTIFICATION OF ACCUSED; TEST TO DETERMINE THE ADMISSIBILITY OF SUCH IDENTIFICATION.— We find no merit in Gomez's claim that Edward's identification of her during trial *might* have been preconditioned by the "suggestive identification" made during the police lineup. In *People v. Teehankee, Jr.*, the Court

explained the procedure for out-of-court identification and the test to determine the admissibility of such identifications in this manner: Out-of-court identification is conducted by the police in various ways. It is done thru **show-ups** where the suspect alone is brought face to face with the witness for identification. It is done thru **mug shots** where photographs are shown to the witness to identify the suspect. It is also done thru **lineups** where a witness identifies the suspect from a group of persons lined up for the purpose x x x In resolving the admissibility of and relying on out-of-court identification of suspects, courts have adopted the **totality of circumstances test** where they consider the following factors, *viz*: (1) the witness' opportunity to view the criminal at the time of the crime; (2) the witness' degree of attention at that time; (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.

3. ID.; ID.; ID.; ID.; TOTALITY-OF-CIRCUMSTANCES TEST; APPLIED IN CASE AT BAR; VICTIM'S OUT-OF-COURT IDENTIFICATION FOUND RELIABLE AND THUS ADMISSIBLE.— Applying the totality-of-circumstances test, we find Edward's out-of-court identification to be reliable and thus admissible. To recall, when the three individuals entered Edward's office, they initially pretended to be customers, and even asked about the products that were for sale. The three had told Edward that they were going to pay, but Pepino "pulled out a gun" instead. After Pepino's companion had taken the money from the cashier's box, the malefactors handcuffed Edward and forced him to go down to the parked car. From this sequence of events, there was thus ample opportunity for Edward – before and after the gun had been pointed at him – to view the faces of the three persons who entered his office. In addition, Edward stated that Pepino had talked to him "[a]t least once a day" during the four days that he was detained. Edward also saw Gomez seated at the front seat of the getaway metallic green Toyota Corolla vehicle. In addition, the abductors removed the tape from Edward's eyes when they arrived at the apartment, and among those whom he saw there was Gomez. According to Edward, he was able to take a good look at the occupants of the car when he was about to be released.

4. ID.; ID.; RIGHTS OF THE ACCUSED; RIGHT TO COUNSEL; THE RIGHT TO BE ASSISTED BY COUNSEL ATTACHES ONLY DURING CUSTODIAL INVESTIGATION.— The lack of a prior description of the kidnappers in the present case should not lead to a conclusion that witnesses' identification was erroneous. The lack of a prior description of the kidnappers was due to the fact that Jocelyn (together with other members of Edward's family), for reasons not made known in the records, opted to negotiate with the kidnappers, instead of immediately seeking police assistance. If members of Edward's family had refused to cooperate with the police, their refusal could have been due to their desire not to compromise Edward's safety. In the same manner, Edward, after he was freed, chose to report the matter to Teresita Ang See, and not to the police. Given these circumstances, the lack of prior description of the malefactors in this case should not in any way taint the identification that Edward and Jocelyn made.

5. ID.; ID.; ID.; THE LACK OF PRIOR DESCRIPTION OF THE MALEFACTORS IN THE CASE SHOULD NOT IN ANY WAY TAINT THE IDENTIFICATION THAT THE VICTIMS MADE.— The right to counsel is a fundamental right and is intended to preclude the slightest coercion that would lead the accused to admit something false. The right to counsel attaches upon the start of the investigation, *i.e.,* when the investigating officer starts to ask questions to elicit information and/or confessions or admissions from the accused. Custodial investigation commences when a person is taken into custody and is singled out as a suspect in the commission of the crime under investigation. As a rule, a police lineup is *not* part of the custodial investigation; hence, the right to counsel guaranteed by the Constitution cannot yet be invoked at this stage. The right to be assisted by counsel attaches only during custodial investigation and cannot be claimed by the accused during identification in a police lineup.

6. ID.; ID.; ID.; THE RESPECTIVE CONVICTIONS IN THE PRESENT CASE WERE BASED ON AN INDEPENDENT IN-COURT IDENTIFICATION MADE BY THE VICTIMS AND NOT ON THE OUT-OF-COURT IDENTIFICATION DURING THE POLICE LINE-UP; THE IN-COURT IDENTIFICATION CURED WHATEVER IRREGULARITY MIGHT HAVE ATTENDED THE

POLICE LINEUP.— Defense witness Reynaldo, however, maintained that Pepino and Gomez were among those ***already presented to the media as kidnapping suspects*** by the DOJ a day before the police lineup was made. In this sense, the appellants were already the focus of the police and were thus deemed to be already under custodial investigation when the out-of-court identification was conducted. Nonetheless, **the defense did not object to the in-court identification for having been tainted by an irregular out-of-court identification in a police lineup**. They focused, instead, on the legality of the appellants' arrests. Whether Edward and Jocelyn could have seen Pepino and Gomez in various media fora that reported the presentation of the kidnapping suspects to the media is not for the Court to speculate on. The records merely show that when defense counsel, Atty. Caesar Esturco, asked Jocelyn during cross-examination whether she was aware that there were several kidnap-for-ransom incidents in Metro Manila, the latter answered that she "can read in the newspapers." At no time did Jocelyn or Edward ever mention that they saw the appellants from the news reports in print or on television. At any rate, the appellants' respective convictions in this case were based on an **independent in-court identification made by Edward and Jocelyn, and not on the out-of-court identification during the police lineup**. We reiterate that the RTC and the CA found the court testimonies of these witnesses to be positive and credible, and that there was no showing that their factual findings had been arrived at arbitrarily. The in-court identification thus cured whatever irregularity might have attended the police lineup.

7. ID.; EVIDENCE; 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.— We add that no competing event took place to draw Edward's and Jocelyn's attention from the incident. Nothing in the records shows the presence of any distraction that could have disrupted the witnesses' attention at the time of the incident. Jurisprudence holds 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. As the Court held in *People v. Esoy*: It is known that the most natural reaction of a witness to a crime is to strive to look at the appearance of

the perpetrator and to observe the manner in which the offense is perpetrated. Most often the face of the assailant and body movements thereof, create a lasting impression which cannot be easily erased from a witness's memory. Experience dictates that precisely because of the unusual acts of violence committed right before their eyes, eyewitnesses can remember with a high degree of reliability the identity of criminals at any given time. While this pronouncement should be applied with great caution, there is no compelling circumstance in this case that would warrant its non-application.

8. ID.; ID.; ID.; THE COLLECTIVE, CONCERTED, AND SYNCHRONIZED ACTS OF THE ACCUSED BEFORE DURING AND AFTER THE KIDNAPPING CONSTITUTE UNDOUBTED PROOF THAT THEY CONSPIRED WITH EACH OTHER TO ATTAIN A COMMON OBJECTIVE TO KIDNAP THE VICTIM AND DETAIN HIM ILLEGALLY IN ORDER TO DEMAND RANSOM FOR HIS RELEASE.— Conspiracy exists when two or more persons come to an agreement concerning the commission of a crime and decide to commit it. It may be proved by direct or circumstantial evidence consisting of acts, words, or conduct of the alleged conspirators before, during and after the commission of the felony to achieve a common design or purpose. Proof of the agreement does not need to rest on direct evidence, as the agreement may be inferred from the conduct of the parties indicating a common understanding among them with respect to the commission of the offense. Corollarily, it is not necessary to show that two or more persons met together and entered into an explicit agreement setting out the details of an unlawful scheme or the details by which an illegal objective is to be carried out.

9. CRIMINAL LAW; REVISED PENAL CODE; KIDNAPPING; ELEMENTS THEREOF; ESTABLISHED IN CASE AT BAR.— The elements of kidnapping and serious illegal detention under Article 267 of the Revised Penal Code, as amended, are: (1) the offender is a private individual; (2) he kidnaps or detains another or in any other manner deprives the latter of his liberty; (3) the act of detention or kidnapping must be illegal; and (4) in the commission of the offense, any of the following circumstances is present: (a) the kidnapping or detention lasts for more than three (3) days; or (b) it is

committed by simulating public authority; or (c) serious physical injuries are inflicted upon the person kidnapped or detained or threats to kill him are made; or (d) the person kidnapped or detained is a minor, female, or a public officer. If the victim of kidnapping and serious illegal detention is a minor, the duration of his detention is immaterial. Likewise, if the victim is kidnapped and illegally detained for the purpose of extorting ransom, the duration of his detention is also of no moment and the crime is qualified and becomes punishable by death even if none of the circumstances mentioned in paragraphs 1 to 4 of Article 267 is present. All these elements have been established by the prosecution. Edward positively identified Gomez and Pepino — both private individuals — as among the three persons who entered his office and pretended to be Kilton Motors' customers. He further declared that Pepino pointed a gun at him, and forcibly took him against his will.

10. ID.; ID.; ID.; IN KIDNAPPING, IT IS ENOUGH THAT THE VICTIM IS RESTRAINED FROM GOING HOME; ITS ESSENCE IS THE ACTUAL DEPRIVATION OF THE VICTIM'S LIBERTY, COUPLED WITH INDUBITABLE PROOF OF THE INTENT OF THE ACCUSED TO EFFECT SUCH DEPRIVATION.— It is settled that the crime of serious illegal detention consists not only of placing a person in an enclosure, but also in detaining him or depriving him of his liberty in any manner. For there to be kidnapping, it is enough that the victim is restrained from going home. Its essence is the actual deprivation of the victim's liberty, coupled with indubitable proof of the intent of the accused to effect such deprivation Notably, Jocelyn corroborated Edward's testimony on the following points: Pepino poked a handgun at Edward while they were on the second floor of Kilton; Pepino and his companion brought him downstairs and out of the building, and made him board a car; and the kidnappers demanded ransom in exchange for Edward's release.

11. ID.; ID.; CIRCUMSTANCES WHICH AFFECT CRIMINAL LIABILITY; CONSPIRACY; MAY BE INFERRED FROM THE CONDUCT OF THE ALLEGED CONSPIRATORS BEFORE, DURING AND AFTER THE COMMISSION OF THE FELONY TO ACHIEVE A COMMON DESIGN OR PURPOSE.— In the present case, the records establish the following facts: Pepino, Gomez, and another man entered

Edward's office, and initially pretended to be customers; the three told Edward that they were going to pay, but Pepino pulled out a gun. After Pepino's companion took the money from the cashier's box, the malefactors handcuffed him and forced him to go down to the parked car; Gomez sat at the front passenger seat of the car which brought Edward to a safe house in Quezon City; the abductors removed the tape from Edward's eyes, placed him in a room, and then chained his legs upon arrival at the safe house; the abductors negotiated with Edward's family who eventually agreed to a ₱700,000.00 ransom to be delivered by the family driver using Edward's own car; and after four days, three men and Gomez blindfolded Edward, made him board a car, drove around for 30 minutes, and left him inside his own car at the UP Diliman campus. The collective, concerted, and synchronized acts of the accused before, during, and after the kidnapping constitute undoubted proof that Gomez and her co-accused conspired with each other to attain a common objective, *i.e.*, to kidnap Edward and detain him illegally in order to demand ransom for his release.

LEONEN, *J.*, *dissenting opinion*:

1. REMEDIAL LAW; CRIMINAL PROCEDURE; IDENTIFICATION OF ACCUSED; APPLYING THE TOTALITY-OF-CIRCUMSTANCES TEST THE VICTIM COULD NOT HAVE POSITIVELY IDENTIFIED APPELLANT GOMEZ BEYOND REASONABLE DOUBT; THE PRESENCE OF A GUN THROUGHOUT THE ORDEAL MAKES IT DOUBTFUL THAT THE VICTIM REMEMBERED PERIPHERAL DETAILS ABOUT THE FEMALE KIDNAPPER DUE TO THE WEAPON-FOCUS EFFECT.— Adopting the totality of circumstances test and the arguments presented by Gomez and the Solicitor General, the prosecution witness, Edward, could not have positively identified Gomez beyond reasonable doubt. Indeed, the danger signs discussed in *Pineda* are present in the out-of-court identification. First, the other witness in this case, Jocelyn, failed to identify Gomez. Second, Edward is Chinese-Filipino, a different race from Gomez, who is Malay-Filipino. Cross-racial identification is often a problem due to the general observation in psychology that "people are better at recognizing faces of persons of their own race than a different race." Third, a considerable amount of time, five months, had elapsed

before identification was made. Fourth, several persons committed the crime, making it more difficult to remember faces. As pointed out in the Decision, Edward might have had ample opportunity to observe the features of Gomez. In his narration, he encountered Gomez three (3) times during the ordeal: first, when he was visited by the three perpetrators at Kilton Motors Corporation; second, when they boarded the vehicle that was driven away from Kilton Motors Corporation; and lastly, when he was released from captivity. Edward first encountered the female kidnapper as a "customer" of his business selling trucks. x x x Edward's first encounter with Gomez as an ordinary customer was in the presence of a weapon. *The presence of a gun throughout the ordeal at Kilton Motors makes it doubtful that Edward remembered peripheral details about the female kidnapper due to the weapon-focus effect.*

2. ID.; ID.; ID.; THE FACT THAT THERE WERE ONLY TWO FEMALE SUSPECTS IN THE LINE UP, THE SAID LINE-UP, THEREFORE, HAD ALL THE SUGGESTIVE FEATURES OF A SHOW-UP.— In the second encounter, Edward's sight was impaired. After he had boarded the vehicle, his eyes were covered with surgical tape and sunglasses. x x x Edward declared during trial that despite the eye cover, he was still able to see when he squinted his eyes. He was even able to identify the area surrounding the safehouse. Edward's third encounter with the female kidnapper was also under similar circumstances. x x x When Edward was released from his captivity, he narrated that he saw the kidnappers in the car. Whether this was before or after his eyes were covered was not clear. When Edward and Jocelyn were at the NBI office to identify the kidnappers, there were only two female suspects in the line-up. The line- up, therefore, had all the suggestive features of a show-up.

3. ID.; ID.; ID.; THE APPEARANCE OF THE ALLEGED KIDNAPPERS IN THE MEDIA COULD HAVE INFLUENCED THE VICTIM'S MEMORIES ON THE KIDNAPPING INCIDENT; THE PREJUDICIAL MEDIA EXPOSURE IS ENOUGH TO CREATE REASONABLE DOUBT ON THE IDENTIFICATION OF APPELLANT GOMEZ.— The prosecution did not present countervailing evidence to show that this prejudicial exposure to the media did not take place. Hence, there was a presumption that media

reported the appearances of these arrested "kidnappers" and were immediately featured in the news across varying media platforms. At that time, high media attention was given to the crackdown of kidnapping, which was a prevalent social ill. The appearance of the alleged kidnappers could have influenced their memories on the kidnapping incident. On the day of the identification, December 9, 1997, Tuesday, kidnap-for-ransom-related news were featured in the headlines for the broadsheets. In the Philippine Daily Inquirer, the article included a photograph with the caption: "SUBDUED kidnap-for-ransom gang member Diosdado Avila and other members of his gang at the Department of Justice Monday." The photograph did not feature all of the kidnapping suspects arrested at that time. However, other visual reports, such as a television broadcast, might have featured all of those who were arrested for kidnapping, including Pepino and Gomez. Unlike in *Teehankee, Jr.* where the witness categorically testified not seeing media reports before the out-of-court identification, Edward did not make a similar testimony. The probability that Edward saw the news reports before the line-up identification exists. The prejudicial media exposure is enough to create reasonable doubt on the identification of Gomez. The image of Gomez being labelled as a kidnapping suspect by the press makes an impression on its viewers. The influence or suggestiveness of this impression is subtle and unconscious. It is the same kind of influence that the photographs in *Pineda* and *Rodrigo* made to the mind of the witnesses, which tainted with infirmity the subsequent police line-up. The witnesses in these cases were conditioned to associate the faces on the photographs to the crime.

4. ID.; ID.; ID.; IT IS MORE RATIONAL TO MAINTAIN THE PRESUMPTION THAT A TAINTED OUT-OF-COURT IDENTIFICATION CORRUPTS THE IN-COURT IDENTIFICATION.— It is more rational to maintain the presumption that a tainted out-of-court identification corrupts the in-court identification. The in-court identification of a witness — unless he or she has two separate brains —is certainly influenced by a preceding out-of-court identification, unless the prosecution can show that there has been an independent in-court identification. Convictions can be sustained even when there is illegal identification as long as there are other evidence

tying the crime to the accused. In *People vs. Ibanez,* the witness who identified the accused in the line-up died during the trial. Only the NBI agent testified without providing details regarding the line-up. Hence, this court found that the out-of-court identification was unreliable. Despite this pronouncement, the conviction was affirmed due to the presence of circumstantial evidence. No other evidence on the record can prove the guilt of Gomez. This court notes that during investigation, Edward identified Pepino, Gomez, and Galgo. The original Information included Pepino and Gomez, but not Galgo. A perusal of the records shows that Galgo executed a Sinumpaang Salaysay dated December 7, 1997, naming Pepino, Gomez, and others as perpetrators of the "Kilton Motors" kidnapping. However, when subpoenaed by the court, Galgo did not appear to testify. His Sinumpaang Salaysay cannot be considered by this court for being hearsay. Hence, this court is left to rely on the identification made by Edward.

5. ID.; ID.; ID.; PROPER WAY TO CONDUCT A FAIR LINE-UP WITHOUT THE PRESENCE OF SUGGESTIVE INFLUENCES.— Law enforcement agents must conduct their investigation properly to avoid instances when the line-up bears doubtful validity due to the presence of suggestive influences. For a line-up to be truly fair, it should be composed of individuals — including the suspect — who fit the description of the perpetrator as provided by a witness. If there is a high probability that a random individual merely relies on the prior description of the eyewitness to select a suspect from a line-up, this line-up is not fair. A line-up is only balanced if, in a line-up of six individuals, the probability that the random individual identifies the suspect is not more than 1/6.

6. ID.; ID.; ID.; TO SUPPLEMENT THE TOTALITY OF CIRCUMSTANCES TEST, COURTS MUST EVALUATE WHETHER THERE ARE UNDUE SUGGESTIONS MADE DURING OUT OF COURT IDENTIFICATION; RULES THAT SHOULD BE CONSIDERED BY THE COURTS.— To supplement the totality of circumstances test, courts must evaluate whether there are undue suggestions made during out-of-court-identification. The following rules should be considered by the courts: First, courts must determine whether the police officers or NBI agents prevent members of the press from photographing or videotaping suspects before witness

identification. Undue influence may be present if there is evidence that the witnesses were able to view the visual press coverage prior to identification. Second, courts must check if the line-up is composed of a sufficient number of individuals. As much as possible, it must be composed of *at least* five to six individuals. Third, if photographs are available, courts can also evaluate if the individuals in the line-up meet the minimum descriptions of appearance provided by the witness at the start of the investigation. If the police finds a suspect through investigating methods other than by the description given by the witness, members of the line-up should be of the same race or color, age range, gender expression, build, and appearance of the suspect. No height markers should be placed. If there is more than one suspect, they should be subjected to separate line-ups composed of different individuals in order to reduce suggestiveness. If the police officers can conduct only one line-up, members of the line-up must have decoys of the same race or color, age range, gender expression, build, and appearance of the different suspects. The general rule is that it should not be easy for the witness to single out a suspect. Fourth, if it is difficult to find individuals with the same build and appearance of the suspects, courts should still accept out-of-court corporeal identification as long as the outward appearance of the members of the line-up does not suggest who the suspects are. Hence, if police officers are needed to supplement the line-up composition, they must wear civilian clothes. The suspected individual should not be handcuffed or be in a detainee's uniform unless identification is made inside a jail cell occupied by other detainees. Fifth, courts must check if the police officers or NBI agents have communicated any information that may suggest that one of the individuals in the line-up is a suspect. Sixth, courts should be aware of how several witnesses identify the accused. Ideally, if there is more than one witness, witnesses should identify the perpetrator from the line-up one at a time. A witness should not be privy to the other witness' identification; otherwise, this may taint his or her perception. These rules will help courts determine if there has been suggestiveness in the out-of-court corporeal identifications. This court recognizes that not all out-of-court corporeal identifications are made through line-ups. While the witness is being interviewed and another individual is brought to the police station, the witness

may immediately recognize the other individual as the perpetrator. There are no undue suggestions in this example because an individual being brought to the station can either be a suspect or witness, and no external influence prompts the witness to point at the individual as the perpetrator.

7. ID.; ID.; ID.; THE HABIT OF PRESENTING THE ACCUSED TO THE MEDIA IMMEDIATELY AFTER THE ARREST POSES AN EQUAL THREAT TO THE PERSONAL LIBERTY WHICH IS PROVIDED IN OUR CONSTITUTION OF AN INDIVIDUAL WHO MAY BE ACCUSED OF COMMITTING A CRIME THAT HE OR SHE DID NOT COMMIT.— Prevalence of kidnapping instills fear among citizens, a type of fear that makes citizens curtail their own personal liberties to provide for their own security. However, the habit of presenting the accused to the media immediately after arrest poses an equal threat to the personal liberty — which is protected by our Constitution —of an individual who may be accused of committing a crime that he or she did not do. Police officers should improve their standards and protocols in order to improve the proper prosecution of those accused of committing deplorable crimes like kidnapping, as well as to balance the interests of victims and of the accused.

APPEARANCES OF COUNSEL

The Solicitor General for petitioner.

Reinaldo S.P. Lazaro for respondent Jerry Pepino *y* Rueras.

Public Attorney's Office for respondent Preciosa Gomez *y* Campos.

D E C I S I O N

BRION, *J.*:

This is an appeal filed by Jerry Pepino *(Pepino)* and Preciosa Gomez *(Gomez)* assailing the June 16, 2006 decision[1] of the Court of Appeals (CA) in CA-G.R. CR-HC No. 02026.

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[1] *Rollo,* pp. 4-21; penned by Associate Justice Martin S. Villarama, Jr. (now a member of this Court) and concurred in by Associate Justices Lucas P. Bersamin (now a member of this Court) and Celia C. Librea-Leagogo.

ANTECEDENTS

The prosecution evidence showed that at 1:00 p.m., on June 28, 1997, two men and a woman entered the office of Edward Tan at Kilton Motors Corporation in Sucat, Parañaque City, and pretended to be customers. When Edward was about to receive them, one of the men, eventually identified as Pepino pulled out a gun. Thinking that it was a holdup, Edward told Pepino that the money was inside the cashier's box. Pepino and the other man looted the cashier's box, handcuffed Edward, and forced him to go with them.[2] From the hallway, Jocelyn Tan (mentioned as "Joselyn" in some parts of the record), Edward's wife, saw Pepino take her husband. She went to the adjoining room upon Edward's instructions.[3]

Pepino brought Edward to a metallic green Toyota Corolla where three other men were waiting inside. The woman (later identified as Gomez) sat on the front passenger seat.[4] The abductors then placed surgical tape over Edward's eyes and made him wear sunglasses. After travelling for two and a half hours, they arrived at an apartment in Quezon City. The abductors removed the tape from Edward's eyes, placed him in a room, and then chained his legs. Pepino approached Edward and asked for the phone number of his father so that he could ask for ransom for his (Edward's) liberty. Edward told Pepino to negotiate with his wife, but the latter insisted on talking to his father.[5]

At around 5:00 p.m. of the same day, the kidnappers called Edward's father and demanded a ₱40 million ransom for his release. Edward's father told the kidnappers that he did not have that amount. The abductors negotiated with Jocelyn who eventually agreed to a ₱700,000.00 ransom. The kidnappers told Jocelyn to pack the money into two packages and to drop

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[2] TSN, January 28, 1999, pp. 6-9, 35-36.

[3] TSN, January 14, 1999, pp. 7-9; TSN, January 28, 1999, p. 37.

[4] TSN, January 28, 1999, pp. 10-13, 65.

[5] *Id*. at 14-16, 59-60.

these at a convenience store in front of McDonald's at Mindanao Avenue. They further demanded that Edward's vehicle be used to bring the money.[6]

After four days, or on July 1, 1997, Antonio Gepiga (the family driver) brought the agreed amount to the 7-Eleven convenience store at Mindanao Avenue as instructed.[7] That evening, three men and Gomez blindfolded Edward, made him board a car, and drove around for 30 minutes. Upon stopping, they told Edward that he could remove his blindfold after five minutes. When Edward removed his blindfold, he found himself inside his own car parked at the UP Diliman Campus. He drove home and reported his kidnapping to Teresita Ang See, a known anti-crime crusader.[8]

After five months, the National Bureau of Investigation *(NBI)* informed Edward that they had apprehended some suspects, and invited him to identify them from a lineup consisting of seven persons: five males and two females. Edward positively identified Pepino, Gomez, and one Mario Galgo.[9] Jocelyn likewise identified Pepino.[10]

Pepino and Gomez did not testify for their defense. The defense instead presented Zeny Pepino, Reynaldo Pepino, NBI Special Investigator Marcelo Jadloc and P/Sr. Insp. Narciso Quano (mentioned as "Qano" in some parts of the record).

Zeny testified that she and her husband, Jerry Pepino, were inside their house in Cebu City on December 7, 1997, when about 20 heavily armed men entered their house looking for Jerry. When Jerry asked them if they had a warrant of arrest, one of the men pointed a gun at him and handcuffed him; the armed men then hit him with the butt of an armalite and punched

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[6] TSN, January l4, 1999, pp. l4-19.

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

[8] TSN, January 28, 1999, pp. 19-21.

[9] *Id*. at 21-23, 27 and 67.

[10] TSN, January 14, 1999, pp. 46-48.

him. The men also took Pepino's wristwatch and wallet, as well as Zeny's bag and watch. Some of the armed men searched the second floor of the house, and found a .45 caliber gun. The armed men brought Zeny and Pepino outside their house where Zeny saw Renato Pepino and Larex Pepino already handcuffed. The armed men brought them to the Cebu City Police Headquarters before bringing them to the NBI Headquarters in Manila. The following day, Jerry, Renato, and Larex were brought to the Department of Justice *(DOJ).* Zeny, on the other hand, was released after being detained at the NBI for three (3) days.[11]

Reynaldo's testimony was summarized by the CA as follows:

> x x x On December 6, 1997, he accompanied accused-appellant Gomez to his brother's sister-in-law who happens to work in a recruitment agency. While they were inside the latter's house at Lot 2, Block 15, Marikina Heights, Marikina City, they heard a noise at the gate. When he peeped through the window, he saw two (2) motorcycles and two (2) Vannette vans. Shortly thereafter, someone kicked the back door and several armed men emerged therefrom and announced their arrest. When he asked them if they had any warrant, they replied: *"Walang warrant, warrant. Walang search, search."* They were then hogtied and made to lie face down. Five (5) of them then went upstairs and seized his personal belongings together with his briefcase which contained ₱45,000.00, documents of accused-appellant Gomez, and his .45 caliber pistol as well as his license and permit to carry the same. No receipts were issued for their personal effects which were confiscated. They were subsequently brought to Camp Crame and subjected to torture. The following day, they were brought to the Department of Justice and a case for kidnapping was filed against him. Upon reinvestigation, however, he was discharged from the Information and the court dismissed the case against him.[12]

SI Jadloc and Police Senior Inspector Quano, Jr. were presented as hostile witnesses.

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[11] TSN, August 25, 1999, pp. 6-23.

[12] CA decision, *rollo,* p. 8.

Jadloc declared on the witness stand that NBI Assistant Director Edmundo Arugay dispatched a team to Cebu City to investigate a kidnap-for-ransom case. The team immediately conducted surveillance operations when they arrived at Calle Rojo, Lahug, Cebu City. One of the team members saw Renato and Larex Pepino with guns tucked in their waists. When the team approached them, the two men ran inside their house. The team went after them and on entering the house, they saw Jerry in possession of a .45 caliber gun. The team arrested Jerry, Renato and Larex, and then brought them to the NBI Headquarters in Manila.[13]

Quano testified that he was designated as the leader of a team tasked to arrest members of a kidnap-for-ransom group at their safe house in Lot 2, Block 50, Marikina Heights, Marikina City. When they arrived there, they introduced themselves as police officers. The police forcibly opened the door after the occupants of the house refused to open the ground floor door. During their search at the second floor, the operatives found an armalite and a .45 caliber gun. The members of the team handcuffed Gomez and Reynaldo, and then brought them to Camp Crame.[14]

The prosecution charged Preciosa Gomez, Jerry Pepino, Reynaldo Pepino, Jessie Pepino, George Curvera, Boy Lanyujan, Luisito "Tata" Adulfo, Henriso Batijon *(a.k.a.* Dodoy Batijon), Nerio Alameda, and an alias Wilan Tan with kidnapping for ransom and serious illegal detention before the Regional Trial Court *(RTC)*, Branch 259, Paranaque City.[15] Reynaldo was subsequently discharged after reinvestigation. Only Pepino, Gomez, and Batijon were arraigned; their other co-accused remained at large.

In its May 15, 2000 decision, the RTC convicted Pepino and Gomez of kidnapping and serious illegal detention under

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[13] TSN, August 25, 1999, pp. 40-73.

[14] TSN, November 25, 1999, pp. 8-29.

[15] Docketed as Criminal Case No. 97-946.

Article 267 of the Revised Penal Code (as amended) and sentenced them to suffer the death penalty. The RTC also ordered them to pay Edward ₱700,000.00 representing the amount extorted from him; ₱50,000.00 as moral damages; and ₱50,000 as exemplary damages. The trial court acquitted Batijon for insufficiency of evidence.

The RTC held that Edward positively identified Pepino and Gomez as two of the persons who forcibly abducted him at gunpoint inside Kilton Motors, and who consequently detained him somewhere in Quezon City for four (4) days until he was released inside the UP Diliman Campus after the payment of ransom. The RTC added that Jocelyn corroborated Edward's testimony on material points. It also pointed out that Edward identified both Pepino and Gomez at the lineup conducted inside the NBI compound, although Jocelyn only recognized Gomez.

The RTC further ruled that the accused were already estopped from questioning the validity of their arrest after they entered their respective pleas.

The case was automatically elevated to this Court in view of the death penalty that the RTC imposed. We referred the case to the CA for intermediate review pursuant to our ruling in *People v. Mateo.*[16]

In its decision dated June 16, 2006, the Court of Appeals affirmed the RTC decision with the modification that the amounts of moral and exemplary damages were increased from ₱300,000.00 and ₱100,000.00, respectively.

The CA held that Pepino and Gomez were deemed to have waived any objection to the illegality of their arrests when they did not move to quash the information before entering their plea, and when they participated at the trial.

The CA further ruled that Pepino and Gomez conspired with each other to attain a common objective, *i.e.,* to kidnap Edward in exchange for ransom.

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[16] 477 Phil. 752 (2004).

While the case was under review by the Supreme Court, Pepino filed an urgent motion to withdraw his appeal, which the Court granted.[17] Only Gomez's appeal is now pending before us.

In her brief[18] and supplemental brief,[19] Gomez maintained that it was impossible for Edward to have seen her in the front seat of the getaway car because he (Edward) was blindfolded. She also alleged that the prosecution failed to prove that she had conspired with the other accused.

Gomez further claimed that Edward's identification of her during trial "may have been preconditioned x x x by suggestive identification"[20] made at the police lineup. She further argued that the death penalty imposed on her is no longer proper due to the enactment of Republic Act No. 9346.

THE COURT'S RULING

We affirm Gomez's conviction, but we modify the penalty imposed and the awarded indemnities.

Illegality of the Arrest

We point out at the outset that Gomez did not question before arraignment the legality of her warrantless arrest or the acquisition of RTC's jurisdiction over her person. Thus, Gomez is deemed to have waived any objection to her warrantless arrest.

It is settled that [a]ny objection to the procedure followed in the matter of the acquisition by a court of jurisdiction over the person of the accused must be opportunely raised before he enters his plea; otherwise, the objection is deemed waived.[21] As we held in *People v. Samson:*[22]

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[17] The case against Pepino became final and executory on August 15, 2014, per Entry of Judgment made on the same day.

[18] *CA rollo,* pp. 45-59.

[19] *Rollo,* 59-70.

[20] *Id*. at 61.

[21] See *People v. Trestiza,* G.R. No. 193833, November 16, 2011, 660 SCRA 407, 442.

[22] G.R. No. 100911, May 16, 1995, 244 SCRA 146.

[A]ppellant is now estopped from questioning any defect in the manner of his arrest as he failed to move for the quashing of the information before the trial court. Consequently, any irregularity attendant to his arrest was cured when he voluntarily submitted himself to the jurisdiction of the trial court by entering a plea of "not guilty" and by participating in the trial.[23]

At any rate, the illegal arrest of an accused is not sufficient cause for setting aside a valid judgment rendered upon a sufficient complaint after a trial free from error. Simply put, the illegality of the warrantless arrest cannot deprive the State of its right to prosecute the guilty when all other facts on record point to their culpability. It is much too late in the day to complain about the warrantless arrest after a valid information had been filed, the accused had been arraigned, the trial had commenced and had been completed, and a judgment of conviction had been rendered against her.[24]

Sufficiency of the Prosecution Evidence

a. Elements of kidnapping proved

The elements of kidnapping and serious illegal detention under Article 267 of the Revised Penal Code, as amended, are: (1) the offender is a private individual; (2) he kidnaps or detains another or in any other manner deprives the latter of his liberty; (3) the act of detention or kidnapping must be illegal; and (4) in the commission of the offense, any of the following circumstances is present: (a) the kidnapping or detention lasts for more than three (3) days; or (b) it is committed by simulating public authority; or (c) serious physical injuries are inflicted upon the person kidnapped or detained or threats to kill him are made; or (d) the person kidnapped or detained is a minor, female, or a public officer. If the victim of kidnapping and serious

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[23] *Id*. at 150.

[24] See *People of the Philippines v. Rommel Araza y Sagun,* G.R. No. 190623, November 17, 2014; and *People of the Philippines v. Richard Giray y Corella alias "Herminigildo Baltazar y Poquiz."* G.R. No. 196240, February 19, 2014.

illegal detention is a minor, the duration of his detention is immaterial. Likewise, if the victim is kidnapped and illegally detained for the purpose of extorting ransom, the duration of his detention is also of no moment and the crime is qualified and becomes punishable by death even if none of the circumstances mentioned in paragraphs 1 to 4 of Article 267 is present.[25]

All these elements have been established by the prosecution. Edward positively identified Gomez and Pepino — both private individuals — as among the three persons who entered his office and pretended to be Kilton Motors' customers. He further declared that Pepino pointed a gun at him, and forcibly took him against his will. To directly quote from the records:

ATTY. WILLIAM CHUA:

Q: Can you tell us if anything unusual happened to you on June 28, 1997?

EDWARD TAN:

A: I was kidnapped.

x x x x x x x x x

Q: Can you tell this Court how the kidnapping was initiated?

A: At around 1:00 o'clock in the afternoon, there were three persons who entered the office of Kilton Motors and pretended to be customers.

Q: What was the gender of these three persons that you are referring to?

A: Two men and a woman.

Q: After they pretended to be customers, tell us what happened?

A: They told me they were going to pay but instead of pulling out money, they pulled out a gun.

Q: How many people pulled out guns as you said?

A: Only one, sir.

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[25] *People v. Jatulan,* 550 Phil. 343, 351-352. (2007).

Q: Will you look around this courtroom now and tell us if the person who pulled out a gun is in court?

A: **(WITNESS POINTED TO A PERSON AT THE RIGHT SECTION, SECOND ROW WHO, WHEN ASKED HIS NAME, ANSWERED JERRY PEPINO)**

Q: Now, you said that there were two men and a woman who went up the Kilton Motors Office and you pointed to one of the men as Jerry Pepino, can you look around the courtroom and tell us if any of the two others are in court?

A: **(WITNESS POINTED TO A WOMAN INSIDE THE COURTROOM WHO, WHEN ASKED HER NAME, ANSWERED AS PRECIOSA GOMEZ)**

x x x x x x x x x

Q: You said Mr. Pepino pulled out his gun, what happened after he pulled out his gun?

A: He told me just to be quiet and go with him.

Q: What was your reaction when he pointed a gun to you and he stated those words?

A: I thought it was only a holdup and so I told him there was money with the cashier and told him to get it.

Q: What happened after you told him the money was in the cashier's box?

A: His companion took the money and told me to still go with them.

Q: When they told you to go with them, what happened next?

A: I told them why should I still go with them and then, I was handcuffed and was forced to go down.

x x x x x x x x x

Q: As they were bringing you down, what happened next, Mr.Witness?

A: When we went down nearing his car, I was boarded on [in] his car.

x x x x x x x x x

Q: When they boarded you inside that car, what did they do to you, Mr. Witness?

A: They put surgical tape on my eyes and also sunglasses.

x x x x x x x x x

Q: Who was at the passenger's front seat of the car?

A: It was **Preciosa Gomez**.[26]

x x x x x x x x x

Edward further declared on the witness stand that Pepino, Gomez, and their other co-accused brought him to a safe house in Quezon City; detained him there for four (4) days; and *demanded ransom* from his (Edward's) family.

It is settled that the crime of serious illegal detention consists not only of placing a person in an enclosure, but also in detaining him or depriving him of his liberty in any manner. For there to be kidnapping, it is enough that the victim is restrained from going home. Its essence is the actual deprivation of the victim's liberty, coupled with indubitable proof of the intent of the accused to effect such deprivation.[27]

Notably, Jocelyn corroborated Edward's testimony on the following points: Pepino poked a handgun at Edward while they were on the second floor of Kilton; Pepino and his companion brought him downstairs and out of the building, and made him board a car; and the kidnappers demanded ransom in exchange for Edward's release.

Both the RTC and the CA found the respective testimonies of Edward and Jocelyn credible and convincing. We affirm the credibility accorded by the trial court (and affirmed by the CA) to these prosecution witnesses, in the absence of any showing that this factual finding had been arbitrarily arrived at. There

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[26] TSN, January 28, 1999, pp. 5-13. Emphasis supplied

[27] See *People v. Anticamara,* G.R. No. 178771, June 8, 2011, 651 SCRA 489, 515 (citations omitted).

is nothing in the records that would put the testimonies of Edward and Jocelyn under suspicion. We recall that Edward had close contacts with Pepino at Kilton Motors and at the safe house. He also saw Gomez (a) seated at the front seat of the getaway Toyota Corolla vehicle; (b) at the safe house in Quezon City; and (c) inside the car before the kidnappers released him.

Jocelyn, for her part, stated that she was very near Pepino while he was taking away her husband.

In *People v. Pavillare*,[28] the Court found the testimonies of the private complainant Sukhjinder Singh and his cousin, Lakhvir Singh, to be credible and convincing, and reasoned out as follows:

> Both witnesses had ample opportunity to observe the kidnappers and to remember their faces. The complainant had close contact with the kidnappers when he was abducted and beaten up, and later when the kidnappers haggled on the amount of the ransom money. His cousin met Pavillare face to face and actually dealt with him when he paid the ransom money. The two-hour period that the complainant was in close contact with his abductors was sufficient for him to have a recollection of their physical appearance. Complainant admitted in court that he would recognize his abductors if he sees them again and upon seeing Pavillare he immediately recognized him as one of the malefactors as he remembers him as the one who blocked his way, beat him up, haggled with the complainant's cousin and received the ransom money. x x x It bears repeating that the finding of the trial court as to the credibility of witnesses is given utmost respect and as a rule will not be disturbed on appeal because it had the opportunity to closely observe the demeanor of the witness in court.[29]

b. Admissibility of Identification

We find no merit in Gomez's claim that Edward's identification of her during trial *might* have been preconditioned by the "suggestive identification" made during the police lineup.

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[28] 386 Phil. 126 (2000).

[29] *Id*. at 144.

In *People* v. *Teehankee, Jr.,*[30] the Court explained the procedure for out-of-court identification and the test to determine the admissibility of such identifications in this manner:

> Out-of-court identification is conducted by the police in various ways. It is done thru **show-ups** where the suspect alone is brought face to face with the witness for identification. It is done thru **mug shots** where photographs are shown to the witness to identify the suspect. It is also done thru **lineups** where a witness identifies the suspect from a group of persons lined up for the purpose x x x In resolving the admissibility of and relying on out-of-court identification of suspects, courts have adopted the **totality of circumstances test** where they consider the following factors, viz: (1) the witness' opportunity to view the criminal at the time of the crime; (2) the witness' degree of attention at that time; (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.[31]

Applying the totality-of-circumstances test, we find Edward's out-of-court identification to be reliable and thus admissible. To recall, when the three individuals entered Edward's office, they initially pretended to be customers,[32] and even asked about the products that were for sale.[33] The three had told Edward that they were going to pay, but Pepino "pulled out a gun" instead.[34] After Pepino's companion had taken the money from the cashier's box, the malefactors handcuffed Edward and forced him to go down to the parked car. From this sequence of events, there was thus ample opportunity for Edward — before and after the gun had been pointed at him to view the faces of the three persons who entered his office. In addition, Edward stated

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[30] 319 Phil. 128 (1995).

[31] *Id*. at 180 (emphasis in the original).

[32] TSN, January 28, 1999, p. 6.

[33] *Id*. at 61.

[34] *Id*. at 7.

that Pepino had talked to him "[a]t least once a day"[35] during the four days that he was detained.

Edward also saw Gomez seated at the front seat of the getaway metallic green Toyota Corolla vehicle. In addition, the abductors removed the tape from Edward's eyes when they arrived at the apartment, and among those whom he saw there was Gomez. According to Edward, he was able to take a good look at the occupants of the car when he was about to be released.

On the part of Jocelyn, she was firm and unyielding in her identification of Pepino as the person who pointed a gun at her husband while going down the stairs, and who brought him outside the premises of Kilton Motors. She maintained that she was very near when Pepino was taking away her husband; and that she could not forget Pepino's face. For accuracy, we quote from the records:

ATTY. CORONEL:

Q: You stated that you were able to see one of the persons who kidnapped your husband, if you see this person again, would you be able to identify him?

JOCELYN SY TAN:

A: Yes, sir.

Q: Can you look around the courtroom and see if the person you are referring to is here today?

A: Yes, sir.

Q: Can you point to him?

A: (WITNESS POINTED TO A MALE PERSON INSIDE THE COURTROOM WHO WHEN ASKED HIS NAME ANSWERED AS JERRY PEPINO).

Q: Ms. Witness, what role did this person whom you identified and gave his name as Jerry Pepino, what role did he play in the kidnapping of your husband?

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[35] *Id*. at 59.

A: *Siya po bale 'yong nakayakap sa husband ko tapos nakatutok ng baril.*

x x x x x x x x x

ATTY. ESTRUCO:

Q: When Jerry Pepino was at Kilton Motors, he embraced your husband?

JOCELYN SY TAN:

A: Yes, sir. And pointed a gun at my husband.

Q: And he was not blindfolded at that time?

A: No, he was not blindfolded, he was only wearing a cap.

Q: You are very sure that he is Jerry Pepino?

A: Yes, I am very, very sure. I could not forget his face.

Q: You are very sure?

A: Yes, sir. *Kahit sa nightmare ko, kasama siya.*

x x x x x x x x x[36]

We add that no competing event took place to draw Edward's and Jocelyn's attention from the incident. Nothing in the records shows the presence of any distraction that could have disrupted the witnesses' attention at the time of the incident.[37]

Jurisprudence holds 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. As the Court held in *People v. Esoy*:[38]

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[36] TSN, January 14, 1999, pp. 6-7 and 34-35.

[37] The so-called "weapon-focus effect," while finding support in the areas of psychology and behavioral science, has yet to find its way as a proven and reliable standard acceptable as a consideration in our jurisdiction. We also emphasize in this regard that the weapon-focus effect only reduces, not eliminates, the ability to recall the other details of the crime.

[38] G.R. No. 185849, April 7, 2010. 617 SCRA 552.

It is known that the most natural reaction of a witness to a crime is to strive to look at the appearance of the perpetrator and to observe the manner in which the offense is perpetrated. Most often the face of the assailant and body movements thereof, create a lasting impression which cannot be easily erased from a witness's memory. Experience dictates that precisely because of the unusual acts of violence committed right before their eyes, eyewitnesses can remember with a high degree of reliability the identity of criminals at any given time.[39]

While this pronouncement should be applied with great caution, there is no compelling circumstance in this case that would warrant its non-application.

Contrary to what Gomez claimed, the police lineup conducted at the NBI was not suggestive. We note that there were seven people in the lineup; Edward was not compelled to focus his attention on any specific person or persons. While it might have been *ideal* if there had been more women included in the lineup instead of only two, or if there had been a separate lineup for Pepino and for Gomez, the fact alone that there were five males and two females in the lineup did not render the procedure irregular. There was no evidence that the police had supplied or even suggested to Edward that the appellants were the suspected perpetrators.

The following exchanges at the trial during Edward's cross-examination prove this point:

ATTY. ESTURCO:

Q: When they were lined up at the NBI, where were they placed, in a certain room?

EDWARD TAN:

A: Yes, sir.

Q: With a glass window? One way?

A: No, sir.

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[39] *Id*. at 561.

Q: You mean to say you were face to face with the alleged kidnappers?

A: Yes, sir.

Q: And before you were asked to pinpoint the persons who allegedly kidnapped you, you conferred with the NBI agents?

A: **The NBI agents told me not to be afraid.**

Q: No, my question is, you conferred with the NBI agents?

A: Yes, sir.

Q: What is the name of the NBI agent?

A: I cannot remember, sir.

Q: And how many were lined up?

A: Seven, sir.

Q: **And the NBI agent gave the names of each of the seven?**

A: **No, sir.**[40]

We also note that Jocelyn's and Edward's out-of-court identifications were made on the same day. While Jocelyn only identified Pepino, the circumstances surrounding this out-of-court identification showed that the whole identification process at the NBI was not suggestive. To directly quote from the records:

ATTY. ESTURCO:

Q: How about the alleged kidnappers, where were they placed during that time?

JOCELYN TAN:

A: They were in front of us.

Q: Without any cover?

A: None, sir.

Q: Without any glass cover?
A: See-through glass window.

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[40] TSN, January 28, 1999, pp. 66-68 (emphasis ours).

Q: One-way mirror?

A: Not one way, see-through.

Q: **And before you were asked to pinpoint the alleged kidnappers, you were already instructed by the NBI what to do and was told who are the persons to be lined up?**

A: **No, sir.**

x x x x x x x x x

Q: **And between the alleged length of time, you were still very positive that it was Gerry (sic) Pepino inside the NBI cell?**

A: **At first, I did not know that he was Jerry Pepino but we know his face.**

Q: **At first, you did not know that it was Jerry Pepino?**

A: **Yes, sir.**

x x x x x x x x x

Q: **It was the NBI officer who told you that the person is Jerry Pepino, am I correct?**

x x x x x x x x x

A: **They identified that the person we identified was Jerry Pepino. We first pinpointed na heto ang mukha at saka sinabi na 'yan si Jerry Pepino.**

x x x x x x x x x[41]

These exchanges show that the lineup had not been attended by any suggestiveness on the part of the police or the NBI agents; there was no evidence that they had supplied or even suggested to either Edward or Jocelyn that the appellants were the kidnappers.

We are not unaware that the Court, in several instances, has acquitted an accused when the out-of-court identification is fatally

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[41] TSN, January 14, 1999, pp. 37-38 and 46-48 (emphasis ours).

flawed. In these cases, however, it had been clearly shown that the identification procedure was suggestive.

In *People v. Pineda,*[42] the Court acquitted Rolando Pineda because the police suggested the identity of the accused by showing only the photographs of Pineda and his co-accused Celso Sison to witnesses Canilo Ferrer and Jimmy Ramos. According to the Court, "there was impermissible suggestion because the photographs were only of appellant and Sison, focusing attention on the two accused."[43]

Similarly, the Court in *People v. Rodrigo*[44] acquitted appellant Lee Rodrigo since only a lone photograph was shown to the witness at the police station. We thus held that the appellant's in-court identification proceeded from, and was influenced by, impermissible suggestions in the earlier photographic identification.

The lack of a prior description of the kidnappers in the present case should not lead to a conclusion that witnesses' identification was erroneous. The lack of a prior description of the kidnappers was due to the fact that Jocelyn (together with other members of Edward's family), for reasons not made known in the records, opted to negotiate with the kidnappers, instead of immediately seeking police assistance. If members of Edward's family had refused to cooperate with the police, their refusal could have been due to their desire not to compromise Edward's safety.[45] In the same manner, Edward, after he was freed, chose to report the matter to Teresita Ang See, and not to the police.

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[42] 473 Phil. 517 (2004).

[43] *Id.* at 540.

[44] 586 Phil. 515 (2008).

[45] Per Jocelyn's testimony, two batches of policemen came. The first batch arrived at Kilton Motors immediately after the incident, but Jocelyn told them, *"huwag nyo muna akong guluhin ngayon kasi magulo pa ang isip ko, umalis muna kayo."* (TSN, January 14, 1999, pp. 11-12) The second batch arrived after Jocelyn had called her brother-in-law, but Jocelyn also told them to leave.

Given these circumstances, the lack of prior description of the malefactors in this case should not in any way taint the identification that Edward and Jocelyn made.

c. The Right to Counsel

The right to counsel is a fundamental right and is intended to preclude the slightest coercion that would lead the accused to admit something false. The right to counsel attaches upon the start of the investigation, *i.e.,* when the investigating officer starts to ask questions to elicit information and/or confessions or admissions from the accused.[46]

Custodial investigation commences when a person is taken into custody and is singled out as a suspect in the commission of the crime under investigation.[47] As a rule, a police lineup is *not* part of the custodial investigation; hence, the right to counsel guaranteed by the Constitution cannot yet be invoked at this stage. The right to be assisted by counsel attaches only during custodial investigation and cannot be claimed by the accused during identification in a police lineup.

Our ruling on this point in *People v. Lara*[48] is instructive:

> x x x The guarantees of Sec. 12(1), Art. III of the 1987 Constitution, or the so-called *Miranda* rights, may be invoked only by a person while he is under custodial investigation. Custodial investigation starts when the police investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect taken into custody by the police who starts the interrogation and propounds questions to the person to elicit incriminating statements. Police line-up is not part of the custodial investigation; hence, the right to counsel guaranteed by the Constitution cannot yet be invoked at this stage.[49]

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[46] See *People v. Reyes,* G.R. No. 178300, March 17, 2009, 581 SCRA 691, 718 (citations omitted).

[47] See *People v. Pavillare,* 386 Phil. 126, 136 (2000).

[48] G.R. No. 199877, August 13, 2012, 678 SCRA 332.

[49] *Id.* at 348.

Defense witness Reynaldo, however, maintained that Pepino and Gomez were among those ***already presented to the media as kidnapping suspects*** by the DOJ a day before the police lineup was made. In this sense, the appellants were already the focus of the police and were thus deemed to be already under custodial investigation when the out-of-court identification was conducted.

Nonetheless, **the defense did not object to the in-court identification for having been tainted by an irregular out-of-court identification in a police lineup.** They focused, instead, on the legality of the appellants' arrests.

Whether Edward and Jocelyn could have seen Pepino and Gomez in various media fora that reported the presentation of the kidnapping suspects to the media is not for the Court to speculate on. The records merely show that when defense counsel, Atty. Caesar Esturco, asked Jocelyn during cross-examination whether she was aware that there were several kidnap- for-ransom incidents in Metro Manila, the latter answered that she "can read in the newspapers."[50] At no time did Jocelyn or Edward ever mention that they saw the appellants from the news reports in print or on television.

At any rate, the appellants' respective convictions in this case were based on an **independent in-court identification made by Edward and Jocelyn, and not on the out-of-court identification during the police lineup.** We reiterate that the RTC and the CA found the court testimonies of these witnesses to be positive and credible, and that there was no showing that their factual findings had been arrived at arbitrarily. The in-court identification thus cured whatever irregularity might have attended the police lineup.

As the Court ruled in *People v. Algarme:*[51]

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[50] TSN, January 14, 1999, p. 64.

[51] G.R No. 175978, February 12, 2009, 578 SCRA 601, 619 citing *People v. Timon,* G.R. Nos. 97841-42, November 12, 1997, 281 SCRA 577, 592.

Even assuming *arguendo* the appellants' out-of-court identification was defective, their subsequent identification in court cured any flaw that may have initially attended it. We emphasize that the "inadmissibility of a police lineup identification x x x should not necessarily foreclose the admissibility of an independent in-court identification." We also stress that all the accused-appellants were positively identified by the prosecution eyewitnesses during the trial.

It is also significant to note that despite the overwhelming evidence adduced by the prosecution, Pepino and Gomez did not even testify for their respective defenses.

d. The Presence of Conspiracy

Conspiracy exists when two or more persons come to an agreement concerning the commission of a crime and decide to commit it. It may be proved by direct or circumstantial evidence consisting of acts, words, or conduct of the alleged conspirators before, during and after the commission of the felony to achieve a common design or purpose.

Proof of the agreement does not need to rest on direct evidence, as the agreement may be inferred from the conduct of the parties indicating a common understanding among them with respect to the commission of the offense. Corollarily, it is not necessary to show that two or more persons met together and entered into an explicit agreement setting out the details of an unlawful scheme or the details by which an illegal objective is to be carried out.[52]

In the present case, the records establish the following facts: Pepino, Gomez, and another man entered Edward's office, and initially pretended to be customers; the three told Edward that they were going to pay, but Pepino pulled out a gun. After Pepino's companion took the money from the cashier's box, the malefactors handcuffed him and forced him to go down to the parked car; Gomez sat at the front passenger seat of the car which brought Edward to a safe house in Quezon City; the abductors removed the tape from Edward's eyes, placed him in a room, and then

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[52] See *People v. Bringas,* G.R. No. 189093. April 23, 2010, 619 SCRA 481.

chained his legs upon arrival at the safe house; the abductors negotiated with Edward's family who eventually agreed to a ₱700,000.00 ransom to be delivered by the family driver using Edward's own car; and after four days, three men and Gomez blindfolded Edward, made him board a car, drove around for 30 minutes, and left him inside his own car at the UP Diliman campus.

The collective, concerted, and synchronized acts of the accused before, during, and after the kidnapping constitute undoubted proof that Gomez and her co-accused conspired with each other to attain a common objective, *i.e.,* to kidnap Edward and detain him illegally in order to demand ransom for his release.

The Proper Penalty:

Article 267 of the Revised Penal Code, as amended, mandates the imposition of the death penalty when the kidnapping or detention is committed for the purpose of extorting ransom from the victim or any other person. Ransom, as employed in the law, is so used in its common or ordinary sense; meaning, a sum of money or other thing of value, price, or consideration paid or demanded for redemption of a kidnapped or detained person, a payment that releases one from captivity.[53]

In the present case, the malefactors not only demanded but received ransom for Edward's release. The CA thus correctly affirmed the RTC's imposition of the death penalty on Pepino and Gomez.

With the passage of Republic Act No. 9346, entitled *"An Act Prohibiting the Imposition of Death Penalty in the Philippines"* (signed into law on June 24, 2006), the death penalty may no longer be imposed. We thus sentence Gomez to the penalty of *reclusion perpetua* without eligibility for parole pursuant to A.M. No. 15-08-02-SC.[54]

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[53] *People v. Ejandra,* G.R. No. 134203, May 27, 2004, 429 SCRA 364, 382.

[54] Guidelines for the Proper Use of the Phrase "Without Eligibility for Parole" in Indivisible Penalties.

The reduced penalty shall likewise apply to the non-appealing party, Pepino, since it is more favorable to him.

The Awarded Indemnities:

In the case of *People v. Gambao*[55] (also for kidnapping for ransom), the Court set the minimum indemnity and damages where facts warranted the imposition of the death penalty if not for prohibition thereof by R.A. No. 9346, as follows: (1) ₱100,000.00 as civil indemnity; (2) ₱100,000.00 as moral damages which the victim is assumed to have suffered and thus needs no proof; and (3) ₱100,000.00 as exemplary damages to set an example for the public good. These amounts shall earn interest at the rate of six percent (6%) per annum from the date of the finality of the Court's Resolution until fully paid.

We thus reduce the moral damages imposed by the CA from ₱300,000.00 to ₱100,000.00 to conform to prevailing jurisprudence on kidnapping cases. This reduced penalty shall apply to Pepino for being more favorable to him. However, the additional monetary award *(i.e.*, ₱100,000.00 civil indemnity) imposed on Gomez shall not be applied to Pepino.[56]

We affirm the ₱700,000.00 imposed by the courts below as restitution of the amount of ransom demanded and received by the kidnappers. We also affirm the CA's award of ₱100,000.00 as exemplary damages based on *Gambao.*

WHEREFORE, in the light of all the foregoing, we **AFFIRM** the challenged June 16, 2006 decision of the Court of Appeals in CA-G.R. CR-HC No. 02026 with the following **MODIFICATIONS:**

(1) the penalty imposed on Gomez and Pepino shall be reduced from death to *reclusion perpetua* without eligibility for parole;

(2) they are jointly and severally ordered to pay the reduced amount of ₱100,000.00 as moral damages;

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[55] G.R. No. 172707, October 1, 2013, 706 SCRA 508, 533.

[56] See *People v. Arondain,* 418 Phil. 354 (2001).

(3) Gomez is further ordered to pay the victim ₱100,000.00 as civil indemnity; and

(4) the awarded amounts shall earn interest at the rate of six percent (6%) per annum from the date of the finality of the Court's Decision until fully paid.

SO ORDERED.

Sereno, C.J., Carpio, Velasco, Jr., Leonardo-de Castro, Peralta, del Castillo, Perez, Mendoza, Reyes, and *Perlas-Bernabe, JJ.,* concur.

Leonen, J., see dissenting opinion.

Bersamin and *Villarama, Jr., JJ.,* no part.

Jardeleza, J., no part, prior OSG action.

DISSENTING OPINION

LEONEN, *J.*:

Due to reasonable doubt, I vote for the acquittal of Preciosa Gomez y Campos (Gomez).

Premature media exposure of suspected criminals affects the integrity of the identification made by a witness. Law enforcers fail to prevent undue influence and suggestion when they present suspects to the media before the actual identification by a witness. An irregular out-of-court identification taints any subsequent identification made in court.

Two men and a woman forcibly took the victim, Edward Tan (Edward), from his workplace at Kilton Motors in Parañaque City on June 28, 1997.[1] One of Edward's kidnappers, eventually identified as Jerry Pepino y Rueras (Pepino), contacted Edward's father and Edward's wife to ask for a ₱40 million ransom.[2]

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[1] TSN, January 14, 1999, pp. 4-10; TSN, January 28, 1999, pp. 5-15.

[2] TSN, January 14, 1999, pp. 13-14.

After negotiations, the kidnappers agreed to the ransom of ₱700,000.00 in exchange for Edward's liberty.[3] Four (4) days after Edward's taking, the kidnappers received the money and released Edward from his detention.[4]

Five (5) months after the incident, Edward and his wife Jocelyn were invited to the National Bureau of Investigation (NBI) to identify Edward's kidnappers among the individuals in the custody of the NBI.[5] The identification procedure involved a line-up of seven (7) individuals: five men and two women.[6] Both Edward and Jocelyn identified Pepino,[7] while only Edward identified two others: Gomez and a certain Mario Galgo (Galgo).[8]

Only Pepino and Gomez were arraigned for the kidnapping of Edward.[9] After trial, the Regional Trial Court convicted both accused for the crime charged.[10]

Both Pepino and Gomez filed appeals before the Court of Appeals and this court.[11] Pepino moved to withdraw his appeal,[12]

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[3] *Id*. at 15-20.

[4] TSN, January 14, 1999, pp. 13-23; TSN, January 28, 1999, pp. 17-20.

[5] RTC records, p. 24, Edward Tan's Sinumpaang Salaysay.

[6] *Id*. at 143, 145, and 147, photographs of the line-up.

[7] TSN, January 14, 1999, pp. 6-7 and 45-48; TSN, January 28, 1999, p. 22.

[8] TSN, January 28, 1999, pp. 21-22. Mario Galgo executed a Sinumpaang Salaysay (RTC records, pp. 51-55) dated December 7, 1997, naming both Pepino and a certain "Fe" Gomez ("Fe" is Preciosa Gomez's alias according to other NBI documents) as perpetrators of the "Kilton Motors" kidnapping (*Id*. at 53 and 132). However, when subpoenaed by the Regional Trial Court, Galgo did not appear to testify (*Id*. at 241 and 243).

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

[10] *Id*. at 16-31. The case was docketed as Crim. Case No. 97-946. The Decision dated May 15, 2000 was penned by Judge Zosimo V. Escano.

[11] *Id*. at 49-59, Preciosa Gomez's Appellant's Brief, and 118-153, Jerry Pepino's Appellant's Brief.

[12] *Rollo,* p. 147, Jerry Pepino's Urgent Motion to Withdraw Appeal.

which we granted.[13] Only Gomez's appeal is pending resolution with this court.

In her Appellant's Brief[14] dated March 12, 2001 and Reply Brief dated January 24, 2005,[15] Gomez argued that her guilt could not be proven beyond reasonable doubt.[16] Since Edward's eyes were covered while he was on board the metallic green Toyota Corolla, there was no certainty that Edward recognized that the woman on the front seat was Gomez.[17] In addition, she argued that even if it were shown that Edward recognized her as the woman inside the car, her mere presence in the car did not show that she was part of the conspiracy to commit the offense.[18]

Gomez also insisted that there were irregularities when the sole eyewitness identified her as a perpetrator to the kidnapping. She noted that Edward "did not make any report to the law enforcement authorities after he [had been] kidnapped."[19] Rather, he reported it to one Teresita Ang See, a civilian.[20] There were no affidavits made on the kidnapping, descriptions of the perpetrator, or a cartographic sketch based on the narration.[21] Hence, there was no official record that the law enforcement authorities could rely upon to begin investigation on the identity of Edward's abductors.[22]

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[13] *Id*. at 246, Supreme Court Resolution dated June 10, 2014.

[14] CA *rollo,* pp. 49-59.

[15] *Id*. at 224-234. However, the document was received by this court on January 24, 2006.

[16] *Id*. at 54-58, Preciosa Gomez's Appellant's Brief, and 225-228, Preciosa Gomez's Reply Brief.

[17] *Id*. at 54-55, Preciosa Gomez's Appellant's Brief.

[18] *Id*. at 55.

[19] *Id*. at 225, Preciosa Gomez's Reply Brief.

[20] *Id*.

[21] *Id*. at 225-226.

[22] *Id*. at 226.

Gomez insisted that the most irregular incident was when she and other individuals were presented to the media as kidnappers on December 8, 1997 at the Department of Justice.[23] On the following day, December 9, 1997, Edward identified her as a suspect to the kidnapping.[24] This made "the identification . . . at the NBI . . . highly suspect because at that time, the appellant had already been presented to the public and branded as kidnappers, and viewed by all and sundry before national television networks, in violation of her constitutional right to be presumed innocent[.]"[25] For Gomez, there was high probability that Edward already saw her in the media reports, thus making it easier for him to identify her as an abductor.[26]

Gomez further argued that her constitutional rights were breached. Her right to be presumed innocent was violated when she was presented to the media as a person responsible for the kidnapping.[27] Further, her right to due process was violated when she was subjected to the line-up without counsel. Since she was already presented before the media as a kidnapper and treated by the police as a suspect, it was just proper that she should have had a counsel during the line-up.[28]

For Gomez, the lack of a prior description and the prejudicial media exposure should be considered. There was reasonable probability that "these circumstances [caused] erroneous identification, and . . . resulted in [her] wrongful conviction [.]"[29]

Only Edward identified Gomez during the investigation and the trial.[30] The line-up that facilitated Gomez's identification

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[23] *Id*.

[24] *Id*.

[25] *Id*.

[26] *Id*. at 227.

[27] *Id*. at 229.

[28] *Id*. at 229-230.

[29] *Id*. at 230.

[30] *Id*. at 225.

was conducted by the NBI more than five (5) months after the kidnapping incident.[31]

On appeal, Gomez questioned the identification procedure that identified her as an accused in this kidnapping case on the ground that she was already presented to the media as a suspect a day before the police line-up.[32]

I

Witnesses, during criminal investigations, assist law enforcers in narrowing their list of suspects. In many instances, the perpetrator is not personally known to a witness but can be reasonably identified. Identifying perpetrators is not limited to knowing their names. Familiarity with the facial and physiological features of the perpetrator is enough.[33]

There are two modes of out-of-court identifications. One mode of out-of-court identification is the police line-up where the witness selects a "suspect from a group of persons lined up[.]"[34] Another mode of identification is the show-up. In show-ups, only one person is presented to the witness or victim for identification.[35] Show-ups are less preferred and are considered "an underhanded mode of identification for 'being pointedly suggestive, generat[ing] confidence where there was none,

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[31] *Id*. at 226.

[32] *Id*. at 226-227.

[33] *People v. Verzosa,* 355 Phil. 890 (1998) [Per *J*. Kapunan, Third Division]: "Identification of a person is not established solely through knowledge of the name of a person. Familiarity with physical features particularly those of the face, is actually the best way to identify a person. One may be familiar with the face but not necessarily the name." (*Id*. at 904).

[34] *People v. Teehankee, Jr.,* 319 Phil. 128, 180 (1995) [Per *J*. Puno, Second Division].

[35] *People v. Escordial,* 424 Phil. 627, 653 (2002) [Per *J*. Mendoza, *En Banc*].

activat[ing] visual imagination, and, all told, subvert[ing]"[36] the reliability of the eyewitness.

Both the line-up and the show-up are referred to as corporeal identification: [37] the body of the suspect is there for identification. Out-of-court identifications are not limited to corporeal identifications. Police can use photographs or mug shots to identify the perpetrator.

Eyewitness identification is affected by "normal human fallibilities and suggestive influences."[38] Courts use the **totality of circumstances test** to ensure the reliability of any of the modes of out-of-court identification. The test was originally used in the United States[39] but was introduced in this jurisdiction in the 1995 case of *People* v. *Teehankee, Jr.*[40] In determining the validity of the out-of-court identification, the following factors are considered:

(1) the witness' opportunity to view the criminal at the time of the crime; (2) the witness' degree of attention at that time; (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.[41]

Teehankee, Jr. involved a high-profile murder. One of the eyewitnesses was the surviving victim who identified the

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[36] *Id*. at 658-659, *citing People v. Niño,* 352 Phil. 764, 771-772 (1998) [Per *J*. Vitug, First Division].

[37] Patrick M. Wall, *EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES* 26-65 (1965).

[38] *People v. Teehankee, Jr.,* 319 Phil. 128, 179 (1995) [Per *J*. Puno, Second Division].

[39] *Stovall v. Denno,* 388 U.S. 293, 302 (1967) originally used the term "totality of the circumstances." This was reiterated in *Neil v. Biggers,* 409 U.S. 188, 199-200 (1972) where it identified factors to be considered in the "totality of circumstances."

[40] 319 Phil. 128 (1995) [Per *J*. Puno, Second Division].

[41] *Id*. at 180.

accused, first, through mug shots while he was still at the hospital[42] and, second, through a line-up of several individuals.[43] The accused claimed that the line-up was irregular because it was conducted in a private residence and not at the NBI. He also argued that the witness already saw the pictures of the accused in media reports tying him to the crime, and that the witness' initial description of the perpetrator was never put in writing. Finally, he argued that the witness only had five minutes of exposure time to the perpetrator and was inebriated by alcohol at the time of the crime.[44]

This court ruled that the identification still passed the totality of circumstances test. First, the location of the line-up did not create an irregularity to the actual line-up. Second, during his testimony in court, the eyewitness stated that since he was hospitalized from the time of the shootings until the photographic identification, he did not see news reports regarding the shootings. Third, the NBI could not obtain the witness' testimony at an earlier time because the witness' tongue was injured then, and no rule in evidence requires the rejection of a testimony if it was not previously reduced to writing. Finally, this court ruled that the witness had ample opportunity to see the perpetrator because the area was well-lit, there was close proximity between the witness and the perpetrator, and the incident occurred for five whole minutes.[45]

The motives of the witness were also considered by this court in *Teehankee, Jr.* The absence of an ill motive for the witness to testify against an accused and the ability to be "unshaken" during vigorous cross- examination lend to the credibility of the witness.[46] This concept of the absence of an ill motive to testify was also used in *People v. Verzosa.*[47]

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[42] *Id*. at 181.

[43] *Id*. at 151.

[44] *Id*. at 178-179.

[45] *Id*. at 180-182.

[46] *Id*. at 182.

[47] 355 Phil. 890, 905 (1998) [Per *J*. Kapunan, Third Division].

Several cases have since used the totality of circumstances test in determining the veracity of an out-of-court identification made by a witness. In light of the events in this case, it is proper to review each circumstance with depth.

Courts have paid close attention to *the witness' opportunity to view the criminal at the time of the crime* and *the witness*' *degree of attention at that time*. Courts make an assessment of a witness' credibility based on the conditions of visibility and the amount of time the witness was exposed to the perpetrators. In *People v. Pavillare*:[48]

> Both witnesses had ample opportunity to observe the kidnappers and to remember their faces. The complainant had close contact with the kidnappers when he was abducted and beaten up, and later when the kidnappers haggled on the amount of the ransom money. His cousin met Pavillare face to face and actually dealt with him when he paid the ransom money. The two-hour period that the complainant was in close contact with his abductors was sufficient for him to have a recollection of their physical appearance. Complainant admitted in court that he would recognize his abductors if he s[aw] them again and upon seeing Pavillare he immediately recognized him as one of the malefactors as he remember[ed] him as the one who blocked his way, beat him up, haggled with the complainant's cousin and received the ransom money. As an indicium of candor the private complainant admitted that he d[id] not recognize the co-accused, Sotero Santos for which reason the case was dismissed against him.[49]

The majority in this case also cited *Pavillare* because it is instructive of the opportunity to adequately see and remember the facial features of a perpetrator not personally known to the victim or witness.[50] In *Pavillare,* the witness' several opportunities for interaction with the perpetrators of the crime meant that the witness would remember what the perpetrators looked like. In *Teehankee, Jr.*, the five-minute incident on a well-lit street

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[48] 386 Phil. 126 (2000) [*Per Curiam*, *En Banc*].

[49] *Id.* at 144.

[50] *Ponencia*, p. 9.

in the evening was deemed as sufficient time for the witness to remember the face of the perpetrator.

On the other hand, in *People v. Gamer*,[51] the crime occurred at 8:30 p.m., and the prosecution's evidence was inconsistent on whether the crime scene was lit or not. Hence, this court ruled that the out-of-court identification was not reliable.[52]

Aside from exposure time, extraordinary capabilities of the witness in recalling events should also be considered. In *People v. Sanchez,*[53] this court took note of important details about the witness that indicated his capability to recall. *Sanchez* involved the theft of an armoured car, and the witness, a trained guard, was presumed to have the ability to be alert about his surroundings during an attack.[54]

The importance of the attentiveness of a witness was underscored by Associate Justice Antonio T. Carpio's Dissenting Opinion in *Lumanog, et al. v. People.*[55] The case involved an ambush.[56] The witness, a security guard, was instructed by one of the perpetrators to stay low.[57] Nevertheless, the witness testified to have seen the incident and identified in court six (6) perpetrators.[58] The majority affirmed the credibility of the witness.[59] However, in Justice Carpio's Dissenting Opinion, he stated:

We agree with the accused that the swiftness by which the crime was committed and the physical impossibility of memorizing the

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[51] 383 Phil. 557 (2000) [Per *J*. Quisumbing, Second Division].

[52] *Id*. at 569-571.

[53] 318 Phil. 547 (1995) [Per *J*. Kapunan, First Division].

[54] *Id*. at 557-558.

[55] 644 Phil. 296 (2010) [Per *J*. Villarama, Jr., *En Banc*].

[56] *Id*. at 332.

[57] *Id*. at 351.

[58] *Id*. at 351-352.

[59] *Id*. at 397-402.

faces of all the perpetrators of the crime whom the witness saw for the first time and only for a brief moment under life-threatening and stressful circumstances incite disturbing doubts as to whether the witness could accurately remember the identity of the perpetrators of the crime.[60]

II

Advances in cognitive psychology and studies on eyewitness testimonies show that the degree of a witness' attentiveness in perceiving an event is influenced by various factors, including exposure time, frequency of exposure, level of violence of the event, the witness' stress levels and expectations, and the witness' activity during the crime.[61]

The level of violence of the event tends to influence the witness' stress levels. One area of continuous psychological research is the effect of the presence of a weapon on the attention of an individual to an incident. Since the 1970s, psychologists hypothesized that the presence of a weapon captures a witness' attention and reduces the witness' ability to pay attention to peripheral details (such as the facial features of the individuals brandishing the weapon).[62] The research model often involves two groups: a group that witnesses an incident where a gun is used, and another group that sees the same incident but with no weapon used (usually a pencil or syringe is used in lieu of a gun). Both groups are asked to identify the perpetrator in a line-up. Results would show that the presence of a weapon makes a statistically significant difference in the accuracy of eyewitness identification:[63]

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[60] *J*. Carpio, Dissenting Opinion in *Lumanog, et al. v. People,* 644 Phil. 296, 451 (2010) [Per *J*. Villarama, Jr., *En Banc*].

[61] Elizabeth F. Loftus, *EYEWITNESS TESTIMONY* 23-51 (1996).

[62] Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect,* 16 LAW AND HUMAN BEHAVIOR 413, 414 (1992).

[63] *Id*. at 420. The author surveyed research material that used this methodology.

[T]he influence of [a weapon focus] variable on an eyewitness's performance can only be estimated post hoc. Yet the data here do offer a rather strong statement: To not consider a weapon's effect on eyewitness performance is to ignore relevant information. The weapon effect does reliably occur, particularly in crimes of short duration in which a threatening weapon is visible. Identification accuracy and feature accuracy of eyewitnesses are likely to be affected, although, as previous research has noted . . . there is not necessarily a concordance between the two.[64]

The results of these scientific studies conducted on weapon focus have not yet permeated into some of this court's decisions. In *People v. Sartagoda*:[65]

[T]he most natural reaction for victims of criminal violence [is] to strive to see the looks and faces of their assailants and observe the manner in which the crime was committed. Most often the face of the assailant and body movements thereof, create a lasting impression which cannot easily be erased from their memory.[66]

We should now start taking greater caution in applying *Sartagoda* and other related cases that proclaim that victims have a natural propensity to remember the faces of their assailants. The stress experienced by victims and witnesses during the commission of a crime might not always affect their perception positively. Hence, it is important for courts to evaluate the totality of circumstances in the identification process.

Aside from the opportunity and ability of the witness to perceive the crime and the identifying features of the assailant, the *accuracy of any prior description given by the witness* to investigators must be considered by courts. A witness is considered more credible when his or her initial description of the accused, either through words or through a cartographic sketch, matches the actual appearance of a suspect selected during a photograph

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[64] *Id*. at 421.

[65] G.R. No. 97525, April 7, 1993, 221 SCRA 251 [Per *J*. Campos, Jr., Second Division].

[66] *Id*. at 257.

or corporeal line-up. This court, however, has exercised leniency in testing this condition.

In *Lumanog, et al.,* this court allowed discrepancies between the description provided by the main prosecution witness in an affidavit executed immediately after the crime and the actual appearance of the suspects. This court stated that estimate of age cannot be made accurately. It was possible that the accused was exposed to sunlight due to his occupation, which was why he appeared to the witness older than his actual age. The majority also accepted the explanation of the prosecution that the reason why the other accused was fair-skinned, contrary to the initial description of the witness that he was dark-skinned, was because of the prolonged incarceration of the accused before trial.[67]

Another circumstance to be considered is the *level of certainty demonstrated by the witness at the identification.* The level of certainty must be demonstrated at the *initial identification* made by the witness during investigation. It is not the certainty of the witness during trial that courts should pay attention to.

Certainty of the witness is often tested during cross-examination. Thus, in many cases, this court finds a witness credible because of a straight and candid recollection of the incident that remains unhampered by the rigors of cross-examination.[68]

However, this circumstance should never be evaluated in a vacuum. A witness who is certain about seeing the crime but uncertain about the facial features of its perpetrators may sound certain about both the crime and the identity of the perpetrator during trial. This is because by the time a witness takes the witness stand, he or she has already narrated the incident to the

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[67] *Lumanog, et al. v. People,* 644 Phil. 296, 400-401 (2010) [Per *J.* Villarama, Jr., *En Banc*].

[68] *People v. Ramos,* 371 Phil. 66, 76 (1999) [*Per Curiam*, *En Banc*]; and *People v. Guevarra,* 258-A Phil. 909, 916-918 (1989) [Per *J.* Sarmiento, Second Division].

police, the public prosecutor and, at times, private prosecutors and members of the press. *He or she becomes "certain" not because of the ability to perceive at the time of the incident, but because he or she has become an experienced storyteller of the narrative and has already confronted questions that may arise during cross-examination with rehearsed answers. The ability of the witness to consistently identify the perpetrator throughout trial does not necessarily mean that he or she correctly identified the perpetrator at the start of the investigation.*

Another circumstance that is evaluated is the *length of time between the crime and the identification.* People's memories tend to fade through time.[69] It is ideal that prosecution witnesses identify the suspect immediately after the crime. An identification made two (2) days after the criminal incident is found to be acceptable.[70] This court found that a corporeal identification made five and a half months might not be as reliable.[71]

Memory is not affected only by the mere passage of time. It is also affected by the interactions of the witness with other individuals relating to the event.[72] *Information acquired by the witness after the incident can reconstruct the way the witness recalls the event.* According to Elizabeth F. Loftus, a cognitive psychologist, "[p]ost[-]event information can not only enhance existing memories but also change a witness's memory and even cause nonexistent details to become incorporated into a previously acquired memory."[73]

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[69] Elizabeth F. Loftus, *EYEWITNESS TESTIMONY* 53 (1996): "It is by now a well-established fact that people are less accurate and complete in their eyewitness accounts after a long retention interval than after a short one."

[70] *People v. Teehankee, Jr.,* 319 Phil. 128, 152 (1995) [Per *J*. Puno, Second Division].

[71] *People v. Rodrigo,* 586 Phil. 515, 536 (2008) [Per *J*. Brion, Second Division].

[72] Elizabeth F. Loftus, *EYEWITNESS TESTIMONY* 54-55 (1996).

[73] *Id*. at 55.

Hence, the last circumstance of *suggestiveness of the identification procedure* should have a great influence whether courts should admit an out- of-court identification. Both verbal and non-verbal information might provide improper suggestions to a witness:

> A police officer may tell a witness that a suspect has been caught and the witness should look at some photographs or come to view a lineup and make an identification. Even if the policeman does not explicitly mention a suspect, it is likely that the witness will believe he is being asked to identify a good suspect who will be one of the members of the lineup or set of photos . . . If the officer should unintentionally stare a bit longer at the suspect, or change his tone of voice when he says, "Tell us whether you think it is number one, two, THREE, four, five, or six," the witness's opinion might be swayed.[74]

In evaluating suggestiveness of the out-of-court identification, this court considers prior or contemporaneous[75] actions of law enforcers, prosecutors, media, or even fellow witnesses.

In *People v. Baconguis*[76] an accused to a murder was acquitted because the identification was tainted by improper suggestion.[77] The witness was made to identify the suspect inside a detention cell where only the accused was the detainee.[78] However, in *People v. Algarme, et al.*,[79] even though the identification was also made inside the detention cell rather than through a formal line-up, this court upheld the propriety and reliability of the identification since there were a number of detainees inside the cell.[80]

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[74] *Id*. at 73-74.

[75] *People v. Algarme, et al.,* 598 Phil. 423, 444 (2009) [Per *J*. Brion, Second Division].

[76] 462 Phil. 480 (2003) [Per *J*. Carpio Morales, *En Banc*].

[77] *Id*. at 490 and 496.

[78] *Id*. at 494.

[79] 598 Phil. 423 (2009) [Per *J*. Brion, Second Division].

[80] *Id*. at 443.

In *People v. Escordial*,[81] the crime involved was robbery with rape.[82] The rape victim and her companions were blindfolded during the entire ordeal.[83] However, the rape victim felt a "rough projection"[84] on the back of the perpetrator. The perpetrator also spoke to the victims, so his voice was familiar to them.[85] The narration of facts included the investigative process in bringing the perpetrator to custody. After interviewing a few individuals, the investigating police officer had an idea of who he was supposed to look for. He "found accused-appellant [in a] basketball court and 'invited' him to go to the police station for questioning."[86] The rape victim was already at the police station. After seeing accused-appellant enter the station premises, the rape victim requested to see the back of the accused-appellant. The accused-appellant took his shirt off. After examining the back of the accused-appellant and seeing a "rough projection" on it, the rape victim talked to the police and confirmed that the accused- appellant was the man who attacked her. The police brought in the other witnesses to identify the accused. Four of the witnesses were brought to the jail cell where the accused-appellant was detained, and the witnesses pointed consistently to accused-appellant despite his being with four other individuals in the jail cell.[87]

This court found that the show-up (with respect to the rape victim) and the line-up (with respect to the other witnesses) in *Escordial* were irregular, and the out-of-court identification could have been subject to objections for inadmissibility. However, these objections were not raised during trial.[88]

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[81] 424 Phil. 627 (2002) [Per *J*. Mendoza, *En Banc*].

[82] *Id*. at 633.

[83] *Id*. at 635.

[84] *Id*. at 639.

[85] *Id*.

[86] *Id*.

[87] *Id*.

[88] *Id*. at 652-654.

Despite the objections in the out-of-court identification not being raised during trial, the majority in *Escordial* found reasonable doubt and acquitted the accused.[89] The rape victim was blindfolded throughout her ordeal. The reliability of her identification was diminished by her own admission that she could only recognize her perpetrator through his eyes and his voice. This court reasoned that given the exposure of the rape victim to the perpetrator, it would have been difficult for her to identify the person immediately. It was the improper suggestion made by the police officer that might have aided the witness to identify the accused-appellant as the perpetrator.[90] The Decision cited a journal article to explain:

> *Social psychological influences.* Various social psychological factors also increase the danger of suggestibility in a lineup confrontation. Witnesses, like other people, are motivated by a desire to be correct and to avoid looking foolish. By arranging a lineup, the police have evidenced their belief that they have caught the criminal; witnesses, realizing this, probably will feel foolish if they cannot identify anyone and therefore may choose someone despite residual uncertainty. Moreover, the need to reduce psychological discomfort often motivates the victim of a crime to find a likely target for feelings of hostility.
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> Finally, witnesses are highly motivated to behave like those around them. This desire to conform produces an increased need to identify someone in order to show the police that they, too, feel that the criminal is in the lineup, and makes the witnesses particularly vulnerable to any clues conveyed by the police or other witnesses as to whom they suspect of the crime.[91] (Emphasis in the original)

In *People v. Pineda*,[92] six perpetrators committed robbery with homicide inside a passenger bus.[93] One of the passengers

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[89] *Id*. at 665.

[90] *Id*. at 659-662.

[91] *Id*. at 659, *citing* Frederic D. Woocher, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification,* 29 STAN. L. REV 969 (1977).

[92] 473 Phil. 517 (2004) [Per *J*. Carpio, *En Banc*].

[93] *Id*. at 522.

recalled that one of the perpetrators was called "Totie" by his fellow felons. The police already knew that a certain Totie Jacob was a member of the robbery gang of Rolando Pineda. At that time, Rolando Pineda and another companion were detained for another robbery. The police brought the photographs of Rolando Pineda and his companion to the witness, and the witness positively identified the two as involved in the robbery with homicide.[94]

This court found that the identification procedure in this case was unacceptable.[95] It introduced the two rules for out-of-court identifications with the use of photographs:

> The first rule in proper photographic identification procedure is that a series of photographs must be shown, and not merely that of the suspect. The second rule directs that when a witness is shown a group of pictures, their arrangement and display should in no way suggest which one of the pictures pertains to the suspect.[96]

Without compliance with these rules, any subsequent corporeal identification made by the witness may not be from the recollection of the criminal incident. Rather, it will simply confirm false confidence in the suggestive identification of the photograph shown to the witness.

Pineda also introduced a list of 12 danger signals that might indicate erroneous identification. The list is not exhaustive but complements the totality of circumstances rule. These danger signals are:

(1) the witness originally stated that he could not identify anyone;

(2) the identifying witness knew the accused before the crime, but made no accusation against him when questioned by the police;

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[94] *Id*. at 526.

[95] *Id*. at 540.

[96] *Id*. at 540, *citing* Patrick M. Wall, *EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES* 74 and 81 (1965).

(3) a serious discrepancy exists between the identifying witness' original description and the actual description of the accused;

(4) before identifying the accused at the trial, the witness erroneously identified some other person;

(5) other witnesses to the crime fail to identify the accused;

(6) before trial, the witness sees the accused but fails to identify him;

(7) before the commission of the crime, the witness had limited opportunity to see the accused;

(8) the witness and the person identified are of different racial groups;

(9) during his original observation of the perpetrator of the crime, the witness was unaware that a crime was involved;

(10) a considerable time elapsed between the witness' view of the criminal and his identification of the accused;

(11) several persons committed the crime; and

(12) the witness fails to make a positive trial identification.[97]

Pineda emphasized that "[t]he more important duty of the prosecution is *to prove the identity* of the perpetrator and not to establish the existence of the crime."[98] Proving the identity of the perpetrator is a difficult task because of the overreliance of our criminal procedure on testimonial evidence rather than physical evidence. Testimonial evidence is often tainted by improper suggestion. Legal scholar Patrick M. Wall observes that improper suggestion "probably accounts for more miscarriages of justice than any other single factor[.]"[99] Marshall Houts, who served the Federal Bureau of Investigation and the American judiciary, agrees with Patrick M. Wall and considers

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[97] *Id*. at 547-548, *citing* Patrick M. Wall, *EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES* 90-130 (1965).

[98] *Id*. at 548.

[99] Patrick M. Wall, *EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES* 26 (1965).

eyewitness identification as "the most unreliable form of evidence[.]"[100]

People v. Rodrigo[101] presented the same circumstance as *Pineda.* The police presented a single photograph to the eyewitness for identification of the perpetrator of a robbery with homicide. The witness tagged the man in the photo as one of the perpetrators. This court stated that despite the in-court identification made by the witness, it was influenced by the impermissible suggestion through the photographic identification that had preceded the trial. This court ruled that a suggestive identification violates the right of the accused to due process because the accused becomes denied of a fair trial:[102]

> The greatest care should be taken in considering the identification of the accused especially, when this identification is made by a sole witness and the judgment in the case totally depends on the reliability of the identification. This level of care and circumspection applies with greater vigor when, as in the present case, the issue goes beyond pure credibility into constitutional dimensions arising from the due process rights of the accused.
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> . . . . . .
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> The initial photographic identification in this case carries serious constitutional law implications in terms of the possible violation of the due process rights of the accused as it may deny him his rights to a fair trial to the extent that his in-court identification proceeded from and was influenced by impermissible suggestions in the earlier photographic identification. In the context of this case, the investigators might not have been fair to Rodrigo if they themselves, purposely or unwittingly, fixed in the mind of Rosita, or at least actively prepared her mind to, the thought that Rodrigo was one of the robbers. Effectively, this act is no different from coercing a witness in identifying an accused, varying only with respect to the means used. Either way, the police investigators are the real actors in the

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[100] Marshall Houts, *FROM EVIDENCE TO PROOF* 10-11 (1956).

[101] 586 Phil. 515 (2008) [Per *J.* Brion, Second Division].

[102] *Id.* at 529.

identification of the accused; evidence of identification is effectively created when none really exists.[103]

This court was unanimous in both *Pineda* (En Banc) and *Rodrigo* (Second Division). However, it was divided in the highly publicized case of *Lumanog, et al.*[104] *Lumanog, et al.* involved the ambush of the former Chief of the Metropolitan Command Intelligence and Security Group of the Philippine Constabulary, Colonel Rolando N. Abadilla.[105] During investigation, a security guard became the principal prosecution witness.[106] The police showed a man's photograph to the guard and asked him if the man was among the several men who conducted the ambush. The guard refused to identify the perpetrator without seeing him in person.[107] A police line-up was conducted, and the guard identified two of the perpetrators.[108]

One of the accused claimed that the line-up was only composed of the accused and police officers who were in their uniforms, making the line-up grossly suggestive to the accused.[109]

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[103] *Id*. at 528-530.

[104] The Decision was penned by Associate Justice Martin S. Villarama, Jr. and concurred in by Chief Justice Renato C. Corona and Associate Justices Presbitero J. Velasco, Jr., Teresita J. Leonardo-de Castro, Arturo D. Brion, Diosdado M. Peralta, Lucas P. Bersamin, Mariano C. Del Castillo, and Jose Perez. Associate Justice Lucas P. Bersamin rendered a Concurring Opinion. Associate Justice Jose C. Mendoza was the Presiding Judge in the Regional Trial Court during the trial of the case, although he was not the judge that rendered the conviction. He and Associate Justice Antonio Eduardo B. Nachura, who signed a pleading as former Solicitor General, inhibited from the case. Associate Justices Antonio T. Carpio, Conchita Carpio Morales, Ma. Lourdes P. A. Sereno (now Chief Justice), and Roberto A. Abad dissented from the majority, with Associate Justices Antonio T. Carpio and Roberto A. Abad rendering their respective Dissenting Opinions.

[105] *Lumanog, et al. v. People,* 644 Phil. 296, 331-332 (2010) [Per *J.* Villarama, Jr., *En Banc*].

[106] *Id*. at 350.

[107] *Id*. at 353.

[108] *Id*. at 339.

[109] *Id*. at 398.

This court, with a majority of nine, voted to affirm the conviction of the accused in *Lumanog, et al.* It ruled that the positive identification made by the guard passed the totality of circumstances test. The irregularities in the line-up were corrected by the independent in-court identification.[110]

In his Dissenting Opinion, Justice Carpio emphasized that the identification of the accused was tainted with impermissible suggestion since the guard-witness had been shown a single photograph of the accused before he pinpointed the same man on the photograph as one of the perpetrators.[111] According to Justice Carpio, "the police primed and conditioned"[112] the witness in identifying the accused, which was a violation of the right of the accused to due process.[113]

Justice Carpio's Dissenting Opinion also discussed the effect of media exposure on conditioning the memory of the witness.[114] In *Lumanog, et al.* all of the perpetrators were presented to the media 11 days after the crime. The news made headlines because the police proudly reported that the case had been closed.[115] According to Justice Carpio:

> [T]he police arrested the accused, and allowed the media to take their pictures with their names written on boards around their necks. The media promptly published these pictures in several newspapers. Thus, at that time, the faces of the accused were regularly splashed all over the newspapers and on television screens in news reports. **Alejo could not have missed seeing the faces of the accused before he identified them in court. To rule otherwise strains credulity.**

Alejo, as the star witness in this case, must naturally be interested to look, or even stare, at the faces of the alleged killers to make

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[110] *Id*. at 398-399.

[111] *J*. Carpio, Dissenting Opinion in *Lumanog, et al. v. People,* 644 Phil. 296, 440 (2010) [Per *J*. Villarama, Jr., *En Banc*].

[112] *Id*.

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

[114] *Id*. at 454-456.

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

sure he identifies them in court. Assuming Alejo failed to personally see the faces of the accused in the newspapers or television, which is highly improbable, if not totally impossible, his family and friends, if not the police, would have provided him with photographs of the accused from the newspapers for easier identification later in court. Surely, Alejo had ample time to memorize and familiarize himself with the faces of the accused before he testified in court and identified Lumanog, Santos, Rameses, Joel, and Fortuna as the killers of Abadilla.

. . . . . .

. . . The media exposure ofthe accused casts serious doubts on the integrity of Alejo's testimony on the identification of the murderers. Such doubts are sufficient to rule that Alejo's in-court identification of the accused as the perpetrators of the crime is neither positive nor credible. "It is not merely any identification which would suffice for conviction of the accused. It must be positive identification made by a credible witness, in order to attain the level of acceptability and credibility to sustain moral certainty concerning the person of the offender."[116] (Emphasis in the original)

Generally, suggestiveness in the identification procedure should always be proven by evidence. If an allegation of suggestiveness is not proven, this court often affirms the conviction.[117] In *Pavillare,* this court ruled that the appellant who argued the impropriety of the police line-up should have presented during trial the police officers who conducted the line-up.[118]

However, when the suggestiveness is principally due to a premature media presentation of the accused coupled with the accusation by law enforcers, it is reasonable to assume that the subsequent identification is already tainted.

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[116] *Id*. at 455-456, *citing People v. Gamer,* 383 Phil. 557, 570 (2000) [Per *J*. Quisumbing, Second Division].

[117] *People v. Tolentino,* 467 Phil. 937, 955 (2004) [Per *J*. Quisumbing, *En Banc*]; *People v. Pavillare,* 386 Phil. 126, 145 (2000) [*Per Curiam*, *En Banc*].

[118] *People v. Pavillare,* 386 Phil. 126, 145 (2000) [*Per Curiam*, *En Banc*].

III

Adopting the totality of circumstances test and the arguments presented by Gomez and the Solicitor General, the prosecution witness, Edward, could not have positively identified Gomez beyond reasonable doubt.

Indeed, the danger signs discussed in *Pineda* are present in the out-of-court identification. First, the other witness in this case, Jocelyn, failed to identify Gomez. Second, Edward is Chinese-Filipino, a different race from Gomez, who is Malay-Filipino.[119] Cross-racial identification is often a problem due to the general observation in psychology that "people are better at recognizing faces of persons of their own race than a different race."[120] Third, a considerable amount of time, five months, had elapsed before identification was made. Fourth, several persons committed the crime, making it more difficult to remember faces.

As pointed out in the Decision, Edward might have had ample opportunity to observe the features of Gomez.[121] In his narration, he encountered Gomez three (3) times during the ordeal: first, when he was visited by the three perpetrators at Kilton Motors Corporation; second, when they boarded the vehicle that was driven away from Kilton Motors Corporation; and lastly, when he was released from captivity.

Edward first encountered the female kidnapper as a "customer" of his business selling trucks. As Edward narrated during his testimony:

[ATTY. CHUA:]

Q: Can you tell this Court how the kidnapping was initiated?

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[119] RTC records, p. 170.

[120] Elizabeth F. Loftus, *EYEWITNESS TESTIMONY* 136-137 (1996).

[121] *Ponencia*, p. 10.

[EDWARD TAN:]

A: At around 1:00 o'clock in the afternoon, there were three persons who entered the office of Kilton Motors and pretended to be customers.

Q: What was the gender of these three people that you are referring to?

A: Two men and a woman.

Q: After they pretended to be customers, tell us what happened?

A: They told me they were going to pay but instead of pulling out money, they pulled out a gun.

Q: How many people pulled out guns as you said?

A: Only one, sir.

Q: Will you look around this courtroom now and tell us if the person who pulled out a gun is in court?

A: (WITNESS POINTED TO A PERSON AT THE RIGHT SECTION, SECOND ROW, WHO WHEN ASKED HIS NAME ANSWERED AS JERRY PEPINO)

ATTY. CHUA:

Now, you said that there were two men and a woman who went up the Kilton Motors office and you pointed to one of the men as Jerry Pepino, can you look around this courtroom and tell us if any of the two others are in court?

A: (WITNESS POINTED TO A WOMAN INSIDE THE COURTROOM WHO WHEN ASKED HIS [sic] NAME ANSWERED AS PRECIOSA GOMEZ)

Q: What about the third person, is he in court?

A: He is not in court, sir.

Q: You said that Mr. Pepino pulled out his gun, what happened after he pulled out his gun?

A: He told me just to be quiet and go with him.[122]

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[122] TSN, January 28, 1999, pp. 6-9.

Edward's first encounter with Gomez as an ordinary customer was in the presence of a weapon. *The presence of a gun throughout the ordeal at Kilton Motors makes it doubtful that Edward remembered peripheral details about the female kidnapper due to the weapon-focus effect.*

In the second encounter, Edward's sight was impaired. After he had boarded the vehicle, his eyes were covered with surgical tape and sunglasses:

[ATTY. CHUA:]
Q: After they boarded you in the car, how long did the car travel?

[EDWARD TAN:]
A: About two and a half hours.

Q: When they boarded you inside that car, what did they do to you, Mr. Witness?

A: They put surgical tape on my eyes and also sunglass.

Q: Do you remember how many people were in that car including yourself?

A: Around five, sir.

Q: Can you tell us who was in the driver's seat of that car?

A: I don't know the driver.

Q: What was the sex?

A: A male, sir.

Q: Who was at the passenger front seat of the car?

A: It was Preciosa Gomez.

Q: Where were you seated?

A: I was at the middle of the backseat.

. . . . . .

Q: But you said that you have surgical tape and sunglass in your eyes, how did you know that you were already in Quezon City?

A: It was just a taper sir, and so, when you close your eyes, you would be able to see.

Q: After you arrived in that particular house which you presumed to be in Quezon City, what happened?

A: We alighted the car, I was brought into a room, my handcuff was removed, as well as the surgical tape and the sunglass and a chain was put on my feet.

Q: What about your blindfold?

A: It was also removed.[123]

Edward declared during trial that despite the eye cover, he was still able to see when he squinted his eyes.[124] He was even able to identify the area surrounding the safehouse.[125]

Edward's third encounter with the female kidnapper was also under similar circumstances:

(ATTY. CHUA:]

Q: You said that you were released sometime on July 1, 1997 at around 6:00P.M., Mr. Witness, can you describe to us how you were released by the kidnappers?

[EDWARD TAN:]

A: I was boarded on our car, a surgical tape and sunglass was placed on my eyes and we drove around for about thirty minutes.

Q: After thirty minutes, what happened?

A: We stopped and I was told to remove my blindfold after five minutes and drove my car in going home.

Q: What did you do after they instructed you to remove your blindfold after five minutes?

A: When I removed my blindfold, they were no longer there and so I drove home.

. . . . . .

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[123] *Id*. at 11-15.

[124] *Id*. at 14.

[125] *Id*.

Q: On the way from the house where they kept you to UP Diliman, do you remember how many people were with you inside the car?

A: We were also five.

Q: Do you remember how many men and how many women were in that car?

A: One female and three males.

Q: And who was that female that you were referring to?

A: Preciosa Gomez.

Q: How about the three men?

A: I don't know them.[126]

When Edward was released from his captivity, he narrated that he saw the kidnappers in the car. Whether this was before or after his eyes were covered was not clear.

When Edward and Jocelyn were at the NBI office to identify the kidnappers, there were only two female suspects in the line-up.[127] The line- up, therefore, had all the suggestive features of a show-up.

Gomez argues that the identification procedure was tainted because she had been exposed to the media immediately before the day Edward identified her as his kidnapper.[128]

Defense witness Reynaldo Pepino testified during cross-examination that after their arrest, they were presented to the media as "kidnappers":

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[126] *Id*. at 19-21.

[127] RTC records, pp. 143, 145, and 147, photographs of the line-up.

[128] *CA rollo,* p. 226, Preciosa Gomez's Reply Brief.

ATTY. CORONEL:

Q. Do you remember approximately what time were you brought to the DOJ?

A. Morning ma'am.

Q. Of December 8?

A. Yes ma'am.

Q. And who were with you when you were brought to the DOJ?

A. With Preciosa ma'am.

Q. With Preciosa only?

A. There were others ma'am but I can not remember them.

Q. How about your brother, was he brought with you to the DOJ?

A. No he was not with us at that time ma'am. He was with the NBI at that time.

Q. So at that time you were allegedly presented to the media as kidnappers, it was only you and Preciosa whom you knew?

A. No. I said only two (2) of us from Camp Crame and my brother came from the NBI *And all of us were presented to the media, at the DOJ.*

Q. So at that time that you were presented at the DOJ, your brother Jerry was already with you?

A. Yes ma'am. They were already there ahead of us.[129] (Emphasis supplied)

The prosecution did not present countervailing evidence to show that this prejudicial exposure to the media did not take place. Hence, there was a presumption that media reported the appearances of these arrested "kidnappers" and were immediately featured in the news across varying media platforms. At that

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[129] TSN, September 15, 1999, pp. 39-42.

time, high media attention was given to the crackdown of kidnapping, which was a prevalent social ill.[130]

The appearance of the alleged kidnappers could have influenced their memories on the kidnapping incident. On the day of the identification, December 9, 1997, Tuesday, kidnap-for-ransom-related news were featured in the headlines for the broadsheets.[131] In the Philippine Daily Inquirer, the article included a photograph with the caption: "SUBDUED kidnap-for- ransom gang member Diosdado Avila and other members of his gang at the Department of Justice Monday."[132] The photograph did not feature all of the kidnapping suspects arrested at that time. However, other visual reports, such as a television broadcast, might have featured all of those who were arrested for kidnapping, including Pepino and Gomez.

Unlike in *Teehankee, Jr.* where the witness categorically testified not seeing media reports before the out-of-court identification, Edward did not make a similar testimony.

The probability that Edward saw the news reports before the line-up identification exists. The prejudicial media exposure

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[130] Edward's kidnapping was included in the following newspaper articles: Romie A. Evangelista, *Ong kidnapping suspect arrested,* MANILA STANDARD, December 8, 1997, at 1, 4; Romie A. Evangelista, *PNP officers doubt kidnappers' arrests,* MANILA STANDARD, December 9, 1997, at 1, 4; and Raymond Burgos and Cynthia D. Balana, *Mastermind in Ong kidnapping arrested,* PHILIPPINE DAILY INQUIRER, December 9, 1997, pp. 1, 18. Pepino and Gomez were mentioned in those articles; however, there were no photographs published.

[131] Raymond Burgos and Cynthia D. Balana, *Mastermind in Ong kidnapping arrested,* PHILIPPINE DAILY INQUIRER, December 9, 1997, pp. 1, 18; Romie A. Evangelista, *PNP officers doubt kidnappers' arrests,* Manila Standard, December 9, 1997, pp. 1, 4.

[132] Raymond Burgos and Cynthia D. Balana, *Mastermind in Ong kidnapping arrested,* PHILIPPINE DAILY INQUIRER, December 9, 1997, p. 18. The article discussed the kidnapping of lgnacio Earl Ong, Jr. but also reported that authorities arrested 28 suspects belonging to different major kidnapping syndicates, which included the "Pepino group." Diosdado Avila, Jr. and his gang, as featured on the photograph, belonged to the "Blue Tiger group."

is enough to create reasonable doubt on the identification of Gomez. The image of Gomez being labelled as a kidnapping suspect by the press makes an impression on its viewers. The influence or suggestiveness of this impression is subtle and unconscious.[133] It is the same kind of influence that the photographs in *Pineda* and *Rodrigo* made to the mind of the witnesses, which tainted with infirmity the subsequent police line-up. The witnesses in these cases were conditioned to associate the faces on the photographs to the crime.

Teehankee, Jr. introduced the totality of circumstances test as the standard for evaluating out-of-court testimonies because this court recognized that "corruption of *out-of-court* identification contaminates the integrity of *in-court* identification[.]"[134] In *Gamer,* the witness' identification failed on the first level since the conditions at that time did not grant the witness ample opportunity to observe and remember the appearance of the accused. Hence, this court stated that "the in-court identification of the appellant ... could have been tainted by the out-of-court (police line-up) procedure[.]"[135]

However, this court have also held that irregularities in out-of-court identifications are cured through in-court identifications.[136] In *People v. Macam,*[137] despite finding the

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[133] Elizabeth F. Loftus, *EYEWITNESS TESTIMONY* 142 (1996): "[U]nconscious transference [is] the term used to refer to the phenomenon in which a person seen in one situation is confused with or recalled as a person seen in a second situation."

[134] *People v. Teehankee, Jr.,* 319 Phil. 128, 180 (1995) [Per *J*. Puno, Second Division].

[135] *People v. Gamer,* 383 Phil. 557, 569 (2000) [Per *J*. Quisumbing, Second Division].

[136] *People v. Macam,* G.R. Nos. 91011-12, November 24, 1994, 238 SCRA 306, 314-315 [Per *J*. Quiason, First Division]; *People v. Pacistol,* 348 Phil. 559, 578 (1998) [Per *J*. Vitug, First Division]; *People v. Lapura,* 325 Phil. 346, 358 (1996) [Per *J*. Vitug, First Division].

[137] G.R. Nos. 91011-12, November 24, 1994, 238 SCRA 306 [Per *J*. Quiason, First Division].

illegality of the line-up, this court stated that since the appellants did not object during trial, the prosecution did not need to show that the in-court identification was made independently from the invalid line-up.[138]

It is more rational to maintain the presumption that a tainted out-of- court identification corrupts the in-court identification. The in-court identification of a witness — unless he or she has two separate brains — is certainly influenced by a preceding out-of-court identification, unless the prosecution can show that there has been an independent in-court identification.[139]

Convictions can be sustained even when there is illegal identification as long as there are other evidence tying the crime to the accused. In *People v. Ibanez,*[140] the witness who identified the accused in the line-up died during the trial.[141] Only the NBI agent testified without providing details regarding the line-up. Hence, this court found that the out-of-court identification was unreliable.[142] Despite this pronouncement, the conviction was affirmed due to the presence of circumstantial evidence.[143]

No other evidence on the record can prove the guilt of Gomez. This court notes that during investigation, Edward identified Pepino, Gomez, and Galgo. The original ·Information[144] included Pepino and Gomez, but not Galgo. A perusal of the records shows that Galgo executed a Sinumpaang Salaysay[145] dated

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[138] *Id*. at 315.

[139] In *People v. Lapura,* 325 Phil. 346, 358 (1996) [Per *J*. Vitug, First Division], this court stated that "the inadmissibility of a police line-up identification of an uncounseled accused should not necessarily foreclose the admissibility of an independent in-court identification."

[140] G.R. No. 191752, June 10, 2013, 698 SCRA 161 [Per *J*. Brion, Second Division].

[141] *Id*. at 168.

[142] *Id*. at 171-172.

[143] *Id*. at 175-180.

[144] RTC records, p. 1.

[145] *Id*. at 51-55.

December 7, 1997, naming Pepino, Gomez, and others as perpetrators of the "Kilton Motors" kidnapping. However, when subpoenaed by the court, Galgo did not appear to testify.[146] His Sinumpaang Salaysay cannot be considered by this court for being hearsay.[147] Hence, this court is left to rely on the identification made by Edward.

IV

Law enforcement agents must conduct their investigation properly to avoid instances when the line-up bears doubtful validity due to the presence of suggestive influences. For a line-up to be truly fair, it should be composed of individuals — including the suspect —who fit the description of the perpetrator as provided by a witness. If there is a high probability that a random individual merely relies on the prior description of the eyewitness to select a suspect from a line-up, this line-up is not fair.[148] A line-up is only balanced if, in a line-up of six individuals, the probability that the random individual identifies the suspect is not more than 1/6.[149]

To supplement the totality of circumstances test, courts must evaluate whether there are undue suggestions made during out-of-court-identification. The following rules should be considered by the courts:

First, courts must determine whether the police officers or NBI agents prevent members of the press from photographing or videotaping suspects before witness identification. Undue

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[146] *Id*. at 241 and 243.

[147] Bert Ignacio, *Victim tags his kidnappers from gallery,* MANILA STANDARD, December 13, 1997, at 1: A news article reported that Mario Galgo "squealed" on his companions. However, the news article did not provide enough information for this court to be able to take judicial notice.

[148] Elizabeth F. Loftus, *EYEWITNESS TESTIMONY* 145-146 (1996).

[149] *Id*. at 146.

influence may be present if there is evidence that the witnesses were able to view the visual press coverage prior to identification.[150]

Second, courts must check if the line-up is composed of a sufficient number of individuals. As much as possible, it must be composed of *at least* five to six individuals.[151]

Third, if photographs are available, courts can also evaluate if the individuals in the line-up meet the minimum descriptions of appearance provided by the witness at the start of the investigation. If the police finds a suspect through investigating methods other than by the description given by the witness, members of the line-up should be of the same race or color,[152] age range, gender expression, build, and appearance[153] of the suspect.[154] No height markers should be placed.[155]

If there is more than one suspect, they should be subjected to separate line-ups composed of different individuals in order to reduce suggestiveness. If the police officers can conduct only one line-up, members of the line-up must have decoys of the same race or color, age range, gender expression, build, and appearance of the different suspects.

The general rule is that it should not be easy for the witness to single out a suspect.

Fourth, if it is difficult to find individuals with the same build and appearance of the suspects, courts should still accept

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[150] *People v. Teehankee, Jr.,* 319 Phil. l28, 181 (1995) [Per *J*. Puno, Second Division].

[151] Patrick M. Wall, *EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES* 52-53 (1965).

[152] Elizabeth F. Loftus, *EYEWITNESS TESTIMONY* 136-142 (1996).

[153] *Id*. at 144.

[154] Marshall Houts, *FROM EVIDENCE TO PROOF* 25 (1956); Patrick M. Wall, *EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES* 53 (1965).

[155] *See* Marshall Houts, *FROM EVIDENCE TO PROOF* 25 (1956).

out-of-court corporeal identification as long as the outward appearance of the members of the line-up does not suggest who the suspects are. Hence, if police officers are needed to supplement the line-up composition, they must wear civilian clothes.[156] The suspected individual should not be handcuffed[157] or be in a detainee's uniform unless identification is made inside a jail cell occupied by other detainees.[158]

Fifth, courts must check if the police officers or NBI agents have communicated any information that may suggest that one of the individuals in the line-up is a suspect.[159]

Sixth, courts should be aware of how several witnesses identify the accused. Ideally, if there is more than one witness, witnesses should identify the perpetrator from the line-up one at a time. A witness should not be privy to the other witness' identification; otherwise, this may taint his or her perception.[160]

These rules will help courts determine if there has been suggestiveness in the out-of-court corporeal identifications. This

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[156] We should avoid the prejudice created in *Lumanog, et al. v. People,* 644 Phil. 296, 398 (2010) [Per *J*. Villarama, Jr., *En Banc*], since the other members of the line-up were police officers who were still wearing their uniform.

[157] *People v. Macam,* G.R. Nos. 91011-12, November 24, 1994, 238 SCRA 306, 315 [Per *J*. Quiason, First Division].

[158] In *People v. Sanchez,* 318 Phil. 547, 559 (1995) [Per *J*. Kapunan, First Division], *citing People v. Padua,* G.R. No. 100916, October 29, 1992, 215 SCRA 266, 275 [Per *J*. Gutierrez, Jr., Third Division], this court stated that "[t]here is no law requiring a police line-up as essential to a proper identification. Identification can be made in a room in a police station even if it were not in a police line-up as long as the required proprieties are observed[.]" See also *People v. Macapanas,* 634 Phil. 125, 143 (2010) [Per *J*. Villarama, Jr., First Division] and *People v. Escote, Jr.,* 448 Phil. 749, 782-783 (2003) [Per *J*. Callejo, Sr., *En Banc*).

[159] Patrick M. Wall, *EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES* 47 (1965), *citing* Cecil Hewitt Rolph, *PERSONAL IDENTITY* 33 (1957).

[160] Patrick M. Wall, *EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES* 49-51 (1965).

court recognizes that not all out-of-court corporeal identifications are made through line-ups. While the witness is being interviewed and another individual is brought to the police station, the witness may immediately recognize the other individual as the perpetrator. There are no undue suggestions in this example because an individual being brought to the station can either be a suspect or witness, and no external influence prompts the witness to point at the individual as the perpetrator.

Prevalence of kidnapping instills fear among citizens, a type of fear that makes citizens curtail their own personal liberties to provide for their own security. However, the habit of presenting the accused to the media immediately after arrest poses an equal threat to the personal liberty — which is protected by our Constitution—of an individual who may be accused of committing a crime that he or she did not do. Police officers should improve their standards and protocols in order to improve the proper prosecution of those accused of committing deplorable crimes like kidnapping, as well as to balance the interests of victims and of the accused.

Gomez is entitled to an acquittal. On the other hand, Pepino's withdrawal of his appeal makes it unnecessary for this court to rule on his guilt. In any case, Pepino's involvement in the commission of the crime was established and he was identified by another witness.

ACCORDINGLY, I vote to **ACQUIT** Preciosa Gomez y Campos.

EN BANC

[G.R. No. 178110. January 12, 2016]

AYALA LAND, INC. and CAPITOL CITIFARMS, INC., *petitioners, vs.* **SIMEONA CASTILLO, LORENZO PERLAS, JESSIELYN CASTILLO, LUIS MAESA, ROLANDO BATIQUIN, and BUKLURAN MAGSASAKA NG TIBIG, as represented by their attorney-in-fact, SIMEONA CASTILLO,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; CIVIL PROCEDURE; APPEALS; THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR WHEN IT DECIDED AN ISSUE RAISED FOR THE FIRST TIME ON APPEAL AND BASED ITS RULING MERELY ON RESPONDENTS' SELF-SERVING ALLEGATION.— This Court has already established that issues raised for the first time on appeal and not raised in the proceedings below ought not to be considered by a reviewing court. Points of law, theories, issues, and arguments not brought to the attention of the trial court are barred by estoppel. x x x Basic considerations of fairness and due process also impel this rule, which according to the Court, is but a logical effect of the regard for due process.

2. ID.; EVIDENCE; RULES OF ADMISSIBILITY; CONCEPT OF ADMISSION AGAINST INTEREST; DOES NOT DISPENSE WITH THE REQUIREMENT THAT THE ADMISSION BE OFFERED IN EVIDENCE.— The concept of admissions against interest is governed by Section 26 of Rule 130 of the Rules of Court, which provides: Sec. 26. *Admissions of a party*. — The act, declaration or omission of a party as to a relevant fact may be given in evidence against him. The above rule considers admissions against interest as admissible evidence, but does not dispense with the requirement that the admission be offered in evidence.

3. LABOR AND SOCIAL LEGISLATION; DEPARTMENT OF AGRARIAN REFORM (DAR) A.O. 12-94 ON PRESERVATION OF PRIME AGRICULTURAL LANDS;

PROSCRIPTION ON CONVERSION MERELY A GUIDING PRINCIPLE NOT APPLICABLE TO LANDS NOT PROVEN TO BE "PRIME AGRICULTURAL LANDS".— [T]he guiding principle of DAR A.O. No. 12-1994 is to preserve prime agricultural lands, which under paragraph VI-D is considered non-negotiable for conversion. x x x [This] is merely a guiding principle [applicable] only to prime agricultural lands. The claim that a prior notice of acquisition bars the issuance of a conversion order is found under paragraph VI (e) of DAR A.O. 12-94. Yet the said paragraph falls under heading VI, "Policies and Guiding Principles." *By no stretch of the imagination can a mere policy or principle be interpreted as an absolute ban on conversion, such policy having been formulated by the same agency which ordered the conversion.* Paragraph VI-E cannot operate to diminish the authority and jurisdiction of the DAR over the land. x x x [Further] the DAR had long investigated and ruled that the property was not suitable for agricultural use, as it had remained undeveloped without any source of irrigation. Hence, it is not "prime agricultural land" as contemplated under A.O. 12-94.

4. **REMEDIAL LAW; EVIDENCE; DETERMINATIONS OF THE DAR ON AGRICULTURAL MATTERS, RESPECTED.—** This Court has held that before the DAR could place a piece of land under CARP coverage, there must first be a showing that the land is an agricultural land, *i.e.,* devoted or suitable for agricultural purposes. In this determination, we cannot substitute our own judgment for that of the DAR. To do so would run counter to another basic rule that courts will not resolve a controversy involving a question that is within the jurisdiction of an administrative tribunal prior to the latter's resolution of that question. Since the DAR's findings herein are supported by substantial evidence, and affirmed by the OP, our only course is to sustain it. x x x On the issue of conversion, this Court must respect the findings of the DAR, which is the only agency charged with the mandate of approving or disapproving applications for conversion.

VILLARAMA, JR., *J.*, *dissenting opinion*:

1. **REMEDIAL LAW; EVIDENCE; RULES OF ADMISSIBILITY; ADMISSION AGAINST INTEREST.—** Admissions against

interest are those made by a party to a litigation or by one in privity with or identified in legal interest with such party, and are admissible whether or not the declarant is available as a witness. An admission against interest is the best evidence that affords the greatest certainty of the facts in dispute, based on the presumption that no man would declare anything against himself unless such declaration is true.

2. **ID.; CIVIL PROCEDURE; APPEALS; ISSUES CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL; EXCEPTIONS.—** [J]urisprudence has laid down certain exceptions to the general rule that points of law, theories, issues, and arguments not brought to the attention of the trial court ought not to be considered by a reviewing court, as these cannot be raised for the first time on appeal. Though not raised below, the following issues may be considered by the reviewing court: lack of jurisdiction over the subject matter, as this issue may be raised at any stage; *plain error*; jurisprudential developments affecting the issues; or the raising of a matter of public policy. We have also held that in the interest of justice and within the sound discretion of the appellate court, a party may change his legal theory on appeal only when the factual bases thereof would not require presentation of any further evidence by the adverse party in order to enable it to properly meet the issue raised in the new theory.

3. **LABOR AND SOCIAL LEGISLATION; COMPREHENSIVE AGRARIAN REFORM PROGRAM (CARP); CONVERSION OF LANDS FROM AGRICULTURAL TO INDUSTRIAL, COMMERCIAL, RESIDENTIAL OR TOURIST PURPOSES; NOT PROPER WHERE NOTICE OF ACQUISITION ALREADY ISSUED.—** [T]he CA correctly sustained the Order cancelling the Conversion Order issued to Capitol Citifarms. Inc. (CCFI) as it contravened the directive in DAR AO 12, Series of 1994, VI (E) that lands already issued a Notice of Acquisition shall not be given due course. CCFI as landowner may not stall the acquisition proceedings started as early as 1989, dragging it for several years and later seek exemption on the ground that the land had already ceased to be economically feasible for agricultural purposes. Precisely, the CARL had envisioned the advent of urbanization that would affect lands awarded to the farmers. Section 65 of RA 6657 provides [for the] *Conversion of lands*.

> x x x Here, however, the CARP was never given the chance to be implemented as a result of the landowner's legal maneuvers until conditions of the land had so changed with the lapse of time. The unabated land-use conversion from agricultural to industrial, commercial, residential or tourist purposes has been aptly described as "systematically reversing land reform in a way that was never foreseen by the framers of CARL."

APPEARANCES OF COUNSEL

Zamora Poblador Vazquez & Bretaña for petitioner Ayala Land, Inc.

Henry B. So for respondents.

Vincent Z. Bolivar and *Emmie-Lou L. Siongco* for Bangko Sentral ng Pilipinas.

R E S O L U T I O N

SERENO, *C.J.*:

To grant this Motion for Reconsideration is to reverse several doctrines that build up a stable judicial system.

First , the doctrine of finality of judgment. The doctrine is grounded on the fundamental principle of public policy and sound practice that, at the risk of occasional error, the judgment of courts and the award of quasi-judicial agencies must become final on some definite date fixed by law.

On 29 August 1995, the Supreme Court in G.R. Nos. 85960 and 92610 allowed the *Bangko Sentral ng Pilipinas*, as receiver, to sell the assets of the Manila Banking Corporation (MBC), including the subject property, to a third party.[1] It may be recalled that the property was earlier mortgaged to the MBC by Capitol Citifarms, Inc. (CCFI), and was later awarded to the former in an auction sale. Pursuant to the Court's Resolution,

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[1] On 29 August 1995, the Supreme Court issued a Resolution in G.R. Nos. 85960 and 92610; *rollo,* pp. 644-645.

a "Deed of Absolute Sale"[2] over the property was executed in favor of Ayala Land, Inc. (ALI) in December 1995.[3]

In a Resolution dated 27 July 1999, the Court considered G.R. Nos. 85960 and 92610 closed and terminated.[4]

On 13 August 2003, Case No. A-9999-04-CV-203-00 — or the Petition for Revocation filed by Lamberto Javier et al. — was also deemed closed as far as the Department of Agrarian Reform (DAR) was concerned.[5] The Bureau of Agrarian Legal Assistance was also directed to issue a Certificate of Finality of the Order dated 26 September 2002 issued by former DAR Secretary Hernani Braganza reversing the revocation of the Conversion Order.

Second, the rule that he who alleges must prove. Rule 131, Section 1 of the Rules of Court, places the burden of proof on the alleging party to present evidence on the facts in issue necessary to establish the claim or defense.

It is simply not the role of the Court to apply the missing Notice of Acquisition in perpetuity. Even the Dissent concedes that the records are bereft of any trace of the Notice of Acquisition. This is not a case of a feudal landowner unjustly enriched by the hard work of a long-suffering tenant. ALI is in the precarious position of having been that third-party buyer that offered the terms and conditions most helpful to, ultimately, the BSP. Prior to that acquisition, there was absolutely no relationship between ALI and the farmers. Respondents, on the other hand, are residents who have not yet established any claim — let alone substantial

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[2] Although denominated as such, the sale was not absolute, but conditional, *i.e.* subject to terms and conditions other than the payment of the price and the delivery of the titles. According to the Deed, the MBC was to continue to have custody of the corresponding titles for as long as any obligation to the MBC remained due.

[3] CA *Rollo*, p. 140.

[4] *Rollo,* p. 659.

[5] Order issued by DAR Secretary Roberto Pagdanganan; *id*. at 158-163.

rights — over the land. On the contrary, what has been duly established is that they have received disturbance compensation.[6]

Respondents never raised the issue regarding the existence or effect of a Notice of Acquisition. Their arguments revolved on the alleged illegality of the sale and the submission of a *Sangguniang Bayan* resolution, instead of an ordinance. Their brief was primarily on the form in which the local government's action was contained. We also note that they were specifically ordered by the Court of Appeals (CA) to submit a copy of the Notice of Acquisition, but they failed to comply.[7] They made no attempt at all to explain their inability to present a copy of the Notice of Acquisition.

Third, the duty of the Court to correct reversible errors of law committed by the CA. It was a grave error on the part of the CA to base its ruling on a conclusion of fact that is not supported by the records of the case. It is settled that issues raised for the first time on appeal and not raised in the proceedings below ought not to be considered by a reviewing court. Points of law, theories, issues, and arguments not brought to the attention of the trial court are barred by estoppel. Especially, as in this case, when the document being cited is not in the record.

Fourth, the doctrine of primary jurisdiction. We reiterate what has been said in the Decision. That is, even assuming that the Notice of Acquisition did exist, considering that CCFI and ALI have had no chance to controvert the CA finding of its legal bar to conversion, this Court is unable to ascertain the details of the Notice of Acquisition at this belated stage, or rule on its legal effect on the Conversion Order duly issued by the DAR, without undermining the technical expertise of the DAR itself. This whole controversy was reviewed and the Conversion Order validated by no less than two DAR Secretaries.

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[6] In his Order dated 18 December 2000, Secretary Morales ruled that CCFI and ALI did not fail to pay/effect payment of disturbance compensation; *rollo,* p. 118.

[7] In a Resolution dated 16 November 2004; CA *Rollo*, p. 98.

The doctrine of primary jurisdiction holds that if a case is such that its determination would require the expertise, specialized training, and knowledge of an administrative body, relief must first be obtained in an administrative proceeding before resorting to the courts, even if the matter may well be within the latter's proper jurisdiction.

Fifth, the great weight and respect accorded to factual findings of administrative agencies. The factual findings of the DAR Secretary, who, by reason of his official position, has acquired expertise in specific matters within his jurisdiction, deserve full respect. Except for a justifiable reason, these findings ought not to be altered, modified or reversed.

FACTS SUBSEQUENT TO THE DECISION

On 15 June 2011, this Court promulgated a Decision[8] granting the Petition for Review on Certiorari[9] filed by ALI and CCFI, and reversing the CA Decision in CA-G.R. SP No. 86321.[10] The Court thereby upheld the Conversion Order[11] issued by then DAR Secretary Ernesto Garilao on 31 October 1997, as well as the Decision[12] of the Office of the President (OP) affirming the Order.

Respondents Simeona Castillo et al. filed a Motion for Reconsideration[13] presenting the same arguments they raised in their Comment,[14] *viz:*

I. The CARP coverage is not a new issue or matter on appeal, as it was previously raised before the DAR and

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[8] *Id*. at 468-496.

[9] *Id*. at 14-53.

[10] *Id*. at 58-66.

[11] *Id*. at 332-334.

[12] *Id*. at 202-208.

[13] *Id*. at 532-549.

[14] *Id*. at 280-282.

the OP, hence, the CA is not barred from entertaining the claim.

II. Under DAR Administrative Order No. 12, series of 1994 (DAR A.O. 12-94), the guiding principle is to preserve prime agricultural land.

III. The Petition for Revocation is not barred by prescription.

IV. Petitioners committed a misrepresentation, because there was no reclassification zoning ordinance.

V. Conversion is not a legal mode to exempt the property from the coverage of CARP.

In a Resolution[15] dated 3 August 2011, the members of the Special Third Division referred the case to the Court *En Banc*. On 16 August 2011, the Court *En Banc* resolved to accept the case.[16] The Court then issued a Resolution[17] requiring petitioners, the BSP and the DAR, which was represented by the Office of the Solicitor General (OSG), to file their respective Comments on the Motion for Reconsideration.

On 10 January 2012, the general counsel of the BSP submitted a Manifestation.[18] It explained that its interest in the case stemmed from its receivership-liquidation of the MBC, particularly the settlement of the latter's obligations to the BSP.[19] As discussed in our Decision, the Supreme Court in G.R. No. 85960 allowed petitioner CCFI, as the mortgage debtor of MBC, to sell its assets, including the subject landholding, "at their fair market value, under the best terms and condition and for the highest price under current real estate appraisals."[20] Counsel for the BSP posited that its interest in the case ended upon the sale of

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[15] *Id*. at 579.

[16] *Id*. at 557.

[17] Dated 6 September 2011; *id*. at 623.

[18] *Id*. at 637-643.

[19] *Id*. at 639.

[20] Resolution dated 29 August 1995; *id*. at 470, 644-655.

the subject land to ALI, after which the BSP entered into settlement scheme with MBC.[21]

On the same date, petitioner ALI filed its Opposition[22] to the Motion for Reconsideration. The OSG's Comment[23] was filed on 10 February 2012; respondents' Comment,[24] on 14 May 2012.

We note, as a preliminary matter, petitioner ALI's Manifestation and Motion[25] apprising the Court that several individuals who affixed their signatures to the verification portion of the Motion for Reconsideration were NOT petitioners in the Petition for Revocation filed with the DAR.[26] According to petitioners, these repeated defects in the pleadings filed by respondents show a blatant disregard for the rule requiring proper verification, and which justify the outright denial of the Motion for Reconsideration.[27]

Respondents failed to address this issue of improper verification in their Comment. Instead, they merely rehashed their arguments in the Motion for Reconsideration. However, since the ends of justice would be better served if the core issues are squarely addressed, this Court writes *finis* to the present controversy on substantive grounds.

We DENY the Motion for Reconsideration.

With the repeated refutation of their theory that the Conversion Order should be revoked because the sale between CCFI and ALI was illegal and CCFI committed misrepresentation in its application for conversion, respondents have based their arguments by simply latching on to a baseless phrase found in the CA Decision: "no less than the cited DAR Administrative

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[21] *Id*. at 640-642.

[22] *Id*. at 663-681.

[23] *Id*. at 740-765.

[24] *Id*. at 810-834.

[25] *Id*. at 723-725.

[26] *Id*. at 551-554.

[27] *Id*. at 724.

Order No. 12 enjoins the conversion of lands directly under a notice of acquisition."

A careful reading shows that the CA did not discuss or even refer to the provision that allegedly disallows applications for conversion. It may have relied on paragraph VI, subparagraph E of A.O. No. 12-94, which reads:

VI. POLICIES AND GOVERNING PRINCIPLES

x x x x x x x x x

E. No application for conversion shall be given due course if 1) the DAR has issued a Notice of Acquisition under the Compulsory Acquisition (CA) process x x x

In our Decision, we have emphatically ruled that a mere principle cannot be interpreted as an absolute proscription on conversion. From a reading of subparagraph E in isolation, it may be culled that what bars conversion is a notice of *acquisition,* not a notice of *coverage*. Assuming *arguendo* that a conver order may be revoked if a notice of acquisition has already been issued, we still cannot grant respondent's MR, because what has been presented before the DAR, the OP, the CA, and this Court is just the notice of coverage.

I. The CA committed reversible error when it decided an issue raised for the first time on appeal and based its ruling merely on respondents' self-serving allegation.

Respondents argue that they raised the issue regarding the Notice of Acquisition in their Petition for Revocation, particularly in paragraph 5 thereof, which states:

That the subsequent application for conversion filed by respondents was a mere ploy to cover up the said illegal transaction and to evade the coverage of the property under the Comprehensive Agrarian Reform Program (CARP).[28]

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[28] *Id*. at 536, 729.

Respondents cannot gloss over the fatal defect of its claim from the nonexistence of the Notice of Acquisition just by reducing the issue to "CARP coverage." As stated above, they are contending that petitioners' application for conversion was a ploy to cover up the illegality of the Deed of Absolute Sale and Partial Redemption between CCFI and ALI. What they repeatedly claimed was that ALI fraudulently concealed the sale agreement from the DAR. Three DAR Secretaries, including Secretary Garilao who issued the Conversion Order, rightly found these allegations baseless. This point was also raised and judiciously passed upon in the OP Order dated 26 September 2003. In contrast, the Notice of Acquisition is a separate issue altogether which has never been raised in the proceedings below.

The grounds relied upon by respondents in their Petition for Revocation are as follows:

> 3. That the respondents[29] grossly violated the Conversion Order because instead of developing the land within five years from the issuance of the Order, it sold said land to the present possessor, Ayala Land, Inc. xxx[30]
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> x x x x x x x x x
>
> 6. That the respondents likewise committed gross misrepresentation of the fact in that they made it appear before the DAR that the landholding in question has been duly reclassified from agricultural uses such as residential, commercial and industrial, when in truth and in fact, the Municipality of Silang does not have an approved town plan/zoning ordinance as of 24 October 1997 as per Certification issued by CAROLINA A, CASAJE, Officer-In-Charge, Board Secretariat of the Housing and Land Use Regulatory Board (HLURB).[31]
>
> x x x x x x x x x

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[29] Pertaining to CCFI and ALI, respondents in the Petition for Revocation.

[30] *Rollo,* p. 99.

[31] *Id*. at 100.

8. That the respondents likewise failed to comply with the undertaking to pay/effect complete payment of the disturbance compensation of tenant-farmers in the subject landholding xxx[32]

While the Decision has extensively discussed the error committed by the CA in passing upon and ruling on a new issue on appeal, we did not grant the Petition for Review on this technical ground alone. **We went over the records and found no admissible proof presented to support respondents' claim that a Notice of Acquisition had been issued.** What was attached to the Petition for Review filed before the CA was a mere photocopy of the Notice of Coverage. The purported Notice of Acquisition was never offered in evidence before the DAR and never became part of the records even at the proceedings *a quo*. Hence, we found that the CA committed reversible error when it gave credence to a mere assertion of the tenant-farmers.

As a prelude to our ruling that new issues cannot be raised for the first time on appeal, we contemplated the scenario in which the farmers had submitted the proper document to the CA. We then said, assuming *arguendo* they did, the appellate court could not have reversed the OP Decision based on nothing more than this submission, as the issue of the Notice of Acquisition had never been raised before the administrative agency concerned.

As contended by the OSG and as exhaustively discussed in our Decision, the CA decided an issue raised for the first time on appeal. It held that the DAR had issued a Notice of Acquisition, which served as a perpetual ban on the conversion of the subject lands. However, respondents never attached a copy, certified or otherwise, to their 1) Petition for Revocation, 2) Motions for Reconsideration in the proceedings *a quo,* or 3) Appeal Memorandum to the OP. This is because they never raised the purpose of the notice as an issue in their Petition for Revocation of the Conversion Order or in their Motion for Reconsideration before the OP. What they repeatedly argued was that fraud had been perpetrated by CCFI and ALI.

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[32] *Id*. at 101.

Respondents expressed their agreement with the point made by Justice Martin S. Villarama, Jr. in his Dissenting Opinion that the coverage of the land under CARL was confirmed by the following documents:

(1) the stipulation/condition in the Deed of Partial Redemption and Deed of Absolute Sale, both dated August 25, 1995, in which CCFI undertook to obtain DAR approval for CARP exemption or conversion to non-agricultural use;

(2) CCFI's letter-request dated May 7, 1996 addressed to the DAR Regional Director for the lifting of the Notice of Acquisition;

(3) BSP' s request in 1995 made in behalf of MBC for exemption of the subject property from CARL coverage, and the letter-denial of DAR Secretary who directed the distribution of the land to qualified farmer beneficiaries;

(4) the Decision dated October 11, 1996 of Executive Secretary Ruben D. Torres on the appeal of BSP from the DAR Secretary's denial of its request for exemption, in which the DAR was directed to defer proceeding with the distribution of lands already covered by CARL and petitioner was granted the opportunity to present proof that the lands are qualified for exemption or conversion; and

(5) MBC's request for DAR clearance in October 1997 to sell its landholdings placed under CARL coverage, which includes the subject property.[33]

With the exception of item 2, there was no reference to a Notice of Acquisition in any of these documents. According to the Dissent of Justice Villarama, considering the attendant circumstances, the letter-request of CCFI for the lifting of the Notice of Acquisition constituted an admission against interest of the fact that the notice was issued.

The concept of admissions against interest is governed by Section 26 of Rule 130 of the Rules of Court, which provides:

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[33] *Id*. at 516.

Sec. 26. *Admissions of a party.*— The act, declaration or omission of a party as to a relevant fact may be given in evidence against him.

The above rule considers admissions against interest as admissible evidence, but does not dispense with the requirement that the admission be offered in evidence. In this case, precisely because respondents did not raise the issue *at all,* petitioners did not have any opportunity to inspect or question the authenticity and due execution of the documents. It would be offensive to the basic rules of fair play, justice, and due process to suddenly reverse the decisions of three DAR Secretaries and the Office of the President based on an alleged document — especially if that document has not been presented, authenticated, or offered in evidence — without giving the other party any opportunity to contradict the purported admission.

CCFI, much less ALI, cannot be bound to whatever inference is being made only now on the purported CCFI letter requesting the lifting of the Notice of Acquisition. They had never been apprised throughout the administrative proceedings of its alleged existence, nor of the inference sought to be drawn therefrom. They were never given the chance to inspect the document as any piece of evidence should be so subjected.

Further, it must be noted that the letter does not identify the document itself, i.e., the Notice of Acquisition, as to date, as to signatory, as to amount tendered. It only asks that the Notice of Acquisition be lifted. It is probable, if this letter is genuine, that the alleged representative of CCFI was referring to the Notice of Coverage, which is an admitted fact, and is precisely the reason why the *Bangko Sentral ng Pilipinas* had to ask for, and was granted, permission by this Court in G.R. Nos. 85960 and 92610 to sell the land.

It is serious error for the CA to base its ruling on a conclusion of fact not supported by the records of this case — whether before us, the CA, the OP, or the DAR. This point becomes all the more crucial, as the CA admitted it would have upheld the findings of the DAR and the OP, were it not for the Notice of Acquisition:

At the concluding part of its discussion, it alluded to another memorandum circular of the DAR (Memorandum Circular No. 11-79) that land use conversion may be allowed when it is by reason of the changes in the predominant land use brought about by urban development. It then pointed to the fact that the close proximity of the province of Cavite to Metro Manila has opened it to the effects of modernization and urbanization. It warned that we would only succeed in hindering progress if under these conditions we would still insist on CARP coverage.

The argument is valid if the agricultural land is still not subjected to compulsory acquisition under CARP. But as we saw, there has already been a *notice of coverage* and *notice of acquisition* issued for the property.[34] (Emphasis supplied.)

The OP rightly ruled that:

x x x Appellants' lapses in not raising the issues before the DAR which has the expertise to resolve the same and in a position to conduct due hearings and reception of evidence from contending parties pertaining to the issue, puts the appellants in estoppel to question the same for the first time on appeal. Jurisprudence dictates the following:

The petitioner for the first time, to allow him to assume a different posture when he comes before the court and challenge the position he had accepted at the administrative level, would be to sanction a procedure whereby the court — which is supposed to review administrative determinations — would not review, but determine and decide for the first time, a question not raised at the administrative forum. This cannot be permitted, for the same reason that underlies the requirement of prior exhaustion of administrative remedies to give administrative authorities the prior authority to decide controversies within its competence, and in much the same way that, on the judicial level, issues not raised in the lower court cannot be raised for the first time on appeal. (Aguinaldo Industries Corporation vs. Commissioner of Internal Revenue & Court of Tax Appeals, 112 SCRA136).[35] (Emphasis supplied.)

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[34] *Rollo,* pp. 391-392.

[35] OP Decision; *id*. at 206.

This Court has already established that issues raised for the first time on appeal and not raised in the proceedings below ought not to be considered by a reviewing court. Points of law, theories, issues, and arguments not brought to the attention of the trial court are barred by estoppel.[36] The rule becomes crucial in this particular case. Here, DAR is the most competent agency that can make a factual determination regarding the Notice of Acquisition and its effect on the Conversion Order long issued by Secretary Garilao. As it stands, none of the DAR Secretaries was ever given the opportunity to dwell on this issue. On the contrary, Secretary Pagdanganan issued an Order on 13 August 2003 ruling that Secretary Braganza's Order affirming the conversion had become final.

Basic considerations of fairness and due process also impel this rule, which according to the Court, is but a logical effect of the regard for due process:

> A perusal of the questions raised in the SAC and the CA shows that the issue on the existence of a consummated sale between the DAR and petitioners was not among the issues therein. Hence, this issue is being raised for the first time on appeal.
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> It is a fundamental rule that this Court will not resolve issues that were not properly brought and ventilated in the lower courts...**An issue, which was neither averred in the complaint nor raised during the trial in the lower courts, cannot be raised for the first time on appeal because it would be offensive to the basic rule of fair play and justice, and would be violative of the constitutional right to due process of the other party.**[37]

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[36] *Atlas Consolidated Mining and Development Corp. v. Commissioner of Internal Revenue,* 190 Phil. 195 (1981).

[37] *Heirs of Vidad v. Land Bank,* 634 Phil. 9 (2010) citing *Fuentes v. Caguimbal,* 563 Phil. 339 (2007) and *Sanchez v. The Hon. Court of Appeals,* 345 Phil. 155, 186 (1997).

II. Assuming that respondents properly raised the above issue before the DAR, the proscription on conversion is a mere guiding principle, because DAR A.O. 12-94 specifies that it is not applicable to lands which have not been proven to be "prime agricultural lands."

Respondents reassert their stand that the guiding principle of DAR A.O. No. 12-1994 is to preserve prime agricultural lands, which under paragraph VI-D is considered non-negotiable for conversion. In our view, this principle alone does not justify reversing the conversion order. Even if we ignore the lapses of the CA and assume that a Notice of Acquisition did exist, it cannot serve as a perpetual bar on conversion, which is merely a guiding principle; and *second,* this principle applies only to prime agricultural lands.

The claim that a prior notice of acquisition bars the issuance of a conversion order is found under paragraph VI (e) of DAR A.O. 12-94. Yet the said paragraph falls under heading VI, "Policies and Guiding Principles." *By no stretch of the imagination can a mere policy or principle be interpreted as an absolute ban on conversion, such policy having been formulated by the same agency which ordered the conversion.* Paragraph VI-E cannot operate to diminish the authority and jurisdiction of the DAR over the land.

As rightly pointed out by the OSG and respondents themselves, the guiding principle governs only prime agricultural lands.[38] The findings of the DAR — which are binding on this Court — and those of the Central Land Use Planning Policy and Implementation (CLUPPI), as well as the Municipal Agrarian Reform Officer (MARO), are as follows:

a) The property is about 10 kilometers from the Provincial Road.

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[38] OSG Comment; *rollo*, p. 748.

b) The land sits on a mountainside overlooking Santa Rosa technopark.

c) The topography of the landholding is hilly and has an average slope of more than 18%. It is undeveloped and mostly covered with a wild growth of vines, bushes, and secondary growth of forest trees.

d) The dominant use of the surrounding area is its industrial/ forest growth as the landholding is sitting on a mountain slope overlooking the Sta. Rosa Technopark.

e) The area is not irrigated and no irrigation system was noted in the area.[39]

Clearly, the DAR had long investigated and ruled that the property was not suitable for agricultural use, as it had remained undeveloped without any source of irrigation. Hence, it is not "prime agricultural land" as contemplated under A.O. 12-94. Additionally, Republic Act 6657 or the Comprehensive Agrarian Law states that all lands with a slope of 18% and over, and undeveloped, shall be exempt from the Act.[40] If the said landholding has been developed for any other purpose — e.g., residential, commercial, or industrial — then it will not fall under the coverage of CARP.[41]

This Court has held that before the DAR could place a piece of land under CARP coverage, there must first be a showing

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[39] Cited in the 15 June 2011 Decision of this Court, pp. 21-22; *id.* at 488-489.

[40] Republic Act No. 6657, Sec. 10.

[41] DAR Opinion No. 59-97, issued on 2 June 1997. The relevant paragraph reads: "Anent your second query, a qualification should be made. It is provided under R.A. No. 6657 that a landholding having a slope of 18% or more and undeveloped is not within the ambit of the CARP. Thus, if such has been developed for the purpose for which the CARP has been enacted (agricultural purposes), regardless of who developed it (*i.e.*, landowner or farmer), the same shall be covered by the said law. On the other hand, if said landholding has been developed for any other purpose, *e.g.*, residential, commercial, or industrial, then said landholding will not fall within the coverage of CARP."

that the land is an agricultural land, *i.e.,* devoted or suitable for agricultural purposes.[42] In this determination, we cannot substitute our own judgment for that of the DAR. To do so would run counter to another basic rule that courts will not resolve a controversy involving a question that is within the jurisdiction of an administrative tribunal prior to the latter's resolution of that question. Since the DAR's findings herein are supported by substantial evidence, and affirmed by the OP, our only course is to sustain it. In *Heirs of Castro, Sr. v. Lozada,*[43] the Court held as follows:

> It has been peremptorily determined by OP and, before it, by the DAR, acting on investigations reports of its provincial (Batangas) office, as reviewed and validated by its regional office, that the OLT coverage of the disputed landholdings was erroneous, it being established that the lands covered are not primarily devoted to rice and corn and that the tenancy relationship has not been clearly established. Absent palpable error by both agencies, of which this Court finds none, their determination as to the use of the property and/or to the dubious status of petitioners as *de jure* tenants is controlling.
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> x x x[I]t is settled that factual findings of administrative agencies are generally accorded respect and even finality by this Court, if such findings are supported by substantial evidence, a situation that obtains in this case. **The factual findings of the Secretary of Agrarian Reform, who, by reason of his official position, has acquired expertise in specific matters within his jurisdiction, deserve full respect, and without justifiable reason, ought not to be altered, modified or reversed.** (Emphasis supplied.)

On the issue of conversion, this Court must respect the findings of the DAR, which is the only agency charged with the mandate of approving or disapproving applications for conversion.[44] The

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[42] *Puyat & Sons v. Alcaide*, 680 Phil. 609 (2012).

[43] 693 Phil. 431 citing *Aninao v. Asturias Chemical Industries, Inc.,* 502 Phil. 766 (2005).

[44] *Roxas & Co., Inc. v. Court of Appeals,* 378 Phil. 727 (1999).

CA Decision effectively enfeebles the Orders of no less than three Secretaries of the DAR and the policy pronouncements of the OP. The rule that conversion orders, once final and executory, may no longer be questioned is contradicted by the actions of respondents: accepting disturbance compensation for the land; seeking petitioners' compliance with the terms of the Conversion Order; then reversing themselves by assailing the Order itself long after the proper period has prescribed.

III. The Petition for Revocation was barred by prescription.

The argument of respondents that the Petition for Revocation was not barred by prescription was anchored on the interpretation of Secretary Morales in his Order dated 18 December 2000. He opined therein that the provisions of DAR A.O. No. 1, series of 1999 (DAR A.O. 1-99), particularly Section 34[45] on prescription, was not applicable. He quoted the Civil Code provision on the non-retroactivity of laws. On the other hand, the Dissent volunteered that DAR A.O. 1-99 expressly provides for the remedy of cancellation or revocation of a conversion order within a five-year period, if the petition is based on a violation of relevant rules and regulations of the DAR.

As to respondents' contention, we reproduce and underscore the relevant portion of the Decision:

Respondents assume that the rule to be applied is that prevailing at the time of the issuance of the Conversion Order. This is incorrect.

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[45] SECTION 34. *Filing of Petition.*– A petition for cancellation or withdrawal of the conversion order may be filed at the instance of DAR or any aggrieved party before the approving authority within ninety (90) days from discovery of facts which would warrant such cancellation but not more than one (1) year from issuance of the order: *Provided,* that where the ground refers to any of those enumerated in Sec. 35 (b), (e), and (f), the petition may be filed within ninety (90) days from discovery of such facts but not beyond the period for development stipulated in the order of conversion: *Provided, further,* that where the ground is lack of jurisdiction, the petition shall be filed with the Secretary and the period prescribed herein shall not apply.

The rule applicable in determining the timeliness of a petition for cancellation or withdrawal of a conversion order is the rule prevailing at the time of the filing of that petition, and not at the time of the issuance of the Conversion Order. It is axiomatic that laws have prospective effect, as the Administrative Code provides. While A.O. 01-99 was not yet promulgated at the time of the issuance of the Conversion Order, it was already published and in effect when the Petition for Revocation was filed on 19 May 2000.

Regarding the question on when the one-year prescription period should be reckoned, it must be still be resolved in conformity with the prospective character of laws and rules. In this case, the one-year period should be reckoned from the date of effectivity of A.O. 1-99, which is 31 March 1999. Therefore, no petition for cancellation or withdrawal of conversion of lands already converted as of 30 March 1999 may be filed after 1 March 2000.

The Petition for Revocation was filed on 19 May 2000.

We now address the contention raised in the Dissent. The alleged violations of rules and regulations of the DAR pertain to the "non- compliance with the condition of developing the area within five years, the illegal sale transaction made by CCFI to evade coverage under CARL, and CCFI's gross misrepresentation before the DAR that the land subject of conversion had already been reclassified to non-agricultural uses." These violations, according to respondents, paved the way for the extended prescriptive period of five years. It must be noted, however, that Secretary Morales gave due course to, and even granted, the Petition for Revocation. He resolved the substantial issues raised and made a categorical factual finding that there had been no misrepresentation.[46] As regards the alleged illegal sale, we have extensively discussed the issue in the Decision.

IV. Conversion was still possible despite the nonexistence of a zoning ordinance.

Respondents insist that there was a clear misrepresentation committed by CCFI when it submitted a resolution instead

[46] *Rollo,* p. 118.

of an ordinance. They proffer the argument that the submission of a zoning ordinance as approved by the HLURB was a requirement for the approval of the application for conversion under DAR A.O. No. 12-94.[47] They quote paragraph 6, Part VII (A)of the administrative issuance:

> A. Requirements for all applicants:
>
> x x x x x x x x x
>
> 6. Zoning Certification from the HLURB Regional Office when the subject land is within a city/municipality with a land use plan (zoning ordinance approved and certified by the HLURB (LUC Form No. 2, Series 1994).

They, however, conveniently ignore paragraph 4 of Part VI (B), whichstates:

> 4. If the city/municipality does not have a comprehensive development plan and zoning ordinance duly approved by HLURB/ SP but the dominant use of the area surrounding the land subject of the application for conversion is no longer agricultural, or if the proposed use is similar to, or compatible with the dominant use of the surrounding areas as determined by the DAR, conversion may be possible.

Respondents themselves point to a certification[48] dated 23 July 2003 by the board secretary of the HLURB stating that, to date, the Municipality of Silang does not have an approved town plan/zoning ordinance/comprehensive land use plan.[49] They also admit that the submission of an ordinance was by *recommendation* of the CLUPPI-1, and that the ordinance has not been adopted by Secretary Garilao.[50]

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[47] *Id*. at 545.

[48] *Id*. at 152.

[49] *Id*. at 820-821.

[50] *Id*. at 545.

V. The property is exempt from CARL coverage.

Respondents "beg the kind indulgence" of the Court to take judicial notice of Section 20[51] of R.A. 7160 that land covered

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[51] SECTION 20. Reclassification of Lands.– (a) A city or municipality may, through an ordinance passed by the sanggunian after conducting public hearings for the purpose, authorize the reclassification of agricultural lands and provide for the manner of their utilization or disposition in the following cases: (1) when the land ceases to be economically feasible and sound for agricultural purposes as determined by the Department of Agriculture or (2) where the land shall have substantially greater economic value for residential, commercial, or industrial purposes, as determined by the sanggunian concerned: Provided, That such reclassification shall be limited to the following percentage of the total agricultural land area at the time of the passage of the ordinance:

(1) For highly urbanized and independent component cities, fifteen percent (15%);
(2) For component cities and first to the third class municipalities, ten percent (10%); and
(3) For fourth to sixth class municipalities, five percent (5%): Provided, further, That agricultural lands distributed to agrarian reform beneficiaries pursuant to Republic Act Numbered Sixty-six hundred fifty-seven (R.A. No. 6657). otherwise known as "The Comprehensive Agrarian Reform Law", shall not be affected by the said reclassification and the conversion of such lands into other purposes shall be governed by Section 65 of said Act.
(b) The President may, when public interest so requires and upon recommendation of the National Economic and Development Authority, authorize a city or municipality to reclassify lands in excess of the limits set in the next preceding paragraph.
(c) The local government units shall, in conformity with existing laws, continue to prepare their respective comprehensive land use plans enacted through zoning ordinances which shall be the primary and dominant bases for the future use of land resources: Provided, That the requirements for food production, human settlements, and industrial expansion shall be taken into consideration in the preparation of such plans.
(d) Where approval by a national agency is required for reclassification, such approval shall not be unreasonably withheld. Failure to act on a proper and complete application for reclassification within three (3) months from receipt of the same shall be deemed as approval thereof.
(e) Nothing in this Section shall be construed as repealing, amending, or modifying in any manner the provisions of R.A. No. 6657.

by CARP shall not be affected by the reclassification and conversion of that land.

Respondents insist that the land in question is covered by CARP. However, the DAR has already conclusively found that the topography is hilly and has an average slope of more than 18%. Hence, the land is exempt from CARP coverage under Section 10 of R.A. 6657:

> SECTION 10. *Exemptions and Exclusions.* — Lands actually, directly and exclusively used and found to be necessary for parks, wildlife, forest reserves, reforestation, fish sanctuaries and breeding grounds, watersheds, and mangroves, national defense, school sites and campuses including experimental farm stations operated by public or private schools for educational purposes, seeds and seedlings research and pilot production centers, church sites and convents appurtenant thereto, mosque sites and Islamic centers appurtenant thereto, communal burial grounds and cemeteries, penal colonies and penal farms actually worked by the inmates, government and private research and quarantine centers and all ***lands with eighteen percent (18%) slope and over,*** except those already developed shall be exempt from the coverage of the Act. (Emphasis supplied)

The Court is not a trier of facts. It relies on the expertise of administrative agencies. In *Roxas & Co., Inc. v. Court of Appeals,*[52] it declared the DAR to be in a better position to resolve a petition for revocation. DAR is the primary agency that possesses the necessary expertise on the matter:

> The doctrine of primary jurisdiction does not warrant a court to arrogate unto itself authority to resolve a controversy the jurisdiction over which is initially lodged with an administrative body of special competence. ***Respondent DAR is in a better position to resolve petitioner's petition for revocation, being primarily the agency possessing the necessary expertise on the matter. The power to determine whether Haciendas Palico, Banilad and Caylaway are non-agricultural, hence, exempt from the coverage of the CARL lies with the DAR, not with this court.*** (Emphasis supplied.)

Lastly, respondents claim that their failures are mere technicalities that cannot prevail over their substantive rights

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[52] 378 Phil. 727 (1999).

as farmers, who should have "more in law." This statement is a gross oversimplification of the issue. The Notice of Acquisition which was mentioned in passing and only at a late stage, has no evidentiary support available in the records. The DAR and the OP have both ruled for CCFI and ALI, and the CA itself has admitted that the stand of CCFI and ALI would have been valid if not for the issuance of the alleged Notice of Acquisition. The CA should have therefore been more circumspect in verifying whether anything on record remotely supported the self-serving claim of the farmers. Even the Notice of Coverage that they presented does not vest substantive rights, as it does not automatically transfer ownership of the land to them. A notice of coverage does not *ipso facto* render the land subject thereof a land reform area.[53]

In *Puyat & Sons v. Alcaide,*[54] both a Notice of Coverage and a Notice of Acquisition were already issued over the subject property. More crucially the existence of the Notice of Acquisition was properly raised and proved before the trial court. Yet, the CA Decision favoring the farmer-beneficiaries was reversed on the ground that they must still comply with procedural rules:

> Time and again, it has been held that the right to appeal is not a natural right or a part of due process, but merely a statutory privilege and may be exercised only in the manner and in accordance with the provisions of the law. The party who seeks to avail of the same must comply with the requirements of the rules, failing in which the right to appeal is lost.

We understand the plight of prospective farmer-beneficiaries all over the country; nevertheless, we cannot see the alleged injustice in this particular case. While it is true that litigation is not a game of technicalities, it is equally true that elementary considerations of due process require that petitioners in this case be duly apprised of a claim against them before judgment may be rendered.[55]

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[53] *Sps. Pasco v. Pison-Arceo Agricultural and Development Corporation,* 520 Phil. 387 (2006).

[54] *Supra* note 34.

[55] *Titan Construction Corporation v. David,* 629 Phil. 346 (2010).

WHEREFORE, in view of the foregoing, the Motion for Reconsideration is hereby **DENIED** with **FINALITY.**

No further pleadings or motions will be entertained.

Let entry of judgment be made in due course.

SO ORDERED.

Carpio, Velasco, Jr., Brion, del-Castillo, Perez, Mendoza, Reyes, and *Perlas-Bernabe, JJ.,* concur.

Leonardo-de Castro, Peralta, Bersamin, and *Leonen, JJ.,* join the dissenting opinion of *J.* Villarama, Jr.

Villarama, Jr., J., see dissenting opinion.

Jardeleza, J., no part.

DISSENTING OPINION

VILLARAMA, JR., *J.*:

This resolves the motion for reconsideration[1] of our Decision[2] promulgated on June 15, 2011 which granted the petition for certiorari filed by Ayala Land, Inc. (ALI) and Capitol Citifarms, Inc. (CCFI) and reversed the Decision dated January 31, 2007 of the Court of Appeals (CA) in CA- G.R. SP No. 86321.

In their *Motion for Reconsideration,* respondents argued that the majority ruling failed to take cognizance of the following:

(1) The Comprehensive Agrarian Reform Program (CARP) coverage is not a new issue or matter on appeal as it was previously raised before the Department of Agrarian Reform (DAR) and the Office of the President (OP). Hence, the CA is not barred from entertaining the claim;

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[1] *Rollo,* pp. 532-550.

[2] *Ayala Land, Inc. v. Castillo,* G.R. No. 178110, June 15, 2011, 652 SCRA 143.

(2) Under DAR Administrative Order (AO) No. 12, Series of 1994, the guiding principle is to preserve prime agricultural land. Petitioners must strictly comply with the said AO.

(3) The petition for revocation is not barred by prescription.

(4) There is no reclassification zoning ordinance. Hence, there was a clear misrepresentation on the part of petitioners.

(5) For lands covered under the CARP, conversion is not the legal mode to exempt the property as only two cases of exemption or exclusion is provided in Section 10 of R.A. No. 6657.[3]

Petitioner ALI filed its Opposition wherein it emphasized that the CA had decided an issue raised for the first time on appeal by the respondents, *i.e.,* the purported issuance of notices of coverage and acquisition of the subject land. It is also pointed out that photocopies of the said notices appeared only for the first time in the petition in CA-G.R. SP No. 86321 as an "exhibit." As to the significance of the "guiding principle" in DAR AO No. 12, Series of 1994 "to preserve prime agricultural land," ALI asserts that the subject property is not prime agricultural land to begin with, as found by the Center for Land Use Policy, Planning and Implementation-1 (CLUPPI-1) Executive Committee and cited in the Conversion Order.

ALI likewise maintains that the petition for revocation/ cancellation of the conversion order is already barred by prescription under Section 34 of DAR AO No. 1, Series of 1999. On respondents' continuing claim of lack of compliance with the requirements of a valid reclassification, ALI contends that this Court correctly rejected such argument when it ruled that conversion and reclassification are two separate and distinct procedures. Respondents' invocation of Section 20 of R.A. No. 7160 is thus misplaced considering that what took place

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[3] *Rollo,* pp. 535-536.

was not the reclassification of the subject property but its conversion.

In its Comment, the Office of the Solicitor General stated that the motion for reconsideration should be denied as it fully concurs with the findings and conclusions contained in the Decision rendered by this Court.

Upon reexamination of the facts on record and applicable laws and jurisprudence, the Court resolves to grant the motion for reconsideration.

The issuance of Notice of Acquisition is an admitted fact

In the Decision, the Court ruled that even assuming the proper document had been submitted to the CA, the issuance of a Notice of Acquisition over the land subject of this controversy could not have, by nothing more than such submission, reversed the OP Decision because the matter had never been raised before the DAR as in fact records show that "this issue was not raised in the original Petition for Revocation in the second Motion for Reconsideration filed by the farmers before the DAR, and that no Notice of Acquisition was attached to their Appeal Memorandum to the OP."[4] The Decision thus pointed out that Secretaries Pagdanganan, Braganza and Morales did not have the opportunity to dwell on this issue as what the respondents persistently alleged is the concealment by petitioners of the sale of the subject land to ALI.

After taking a second look on this case, we find that based on records of the DAR, the fact of issuance of the Notice of Coverage and Notice of Acquisition pertaining to the 221.3048 hectares of agricultural land in the name of CCFI under Transfer Certificate of Title (TCT) No. 128672 was never disputed by petitioners during the proceedings before the DAR. While it is true that the exhibits attached to respondents' petition before

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[4] *Supra* note 2, at 157.

the CA were plain photocopies, the totality of documentary evidence indisputably established that the property was already placed under CARP coverage through the issuance by DAR of a Notice of Coverage and Notice of Acquisition in 1989. Such was the actual status of the subject land notwithstanding the absence of reference to these issuances in the Morales Order.[5] Clearly, the proceedings for acquisition of private agricultural lands had formally commenced with the issuance of Notice of Coverage and Notice of Acquisition, and CCFI thereafter exhausted the available administrative remedies which effectively delayed their implementation.

That the subject lands have already been placed under CARP coverage even before the Manila Banking Corporation (MBC), CCFI's creditor-mortgagee, acquired the subject property is further confirmed by the following documentary evidence: (1) the stipulation/condition in the Deed of Partial Redemption and Deed of Absolute Sale, both dated August 25, 1995, whereby CCFI undertook to obtain DAR approval for CARP exemption or conversion to non-agricultural use; (2) **CCFI's letter-request dated May 7, 1996 addressed to the DAR Regional Director for the *lifting of the Notice of Acquisition;*** (3) BSP's request in 1995 made in behalf of MBC for exemption of the subject property from Comprehensive Agrarian Reform Law (CARL) coverage, and the letter-denial of DAR Secretary who directed the distribution of the land to qualified farmer beneficiaries; (4) the Decision dated October 11, 1996 of Executive Secretary Ruben D. Torres on the appeal of BSP from the DAR Secretary's denial of its request for exemption, in which the DAR was directed to defer proceeding with the distribution of lands already covered by CARL and petitioner was granted the opportunity to present proof that the lands are qualified for exemption or conversion; and (5) MBC's request for DAR clearance in October 1997 to sell its landholdings placed under CARL coverage, which included the subject property.

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[5] *Rollo,* pp. 336-352.

Indeed, records bear out that CCFI through counsel wrote the DAR Regional Director to request the **lifting of the Notice of Acquisition**.[6] Said letter dated May 7, 1996 reads:

In behalf of our client, CAPITOL CITIFARMS, INC., we wish to request for the lifting of the Notice of Acquisition on their property situated in Barangay Munting-ilog, Silang, Cavite covered by Transfer Certificate of Title No. 128672 issued by the Register of Deeds of the Province of Cavite.

The subject property has been reclassified by the Municipal Council of Silang, Cavite from agricultural to residential, commercial and industrial area, a certified true copy of the said Municipal Resolution is hereto attached.

The subject property is not serviced by the National Irrigation Administration, a xerox copy of the Certification is hereto attached. The Philippine Coconut Authority has certified that the area is not planted to coconut trees, a xerox copy of the said certification is hereto attached. The Department of Agriculture based on these certifications and the ocular inspection conducted by the Technical Group certified that the subject property is eligible for land conversion, a xerox copy of this certification is hereto attached.

The subject property is not tenanted although there are occupants in the property. These occupants has executed a Waiver of Rights and an endorsement for the lifting of the Notice of Acquisition after they have been paid their disturbance compensation. Copies of these individual Waivers are hereto attached.

We are also enclosing herewith a certified true copy of Transfer Certificate of Title No. 128672, Tax Declaration No. 6800 and a parcellary map of the property showed actual occupancy by Farmers/ Occupants.

We trust that you will give this request your kind consideration.

Very truly yours,

(Sgd.)
ELADIO S. PASAMBA

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[6] DAR records, folder #1 of 3, pp. 525-526.

Under Indorsement[7] dated February 25, 1997, DAR Assistant Regional Director for Operations Renato B. Alano referred CCFI's request for the lifting of Notice of Acquisition to Atty. Ibra D. Omar, AI Haj., Chief of the Legal Division, DAR Region IV, for the latter's appropriate action. Acting on the said request, Atty. Victor B. Baguilat set the matter for hearing and sent a letter[8] to Atty. Pasamba inviting him to appear at DAR Provincial Office, Legal Division, Capitol Compound, Trece Martires City on March 25, 1997 and further instructing him to bring pertinent documents in support of CCFI's claim. However, in his letter-reply[9] dated March 24, 1997, Atty. Pasamba informed Atty. Baguilat that he will not be able to attend the scheduled hearing and requested for a resetting on April 7 or 8, 1997. Apart from these communications, there seems to be no further action taken by DAR on CCFI's request for the lifting of the Notice of Acquisition. What appears from the records is the transmittal[10] dated May 23, 1997 sent by Regional Director Eugenio B. Bernardo in compliance with a memorandum order issued by DAR, which was addressed to the Head, CLUPPI-2 Secretariat forwarding the Case Folder pertaining to the subject land labelled as "Protest on Coverage (A.O. No. 09, Series of 1994)" by applicant CCFI.

It may be recalled that CCFI's request for the lifting of the Notice of Acquisition was made following the denial by Secretary Ernesto Garilao of BSP's (statutory receiver of MBC) request for a DAR order exempting the subject lands from the coverage of CARP, under letters dated February 14, 1995 and June 13, 1995.[11] While said orders were appealed to the OP, CCFI, under the Deed of Absolute Sale with ALI, remained duty-bound to fulfill the condition precedent to the direct payment of down

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[7] *Id*. at 523.

[8] *Id*. at 522.

[9] *Id*. at 519.

[10] *Id*. at 517.

[11] *Rollo,* pp. 326-331.

payment to MBC (equivalent to payment of down payment due to CCFI under the contract of sale), that is, to obtain an order of exemption or land conversion from DAR. In other words, prior to the filing of an application for conversion, CCFI first sought **the lifting of the Notice of Acquisition** after it failed to secure from Secretary Garilao an order of exemption from CARP coverage. There was clearly no dispute as to the existence of the said Notice of Acquisition. In fact, by resorting to various legal remedies, petitioners succeeded in delaying the implementation by the DAR of the subject landholding under the Compulsory Acquisition scheme.

Even prior to the aforesaid requests for exemption and lifting of the Notice of Acquisition, MBC filed a motion for the issuance of an order granting it a period of five years within which to seek conversion of its landholdings to non-agricultural use. On October 11, 1996, then Executive Secretary Ruben D. Torres ordered the remand of the case to the DAR for the purpose of receiving evidence on the question of which among the parcels of land, are exempt from the coverage of the CARL, which lands may be converted into non-agricultural uses, and which may be subjected to compulsory coverage.[12] DAR moved for reconsideration but the OP denied it.[13]

Notwithstanding the favorable ruling of Executive Secretary Torres, MBC still sought DAR clearance to sell all its foreclosed assets which have been placed under CARP coverage. **This further confirms that the subject lands have already been subjected to compulsory acquisition under R.A. No. 6657.** Secretary Garilao in his Order[14] dated October 3, 1997 clarified that despite the sale to be effected by MBC, which is allowed under Section 73-A of R.A. No. 6657, as amended by R.A. No. 7881, the subject lands remain subject to compulsory transfer pursuant to Section 71 of said law, and also directed that only

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[12] DAR records, folder #3 of 3, pp. 1481-1490.

[13] *Id*. at 1491-1493.

[14] *Id*. at 1494-1497.

those parcels not yet covered by Certificate of Land Ownership Awards or Emancipation Patents may be sold or conveyed by MBC. Apparently, MBC and CCFI did not disclose that the subject lands have already been **sold by CCFI to ALI as early** as **December 1995.** While Secretary Garilao acknowledged the fact that a cease and desist order was issued by the OP, he nevertheless maintained that the landholdings remained subject to the provisions on acquisition under CARL although the acquisition of petitioners' properties was thereby *suspended.* The clearance to sell requested by MBC was thus granted simply because the sale and/or transfer of agricultural land in case such sale, transfer or conveyance is made necessary as a result of a bank's foreclosure of the mortgaged land, is permitted under Section 73-A, R.A. No. 6657, as amended by R.A. No. 7881. But such clearance was granted to enable MBC, the foreclosing mortgagee bank, to sell the subject lands as a consequence of foreclosure under the law and not for their disposition by CCFI. Indeed, conveyance or sale **by the original landowner** is subject to **restrictions or limitations** under the CARL.

In view of the circumstances, we hold that CCFI's **May 1996 request for the lifting of Notice of Acquisition** constitutes an admission against interest of the fact that such notice had been issued following the earlier issuance of Notice of Coverage over its landholdings. Admissions against interest are those made by a party to a litigation or by one in privity with or identified in legal interest with such party, and are admissible whether or not the declarant is available as a witness.[15] An admission against interest is the best evidence that affords the greatest certainty of the facts in dispute, based on the presumption that no man would declare anything against himself unless such declaration is true.[16] ALI being the successor-in-interest of CCFI was

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[15] *Lazaro v. Agustin,* G.R. No. 152364, April 15, 2010, 618 SCRA 298, 308, citing *Unchuan v. Lozada,* G.R. No. 172671. April 16, 2009, 585 SCRA 421, 435.

[16] *Taghoy v. Tigol, Jr.,* G.R. No. 159665, August 3, 2010, 626 SCRA 341, 350, citing *Heirs of Miguel Franco v. Court of Appeals,* 463 Phil.

therefore bound by such admission and may not be allowed at this stage to dispute the issuance of the Notices of Coverage and Acquisition.

It may be that respondents in their appeal to the OP raised a new argument in support of their position that the Conversion Order was validly revoked by Secretary Morales when they contended that since Notices of Coverage and Acquisition have already been issued, the DAR erred in granting CCFI's application for conversion, citing as basis AO No. 12, Series of 1994, VI (E), which provides:

> E. **No application for conversion shall be given due course** if 1) the DAR has issued a Notice of Acquisition under the compulsory acquisition (CA) process; 2) Voluntary Offer to Sell (VOS), or an application for stock distribution covering the subject property has been received by DAR; or 3) there is already a perfected agreement between the landowner and the beneficiaries under Voluntary Land Transfer (VLT). (Emphasis supplied)

However, jurisprudence has laid down certain exceptions to the general rule that points of law, theories, issues, and arguments not brought to the attention of the trial court ought not to be considered by a reviewing court, as these cannot be raised for the first time on appeal. Though not raised below, the following issues may be considered by the reviewing court: lack of jurisdiction over the subject matter, as this issue may be raised at any stage; *plain error;* jurisprudential developments affecting the issues; or the raising of a matter of public policy.[17] We have also held that in the interest of justice and within the sound discretion of the appellate court, a party may change his legal theory on appeal only when the factual bases thereof would not require presentation of any further evidence by the adverse party

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417, 425 (2003); *Yuliongsiu v. PNB,* 130 Phil. 575, 580 (1968); *Republic v. Bautista,* G.R. No. 169801, September 11, 2007, 532 SCRA 598, 609; and *Bon v. People,* 464 Phil. 125, 138 (2004).

[17] *Villaranda v. Villaranda,* G.R. No. 153447, February 23, 2004, 423 SCRA 571, 589-580.

in order to enable it to properly meet the issue raised in the new theory.[18]

In this case, the CA found merit in the argument raised by respondents pertaining to the violation of AO No. 12, Series of 1994, VI (E) and considered the matter of issuance of Notices of Coverage and Acquisition sufficiently established in the DAR records. Finding such ground to be crucial in resolving the issue of whether or not the OP erred in sustaining the Braganza and Pagdanganan orders which reversed the Morales Order revoking the conversion order issued in favor of CCFI, the CA ruled that the OP committed a reversible error in upholding a conversion order that permits the circumvention of agrarian laws because CCFI's application should not have been entertained in the first place.

Assuming therefore, that the issue was raised by respondents only before the OP, the CA's findings and conclusion on the validity of the revocation of the conversion order cannot be assailed as serious error or grave abuse of discretion.

DAR violated AO No. 12, Series of 1994 when it issued the Conversion Order

In the Decision, the Court declared that DAR AO 12, Series of 1994, paragraph VI (E) is a "mere principle" which cannot be interpreted as an absolute proscription on conversion. The CA was faulted for "favoring a principle over the DAR's own factual determination of the propriety of conversion."[19] It was further noted that while the CA agreed with the OP that land use conversion may be allowed when it is by reason of changes in the predominant use brought about by urban development, said court nevertheless set aside the OP Decision.

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[18] *Ramos v. Philippine National Bank,* G.R. No. 178218, December 14, 2011, 662 SCRA 479, 496, citing *Lianga Lumber Company v. Liang Timber Co., Inc.,* 166 Phil. 661, 687 (1977).

[19] *Supra* note 2, at 160.

The Decision was emphatic in saying that Paragraphs E and B (3) were set merely as guidelines in issues of conversion as evidently the intent of DAR AO 12, Series of 1994 is to make the DAR the principal agency in deciding questions on conversion, vesting the said agency with exclusive authority to approve or disapprove applications for conversion of agricultural lands for residential, commercial, industrial, and other land uses. And in the implementation of CARL, DAR shall thus take into account *current* land use as governed by the needs and political will of the local government and its people. The Court further said:

> However, *under the same heading VI, on Guiding Principles, is paragraph B (3), which reads:*
>
> "If at the time of the application, the land still falls within the agricultural zone, conversion shall be allowed only on the following instances:
>
> a) When the land has ceased to be economically feasible and sound for agricultural purposes, as certified by the Regional Director of the Department of Agriculture (DA) or
>
> b) When the locality has become highly urbanized and the land will have a greater economic value for residential, commercial and industrial purposes, as certified by the local government unit."
>
> *The thrust of this provision, which DAR Secretary Garilao rightly took into account in issuing the Conversion Order, is that even if the land has not yet been reclassified, if its use has changed towards the modernization of the community, conversion is still allowed.*

As DAR Secretary, Garilao had *full authority to balance the guiding principle in paragraph E against that in paragraph B (3) and to find for conversion.* Note that the same guiding principle which includes the general proscription against conversion was scrapped from the new rules on conversion, DAR A.O. 1, Series of 2002, or the "Comprehensive Rules on Land Use Conversion." It must be emphasized that the policy allowing conversion, on the other hand, was retained. This is a complex case in which there can be no simplistic or mechanical solution. The Comprehensive Agrarian Reform Law is not intractable, nor does it condemn a piece of land to a single

use forever. With the same conviction that the state promotes rural development, it also "recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments."[20] (Italics supplied)

The above pronouncement failed to consider that those landholdings which have already been placed under CARP through compulsory acquisition or Voluntary Offer to Sell (VOS) were expressly excluded from conversion such that DAR officials were explicitly directed *not to give due course to* applications for conversion over these lands. There was no ambiguity in the terminology used in paragraph VI (E) of AO No. 12, Series 1994. Paragraph B (3) (b) applies only if the lands were not yet subjected to CARP under either compulsory acquisition or VOS process. This is evident from the opening statement of paragraph B setting forth certain criteria as bases for approving applications for conversion.

> B. DAR acknowledges the need of society for other uses of land, but likewise recognizes the need for prudence in the exercise of its authority to approve conversions and *hereby adopts the following criteria as bases for the* ***approval of applications for conversion:***
>
> 1. Agricultural lands classified or zonified for non-agricultural uses by LGUs and approved by the HLURB before June 15, 1988, shall be governed by DAR Administrative Order No. 6, Series of 1994.
>
> 2. Conversion may be allowed if at the time of the application, the lands are reclassified as commercial, industrial and residential in the new or revised town plans promulgated by the local government unit (LGU) and approved by the Housing and Land Use Regulatory Board (HLURB) or by the Sangguniang Panlalawigan (SP) after June 15, 1988 in accordance with Section 20 of R.A. No. 7160, as implemented by M.C. No. 54, and Executive Order No. 72 Series of 1993 of the Office of the President.

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[20] *Id*. at 160-161.

3. If at the time of the application, the land still falls within the agricultural zone, conversion shall be allowed only on the following instances:

   a) when the land has ceased to be economically feasible and sound for agricultural purposes, as certified by the Regional Director of the Department of Agricultural (DA); or

   b) when the locality has become highly urbanized and the land will have a greater economic value for residential, commercial or industrial purposes, as certified by the local government unit.

4. If the city/municipality does not have a comprehensive development plan and zoning ordinance duly approved by HLURB/SP but the dominant use of the area surrounding the land subject of the application for conversion is no longer agricultural, or if the proposed use is similar to, or compatible with the dominant use of the surrounding areas as determined by the DAR, conversion may be possible.

5. In all cases, conversion shall be allowed only if DENR issues a certification that the conversion is ecologically sound.

Paragraph VI (E) is a separate provision mandating the exclusion of all landholdings already subjected to CARP under compulsory acquisition or VOS from the **exercise of administrative power to approve** conversion applications. Hence, the statement that Secretary Garilao had authority to "balance the guiding principle in paragraph E against that in paragraph B (3) and to find for conversion"[21] undermines the true intent of AO No. 12, Series of 1994 considering that, as a matter of policy, the government already exempted those landholdings from the Secretary's approving authority. This interpretation is more consistent with paragraph A under the same Policies and Guiding Principles stating that "DAR's primary mandate is to acquire and distribute agricultural lands to as many qualified beneficiaries as possible."

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[21] *Id*. at 161.

From another perspective, the pronouncement in the Decision could set an undesirable precedent as it provides landowners engaged in protracted litigation with farmer-beneficiaries with yet another legal weapon to derail the process of land distribution by invoking the exercise of administrative discretion and permit conversion even on landholdings already subjected to CARP. In the face of competing interests between the foreclosing creditors of landowners and the marginalized farmers, the implementors of CARL are called upon to give meaning to the policy enshrined in our Constitution[22] that "[t]he welfare of the landless farmers will receive the highest consideration to promote social justice and to move the nation toward sound agricultural development and industrialization."

The Petition for Cancellation/ Revocation of Conversion Order is not time-barred

Section 34 of DAR AO No. 1, Series of 1999 states:

Article VII

Cancellation or Withdrawal of Conversion Orders

SEC. 34. *Filing of Petition.* — A petition for cancellation or withdrawal of the conversion order may be filed at the instance of DAR or any aggrieved party before the approving authority within ninety (90) days from discovery of facts which would warrant such cancellation **but not more than one (1) year from issuance of the order:** *Provided,* that where the ground refers to any of those enumerated in **Sec. 35 (b), (e), and (f)**, the petition may be filed within ninety (90) days from discovery of such facts **but not beyond the period for development stipulated in the order of conversion:** *Provided, further,* That where the ground is lack of jurisdiction, the petition shall be filed with the Secretary and the period prescribed herein shall not apply. (Emphasis supplied)

In the Decision, the Court ruled that respondents may no longer question the Conversion Order which had attained finality considering that the action for its cancellation was filed almost

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[22] Art. XIII, Sec. 1, 1987 Constitution; Sec. 2, RA 6657.

three years after the said order had been in force and effect. This is based on the one-year prescriptive period laid down in Section 34 of DAR AO No. 1, Series of 1999.

However, the same provision allows the filing of a petition for cancellation/withdrawal of conversion order within the period of development provided in the order of conversion if the ground refers to any of those mentioned in Section 35 (b), (e) and (f):

x x x x x x x x x

(b) **Non-compliance with the conditions of the conversion order;**

x x x x x x x x x

(e) Conversion to a use other than that authorized in the conversion order; and/or

(f) **Any other violation of relevant rules and regulations of DAR.** (Emphasis supplied)

The October 31, 1997 Conversion Order likewise contained the following condition:

> 4. The DAR reserves the right to cancel or withdraw this order for misrepresentation of facts integral to its issuance and for violation of the rules and regulation on land use conversion.[23]

Respondents raised as main grounds for the revocation or cancellation of the conversion order the non-compliance with the condition of developing the area within five years, the illegal sale transaction made by CCFI to evade coverage under CARL, and CCFI's gross misrepresentation before the DAR that the land subject of conversion had already been reclassified to non-agricultural uses when in fact the Municipality of Silang does not have an approved town plan/zoning ordinance as of October 24, 1997 and what was passed was a mere resolution and not an ordinance, and the pressure exerted on the tenant-farmers left them with no alternative but to accept partial payments and sign waivers. Such misrepresentation of facts and *violation*

[23] CA *rollo,* p. 40.

of the rules and regulations on land conversion were legally sufficient for the filing of a petition to revoke or cancel the October 31, 1997 Conversion Order, and to exempt the same from the one-year prescriptive period laid down in DAR AO No. 1, Series of 1999. Hence, the petition was timely filed in May 2000, well within the five-year development period provided in the Conversion Order.

Mortgaged agricultural lands foreclosed by banks remain under CARP Coverage

The closing statement of the Decision expressed the majority's view that its ruling on this case simply adhered to the government's policy decisions insofar as the buy-out transaction between CCFI, MBC and ALI.

> CARL cannot be used to stultify modernization. It is not the role of the Supreme Court to apply the missing notice of acquisition in perpetuity. This is not a case wherein a feudal landowner is unjustly enriched by the plantings of a long-suffering tenant. ALI is in the precarious position of having been that third-party buyer who offered the terms and conditions most helpful to CCFI, MBC, and effectively, the BSP, considering the 85% portion of the total debt of MBC that BSP owns. What this Court can do positively is to contribute to policy stability by binding the government to its clear policy decisions borne over a long period of time.[24]

The foregoing confirms that the majority ruling on the main issue of whether the CA erred in sustaining the revocation of the Conversion Order tenaciously hinged on the supposed absence of a Notice of Acquisition. After scrutinizing anew the entire records of the DAR, such claim was plainly revealed as an afterthought on the part of petitioners to defeat respondents' cause. As earlier discussed, it was not the intent of DAR AO 12, Series of 1994 to grant unbridled discretion to the DAR Secretary in cases where lands applied for conversion have already been placed under CARP. Thus, Secretary Garilao, who made

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[24] *Supra* note 2, at 174.

a complete turnaround from his earlier denial of BSP/MBC's request for exemption from CARP coverage when he eventually issued the Conversion Order, cannot violate DAR's own rules and disregard the declared policy in Paragraph VI (E).

As to the Decision's perceived "contribution to policy stability by binding the government to its clear policy decisions borne over a long period of time," particularly with respect to the buy-out arrangement between CCFI, MBC and ALI, with the concurrence of the Receiver, BSP, we find that the scheme actually runs counter to DAR's established policy on the matter.

We recall that the OP remanded the case to the DAR for further proceedings in order to give the petitioners opportunity to prove that their landholdings are qualified for exemption and/or conversion, as a matter of due process highlighted by the public interest involved *(i.e.,* rehabilitation of financially distressed MBC). The OP underscored the need to "balance the interest between the petitioner bank (under receivership by the BSP), its creditors [including the BSP to which MBC was indebted in the total amount of ₱8,771,893,000 representing 85% of its total indebtedness] and the general public on one hand, and the faithful implementation of agrarian reform program on the other, with the view of harmonizing them and ensuring that the objectives of the CARP are met and satisfied." Nonetheless, such pronouncement did not serve as imprimatur for disregarding the rules on land conversion promulgated by DAR. As far as the DAR is concerned, its decisions are primarily guided by its constitutional mandate as it declared that: "[S]ince RA. No. 6657 is a social welfare legislation, the rules on exemptions, exclusions and/or conversions must be *interpreted restrictively* and *any doubt* as to the applicability of the law should be resolved in favor of inclusion."[25]

Accordingly, in those instances where the mortgaged agricultural lands are foreclosed, the defaulting landowner alone should bear the loss in case of deficiency because the foreclosure

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[25] See DAR Opinion No. 18, s. 2003, September 17, 2003.

buyer is merely substituted to the landowner entitled only to just compensation pursuant to R.A. No. 6657 and its implementing rules.[26] While Sec. 73-A of the law was amended by R.A. No. 7881 to permit the sale of mortgaged agricultural lands made necessary as a result of a bank's foreclosure, *it did not exempt the land sold from the operation of CARP.*

DAR Opinion No. 09, Series of 2008[27] states this unchanged policy with respect to mortgaged agricultural lands foreclosed by a bank, which applies even if the latter is under receivership/ liquidation:

FORECLOSURE BY PRIVATE BANK PLACED UNDER RECEIVERSHIP/LIQUIDATION STILL UNDER ACQUISITION AND DISTRIBUTION TO QUALIFIED BENEFICIARIES

- Private bank's foreclosed assets, regardless of the area, are subject to existing laws on their compulsory transfer under the General Banking Act as a consequence of foreclosure and acquisition under Section 16 of R.A. No. 6657. As long as the subject property is agricultural, the same shall still be subjected to acquisition and distribution to qualified beneficiaries pursuant to the provisions of the CARL. **Private bank may sell to third parties their foreclosed asset, as a consequence of foreclosure, but still subject to acquisition under CARP.**
- Even if the subject foreclosed property was placed under receivership or liquidation by the BSP, the same shall still be subjected to acquisition under CARL. **In case said foreclosed property was sold or will be sold as a consequence of liquidation or receivership by the BSP, the same will still be subjected to acquisition and eventual distribution to agrarian reform beneficiaries pursuant to CARL.** (Emphasis supplied)

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[26] See DAR Administrative Order No. 1, Series of 2000 entitled "REVISED RULES AND REGULATIONS ON THE ACQUISITION OF AGRICULTURAL LANDS SUBJECT OF MORTGAGE OR FORECLOSURE."

[27] Dated April 14, 2008.

In this case, MBC sought authority from this Court to sell its acquired assets in G.R. No. 85960 in view of the injunction issued enjoining the BSP from liquidating MBC pending the outcome of Civil Case No. 87-40659 pending in the RTC of Manila, Branch 23. The Court authorized the intended sale "under the best terms and conditions" to enable the MBC to settle its obligations to BSP. Records fail to show that MBC at that time disclosed to this Court that among those assets requested to be sold are agricultural lands already covered by CARP.

Summarizing, the Court holds that the CA correctly sustained the Morales Order cancelling the Conversion Order issued to CCFI as it contravened the directive in DAR AO 12, Series of 1994, VI (E) that lands already issued a Notice of Acquisition shall not be given due course.

CCFI as landowner may not stall the acquisition proceedings started as early as 1989, dragging it for several years and later seek exemption on the ground that the land had already ceased to be economically feasible for agricultural purposes. Precisely, the CARL had envisioned the advent of urbanization that would affect lands awarded to the farmers.

Section 65 of RA 6657 thus provides:

> SEC. 65. *Conversion of lands.* – **After the lapse of five (5) years from its award,** when the land ceases to be economically feasible and sound for agricultural purposes, or the locality has become urbanized and the land will have a greater economic value for residential, commercial or industrial purposes, the DAR upon application of the beneficiary or the landowner, with due notice to the affected parties and subject to existing laws, may authorize the reclassification or conversion of the land and its disposition: *Provided,* That the beneficiary shall have fully paid his obligation. (Emphasis supplied)

Here, however, the CARP was never given the chance to be implemented as a result of the landowner's legal maneuvers until conditions of the land had so changed with the lapse of time. The unabated land-use conversion from agricultural to industrial, commercial, residential or tourist purposes has been

aptly described as "systematically reversing land reform in a way that was never foreseen by the framers of CARL."[28]

With the FOREGOING, I therefore VOTE —

1. To **GRANT** the motion for reconsideration of respondents SIMEONA CASTILLO, et al.;
2. To **SET ASIDE** the Decision promulgated by the then Third Division of this Court on June 15, 2011; and
3. That a new judgment be entered **AFFIRMING** the Decision dated January 31, 2007 of the Court of Appeals in CA-G.R. SP No. 86321.

EN BANC

[G.R. No. 201614. January 12, 2016]

SHERYL M. MENDEZ, *petitioner, vs.* **Shari'a District Court, 5th Shari'a District, Cotabato City, Rasad G. Balindong (Acting Presiding Judge); 1st Shari'a Circuit Court, 5th Shari'a District, Cotabato City, Montano K. Kalimpo (Presiding Judge); and DR. JOHN O. MALIGA,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; JURISDICTION; APPELLATE JURISDICTION OF THE COURT IN SHARI'A CASES.— At the outset, the Court notes that this petition has been correctly

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[28] Antonio Ma. Nieva, *"Agrarian 'Reform,' Ramos Style"* based on a series of articles published by the Philippine Daily Inquirer, source: *http://www.multinationalmonitor.org/hyper/issues/1994/01/nieva.html.*

instituted with this Court. It has been recognized that decades after the 1989 enactment of the law creating the Shari'a Appellate Court and after the Court authorized its creation in 1999, it has yet to be organized. Pending the organization of the Shari'a Appellate Court, appeals or petitions from final orders or decisions of the ShDC shall be filed with the Court of Appeals (*CA*) and referred to a Special Division to be organized in any of the CA stations preferably to be composed of Muslim CA Justices. For cases where only errors or questions of law are raised or involved, the appeal shall be to this Court via a petition for review on *certiorari* under Rule 45 of the Rules of Court pursuant to Article VIII, Section 5 of the Constitution and Section 2 of Rule 41 of the Rules. As the present petition involves only questions of law, it has been properly filed before this Court.

2. ID.; ID.; JURISDICTION OF SHARI'A COURTS; THE SHARI'A CIRCUIT COURT (ShCC) HAS EXCLUSIVE ORIGINAL JURISDICTION OVER CIVIL ACTIONS BETWEEN PARTIES WHO HAVE BEEN MARRIED IN ACCORDANCE WITH MUSLIM LAW, INVOLVING DISPUTES RELATING TO DIVORCE UNDER THE CODE OF MUSLIM PERSONAL LAWS OF THE PHILIPPINES (P.D. NO. 1083).— Jurisdiction is the power and authority of a court to hear, try and decide a case. In order for the court to have authority to dispose of a case on the merits, it must acquire jurisdiction over the subject matter and the parties. The Congress has the power to define, prescribe and apportion the jurisdiction of various courts, and courts are without authority to act where jurisdiction has not been conferred by law. Jurisdiction is conferred only by the Constitution or the law. It cannot be acquired through a waiver or enlarged by the omission of the parties or conferred by the acquiescence of the court, and may be raised at any stage of the proceedings, even for the first time on appeal. The law which confers jurisdiction on the Shari'a courts is P.D. No. 1083. x x x It is clear that the ShCC has exclusive original jurisdiction over civil actions between parties who have been married in accordance with the Muslim law, involving disputes *relating to* divorce under P.D. No. 1083. There is, therefore, no doubt that the ShCC had jurisdiction to confirm the *talaq* between Mendez and Maliga.

3. ID.; ID.; THOUGH ARTICLE 54 OF P.D. 1083 DOES NOT DIRECTLY CONFER JURISDICTION TO THE ShCC TO RULE ON THE ISSUE OF CUSTODY, THE COURT, NEVERTHELESS GRANTS THE ShCC ANCILLARY JURISDICTION TO RESOLVE ISSUES RELATED TO DIVORCE; ISSUE OF CUSTODY IS A NECESSARY CONSEQUENCE OF A DIVORCE PROCEEDING.—As opined by Secretary Sadain, the ShCC does seem to have ancillary jurisdiction over custody issues as they relate to a divorce decree. Under Article 155, it is provided that the SHCC shall have exclusive original jurisdiction over all civil actions and proceedings involving disputes *relating to* divorce. x x x Clearly, the provision above clothes the ShCC with power to hear and decide civil actions *relating to* a *talaq* or divorce. It cannot be denied that the issue of custody is a necessary consequence of a divorce proceeding. As Article 54 of P.D. No. 1083 provides. x x x (c) **The custody of children shall be determined in accordance with Article 78 of this Code.** x x x Though Article 54 does not directly confer jurisdiction to the ShCC to rule on the issue of custody, the Court, nevertheless grants the ShCC ancillary jurisdiction to resolve issues *related to* divorce. The above-quoted provision states categorically that as a consequent effect of divorce, the custody of children shall be determined in accordance with **Article 78** of the Code. In turn, **Article 78** states that the care and custody of **children below seven** whose parents are divorced shall **belong to the mother**, and the minor **above seven but below the age of puberty** may **choose the parent** with whom he/she wants to stay.

4. ID.; ID.; TO RULE THAT THE ShCC IS WITHOUT JURISDICTION TO RESOLVE ISSUES ON CUSTODY AFTER IT HAD DECIDED ON THE ISSUE OF DIVORCE, SIMPLY BECAUSE IT APPEARS TO CONTRAVENE ARTICLE 143 OF P.D. 1083, WOULD BE ANTITHETICAL TO THE DOCTRINE OF ANCILLARY JURISDICTION.— To rule that the ShCC is without jurisdiction to resolve issues on custody after it had decided on the issue of divorce, simply because it appears to contravene Article 143 of P.D. No. 1083, would be antithetical to the doctrine of ancillary jurisdiction. "While a court may be expressly granted the incidental powers necessary to effectuate its jurisdiction, a grant of jurisdiction,

in the absence of prohibitive legislation, implies the necessary and usual incidental powers essential to effectuate it, and, subject to existing laws and constitutional provisions, every regularly constituted court has power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction and for the enforcement of its judgments and mandates. Hence, demands, matters or questions ancillary or incidental to, or growing out of, the main action, and coming within the above principles, may be taken cognizance of by the court and determined, since such jurisdiction is in aid of its authority over the principal matter, even though the court may thus be called on to consider and decide matters which, as original causes of action, would not be within its cognizance." Following the doctrine, the ShCC, in cases involving divorce, possesses the power to resolve the issue of custody, it being a *related issue* to the main cause of action.

5. ID.; ID.; WHERE THE MAIN CAUSE OF ACTION IS ONE OF CUSTODY, THE SAME MUST BE FILED WITH SHARI'A DISTRICT COURTS (ShDC), PURSUANT TO ARTICLE 143 OF P.D. 1083.— At this juncture, the question must be asked: By recognizing the power of the **ShCC** to rule on the issue of custody, would this effectively render Article 143 of P.D. No. 1083 meaningless, considering that the same is unequivocal in providing that the **ShDC** has the exclusive original jurisdiction to decide on all cases involving custody? The Court rules in the negative. A distinction must be made between a case for divorce wherein the issue of custody is an *ancillary issue* and a case where custody is the *main issue.* Jurisdiction in the former, as discussed above, lies with the ShCC, as the main cause of action is divorce. The latter on the other hand, where the main cause of action is one of custody, the same must be filed with the ShDC, pursuant to Article 143 of P.D. No. 1083.

6. ID.; ID.; THE AWARD OF CUSTODY TO RESPONDENT IS VOID AS IT WAS RENDERED IN VIOLATION OF THE CONSTITUTIONAL RIGHT OF PETITIONER TO DUE PROCESS; NO NOTICE OF HEARING AND NO HEARING WAS CONDUCTED.— Notwithstanding the foregoing, the award of custody to Maliga by the ShCC was void as it was rendered in violation of the constitutional right of Mendez to due process. Mendez pointed out that Maliga's

urgent motion for issuance of temporary custody was filed on October 9, 2010, even before the main petition for *talaq* was filed on November 2, 2010, and that she never received a summons pertaining to the urgent motion. Indeed, a review of the records reveals that the date of filing was handwritten on the said motion as "October 9, 2010." The motion itself and the registry receipt attached thereto, however, were dated "November 9, 2010." The Court is, thus, of the view that the month "October" was mistakenly written by the receiving clerk instead of "November," and that the motion was filed *subsequent* to the main petition for *talaq* as an ancillary matter. The Court, nonetheless, agrees with Mendez that the urgent motion lacked the requisite notice of hearing. It is immediately evident from the face of the motion that it did not contain the notice of hearing required by the Rules of Court which has suppletory application to the present case. Section 4 of Rule 15 provides that every written motion shall be set for hearing by the applicant. Every written motion is required to be heard and the notice of hearing shall be served in such manner as to insure its receipt by the other party at least three (3) days before the date of hearing, unless the court for good cause sets the hearing on shorter notice. The notice of hearing is intended to prevent surprise and to afford the adverse party a chance to be heard before the motion is resolved by the court. A seasonable service of a copy of the motion on the adverse party with a notice of hearing indicating the time and place of hearing is a mandatory requirement that cannot be dispensed with as this is the minimum requirement of procedural due process. A motion that does not contain a notice of hearing is a mere scrap of paper and presents no question which merits the attention and consideration of the court. It is not even a motion for it does not comply with the rules, and, hence, even the clerk has no right to receive it.

7. ID.; ID.; THE AWARD OF CUSTODY ALSO LACKS EVIDENTIARY BASIS.— Not only was the award of custody violative of the constitutional right of Mendez to due process, but also both the orders of the ShCC and the ShDC awarding custody of Princess Fatima to Maliga were without evidentiary basis because no hearing was actually conducted prior to the issuance of the order granting the urgent motion. Moreover, there was no explanation given as to why the motion was resolved without notice to, or the participation of Mendez.

Although the ShCC stated that, in deciding on the custody case, it scrutinized the evidence on hand, it was remiss in its duty to state the precise factual and legal basis on which its ruling awarding custody to Maliga was based. Section 14, Article VIII of the 1987 Constitution mandates that decisions must clearly and distinctly state the facts and the law on which they are based. The decisions of courts must be able to address the issues raised by the parties through the presentation of a comprehensive analysis or account of factual and legal findings of the court. It is evident that the ShCC failed to comply with these requirements. It merely stated that it was in Princess Fatima's "best interest in all aspects of life, economically, socially and religiously" that custody be awarded to her father. There was no express finding that Mendez was unfit in any way, or a hint of an explanation as to why Maliga was in a better position to take custody of Princess Fatima. The ShDC, on the other hand, in affirming the findings of the ShCC, stated that Mendez was disentitled to custody because she had turned apostate, and held that she would remain disqualified until she return to the Islamic faith in accordance with the Muslim Law. It appears, however, that *disqualification* due to *apostasy* under the Muslim Code pertains to *disinheritance* under Article 93 of the Muslim Code, and *not to the custody of children.*

APPEARANCES OF COUNSEL

Paisal S. Abdul for petitioner.
Lincoln B. Bagundang for private respondent John O. Maliga.

D E C I S I O N

MENDOZA, *J.*:

Before this Court is a petition for review on *certiorari* under Rule 45 of the Rules of Court, assailing the March 30, 2012 Decision[1] of the Shari'a District Court, 5th Shari'a District, Cotabato City *(ShDC),* in ShDC Appealed Case No. 2011-19.

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[1] *Rollo,* pp. 108-109; penned by Acting Presiding Judge Rasad G. Balindong.

The assailed decision affirmed the August 19, 2011 Order[2] of the 1st Shari'a Circuit Court, Cotabato City *(ShCC),* in ShCC Civil Case No. 2010-559, confirming the *talaq*[3] (divorce) between petitioner Sheryl M. Mendez *(Mendez)* and private respondent Dr. John O. Maliga *(Maliga)*: awarding the custody of their minor child to Maliga; and ordering him to give a *mut'a* (consolatory gift) to Mendez.

The Facts

From the records, it appears that on April 9, 2008, Mendez and Maliga were married under Muslim rites. Prior to their marriage, the couple was already blessed with a daughter, Princess Fatima M. Maliga *(Princess Fatima).* Their marriage, however, soured shortly after their wedding.

On November 2, 2010, Maliga filed with the ShCC a petition[4] for the judicial confirmation of *talaq* from Mendez, with a prayer for the grant of probational custody of their minor child pending the resolution of the case. According to Maliga, Mendez was a Roman Catholic and she only embraced the Islamic faith on the date of their marriage. Shortly after being married, he claimed that he started to doubt the sincerity of his wife's submission to Islam, having noticed no changes in her moral attitude and social lifestyle despite his guidance. Maliga added that despite

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[2] *Id*. at 61-66; penned by Presiding Judge Montano K. Kalimpo.

[3] Art. 45. Definition and forms. — Divorce is the formal dissolution of the marriage bond in accordance with this Code to be granted only after the exhaustion of all possible means of reconciliation between the spouses. It may be effected by:

(a) Repudiation of the wife by the husband *(talaq);*
(b) Vow of continence by the husband (ila);
(c) Injurious assanilation of the wife by the husband (zihar);
(d) Acts of imprecation (li'an);
(e) Redemption by the wife (khul');
(f) Exercise by the wife of the delegated right to repudiate (tafwld); or
(g) Judicial decree (faskh). [Presidential Decree No. 1083 (1977), Book Two, Title II, Chapter III, Sec. 1]

[4] *Rollo,* pp. 45-46.

his pleas for her to remain faithful to the ways of Islam, she remained defiant. He alleged that sometime in December 2008, Mendez reverted to Christianity. Maliga went on to add that she went to Manila a few days after their wedding and brought Princess Fatima with her without his knowledge and consent. In Manila, she taught their daughter how to practice Christianity by enrolling her in a Catholic school. Maliga, thus, prayed for probational custody considering the unsafe religious growth and values repugnant to Islam.

Before Mendez could file her answer, Maliga filed his urgent motion[5] reiterating his plea to be awarded temporary custody of Princess Fatima. He claimed that considering such factors as moral values, social upliftment, behavioral growth, and religious consideration, he should have custody of their child.

On November 12, 2010, the ShCC issued the order[6] granting Maliga's urgent motion. The ShCC deemed it proper for Princess Fatima to stay with her father because of his social, financial and religious standing, and considering that she was then under his custody; that he raised her as a good Muslim daughter as evidenced by her appearance; and that her parents were married under Islamic rites.

On November 18, 2010, Mendez filed her Answer.[7] She alleged that she followed the religion of her Muslim grandfather, and denied Maliga's allegations that she was not sincere in her practice of Islam. She averred that she became pregnant before she married Maliga and had been raising their daughter on her own since her birth and that he had been totally remiss in his material and moral obligations to support her and their child. She opposed his prayer for custody, arguing that she had been raising Princess Fatima since she was born; that Maliga had several wives and three other children and was very busy with his profession as

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[5] Urgent Motion for Issuance of Temporary Custody of Minor Princess Fatima, Pending Answer or Resolution to the above-entitled case, *id.* at 35.

[6] *Id*. at 36-37.

[7] *Id*. at 48-50.

a physician; and that the custody of children below seven years old should belong to the mother.

Mendez added that on October 21, 2010, she left their daughter in Maliga's custody for a visit, with the understanding that he would bring her back the following day. On October 22, 2010, she went with her cousin to fetch her daughter but Maliga threatened to kill them and displayed his bodyguards clad in police uniforms and firearms. This prompted her to file a complaint-affidavit for kidnapping and failure to return a minor with the National Bureau of Investigation.[8]

On November 22, 2010, Mendez filed her opposition[9] to Maliga's urgent motion for issuance of temporary custody. She argued that the motion did not contain the requisite notice of hearing and was, therefore, a mere scrap of paper. She pointed out that the motion was filed on October 9, 2010, *prior* to the filing of the main case on November 2, 2010. She contended that she never received the summons in connection with the urgent motion and, furthermore, she never received a copy of the November 12, 2010 Order granting temporary custody to Maliga, which she had only picked up from the court herself on November 18, 2010, the day she filed her answer.

In its Order,[10] dated December 3, 2010, the ShCC *partially reconsidered* its initial order awarding temporary custody to Maliga by granting the right of *visitation* to Mendez, as follows:

> WHEREFORE, in the light of the foregoing, PRINCESS FATIMA, daughter of the herein parties is hereby ordered be placed under the CARE and CUSTODY of the Petitioner, DR. JOHN O. MALIGA, pending the resolution of the above-entitled case, effective immediately, WITH THE RIGHT OF VISITATION BY THE RESPONDENT, SHERYL M. MENDEZ TO HER DAUGHTER PRINCESS FATIMA M. MALIGA, ANY REASONABLE TIME OF THE DAY AND NIGHT, AND/OR BORROW HER

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[8] *Id*. at 31-32.

[9] *Id*. at 38-39.

[10] *Id*. at 43-44.

(PRINCESS FATIMA M. MALIGA) PROVIDED THAT IT MUST BE ONLY WITHIN THE VICINITY OF COTABATO CITY AND THEREAFTER, RETURN HER TO THE PETITIONER, DR. JOHN O. MALIGA, UPON PROPER COORDINATION AND ARRANGEMENT FROM THE ABOVE-NAMED PETITIONER OR HIS DULY AUTHORIZED REPRESENTATIVE.

SO ORDERED.[11]

Mendez filed a motion for reconsideration of the December 3, 2010 order, arguing that the question of custody was within the exclusive original jurisdiction of the ShDC, and not the ShCC, and praying that the said order be declared null and void.[12]

On January 19, 2011, the ShCC constituted an Agama Arbitration Council[13] which, after its own hearing and meeting, submitted the case for hearing on the merits because the parties failed to arrive at an amicable settlement and because "the [d]ivorce was moot and academic."[14]

The Ruling of the Shari'a Circuit Court

On August 19, 2011, the ShCC issued the order[15] confirming the *talaq* pronounced by Maliga against Mendez and awarded to him the care and custody of Princess Fatima. In the same order, the ShCC granted visitation rights to Mendez and ordered Maliga to give her a *mut'a* (consolatory gift) in the amount of ₱24,000.00. Thus:

WHEREFORE, in the light of the foregoing, it is hereby ORDERED, that:

1. The pronounced *Talaq* (Divorce) by herein Petitioner DR. JOHN O. MALIGA against respondent SHERYL M.

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[11] *Id*. at 44.

[12] Records, pp. 22-23.

[13] *Id*. at 9.

[14] *Id*. at 29.

[15] *Rollo,* pp. 61-66.

MENDEZ is hereby CONFIRMED and considering that the Iddah (cooling-off/waiting period) had long been lapsed, she may now be allowed to use her former maiden name in all personal and official transactions;

2. The care and custody of the PARTIES' minor daughter PRINCESS FATIMA shall remain with Petitioner DR. JOHN O. MALIGA with a right of visitation by respondent SHERYL M. MENDEZ any reasonable time of the day and night and/ or borrow her and thereafter, return her (PRINCESS FATIMA) to petitioner DR. JOHN O. MALIGA, provided it is only within the vicinity of Cotabato City and provided further that there should be a proper coordination with the above-named Petitioner, and the petitioner is hereby ordered to observe such rights of visitation and/or borrow of by the respondent SHERYL M. MENDEZ; and

3. Petitioner DR. JOHN O. MALIGA is hereby ordered upon receipt hereof, to give consolatory gift (mut'a) to respondent SHERYL M. MENDEZ in the amount of TWENTY FOUR THOUSAND PESOS (Php. 24,000.00) as provided by law as contained in the petitioner's prayer which amounts of money must be coursed/ consigned to this Court.

Let the copy of this Order be furnished to the Office of the Shari'a Circuit Registrar of this Court for record and registration purposes, and/or ANNOTATION of the PARTIES' marriage contract as DIVORCED.

SO ORDERED.[16]

In its ruling, the ShCC noted that Mendez never questioned the validity of the *talaq* and found that it was caused by the irreconcilable religious differences between the spouses as to the upbringing of their daughter. For said reason, it ruled that, in the best interest of the child in all aspects of life — economic, social and religious, the care and custody of Princess Fatima should remain with Maliga.[17]

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[16] *Id*. at 65-66.

[17] *Id*. at 63-65.

The Ruling of the Shari'a District Court

Mendez appealed the ShCC order to the ShDC only with respect to the ruling on custody. In her memorandum[18] before the ShDC, Mendez argued that the order of the ShCC was null and void for its failure to state the facts and law on which its findings were based in accordance with Section l, Rule 36 of the Rules of Court. She reiterated that the urgent motion filed by Maliga did not contain the requisite notice of hearing, and that the mother had the right of custody if the child was under seven years of age. She asserted that the question of custody was within the exclusive original jurisdiction ofthe ShDC only, and that an order of a court not vested with jurisdiction was null and void.[19]

On March 30, 2012, the ShDC issued the assailed decision,[20] *affirming* the August 19, 2011 Order of the ShCC. Giving credence to Maliga's allegation that Mendez had reverted to Christianity, the ShDC ruled that in Shari'a Law, a mother might be legally disentitled to the custody of her child if she turned apostate, and disqualified until she returned to the Islamic faith; and that the father, as a Muslim, was in a better position to take care of the child's well-being and raise her as a Muslim. Affirming the ShCC ruling, the ShDC found that Princess Fatima should remain with her father for her best interest in all aspects of life, economically, socially and religiously.

Hence, this petition where Mendez argues the following:

ASSIGNMENT OF ERRORS

A. THE HONORABLE PRESIDING JUDGE OF 1st SHARI'A CIRCUIT, COTABATO CITY, 5th SHARIA [DISTRICT), MONTANO K. KALIMPO, GRAVELY AND SERIOUSLY ERRED IN DECIDING IN FAVOR OF THE PETITIONER-APPELLEE IN SHCC CIVIL CASE NO.

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[18] Memorandum Brief for [Defendant-Appellant], *id*. at 71-82.

[19] *Id*. at 74-86.

[20] *Id*. at 108-109.

2010-559, DR. JOHN O. MALIGA FOR CARE AND CUSTODY [OF] MINOR CHILD AGAINST HEREIN RESPONDENT-APPELLANT AS THE HONORABLE JUDGE, GRAVELY ABUSES HIS AUTHORITY AMOUNTED TO LACK OF JURISDICTION OVER THE CASE.

B. WERE THE ORDER OF THE HONORABLE PRESIDING JUDGE MONTANO K. KALIMPO OF 1st SHARI'A CIRCUIT COURT, COTABATO CITY DATED NOVEMBER 12, 2010 AND DECEMBER 03, 2010 AWARDED THE CARE AND CUSTODY IN FAVOR OF PETITIONER-APPELLEE SHCC CIVIL CASE NO. 2010-559 FOR BEING UNREASONABLE, IN VIOLATION OF RULE 15, SECTIONS 4, 5, 6 REVISED RULES OF CIVIL PROCEDURE 1997, ARTICLE 143, PAR. 1, SECTION a OF THE P.D. 1083, ARTICLE 78, P.D. 1083 AS WELL AS JURISDICTION.

C. WERE THE DECISION OF THE HONORABLE SHARI'A DISTRICT COURT, 5TH SHARI'A DISTRICT COTABATO CITY, PROMULGATED ON MARCH 30, 2011, AFFIRMED ASSAILED ORDER DATED AUGUST 19, 2011 OF THE SHARI'A CIRCUIT COTABATO CITY, FOR BEING UNREASONABLE.[21]

Mendez argues that the ShCC acted in excess of jurisdiction when it ruled on Maliga's urgent motion for issuance of temporary custody, considering that the motion was a mere scrap of paper for lack of notice of hearing. She reiterates that she never received any summons in connection with the urgent motion. She never received a copy of the ShCC order granting the said motion either.[22]

Mendez goes on to contend that the ShCC had no jurisdiction to hear, try and decide the issue of Princess Fatima's custody, considering that under Article 143(l) (a) of Presidential Decree *(P.D.)* No. 1083,[23] it is the ShDC which has the exclusive original

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

[22] *Id*. at 17-18.

[23] Otherwise known as the Code of Muslim Personal Laws of the Philippines.

jurisdiction over all cases involving custody. She argues the rule that any decision rendered without jurisdiction is a total nullity and may be struck down at any time, even on appeal.[24]

Finally, she asserts that she should have been awarded custody under Article 78 of P.D. No. 1083, as Princess Fatima was *not above seven years old* at the time the ShCC order was promulgated. As to Maliga's claim that she was disqualified to have custody over Princess Fatima for becoming apostate to the Islamic faith, Mendez argues that while the same may be a ground for disinheritance under the Muslim Law, the same law does not provide that being apostate is a ground to be denied of the care and custody of her minor child.[25] Besides, she professes that she is still a Muslim.

In the July 9, 2012 Resolution[26] the Court initially denied the subject petition for various procedural defects.

On November 12, 2012, acting on the motion for reconsideration filed by Mendez, the Court reinstated the petition.[27] Thereafter, Maliga and Mendez filed their respective pleadings.

In his Comment[28] dated January 17, 2013, Maliga countered that a mother may be deprived of the custody of her child below seven years of age for compelling reasons. He alleged that Mendez was unemployed and was financially dependent on him for all the needs of Princess Fatima since her conception. He reiterated that a Muslim mother may be legally disentitled to the custody of her minor child if she turned apostate and should remain disqualified until she return to the Islamic faith. Maliga noted that although the Family Code would now apply to Mendez, who was no longer a Muslim, the application of the Family

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[24] *Id*. at 20-22.

[25] *Id*. at 22-23.

[26] *Id*. at 93-94.

[27] *Id*. at 117.

[28] *Id*. at 118-122.

Code would defeat the purpose of the Muslim law on disqualification to inheritance by virtue of apostasy. Finally, he claimed that he was fit and qualified to have custody of his child as he was a prominent medical practitioner with resources to meet all her needs. He pointed out that, under his care, Princess Fatima's academic performance dramatically improved from the lowest ranking to the top six in her 3rd grade class.

In her Reply[29] dated April 26, 2013, Mendez countered that Maliga only filed his petition for *talaq* when he discovered that she had filed a complaint-affidavit against him for kidnapping and failure to return a minor;[30] that he had been totally remiss in his material and moral obligations to his daughter;[31] that he was unfit to take care of Princess Fatima as his numerous wives had been confusing the child; [32] and that she was not unemployed as she was a registered nurse who could provide for all the needs of her child and who, in fact, had cared for her from birth until she was six (6) years old and sent her to an exclusive school, all without the assistance of Maliga.[33]

ISSUES

As can be gleaned from the pleadings, the Issues at hand are the following:

1. **Whether or not the ShCC erred in acting on Maliga's urgent motion for issuance of temporary custody;**
2. **Whether or not the ShCC and the ShDC had jurisdiction to rule on the issue of custody; and**
3. **Whether or not custody was properly granted to Maliga.**

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[29] *Id*. at 136-138.

[30] *Id*. at 136-137.

[31] *Id*. at 137.

[32] *Id*.

[33] *Id*.

Opinion of Amicus Curiae

On March 11, 2014, the Court appointed Secretary-CEO Mehol K. Sadain *(Secretary Sadain)* of the National Commission on Muslim Filipinos *(NCMF)* and Dr. Hamid A. Barra of the King Faisal Center for Islamic, Arabic and Asian Studies, as *amici curiae,* and directed them to submit their respective opinions on the matter of jurisdiction with respect to the issue of custody,[34] in view of the fact that the exclusive original jurisdiction over divorce and custody pertains to two separate courts, namely, the ShCC and the ShDC, respectively.

In compliance, Secretary Sadain submitted his opinion,[35] calling on the Court to apply the *darurah*-oriented principle of liberal construction in order to promote the objective of securing a just, speedy and inexpensive disposition of every action and proceeding, in accordance with the Rules of Court, which applies to P.D. No. 1083 in a suppletory manner. He explained that Islamic law subscribes to the same objective of dispensing speedy and equitable justice, as well as its own *darurah*-oriented liberal construction for the sake of promoting equitable or weighty public interests. He elucidated that under the doctrine of *darurah* (necessity), prohibited actions may be allowed or restrictive rules may be relaxed if such would serve a greater and more primordial interest, such as the preservation of life and property, or the higher pursuit of justice. He cited as an example the prohibition on the eating of pork by a Muslim which could be temporarily set aside if he was faced with the choice of starving to death or eating pork to survive. Another example given was the allowance of the internal use of alcohol-based products if ingested in the form of life-preserving medicine.

In consonance with the above principles, Secretary Sadain was of the view that strict procedural requirements could be relaxed if such would result in a speedy, fair and beneficial disposition of a pending legal question. He noted that determining the custody of a child was an ancillary matter, which unavoidably

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[34] *Id*. at 160.

[35] *Id*. at 166-169.

would arise in divorce proceedings, and would usually involve delving into matters of child welfare and interest, as well as the fitness of the person/s seeking custody. He noted that the speedy resolution of divorce and custody proceedings had an effect on the general welfare of the child and was in the child's best interest. He cited that the Islamic legal jurisdiction in Pakistan had ruled that, in guardianship proceedings, the Court exercised parental jurisdiction, and technicalities of pleadings or strict formalities need not be enforced because the State took charge of the rights of the child to safeguard their welfare by deciding the question of custody as expeditiously as possible.

Secretary Sadain, thus, opined that the rule on jurisdiction under P.D. No. 1083 may be relaxed considering that the issue of custody arose as an ancillary matter in the divorce proceedings, which must be addressed in the same court in order to protect the welfare, rights and interest of the child as expeditiously as possible. He also pointed out that allowing the ShCC to decide on the matter of custody would avoid multiplicity of suits and delay in the judicial proceedings. Lastly, he noted that because the ShDC had passed judgment on the case appealed from the ShCC, the need for a separate case had been moot and the jurisdictional and procedural defects had been cured.

Dr. Hamid Barra, despite repeated requests, did not submit an opinion.[36]

The Ruling of the Court

Appellate Jurisdiction of the Court in Shari'a Cases

At the outset, the Court notes that this petition has been correctly instituted with this Court. It has been recognized that decades after the 1989 enactment of the law[37] creating the Shari'a

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[36] Atty. Eric Ismael P. Sakkam, Court Attorney VI in the office of the member-in-charge, reported that he was able to get in touch with Dr. Hamid Barra, who claimed that he was already based in Malaysia and would no longer submit any opinion.

[37] Autonomous Region in Muslim Mindanao Organic Law (R.A. No. 6734), as amended.

Appellate Court and after the Court authorized its creation in 1999,[38] it has yet to be organized. Pending the organization of the Shari'a Appellate Court, appeals or petitions from final orders or decisions of the ShDC shall be filed with the Court of Appeals (CA) and referred to a Special Division to be organized in any of the CA stations preferably to be composed of Muslim CA Justices. For cases where only errors or questions of law are raised or involved, the appeal shall be to this Court via a petition for review on *certiorari* under Rule 45 of the Rules of Court pursuant to Article. VIII, Section 5 of the Constitution and Section 2 of Rule 41 of the Rules.[39] As the present petition involves only questions of law, it has been properly filed before this Court.

Jurisdiction of Shari'a Courts

Jurisdiction is the power and authority of a court to hear, try and decide a case.[40] In order for the. court to have authority to dispose of a case on the merits, it must acquire jurisdiction over the subject matter and the parties.[41] The Congress has the power to define, prescribe and apportion the jurisdiction of various courts,[42] and courts are without authority to act where jurisdiction has not been conferred by law.[43] Jurisdiction is conferred only by the Constitution or the law. It cannot be acquired through a waiver or enlarged by the omission of the parties or conferred by the acquiescence of the court, and may be raised at any stage of the proceedings, even for the first time on appeal.[44]

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[38] A.M. No. 99-4-66.

[39] *Tomawis v. Balindong,* 628 Phil. 252, 258-259 (2010).

[40] *Century Insurance Co. v. Fuentes,* 112 Phil. 1065. 1072 (1961).

[41] *Paramount Insurance Corporation v. Japzon,* G.R. No. 68037, July 29, 1992, 211 SCRA 879, 885.

[42] Sec. 2, Article VIII, 1987 Constitution.

[43] *Municipality of Sogod v. Rosal,* 278 Phil. 642, 648 (1991).

[44] *Republic v. Bantigue Point Development Corporation,* 684 Phil. 192, 199 (2012).

The law which confers jurisdiction on the Shari'a courts is P.D. No. 1083. The pertinent articles of the law as to the original jurisdiction of the Shari'a courts are as follows:

Art. 143. Original jurisdiction. –

(1) **The Shari'a District Court shall have exclusive original jurisdiction over:**

(a) **All cases involving custody**, guardianship, legitimacy, paternity and filiation arising under this Code;

(b) All cases involving disposition, distribution and settlement of the estate of deceased Muslims, probate of wills, issuance of letters of administration or appointment of administrators or executors regardless of the nature or the aggregate value of the property;

(c) Petitions for the declaration of absence and death and for the cancellation or correction of entries in the Muslim Registries mentioned in Title VI of Book Two of this Code;

(d) All actions arising from customary contracts in which the parties are Muslims, if they have not specified which law shall govern their relations; and

(e) All petitions for mandamus, prohibition, injunction, certiorari, habeas corpus, and all other auxiliary writs and processes in aid of its appellate jurisdiction.

(2) Concurrently with existing civil courts, the Shari'a District Court shall have original jurisdiction over:

(a) Petitions by Muslims for the constitution of a family home, change of name and commitment of an insane person to an asylum;

(b) All other personal and real actions not mentioned in paragraph 1(d) wherein the parties involved are Muslims except those for forcible entry and unlawful detainer, which shall fall under the exclusive original jurisdiction of the Municipal Circuit Court; and

(c) All special civil actions for interpleader or declaratory relief wherein the parties are Muslims or the property involved belongs exclusively to Muslims.

x x x x x x x x x

Art. 155. Jurisdiction. – **The Shari'a Circuit Courts shall have exclusive original jurisdiction over:**

(1) All cases involving offenses defined and punished under this Code.

(2) All civil actions and proceedings between parties who are Muslims or have been married in accordance with Article 13 involving disputes relating to:

(a) Marriage;

(b) Divorce recognized under this Code;

(c) Betrothal or breach of contract to marry;

(d) Customary dower (mahr);

(e) Disposition and distribution of property upon divorce;

(f) Maintenance and support, and consolatory gifts, (mut'a); and

(g) Restitution of marital rights.

(3) All cases involving disputes relative to communal properties.

[Emphases and Underscoring Supplied]

It is clear that the ShCC has exclusive original jurisdiction over civil actions between parties who have been married in accordance with the Muslim law, involving disputes *relating to* divorce under P.D. No. 1083. There is, therefore, no doubt that the ShCC had jurisdiction to confirm the *talaq* between Mendez and Maliga.

Jurisdiction in Custody Case

Article 143 above, however, clearly provides that **the ShDC has exclusive original jurisdiction over all cases involving custody under P.D. No. 1083.** Exclusive jurisdiction is the power of the court to take cognizance of and decide certain cases to the exclusion of any other courts.[45] Original jurisdiction is the power of the court to take judicial cognizance of a case instituted for judicial action for the first time under conditions provided by law.

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[45] Bensaudi I. Arabani, Sr., Philippine Shari'a Courts Procedure, (Quezon City, Philippines: Rex Book Store, Inc., 2000), First Edition, p. 18.

On the other hand, appellate jurisdiction is the authority of a court higher in rank to re-examine the final order of judgment of a lower court which tried the case now elevated for judicial review.[46] Since the two jurisdictions are exclusive of each other, each must be expressly conferred by law. One does not flow from, nor is inferred from the other.[47]

Implication of Article 54

As opined by Secretary Sadain.[48] the ShCC does seem to have ancillary jurisdiction over custody issues as they relate to a divorce decree. Under Article 155, it is provided that the SHCC shall have exclusive original jurisdiction over all civil actions and proceedings involving disputes *relating to* divorce. To quote once more:

Article 155. Jurisdiction. The **Shari'a Circuit Court** shall have exclusive original jurisdiction over

(1) All cases involving offenses defined and punished under this Code.

(2) All civil actions and proceedings between parties who are Muslims or have been married in accordance with Article 13 involving disputes **relating to:**

(a) x x x.

(b) Divorce recognized under this Code.

x x x x x x x x x

Clearly, the provision above clothes the ShCC with power to hear and decide civil actions *relating to* a *talaq* or divorce. It cannot be denied that the issue of custody is a necessary consequence of a divorce proceeding. As Article 54 of P.D. No. 1083 provides:

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[46] Oscar M. Herrera, Remedial Law, (Quezon City, Philippines: Rex Book Store, Inc., 2000), Volume l, p. 59.

[47] *Garcia v. De Jesus,* G.R. No. 88158, March 4, 1992, 206 SCRA 779, 786.

[48] And also pointed out by Associate Justice Presbitero J. Velasco, Jr.

Article 54. Effects of irrevocable talaq or faskh. A *talaq* or *faskh,* as soon as it becomes irrevocable, shall have the following effects:

(a) The marriage bond shall be severed and the spouses may contract another marriage in accordance with this Code;
(b) The spouses shall lose their mutual rights of inheritance;
(c) **The custody of children shall be determined in accordance with Article 78 of this Code;**
(d) The wife shall be entitled to recover from the husband her whole dower in case the *talaq* has been effected after the consummation of the marriage, or one-half thereof if effected before its consummation;
(e) The husband shall not be discharged from his obligation to give support in accordance with Article 67; and
(f) The conjugal partnership, if stipulated in the marriage settlements, shall be dissolved and liquidated.

Though Article 54 does not directly confer jurisdiction to the ShCC to rule on the issue of custody, the Court, nevertheless grants the ShCC ancillary jurisdiction to resolve issues *related to* divorce. The above-quoted provision states categorically that as a consequent effect of divorce, the custody of children shall be determined in accordance with **Article 78** of the Code. In turn, **Article 78** states that the care and custody of **children below seven** whose parents are divorced shall **belong to the mother,** and the minor **above seven but below the age of puberty** may **choose the parent** with whom he/she wants to stay.[49]

To rule that the ShCC is without jurisdiction to resolve issues on custody after it had decided on the issue of divorce, simply

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[49] Art. 78. *Care and custody.* – (1) The care and custody of children below seven years of age whose parents are divorced shall belong to the mother or, in her absence, to the maternal grandmother, the paternal grandmother, the sister and aunts. In their default, it shall devolve upon the father and the nearest paternal relatives. The minor above seven years of age but below the age of puberty may choose the parent with whom he wants to stay.

(2) The unmarried daughter who has reached the age of puberty shall stay with the father; the son, under the same circumstances, shall stay with the mother.

because it appears to contravene Article 143 of P.D. No. 1083, would be antithetical to the doctrine of ancillary jurisdiction. "While a court may be expressly granted the incidental powers necessary to effectuate its jurisdiction, a grant of jurisdiction, in the absence of prohibitive legislation, implies the necessary and usual incidental powers essential to effectuate it, and, subject to existing laws and constitutional provisions, every regularly constituted court has power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction and for the enforcement of its judgments and mandates. Hence, demands, matters or questions ancillary or incidental to, or growing out of, the main action, and coming within the above principles, may be taken cognizance of by the court and determined, since such jurisdiction is in aid of its authority over the principal matter, even though the court may thus be called on to consider and decide matters which, as original causes of action, would not be within its cognizance."[50]

Following the doctrine, the ShCC, in cases involving divorce, possesses the power to resolve the issue of custody, it being a *related issue* to the main cause of action.

At this juncture, the question must be asked: By recognizing the power of the **ShCC** to rule on the issue of custody, would this effectively render Article 143 of P.D. No. 1083 meaningless, considering that the same is unequivocal in providing that the **ShDC** has the exclusive original jurisdiction to decide on all cases involving custody?

The Court rules in the negative.

A distinction must be made between a case for divorce wherein the issue of custody is an *ancillary issue* and a case where custody is the *main issue*. Jurisdiction in the former, as discussed above, lies with the ShCC, as the main cause of action is divorce. The latter on the other hand, where the main cause of action is one of custody, the same must be filed with the ShDC, pursuant to Article 143 of P.D. No. 1083.

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[50] *City of Manila v. Grecia-Cuerdo,* G.R. No. 175723, February 4, 2014, 715 SCRA 182, 206.

Violation of Due Process;
No Notice of Hearing; and
Absence of Hearing

Notwithstanding the foregoing, the award of custody to Maliga by the ShCC was void as it was rendered in violation of the constitutional right of Mendez to due process.

Mendez pointed out that Maliga's urgent motion for issuance of temporary custody was filed on October 9, 2010, even before the main petition for *talaq* was filed on November 2, 2010, and that she never received a summons pertaining to the urgent motion. Indeed, a review of the records reveals that the date of filing was handwritten on the said motion as "October 9, 2010." The motion itself and the registry receipt attached thereto, however, were dated "November 9, 2010." The Court is, thus, of the view that the month "October" was mistakenly written by the receiving clerk instead of "November," and that the motion was filed *subsequent* to the main petition for *talaq* as an ancillary matter.

The Court, nonetheless, agrees with Mendez that the urgent motion lacked the requisite notice of hearing. It is immediately evident from the face of the motion that it did not contain the notice of hearing required by the Rules of Court which has suppletory application to the present case. Section 4 of Rule 15 provides that every written motion shall be set for hearing by the applicant. Every written motion is required to be heard and the notice of hearing shall be served in such manner as to insure its receipt by the other party at least three (3) days before the date of hearing, unless the court for good cause sets the hearing on shorter notice.[51] The notice of hearing is intended to prevent surprise and to afford the adverse party a chance to be heard before the motion is resolved by the court. A seasonable service of a copy of the motion on the adverse party with a notice of hearing indicating the time and place of hearing is a mandatory

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[51] *Bank of the Philippine Islands v. Far East Molasses,* G.R. No. 89125, July 2, 1991, 198 SCRA 689, 698.

requirement that cannot be dispensed with as this is the minimum requirement of procedural due process.[52]

A motion that does not contain a notice of hearing is a mere scrap of paper and presents no question which merits the attention and consideration of the court. It is not even a motion for it does not comply with the rules, and, hence, even the clerk has no right to receive it.[53]

Award of Custody; No Basis

Not only was the award of custody violative of the constitutional right of Mendez to due process, but also both the orders of the ShCC and the ShDC awarding custody of Princess Fatima to Maliga were without evidentiary basis because no hearing was actually conducted prior to the issuance of the order granting the urgent motion. Moreover, there was no explanation given as to why the motion was resolved without notice to, or the participation of, Mendez.

In awarding custody to Maliga, the ShCC merely wrote:

> On the issue of CARE AND CUSTODY of the PARTIES' minor daughter PRINCESS FATIMA, this Court after closely scrutinizing the evidence on hand, deemed it just and proper and/or is convinced that it should be under status quo, remains (sic) with Petitioner DR. JOHN O. MALIGA, for her (PRINCESS FATIMA) best interest in all aspects of life, economically, socially and religiously etc WITHOUT prejudice of the rights of visitation of respondent SHERYL M. MENDEZ any reasonable time of the day and right (sic), and borrow her (PRINCESS FATIMA) provided that it is only within the vicinity of Cotabato City and thereafter, return her, with proper coordination with Petitioner DR. JOHN O. MALIGA, and the latter (DR. JOHN O. MALIGA) is hereby ordered to observe such rights afforded to respondent SHERYL M. MENDEZ.[54]

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[52] *Leobrera v. Court of Appeals,* 252 Phil. 737, 743 (1989).

[53] *Bank of the Philippine Islands v. Far East Molasses, supra* note 51.

[54] Records, pp. 59-60.

Although the ShCC stated that, in deciding on the custody case, it scrutinized the evidence on hand, it was remiss in its duty to state the precise factual and legal basis on which its ruling awarding custody to Maliga was based. Section 14, Article VIII of the 1987 Constitution mandates that decisions must clearly and distinctly state the facts and the law on which they are based. The decisions of courts must be able to address the issues raised by the parties through the presentation of a comprehensive analysis or account of factual and legal findings of the court.[55] It is evident that the ShCC failed to comply with these requirements. It merely stated that it was in Princess Fatima's "best interest in all aspects of life, economically, socially and religiously" that custody be awarded to her father. There was no express finding that Mendez was unfit in any way, or a hint of an explanation as to why Maliga was in a better position to take custody of Princess Fatima.

The ShDC, on the other hand, in affirming the findings of the ShCC, stated that Mendez was disentitled to custody because she had turned apostate, and held that she would remain disqualified until she return to the Islamic faith in accordance with the Muslim Law. It appears, however, that *disqualification* due to *apostasy* under the Muslim Code pertains to *disinheritance* under Article 93 of the Muslim Code,[56] and *not to the custody of children.*

WHEREFORE, the petition is **PARTIALLY GRANTED.** The following are declared **NULL** and **VOID:**

1. the November 12, 2010 and December 3, 2010 Orders of the Shari'a Circuit Court in ShCC Civil Case No. 2010-559, insofar as the ruling on custody and visitation is concerned;

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[55] *Office of the President v. Cataquiz,* 673 Phil. 318, 334 (2011).

[56] Jainal D. Rasul and Ibrahim Ghazali, *Commentaries and Jurisprudence on the Muslim Code of the Philippines*, (Quezon City, Philippines: Central Lawbook Publishing Co., Inc., 1984), p. 260.

2. the August 19, 2011 Order of the Shari'a Circuit Court in ShCC Civil Case No. 2010-559, insofar as the ruling on custody is concerned; and

3. the March 30, 2012 Decision of the Shari'a District Court in SDC Appealed Case No. 2011-19, insofar as the ruling on custody is concerned.

In the August 19, 2011 Order of the Shari'a Circuit Court in ShCC Civil Case No. 2010-559, confirming the pronouncement of *Talaq* (Divorce) by petitioner Dr. John O. Maliga against respondent Sheryl M. Mendez and the giving of consolatory gift *(mut'a)* to her in the amount of ₱24,000.00 is maintained.

The records of the case are hereby ordered **REMANDED** to the Shari'a Circuit Court for appropriate proceedings on the motion of Dr. John O. Maliga for the determination of custody of Princess Fatima M. Maliga.

SO ORDERED.

Sereno C.J., Carpio, Velasco, Jr., Leonardo-de Castro, Brion, Peralta, Bersamin, del Castillo, Villarama, Jr., Perez, Reyes, Perlas-Bernabe, Leonen, and *Jardeleza,*[*] *JJ.,* concur.

EN BANC

[G.R. No. 211140. January 12, 2016]

LORD ALLAN JAY Q. VELASCO, *petitioner, vs.* **HON. SPEAKER FELICIANO R. BELMONTE, JR., SECRETARY GENERAL MARILYN[1] B. BARUA-YAP AND REGINA ONGSIAKO REYES,** *respondents.*

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[*] Corrected.

[1] Originally cited as "Emilia."

SYLLABUS

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *MANDAMUS*; THE PRESENT PETITION IS ONE FOR *MANDAMUS* AND NOT A *QUO WARRANTO* CASE; IT CANNOT BE CLAIMED THAT THE PRESENT PETITION IS ONE FOR THE DETERMINATION OF PETITIONER'S RIGHT TO THE CLAIMED OFFICE.— After a painstaking evaluation of the allegations in this petition, it is readily apparent that this special civil action is really one for *mandamus* and not a *quo warranto* case, contrary to the asseverations of the respondents. A petition for *quo warranto* is a proceeding to determine the right of a person to the use or exercise of a franchise or office and to oust the holder from its enjoyment, if his claim is not well-founded, or if he has forfeited his right to enjoy the privilege. Where the action is filed by a private person, he must prove that he is entitled to the controverted position; otherwise, respondent has a right to the undisturbed possession of the office. In this case, given the present factual milieu, *i.e.*, (*i*) the final and executory resolutions of this Court in G.R. No. 207264; (*ii*) the final and executory resolutions of the COMELEC in SPA No. 13-053 (DC) cancelling Reyes's Certificate of Candidacy; and (*iii*) the final and executory resolution of the COMELEC in SPC No. 13-010 declaring null and void the proclamation of Reyes and proclaiming Velasco as the winning candidate for the position of Representative for the Lone District of the Province of Marinduque – it cannot be claimed that the present petition is one for the determination of the right of Velasco to the claimed office. To be sure, what is prayed for herein is merely the enforcement of clear legal duties and not to try disputed title. That the respondents make it appear so will not convert this petition to one for *quo warranto*.

2. ID.; ID.; ID.; PETITION FOR *MANDAMUS*, EXPLAINED; MINISTERIAL AND DISCRETIONARY ACT, DISTINGUISHED.— Section 3, Rule 65 of the Rules of Court, as amended, provides that any person may file a verified petition for *mandamus* "when any tribunal, corporation, board, officer or person unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station, or unlawfully excludes another from the use and enjoyment of a right or office to which such other is entitled,

and there is no other plain, speedy and adequate remedy in the ordinary course of law." A petition for *mandamus* will prosper if it is shown that the subject thereof is a *ministerial* act or duty, and *not purely discretionary* on the part of the board, officer or person, and that the petitioner has a well-defined, clear and certain right to warrant the grant thereof. The difference between a ministerial and discretionary act has long been established. A purely ministerial act or duty is one which an officer or tribunal performs in a given state of facts, in a prescribed manner, in obedience to the mandate of a legal authority, without regard to or the exercise of his own judgment upon the propriety or impropriety of the act done. If the law imposes a duty upon a public officer and gives him the right to decide how or when the duty shall be performed, such duty is discretionary and not ministerial. The duty is ministerial only when the discharge of the same requires neither the exercise of official discretion or judgment.

3. ID.; ID.; ID.; CIRCUMSTANCES WARRANTING THE GRANT OF THE PETITION FOR *MANDAMUS*.— It is beyond cavil that there is in existence final and executory resolutions of this Court in G.R. No. 207264 affirming the final and executory resolutions of the COMELEC in SPA No.13-053 (DC) cancelling Reyes's Certificate of Candidacy. There is likewise a final and executory resolution of the COMELEC in SPC No. 13-010 declaring null and void the proclamation of Reyes, and proclaiming Velasco as the winning candidate for the position of Representative for the Lone District of the Province of Marinduque. The foregoing state of affairs collectively lead this Court to consider the facts as settled and beyond dispute – **Velasco is the proclaimed winning candidate for the Representative of the Lone District of the Province of Marinduque.** x x x This Court will not give premium to the illegal actions of a subordinate entity of the COMELEC, the PBOC who, despite knowledge of the May 14, 2013 resolution of the COMELEC *En Banc* cancelling Reyes's COC, still proclaimed her as the winning candidate on May 18, 2013. Note must also be made that as early as May 16, 2013, a couple of days before she was proclaimed, Reyes had already received the said decision cancelling her COC. These points clearly show that the much argued proclamation was made in clear defiance of the said COMELEC *En Banc* Resolution. That Velasco now has a well-defined, clear and certain right to

warrant the grant of the present petition for *mandamus* is supported by the following undisputed facts that should be taken into consideration: **First**. At the time of Reyes's proclamation, her COC was already cancelled by the COMELEC *En Banc* in its final finding in its resolution dated May 14, 2013, the effectivity of which was not enjoined by this Court, as Reyes did not avail of the prescribed remedy which is to seek a restraining order within a period of five (5) days as required by Section 13(b), Rule 18 of COMELEC Rules. Since no restraining order was forthcoming, the PBOC should have refrained from proclaiming Reyes. **Second**. This Court upheld the COMELEC decision cancelling respondent Reyes's COC in its Resolutions of June 25, 2013 and October 22, 2013 and these Resolutions are already final and executory. **Third**. As a consequence of the above events, the COMELEC in SPC No. 13-010 cancelled respondent Reyes's proclamation and, in turn, proclaimed Velasco as the duly elected Member of the House of Representatives in representation of the Lone District of the Province of Marinduque. **The said proclamation has not been challenged or questioned by Reyes in any proceeding. Fourth**. When Reyes took her oath of office before respondent Speaker Belmonte, Jr. in open session, Reyes had **NO** valid COC **NOR** a valid proclamation. Thus, to consider Reyes's proclamation and treating it as a material fact in deciding this case will paradoxically alter the well-established legal milieu between her and Velasco. **Fifth**. In view of the foregoing, Reyes **HAS ABSOLUTELY NO LEGAL BASIS** to serve as a Member of the House of Representatives for the Lone District of the Province of Marinduque, and therefore, she **HAS NO LEGAL PERSONALITY** to be recognized as a party-respondent at a *quo warranto* proceeding before the HRET.

4. ID.; ID.; ID.; THE SPEAKER OF THE HOUSE OF REPRESENTATIVES MAY BE COMPELLED BY *MANDAMUS* TO ADMINISTER THE OATH OF THE RIGHTFUL REPRESENTATIVE OF A LEGISLATIVE DISTRICT AND THE SECRETARY GENERAL TO ENTER SAID REPRESENTATIVE'S NAME IN THE ROLL OF MEMBERS OF THE HOUSE OF REPRESENTATIVES.— The present Petition for *Mandamus* seeks the issuance of a writ of *mandamus* to compel respondents Speaker Belmonte, Jr. and Sec. Gen. Barua-Yap to **acknowledge** and **recognize** the final and executory Decisions and Resolution

of this Court and of the COMELEC by administering the oath of office to Velasco and entering the latter's name in the Roll of Members of the House of Representatives. In other words, the Court is called upon to determine whether or not the prayed for acts, *i.e.,* (*i*) the administration of the oath of office to Velasco; and (*ii*) the inclusion of his name in the Roll of Members, are ministerial in character *vis-à-vis* the factual and legal milieu of this case. As we have previously stated, the administration of oath and the registration of Velasco in the Roll of Members of the House of Representatives for the Lone District of the Province of Marinduque **are no longer a matter of discretion or judgment** on the part of Speaker Belmonte, Jr. and Sec. Gen. Barua-Yap. They are legally duty-bound to recognize Velasco as the duly elected Member of the House of Representatives for the Lone District of Marinduque in view of the ruling rendered by this Court and the COMELEC's compliance with the said ruling, now both final and executory. It will not be the first time that the Court will grant Mandamus to compel the Speaker of the House of Representatives to administer the oath to the rightful Representative of a legislative district and the Secretary-General to enter said Representative's name in the Roll of Members of the House of Representatives. x x x Similarly, in this case, by virtue of (***i***) COMELEC *en banc* Resolution dated May 14, 2013 in SPA No. 13-053 (DC); (***ii***) Certificate of Finality dated June 5, 2013 in SPA No. 13-053 (DC); (***iii***) COMELEC *en banc* Resolution dated June 19, 2013 in SPC No. 13-010; (***iv***) COMELEC *en banc* Resolution dated July 10, 2013 in SPA No. 13-053 (DC); and (***v***) Velasco's Certificate of Proclamation dated July 16, 2013, **Velasco is the rightful Representative of the Lone District of the Province of Marinduque; hence, entitled to a writ of *Mandamus*.**

5. ID.; ID.; ID.; ID.; DOCTRINE OF *RES JUDICATA* BY CONCLUSIVENESS OF JUDGMENT, APPLICABLE IN CASE AT BAR; RESTRICTED INTERPRETATION OF *RES JUDICATA* IS INTOLERABLE FOR IT WILL DEFEAT PRIOR RULING OF THE COURT.— As to the view of Reyes and the OSG that since Velasco, Speaker Belmonte, Jr. and Sec. Gen. Barua-Yap are not parties to G.R. No. 207264, Velasco can neither ask for the enforcement of the Decision rendered therein nor argue that the doctrine of

res judicata by conclusiveness of judgment applies to him and the public respondents, this Court maintains that such contention is incorrect. Velasco, along with public respondents Speaker Belmonte, Jr. and Sec. Gen. Barua-Yap, are all legally bound by this Court's judgment in G.R. No. 207264, *i.e.*, essentially, that the COMELEC correctly cancelled Reyes's COC for Member of the House of Representatives for the Lone District of the Province of Marinduque on the ground that the latter was ineligible for the subject position due to her failure to prove her Filipino citizenship and the requisite one-year residency in the province of Marinduque. A contrary view would have our dockets unnecessarily clogged with petitions to be filed in every direction by any and all registered voters not a party to a case to question the final decision of this Court. Such restricted interpretation of *res judicata* is intolerable for it will defeat this Court's ruling in G.R. No. 207264. To be sure, Velasco who was duly proclaimed by COMELEC is a proper party to invoke the Court's final judgment that Reyes was ineligible for the subject position. It is well past the time for everyone concerned to accept what has been adjudicated and take judicial notice of the fact that Reyes's ineligibility to run for and be elected to the subject position had already been long affirmed by this Court. Any ruling deviating from such established ruling will be contrary to the *Rule of Law* and should not be countenanced.

PEREZ, *J.*, *concurring opinion*:

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *MANDAMUS;* DUAL ELEMENTS FOR *MANDAMUS* TO PROSPER OBTAIN IN CASE AT BAR; PETITIONER INDUBITABLY ESTABLISHED HIS CLEAR LEGAL RIGHT TO BE ACKNOWLEDGED AS A MEMBER OF THE HOUSE OF REPRESENTATIVES.— It is a fundamental precept in remedial law that for the extraordinary writ of *mandamus* to be issued, it is essential that the petitioner has **a clear legal right to the thing demanded and** it must be **the imperative duty of the respondent to perform the act required.** As will be demonstrated, it is beyond cavil that the dual elements for the *mandamus* petition to prosper evidently obtain in the case at bar. x x x Well-settled is that the legal right of the petitioner to the performance of the particular act which is sought to be

compelled by *mandamus* must be clear and complete. A clear legal right within the meaning of this rule means a right clearly founded in, or granted by law; a right which is inferable as a matter of law. Here, petitioner indubitably established his right to be acknowledged as a member of the House of Representatives. To elucidate, there were only two (2) candidates in the 2013 congressional race for the Lone District of Marinduque: petitioner Velasco and respondent Reyes. In the initial canvassing results, Reyes garnered more votes than Velasco. Before she could be proclaimed the winner, however, the COMELEC First Division, x x x cancelled Reyes' CoC. x x x Upon resolving with finality that Reyes is ineligible to run for Congress and that her CoC is a nullity, the only logical consequence is to declare Velasco, Reyes' only political rival in the congressional race, as the victor in the polling exercise. This finds basis in the seminal case of *Aratea v. Comelec (Aratea*), wherein it was held that a void CoC cannot give rise to a valid candidacy, and much less to valid votes. x x x Thus, notwithstanding the margin of votes Reyes garnered over Velasco, the votes cast in her favor are considered strays since she is not eligible for the congressional post, a non-candidate in the bid for the coveted seat of Representative for the Lone District of Marinduque. Following the doctrinal teaching in *Aratea*, Velasco, as the only remaining qualified candidate in the congressional race, is, for all intents and purposes, the rightful member of the lower house. x x x [C]onsidering that Reyes' CoC was cancelled and was deemed *void ab initio* by virtue of the final and executory decisions rendered by the COMELEC and this Court, Velasco is [not a] second-placer as claimed by the Dissent; rather, Velasco is the **only placer and the winner** during the May elections and thus, for all intents and purposes, Velasco has a clear legal right to office as Representative of the Lone District of Marinduque.

2. **ID.; ID.; ID.; ID.; PETITIONER SEEKS THE PERFORMANCE OF MINISTERIAL ACT SINCE RESPONDENTS SPEAKER AND SECRETARY GENERAL OF THE HOUSE OF REPRESENTATIVES REFUSED TO ALLOW HIM TO SIT IN THE HOUSE OF REPRESENTATIVES.—** Anent the second element for *mandamus* to lie, it is critical that the duty the performance of which is to be compelled be ministerial in nature, rather than discretionary. A purely ministerial act or duty is

one that an officer or tribunal performs in a given state of facts, in a prescribed manner, in obedience to the mandate of a legal authority, without regard to or the exercise of its own judgment upon the propriety or impropriety of the act done. The writ neither confers powers nor imposes duties. It is simply a command to exercise a power already possessed and to perform a duty already imposed. Without a doubt, petitioner herein seeks the performance of a ministerial act, without which he is unjustly deprived of the enjoyment of an office that he is clearly entitled to, as earlier discussed. It must be borne in mind that this petition was brought to fore because, despite repeated demands from petitioner and their receipt of the "*Certificate of Canvass of Votes and Proclamation of Winning Candidate for the position of Member of House of Representatives for the Lone District of Marinduque*," respondents Belmonte and Barua-Yap refused to allow Velasco to sit in the Lower House as Marinduque Representative[.] The non-discretionary function of respondents Belmonte and Barua-Yap is underscored in *Codilla, Sr. v. De Venecia (Codilla)*, wherein the Court held that the House Speaker and the Secretary General of the Lower House are duty-bound to recognize the legally elected district representatives as members of the House of Representatives.

3. ID.; ID.; ID.; RULINGS OF THE COURT UPHOLDING THE CANCELLATION OF THE CERTIFICATE OF CANDIDACY OF A CANDIDATE IS BINDING UPON THE SPEAKER AND THE SECRETARY GENERAL OF THE HOUSE OF REPRESENTATIVES ALTHOUGH THEY WERE NOT MADE PARTIES THERETO.— It matters not that respondents Belmonte and Barua-Yap are non-parties to *Reyes*. It is erroneous to claim that Our final ruling therein is not binding against Belmonte and Barua-Yap on ground that they were neither petitioners nor respondents in the said case, and that they were not given the opportunity to be heard on the issues raised therein. Again, SPA No. 13-053, G.R. No. 207264, and SPA No. 13-010 are not civil cases and do not involve purely private rights which requires notice and full participation of respondents Belmonte and Barua-Yap. It must also be noted that the said case originated as petition to deny or cancel Reyes' CoC, which does not require the participation

of the Speaker and Secretary General of the House of Representatives. In fact, there is nothing in BP 881, the COMELEC Rules of Procedure, nor in Rule 64, in relation to Rule 65 of the Rules of Court, which requires that the Speaker and Secretary General to be included either in the original petition for cancellation of CoC or when the case is elevated to this Court via petition for certiorari. In any event, the fact that they were not made parties in *Reyes* does not mean that the public respondents are not bound by the said decision considering that the same already form part of the legal system of the Philippines.

4. POLITICAL LAW; ELECTIONS; THE AUTHORITY TO REVIEW, MODIFY OR ANNUL THE INVALID ACTS OF THE PROVINCIAL BOARD OF CANVASSERS (PBOC) IS LODGED WITH THE COMELEC.— The Dissent also claims that when respondent Reyes was proclaimed by the PBOC as the duly elected Representative of the Lone District of Marinduque on May 18, 2013, petitioner Velasco should have continued his election protest *via* a *quo warranto* petition before HRET. This suggestion is legally flawed considering that the HRET is without authority to review, modify, more so annul, the illegal acts of PBOC. On the contrary, this authority is lodged with the COMELEC and is incidental to its power of "direct control and supervision over the Board of Canvassers." Therefore, the COMELEC is the proper entity that can legally and validly nullify the acts of the PBOC. x x x Furthermore, the illegal proclamation of the PBOC cannot operate to automatically oust the COMELEC of its supervisory authority over the PBOC.

5. ID.; ID.; THE PENDENCY OF TWO *QUO WARRANTO* CASES BEFORE THE HOUSE OF REPRESENTATIVES ELECTORAL TRIBUNAL (HRET) CANNOT DIVEST THE COMELEC AND THE COURT OF THEIR JURISDICTION OVER THE ISSUE ON ELIGIBILITY OF A CANDIDATE.— The Dissent makes much of the cases questioning Reyes' eligibility that are pending before the HRET, and argues that the Court should deny the instant petition and defer to the action of the electoral tribunal. The argument is specious. It is of no moment that there are two *quo warranto* cases currently pending before the HRET that seek to disqualify Reyes from holding the congressional office. These cases cannot

oust the COMELEC and the Court of their jurisdiction over the issue on Reyes' eligibility, which they have already validly acquired and exercised in SPA No. 13-053 and *Reyes*. The petitioners in the *quo warranto* cases themselves recognize the enforceability of the COMELEC and the Court's ruling in SPA No. 13-053 and *Reyes,* and even invoked the rulings therein to support their respective petitions. They seek not a trial *de novo* for the determination of whether or not Reyes is eligible to hold office as Representative, but seek the implementation of the final and executory decisions of the COMELEC and of the High Court. Interestingly, Reyes merely prayed for the dismissal of these cases, but never asked the HRET for any affirmative relief to counter the executory rulings in SPA No. 13-053, G.R. No. 207264, and SPA No. 13-010.

LEONEN, *J.*, *concurring opinion*:

1. POLITICAL LAW; ELECTIONS; ELECTION CONTEST, NATURE AND PURPOSE OF; THE HOUSE OF REPRESENTATIVES ELECTORAL TRIBUNAL (HRET) HAS THE SOLE JURISDICTION OVER ELECTION CONTESTS INVOLVING MEMBERS OF THE HOUSE OF REPRESENTATIVES; THE COURT DOES NOT HAVE JURISDICTION TO RULE ON A PETITION FOR *MANDAMUS* THAT WOULD RENDER THE *QUO WARRANTO* CASES PENDING BEFORE THE HRET MOOT AND ACADEMIC.— An election contest, whether an election protest or petition for quo warranto, is a remedy "to dislodge the winning candidate from office" and "to establish who is the *actual winner* in the election." The action puts in issue the validity of the incumbent's claim to the office. A contest contemplated by the Constitution settles disputes as to who is rightfully entitled to a position. It is not this court but the House of Representatives Electoral Tribunal that has sole jurisdiction of contests involving Members of the House of Representatives. This can be filed through (a) an election protest under Rule16 of the 2011 Rules of the House of Representatives Electoral Tribunal; and (b) quo warranto under Rule 17 of the 2011 Rules of the House of Representatives Electoral Tribunal. Thus, while the petitions for quo warranto were pending before the House of Representatives Electoral Tribunal, this court did not have the jurisdiction to rule on

this Petition for Mandamus. A grant of the writ of mandamus would have openly defied the Constitution and, in all likelihood, would muddle the administration of justice as it would have rendered the quo warranto cases properly pending before the House of Representatives Electoral Tribunal moot and academic. We would have arrogated upon ourselves the resolution of then pending House of Representatives Electoral Tribunal cases.

2. **ID.; ID.; ID.; ID.; ANY ALLEGED INVALIDITY OF THE PROCLAMATION OF A MEMBER OF THE HOUSE OF REPRESENTATIVES DOES NOT DIVEST THE HRET OF JURISDICTION; THE POWER OF HRET TO BE THE SOLE JUDGE OF ELECTION CONTESTS IS CONFERRED BY THE CONSTITUTION.—** When Reyes was proclaimed by the Provincial Board of Canvassers as the duly elected Representative of the Lone District of Marinduque on May 18, 2013, Velasco should have continued his election protest or filed a quo warranto Petition before the House of Representatives Electoral Tribunal. Instead, Velasco filed a Petition to annul the proceedings of the Provincial Board of Canvassers and the proclamation of Reyes on May 20, 2013 before the Commission on Elections. At that time, the Commission on Elections no longer had jurisdiction over the Petition that was filed after Reyes' proclamation. Any alleged invalidity of the proclamation of a Member of the House of Representatives does not divest the House of Representatives Electoral Tribunal of jurisdiction. Should there have been pending cases at the House of Representatives Electoral Tribunal, we should have deferred to the action of the constitutional body given the competence to act initially on the matter. x x x The House of Representatives Electoral Tribunal is the sole judge of contests involving Members of the House of Representatives. This is a power conferred by the sovereign through our Constitution.

3. **REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *MANDAMUS;* UNDER THE SITUATION ATTENDANT IN THIS CASE, THERE IS NO OTHER REMEDY TO ENFORCE THE FINAL DECISION OF THE COURT EXCEPT THROUGH *MANDAMUS*.—** [T]he House of Representatives Electoral Tribunal already ruled on the two quo warranto cases against Reyes that were consolidated. The House of Representatives Electoral Tribunal held that it had no jurisdiction to resolve

the petitions for quo warranto relying on this court's Decision in *Reyes v. Commission on Elections*. x x x The tribunal dismissed the quo warranto cases holding that the Commission on Elections' cancellation of Reyes' certificate of candidacy resulted in the nullification of her proclamation. x x x In effect, the decision by the sole judge of all electoral contests acknowledges Reyes' lack of qualifications. While maintaining my dissent in *Reyes v. Commission on Elections*, I now acknowledge that there is no other remedy in law or equity to enforce a final decision of this court except through mandamus. Applying *Codilla, Sr. v. Hon. de Venecia*, this Petition for Mandamus should be granted.

BRION, *J.*, *dissenting opinion*:

1. **REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *MANDAMUS;* NATURE AND CONCEPT, EXPLAINED.—** *Mandamus* is a command issuing from a court of law of competent jurisdiction, in the name of the state or sovereign, *directed to some* ***inferior*** *court, tribunal, or board, or to some corporation or person,* requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law. The writ of *mandamus* is an ***extraordinary remedy*** *issued only in cases of extreme necessity* where the *ordinary course of procedure is powerless to afford an adequate and speedy relief* to one who has a *clear legal right to the performance of the act* to be compelled. x x x Moreover, the remedy of *mandamus* is employed to compel the performance of a ***ministerial duty*** after performance of the duty has been refused.

2. **ID.; ID.; ID.; MINISTERIAL AND DISCRETIONARY ACTS, DISTINGUISHED.— "Discretion,"** when applied to public functionaries, means the power or right conferred upon them by law of acting officially, under certain circumstances, uncontrolled by the judgment or sense of propriety of others. If the law imposes a duty upon a public officer and gives him the right to decide how and when the duty shall be performed, such duty is discretionary and not ministerial. In contrast, a purely ministerial act or duty is one which an officer or tribunal performs under a given state of facts, in a prescribed manner, in obedience to the mandate of a legal authority, without regard

to or the exercise of his own judgment on the propriety or impropriety of the act done. The duty is ministerial only when the discharge of the same requires neither the exercise of official discretion or judgment.

3. **ID.; ID.; ID.; REQUIREMENTS FOR THE ISSUANCE OF THE WRIT OF *MANDAMUS*.—** In the light of its nature, the writ of *mandamus* will issue only if the following requirements are complied with: ***First***, *the petitioner has a* ***clear and unmistakable legal right*** *to the act demanded.* x x x The writ contemplates only those **rights** which are **founded in law, are specific, certain, clear, established, complete, undisputed or unquestioned, and are without any semblance or color of doubt.** In situations where the right claimed, or the petitioner's entitlement to it, is unclear, the writ of *mandamus* will not lie. x x x ***Second,*** *it must be the duty of the respondent to perform the act because it is mandated by law.* The act must be clearly and peremptorily enjoined by law or by reason of the respondent's official station. It must be the imperative duty of the respondent to perform the act required. ***Third****, the respondent unlawfully neglects the performance of the duty enjoined by law or unlawfully excludes the petitioner from the use or enjoyment of the right or office.* ***Fourth,*** *the act to be performed is ministerial, not discretionary.* ***Fifth*** **and last***, there is no other plain, speedy and adequate remedy in the ordinary course of law.*

4. **ID.; ID.; ID.; ID.; PETITIONER FAILED TO SHOW THAT HE HAS A CLEAR AND UNMISTAKABLE RIGHT TO THE POSITION OF MEMBER OF THE HOUSE OF REPRESENTATIVES.—** Velasco's cited legal grounds for the issuance of the writ of mandamus in his favor are the final rulings in the following cases: **SPA No. 13-053** and ***Reyes v. Comelec***, and **SPC No.13-010.** x x x **In sum**, the Comelec's rulings in SPA No. 13-053 and SPC No. 13-010, and the Court's rulings in *Reyes v. Comelec* did not establish a clear and unmistakable right in Velasco's favor to the position of the Representative of Marinduque. At most, Velasco's right to hold the congressional seat based on these rulings is substantially doubtful. Unless this substantial doubt is settled, Velasco cannot claim as of right any entitlement, and cannot also compel the respondents to admit him, to HOR membership through the Court's issuance of a writ of *mandamus.*

5. ID.; ID.; ID.; ID.; PETITIONER FAILED TO SHOW THAT THERE IS NO OTHER PLAIN, SPEEDY, AND ADEQUATE REMEDY AVAILABLE IN THE ORDINARY COURSE OF LAW TO SECURE TO HIM THE CONGRESSIONAL SEAT.— I submit that Velasco failed to show that there is **no other plain, speedy, and adequate remedy** available in the ordinary course of law to secure to him the congressional seat. I reiterate and emphasize once more that respondent Reyes became a Member of the HOR on June 30, 2013, after her proclamation, oath, and assumption to office. Whether the Court views these circumstances under the restrictive standard of *Reyes v. Comelec* to be the legally correct standard or simply the applicable one under the circumstances of the petition, respondent Reyes undoubtedly has complied with the conditions for HOR membership that *Reyes v. Comelec* laid down. Since Reyes is a member of the HOR, any challenge against her right to hold the congressional seat or which may have the effect of removing her from the office – whether pertaining to her election, returns or qualifications – now rests with the HRET. Viewed by itself and in relation to the surrounding cited cases and circumstances, Velasco's present petition cannot but be a challenge against respondent Reyes' election, returns, and qualifications, hiding behind the cloak of a petition for *mandamus*. x x x [T]he Court should recognize this kind of challenge for what it really is – a challenge that properly belongs to the domain of the HRET and one that should be raised before that tribunal through the proper action.

6. POLITICAL LAW; CONSTITUTIONAL LAW; PRINCIPLE OF SEPARATION OF POWERS; *MANDAMUS* WILL NOT GENERALLY LIE AGAINST A CO-EQUAL AND COORDINATE BRANCH; THERE IS NO COMPELLING AND EQUITABLE REASON TO JUSTIFY THE GRANT OF THE PETITION FOR *MANDAMUS* IN CASE AT BAR.— In the context of the separation of powers principle, I submit that the Court must proceed with greater caution before issuing the writ against a co-equal branch, notwithstanding the concurrence of the requirements. **As a general rule, *mandamus* will not lie against a coordinate branch.** The rule proceeds from the obvious reason that none of the three departments is inferior to the others; by its very nature, the writ of *mandamus* is available against an **inferior** court, tribunal,

body, corporation, or person. With respect to a coordinate and co-equal branch, the issuance can be justified only under the Court's expanded jurisdiction under Article VIII, Section 1 of the Constitution and under the ***most compelling circumstances and equitable reasons.*** I submit that no grave abuse of discretion intervened in the present case to justify resort to the Court's expanded jurisdiction. Neither are there compelling and equitable reasons to justify a grant as ***there is a remedy in law that was available to petitioner Velasco*** (for reasons of his own, he has failed to pursue the remedy before the HRET to its full fruition) and ***that is available now*** – to present the final rulings in the cited HRET cases to the HOR for its own action on an internal matter it zealously guards.

APPEARANCES OF COUNSEL

Marcelino Michael I. Atanante IV for petitioner.

Roger R. Rayel for public respondent Regina Ongsiako Reyes.

The Solicitor General for public respondents Feliciano R. Belmonte, Jr., and Marilyn B. Barua-Yap.

D E C I S I O N

LEONARDO-DE CASTRO, *J.*:

In the same manner that this Court is cautioned to be circumspect because one party is the son of a sitting Justice of this Court, so too must we avoid abjuring what ought to be done as dictated by law and justice solely for that reason.

Before this Court is a Petition for *Mandamus* filed under Rule 65 of the Rules of Court, as amended, by Lord Allan Jay Q. Velasco (Velasco) against Hon. Feliciano R. Belmonte, Jr. (Speaker Belmonte, Jr.), *Speaker,* House of Representatives, Hon. Marilyn B. Barua-Yap (Sec. Gen. Barua- Yap), *Secretary General,* House of Representatives, and Hon. Regina Ongsiako Reyes (Reyes), *Representative,* Lone District of the Province of Marinduque.

Velasco principally alleges that he is the *"legal and rightful winner during the May 13, 2013 elections in accordance*

with final and executory resolutions of the Commission on Elections (COMELEC) and [this] Honorable Court;"[2] thus, he seeks the following reliefs:

a. that a WRIT OF MANDAMUS against the HON. SPEAKER FELICIANO BELMONTE, JR. be issued ordering said respondent to administer the proper OATH in favor of petitioner Lord Allan Jay Q. Velasco for the position of Representative for the Lone District of Marinduque; .and allow petitioner to assume the position of representative for Marinduque and exercise the powers and prerogatives of said position of Marinduque representative;

b. that a WRIT OF MANDAMUS against SECRETARY-GENERAL [MARILYN] BARUA-YAP be issued ordering said respondent to REMOVE the name of Regina O. Reyes in the Roll of Members of the House of Representatives and to REGISTER the name of petitioner Lord Allan Jay Q. Velasco, herein petitioner, in her stead; and

c. that a TEMPORARY RESTRAINING ORDER be issued to RESTRAIN, PREVENT and PROHIBIT respondent REGINA ONGSIAKO REYES from usurping the position of Member of the House of Representatives for the Lone District of Marinduque and from further exercising the prerogatives of said position and performing the duties pertaining thereto, and DIRECTING her to IMMEDIATELY VACATE said position.[3]

The pertinent facts leading to the filing of the present petition are:

On October 10, 2012, one Joseph Socorro Tan (Tan), a registered voter and resident of the Municipality of Torrijos, Marinduque, filed with the Commission on Elections (COMELEC) a petition[4] to deny due course or cancel the Certificate of Candidacy (COC) of Reyes as candidate for the

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[2] *Rollo* (G.R. No. 201140), pp. 3-4.

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

[4] Docketed as SPA No. 13-053 (DC).

position of Representative of the Lone District of the Province of Marinduque. In his petition, **Tan alleged that Reyes made several material misrepresentations in her COC,** *i.e.,* "(i) that she is a resident of Brgy. Lupac, Boac, Marinduque; *(ii)* that she is a natural-born Filipino citizen; *(iii)* that she is not a permanent resident of, or an immigrant to, a foreign country; *(iv)* that her date of birth is July 3, 1964; (*v*) that her civil status is single; and finally *(vi)* that she is eligible for the office she seeks to be elected to."[5] The case was docketed as **SPA No. 13-053 (DC)**, entitled *"Joseph Socorro B. Tan v. Atty. Regina Ongsiako Reyes."*

On March 27, 2013, the COMELEC First Division resolved to grant the petition; hence, Reyes's COC was accordingly cancelled. The dispositive part of said resolution reads:

> **WHEREFORE,** in view of the foregoing, the instant Petition is **GRANTED**. Accordingly, the Certificate of Candidacy of respondent REGINA ONGSIAKO REYES is hereby **CANCELLED**.[6]

Aggrieved, Reyes filed a motion for reconsideration thereto.

But while said motion was pending resolution, the synchronized local and national elections were held on May 13, 2013.

The day after, or on May 14, 2013, the COMELEC *En Banc* affirmed the resolution of the COMELEC First Division, to wit:

> **WHEREFORE,** premises considered, the Motion for Reconsideration is hereby **DENIED** for lack of merit. The March 27, 2013 Resolution of the Commission (First Division) is hereby **AFFIRMED**.[7]

A copy of the foregoing resolution was received by the Provincial Election Supervisor of Marinduque, through Executive Assistant Rossini M. Oscadin, on May 15, 2013.

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[5] *Rollo* (G.R. No. 201140), pp. 31-32.

[6] *Id*. at 42.

[7] *Id*. at 47.

Likewise, Reyes's counsel, Atty. Nelia S. Aureus, received a copy of the same on May 16, 2013.

On May 18, 2013, despite its receipt of the May 14, 2013 COMELEC Resolution, the Marinduque Provincial Board of Canvassers (PBOC) proclaimed Reyes as the winner of the May 13, 2013 elections for the position of Representative of the Lone District of Marinduque.

On May 31, 2013, Velasco filed an *Election Protest Ad Cautelam* against Reyes in the House of Representatives Electoral Tribunal (HRET) docketed as **HRET Case No. 13-028**, entitled "*Lord Allan Jay Q. Velasco v. Regina Ongsiako Reyes*."

Also on the same date, a *Petition for Quo Warranto Ad Cautelam* was also filed against Reyes in the HRET docketed as **HRET Case No. 13-027**, entitled "*Christopher P. Matienzo v. Regina Ongsiako Reyes*."

On June 5, 2013, the COMELEC *En Banc* issued a *Certificate of Finality*[8] in **SPA No. 13-053 (DC)**, which provides:

> **NOW, THEREFORE,** considering that more than twenty-one (21) days have lapsed since the date of the promulgation with no Order issued by the Supreme Court restraining its execution, the Resolution of the Commission *en banc* promulgated on May 14, 2013 is hereby declared **FINAL** and **EXECUTORY**.[9]

On June 7, 2013, Speaker Belmonte, Jr. administered the oath of office to Reyes.

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[8] *Id*. at 65-67.

[9] *Id*. at 67. Section 13, Rule 18 of the 1993 COMELEC Rules of Procedure in relation to Paragraph 2, Section 8 of Resolution No. 9523, provides that a decision or resolution of the COMELEC *En Banc* in special actions and special cases shall become final and executory five (5) days after its promulgation unless a restraining order is issued by the Supreme Court. Section 3, Rule 37, Part VII also provides that decisions in petitions to deny due course to or cancel certificates of candidacy, to declare a candidate as nuisance candidate or to disqualify a candidate, shall become final and executory after the lapse of five (5) days from promulgation, unless restrained by the Supreme Court.

On June 10, 2013, Reyes filed before this Court a Petition for *Certiorari* docketed as **G.R. No. 207264**, entitled *"Regina Ongsiako Reyes v. Commission on Elections and Joseph Socorro Tan,"* assailing ***(i)*** the May 14, 2013 Resolution of the COMELEC *En Banc,* which denied her motion for reconsideration of the March 27, 2013 Resolution of the COMELEC First Division cancelling her. Certificate of Candidacy (for material misrepresentations made therein); and ***(ii)*** the June 5, 2013 Certificate of Finality.

In the meantime, it appears that Velasco filed a *Petition for Certiorari* before the COMELEC docketed as **SPC No. 13-010**, entitled *"Rep. Lord Allan Jay Q. Velasco vs. New Members/Old Members of the Provincial Board of Canvassers (PBOC) of the Lone District of Marinduque and Regina Ongsiako Reyes,"* **assailing the proceedings of the PBOC and the proclamation of Reyes as null and void**.

On June 19, 2013, however, the COMELEC denied the aforementioned petition in SPC No. 13-010.

On June 25, 2013, in **G.R. No. 207264**, this Court promulgated a Resolution dismissing Reyes's petition, *viz.:*

IN VIEW OF THE· FOREGOING, the instant petition is **DISMISSED**, finding no grave abuse of discretion on the part of the Commission on Elections. The 14 May 2013 Resolution of the COMELEC *En Banc* affirming the 27 March 2013 Resolution of the COMELEC First Division is upheld.[10]

Significantly, this Court held that Reyes cannot assert that it is the HRET which has jurisdiction over her since she is not yet considered a Member of the House of Representatives. This Court explained that to be considered a Member of the House of Representatives, there must be a concurrence of the following requisites: ***(i)*** a valid proclamation, ***(ii)*** a proper oath, and ***(iii)*** assumption of office.[11]

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[10] *Id*. at 82.

[11] *Id*. at 74.

On June 28, 2013, Tan filed a *Motion for Execution* (of the March 27, 2013 Resolution of the COMELEC First Division and the May 14, 2013 Resolution of the COMELEC *En Banc)* in **SPA No. 13-053 (DC)**, wherein he prayed that:

> [A]n Order be issued granting the instant motion; and cause the immediate EXECUTION of this Honorable Commission's Resolutions dated March 27, 2013 and May 14, 2013; CAUSE the PROCLAMATION of LORD ALLAN JAY Q. VELASCO as the duly elected Member of the House of Representatives for the Lone District of Marinduque, during the May 2013 National and Local Elections.[12]

At noon of June 30, 2013, it would appear that Reyes assumed office and started discharging the functions of a Member of the House of Representatives.

On July 9, 2013, in **SPC No. 13-010**, acting on the motion for reconsideration of Velasco, the COMELEC *En Banc* reversed the June 19, 2013 denial of Velasco's petition and declared null and void and without legal effect the proclamation of Reyes. The dispositive part reads:

> WHEREFORE, in view of the foregoing, the instant motion for reconsideration is hereby GRANTED. The assailed June 19, 2013 Resolution of the First Division is REVERSED and SET ASIDE.
>
> Corollary thereto, the May 18, 2013 proclamation of respondent REGINA ONGSIAKO REYES is declared NULL and VOID and without any legal force and effect. **Petitioner LORD ALLAN JAY Q. VELASCO is hereby proclaimed the winning candidate** for the position of representative in the House of Representatives for the province of Marinduque.[13] (Emphasis supplied.)

Significantly, the aforequoted Resolution has not been challenged in this Court.

On July 10, 2013, in **SPA No. 13-053 (DC)**, the COMELEC *En Banc,* issued an Order ***(i)*** granting Tan's motion for execution (of the May 14, 2013 Resolution); and ***(ii)*** directing the

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[12] *Id*. at 106.

[13] *Id*. at 267.

reconstitution of a new PBOC of Marinduque, as well as the proclamation by said new Board of Velasco as the duly elected Representative of the Lone District of Marinduque. The *fallo* of which states:

IN VIEW OF THE FOREGOING; the Commission hereby GRANTS the instant Motion. Accordingly, a new composition of the Provincial Board of Canvassers of Marinduque is hereby constituted to be composed of the following:

1. Atty. Ma. Josefina E. Dela Cruz -Chairman
2. Atty. Abigail Justine Cuaresma-Lilagan -Vice Chairman
3. Dir. Ester Villaflor-Roxas -Member
4. Three (3) Support Staffs

For this purpose, the Commission hereby directs, after due notice to the parties, the convening of the New Provincial Board of Canvassers of Marinduque on July 16, 2013 (Tuesday) at 2:00 p.m., at the COMELEC Session Hall. 8th Floor. PDG Intramuros, Manila and to PROCLAIM LORD ALLAN JAY Q. VELASCO as the duly elected Member of the House of Representatives for the Lone District of Marinduque in the May 13, 2013 National and Local Elections.

Further, Director Ester Villaflor-Roxas is directed to submit before the New Provincial Board of Canvassers (NPBOC) a certified true copy of the votes of congressional candidate Lord Allan Jay Q. Velasco in the 2013 National and Local Elections.

Finally, the NPBOC of the Province of Marinduque is likewise directed to furnish copy of the Certificate of Proclamation to the Department of Interior and Local Government (DILG) and the House of Representatives.[14]

On July 16, 2013, the newly constituted PBOC of Marinduque proclaimed herein petitioner Velasco as the duly elected Member of the House of Representatives for the Lone District of Marinduque with 48,396 votes obtained from 245 clustered precincts.[15]

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[14] *Id*. at 107.

[15] *Id*. at 109. Certificate of Canvass of Votes and Proclamation of Winning Candidate for the Position of Member of House of Representatives for the Lone District of Marinduque.

On July 22, 2013, the 16th Congress of the Republic of the Philippines formally convened in a joint session. On the same day, Reyes, as the recognized elected Representative for the Lone District of Marinduque, along with the rest of the Members of the House of Representatives, took their oaths in open session before Speaker Belmonte, Jr.

On July 23, 2013, Reyes filed a *Manifestation and Notice of Withdrawal of Petition* "without waiver of her arguments, positions, defenses/causes of action as will be articulated in the HRET which is now the proper forum."[16]

On October 22, 2013, Reyes's motion for reconsideration[17] (of this Court's June 25, 2013 Resolution in **GR. No. 207264)** filed on July 15, 2013, was denied by this Court, *viz.:*

WHEREFORE, The Motion for Reconsideration is DENIED. The dismissal of the petition is affirmed. Entry of Judgment is ordered.[18]

On November 27, 2013, Reyes filed a *Motion for Leave of Court to File and Admit Motion for Reconsideration* in G.R. No. 207264.

On December 3, 2013, said motion was treated as a second motion for reconsideration and was denied by this Court.

On December 5, 2013 and January 20, 2014, respectively, Velasco sent two letters to Reyes essentially demanding that she vacate the office of Representative of the Lone District of Marinduque and to relinquish the same in his favor.

On December 10, 2013, Velasco wrote a letter to Speaker Belmonte, Jr. requesting, among others, that he be allowed to assume the position of Representative of the Lone District of Marinduque.

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[16] *Rollo* (G.R. No. 207264), pp. 409-412.

[17] *Id*. at 308-376.

[18] *Rollo* (G.R. No. 201140), p. 122.

On December 11, 2013, in **SPC No. 13-010,** acting on the Motion for Issuance of a Writ of Execution filed by Velasco on November 29, 2013, praying that:

> WHEREFORE, it is respectfully prayed that a writ of execution be ISSUED to implement and enforce the May 14, 2013 Resolution in SPA No. 13-053, the July 9, 2013 Resolution in SPC No. 13-010 and the July 16, 2013 Certificate of Proclamation of Petitioner Lord Allan Jay Q. Velasco as Representative of Marinduque. It is further prayed that a certified true copy of the writ of execution be personally served and delivered by the Commission's bailiff to Speaker Feliciano Belmonte for the latter's implementation and enforcement of the aforementioned May 14, 2013 Resolution and July 9, 2013 Resolution and the July 16, 2013 Certificate of Proclamation issued by the Special Board of Canvassers of the Honorable Commission.[19]

the COMELEC issued an Order[20] dated December 11, 2013 directing, *inter alia,* that all copies of its Resolutions in SPA No. 13-053 (DC) and SPC No. 13-010, the Certificate of Finality dated June 5, 2013, the Order dated July 10, 2013, and the Certificate of Proclamation dated July 16, 2013 be forwarded and furnished to Speaker Belmonte, Jr. for the latter's information and guidance.

On February 4, 2014, Velasco wrote another letter to Speaker Belmonte, Jr. reiterating the above-mentioned request but to no avail.

On February 6, 2014, Velasco also wrote a letter to Sec. Gen. Barua-Yap reiterating his earlier requests (July 12 and 18, 2013) to delete the name of Reyes from the Roll of Members and register his name in her place as the duly elected Representative of the Lone District of Marinduque.

However, Velasco relates that his efforts proved futile. He alleges that despite all the letters and requests to Speaker Belmonte, Jr. and Sec. Gen. Barua-Yap, they refused to recognize him as the duly elected Representative of the Lone District of

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[19] *Id*. at 269.

[20] *Id*. at 269-272.

Marinduque. Likewise, in the face of numerous written demands for Reyes to vacate the position and office of the Representative of the Lone District of Marinduque, she continues to discharge the duties of said position.

Hence, the instant Petition for *Mandamus* with prayer for issuance of a temporary restraining order and/or injunction anchored on the following Issues:

A. Whether or not Speaker Belmonte, Jr. can be COMPELLED, DIRECTED and ORDERED by a Writ of Mandamus to administer the oath in favor of petitioner as duly elected Marinduque Representative and allow him to assume said position and exercise the prerogatives of said office.

B. Whether or not respondent SG Barna-Yap can be COMPELLED, DIRECTED and ORDERED by a Writ of Mandamus to delete the name of respondent Reyes from the Roll of Members of the House and include the name of the Petitioner in the Roll of Members of the House of Representatives.

C. Whether or not a TEMPORARY RESTRAINING ORDER (TRO) and a Writ of PERMANENT. INJUNCTION can be issued to prevent, restrain and prohibit respondent Reyes from exercising the prerogatives and performing the functions as Marinduque Representative, and to order her to VACATE the said office.[21]

As to the first and second issues, Velasco contends that he *"has a well- defined and clear legal right and basis to warrant the grant of the writ of mandamus* ."[22] He insists that the final and executory decisions of the COMELEC in SPA No. 13-053 (DC), and this Court in G.R. No. 207264, as well as the nullification of respondent Reyes's proclamation and his subsequent proclamation as the duly elected Representative of the Lone District of Marinduque, collectively give him the legal right to claim the congressional seat.

Thus, he contends that it is the ministerial duty of *(i)* respondent Speaker Belmonte, Jr. *"to administer the oath to [him] and*

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

[22] *Id*. at 14.

to allow him to assume and exercise the prerogatives of the congressional seat for Marinduque representative;"[23] and *(ii)* respondent Sec. Gen. Barua-Yap *"to register [his] name x x x as the duly elected member of the House and delete the name of respondent Reyes from the Roll of Members."*[24] Velasco anchors his position on *Codilla, Sr. v. De Venecia,*[25] citing a statement of this Court to the effect that the Speaker of the House of Representatives has the ministerial duty to recognize the petitioner therein (Codilla) as the duly elected Representative of the Fourth District of Leyte.

Despite the foregoing, Velasco asserts that both respondents Speaker Belmonte, Jr. and Sec. Gen. Barua-Yap are unlawfully neglecting the performance of their alleged ministerial duties; thus, illegally excluding him (Velasco) from the enjoyment of his right as the duly elected Representative of the Lone District of Marinduque.[26]

With respect to the third issue, Velasco posits that the *"continued usurpation and unlawful holding of such position by respondent Reyes has worked injustice and serious prejudice to [him] in that she has already received the salaries, allowances, bonuses and emoluments that pertain to the position of Marinduque Representative since June 30, 2013 up to the present in the amount of around several hundreds of thousands of pesos."* Therefore, he prays for the issuance of a temporary restraining order and a writ of permanent injunction against respondent Reyes to *"restrain, prevent and prohibit [her] from usurping the position."*[27]

In her Comment, Reyes contends that the petition is actually one for *quo warranto* and not mandamus given that it essentially

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

[24] *Id*. at 20.

[25] 442 Phil. 135, 189-190 (2002).

[26] *Rollo* (G.R. No. 201140), p. 21.

[27] *Id*. at 24-25.

seeks a declaration that she usurped the subject office; and the installation of Velasco in her place by Speaker Belmonte, Jr. when the latter administers his oath of office and enters his name in the Roll of Members. She argues that, being a collateral attack on a title to public office, the petition must be dismissed as enunciated by the Court in several cases.[28]

As to the issues presented for resolution, Reyes questions the jurisdiction of the Court over *Quo Warranto* cases involving Members of the House of Representatives. She posits that *"even if the Petition for Mandamus be treated as one of Quo Warranto, it is still dismissible for lack of jurisdiction and absence of a dear legal right on the part of [Velasco]."*[29] She argues that numerous jurisprudence have already ruled that it is the House of Representatives Electoral Tribunal that has the sole and exclusive jurisdiction over all contests relating to the election, returns and qualifications of Members of the House of Representatives. Moreover, she insists that there is also an abundance of case law that categorically states that the COMELEC is divested of jurisdiction upon her proclamation as the winning candidate, as, in fact, the HRET had already assumed jurisdiction over *quo warranto* cases[30] filed against Reyes by several individuals.

Given the foregoing, Reyes concludes that this Court is "*devoid of original jurisdiction to annul [her] proclamation.*"[31] But she hastens to point out that ***(i)*** *"[e]ven granting for the sake of argument that the proclamation was validly nullified,*

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[28] *Nacionalista Party v. De Vera,* 85 Phil. 126 (1949); *Pilar v. Secretary of the Department of Public Works and Communications,* 125 Phil. 766 (1967); *Gonzales v. Commission on Elections, 129 Phil.* 7 (1967); *Topacio v. Ong,* 595 Phil. 491 (2008); *Señeres v. Commission on Elections, 603 Phil. 552* (2009).

[29] *Rollo* (G.R. No. 201140), p. 314.

[30] HRET Case Nos. 13-036 to 37, entitled *"Noeme Mayores Tan and Jeasseca L. Mapacpac v. Regina Ongsiako Reyes"* and *"Eric Del Mundo Junio v. Regina Ongsiako Reyes,"* respectively.

[31] *Rollo* (G.R. No. 201140), p. 344.

[Velasco] as second placer cannot be declared the winner x x x" as he was not the choice of the people of the Province of Marinduque; and ***(ii)*** Velasco is estopped from asserting the jurisdiction of this Court over her (Reyes) election because he (Velasco) filed an Election Protest *Ad Cautelam* in the HRET on May 31, 2014.

The Office of the Solicitor General (OSG), arguing for Speaker Belmonte, Jr. and Sec. Gen. Barua-Yap, opposed Velasco's petition on the following grounds:

I.

UPON RESPONDENT REYES' PROCLAMATION ON MAY 18, 2013, EXCLUSIVE JURISDICTION TO RESOLVE ELECTION CONTESTS INVOLVING RESPONDENT REYES, INCLUDING THE VALIDITY OF HER PROCLAMATION AND HER ELIGIBILITY FOR OFFICE, VESTED IN THE HRET.

Hence, until and unless the HRET grants any quo warranto petition or election protest filed against respondent Reyes, and such HRET resolution or resolutions become final and executory, respondent Reyes may not be restrained from exercising the prerogatives of Marinduque Representative, and respondent Sec. Gen. Barua-Yap may not be compelled by mandamus to remove respondent Reyes's name from the Roll of Members of the House.

II.

CODILLA v. COMELEC IS NOT APPLICABLE TO THIS CASE, GIVEN THAT PETITIONER, BEING MERELY THE SECOND PLACER IN THE MAY 13, 2013 ELECTIONS, CANNOT VALIDLY ASSUME THE POST OF MARINDUQUE REPRESENTATIVE.

Hence, respondents Speaker Belmonte and Sec. Gen. Barua-Yap may not be compelled by mandamus to, respectively, administer the proper oath to petitioner and register the latter's name in the Roll of Members of the House.

III.

PETITIONER IS NOT ENTITLED TO THE INJUNCTIVE RELIEFS PRAYED FOR.[32]

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[32] *Id*. at 385-386.

The OSG presents the foregoing arguments on the premise that there is a need for this Court to *revisit* its twin Resolutions dated June 25, 2013 and October 22, 2013 both in G.R. No. 207264, given that *(i)* this Court was "divided" when it issued the same; and *(ii)* there were strong dissents to the majority opinion. It argues that this Court has in the past revisited decisions already final and executory; there is no hindrance for this Court to do the same in G.R. No. 207264.

Moreover, the OSG contends that:

> Despite the finality of the June 25, 2013 Resolution and the October 22, 2013 Resolution, upholding the cancellation of respondent Reyes's CoC, there has been no compelling reason for the House to withdraw its recognition of respondent Reyes as Marinduque Representative, in the absence of any specific order or directive to the House. To be sure, there was nothing in the Honorable Court's disposition in *Reyes v. COMELEC* that required any action from the House. Again, it bears emphasis that neither petitioner nor respondents Speaker Belmonte and Sec. Gen. Barua-Yap were parties in *Reyes v. COMELEC.*
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> Further, records with the HRET show that the following cases have been filed against respondent Reyes:
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> (i) Case No. 13-036 (Quo Warranto), entitled *Noeme Mayores Tan & Jeasseca L. Mapacpac v. Regina Ongsiako Reyes;*
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> (ii) Case No. 13-037 (Quo Warranto), entitled *Eric D. Junio v. Regina Ongsiako Reyes;*
>
> (iii) Case No. 13-027 (Quo Warranto), entitled *Christopher Matienzo v. Regina Ongsiako Reyes;* and
>
> (iv) Case No. 13-028 (Election Protest), entitled *Lord Allan Jay Velasco v. Regina Ongsiako Reyes.*[33]

And in view of the cases filed in the HRET, the OSG insists that:

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[33] *Id*. at 398-399.

If the jurisdiction of the COMELEC were to be retained until the assumption of office of the winner, at noon on the thirtieth day of June next following the election, then there would obviously be a clash of jurisdiction between the HRET and the COMELEC, given that the 2011 HRET Rules provide that the appropriate cases should be filed before it within 15 days from the date of proclamation of the winner. If, as the June 25, 2013 Resolution provides, the HRET's jurisdiction begins only after assumption of office, at noon of June 30 following the election, then *quo warranto* petitions and election protests filed on or after said date would be dismissed outright by the HRET under its own rules for having been filed out of time, where the winners have already been proclaimed within the period after the May elections and up to June 14.[34]

In recent development, however, the HRET promulgated a Resolution on December 14, 2015 dismissing HRET Case Nos. 13-036 and 13-037,[35] the twin petitions for *quo warranto* filed against Reyes, to wit:

WHEREFORE, in view of the foregoing, the September 23, 2014 Motion for Reconsideration of Victor Vela Sioco is hereby **GRANTED**. The September 11, 2014 Resolution of [the] Tribunal is hereby **REVERSED and SET ASIDE**. Accordingly, the present *Petitions for Quo Warranto* are hereby **DISMISSED** for lack of jurisdiction.[36]

In the said *Resolution,* the HRET held that *"the final Supreme Court ruling in GR. No. 207264 is the COGENT REASON to set aside the September 11, 2014 Resolution."*[37]

To make clear, the September 11, 2014 *Resolution* of the HRET ordered the dismissal of a *Petition-In-Intervention* filed by one Victor Vela Sioco (Sioco) in the twin petitions for *quo warranto,* for *"lack of merit."* Further, the HRET directed *"the hearing and reception of evidence of the two Petitions*

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[34] *Id*. at 397.

[35] Petitioner Velasco's *Manifestation* dated January 6, 2016, with attachments.

[36] *Id*., Annex "D", p. 5.

[37] *Id*. at 2.

for Quo Warranto against x x x Respondent [Reyes] to proceed."[38] Sioco, however, moved for the reconsideration of the said September 11, 2014 HRET *Resolution* based on the argument that the latter was contrary to law and jurisprudence given the Supreme Court ruling in G.R. No. 207264.

Subsequently, the December 14, 2015 *Resolution* of the HRET held that —

The Tribunals Jurisdiction

It is necessary to clarify the Tribunal's jurisdiction over the present petitions for *quo warranto,* considering the parties' divergent postures on how the Tribunal should resolve the same *vis-a-vis* the Supreme Court ruling in G.R. No. 207264.

The petitioners believe that the Tribunal has jurisdiction over their petitions. They pray that "after due proceedings," the Tribunal "declare Respondent REGINA ONGSIAKO REYES DISQUALIFIED/ INELIGIBLE to sit as Member of the House of Representatives, representing the Province of Marinduque." In addition, the petitioner Eric Del Mundo Junio urges the Tribunal to follow the Supreme Court pronouncement in G.R. No. 207264.

On the other hand, Victor Vela Sioco, in his *Petition-In-Intervention,* pleads for the outright dismissal of the present petitions considering the Supreme Court final ruling in G.R. No. 207264. For her part, respondent Regina Reyes prays too for the dismissal of the present petitions, albeit after reception of evidence by the contending parties.

The constitutional mandate of the Tribunal is clear: It is "the sole judge of all contests relating to the election, returns, and qualifications of [House] Members." Such power or authority of the Tribunal is echoed in its 2011 Rules of the House of Representatives Electoral Tribunal: "The Tribunal is the sole judge of all contests relating to the elections, returns, and qualifications of the Members of the House of Representatives."

x x x x x x x x x

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[38] *Id.* at 1.

In the present cases, before respondent Regina Reyes was proclaimed on May 18, 2013, the COMELEC *En Banc,* in its Resolution of May 14, 2013 in SPA No. 13-053 (DC), had already resolved that the COMELEC First Division correctly cancelled her COC on the ground that she lacked the Filipino citizenship and residency requirements. Thus, the COMELEC nullified her proclamation. When Regina Reyes challenged the COMELEC actions, the Supreme Court *En Banc,* in its Resolution of June 25, 2013 in G.R. No. 207246, upheld the same.

With the COMELEC's cancellation of respondent Regina Reyes' COC, resulting in the nullification of her proclamation, the Tribunal, much as we would want to, cannot assume jurisdiction over the present petitions. The jurisdiction of the HRET begins only after the candidate is considered a Member of the House of Representatives. And to be considered a Member of the House of Representatives, there must be a concurrence of the following requisites: (1) a valid proclamation, (2) a proper oath, and (3) assumption of office, so the Supreme Court pronounced in its Resolution of June 25, 2013 in G.R. No. 207264, thus:

> x x x, the jurisdiction of the HRET begins only after the candidate is considered a Member of the House of Representatives, as stated in Section 17, Article VI of the 1987 Constitution:
>
> x x x x x x x x x
>
> As held in *Marcos v. COMELEC,* the HRET does not have jurisdiction over a candidate who is not a member of the House of Representatives x x x.
>
> x x x x x x x x x
>
> The next inquiry, then, is when is a candidate considered a Member of the House of Representatives?
>
> In *Vinzons-Chato v. COMELEC,* citing *Aggabao v. COMELEC* and *Guerrero v. COMELEC,* the Court ruled that:
>
> > The Court has invariably held that once a winning candidate has been proclaimed, taken his oath, and assumed office as a Member of the House of Representatives, the COMELEC's jurisdiction over election contests relating to his election, returns, and qualifications ends, and the HRET's own jurisdiction begins. x x x

> From the foregoing, it is then clear that to be considered a Member of the House of Representatives, there must be a concurrence of the following requisites: (1) a valid proclamation, (2) a proper oath, and (3) assumption of office x x x.

Based on the above-quoted ruling of the Supreme Court, a *valid proclamation* is the first essential element before a candidate can be considered a Member of the House of Representatives over which the Tribunal could assume jurisdiction. Such element is obviously absent in the present cases as Regina Reyes' proclamation was nullified by the COMELEC, which nullification was upheld by the Supreme Court. On this ground alone, the Tribunal is without power to assume jurisdiction over the present petitions since Regina Reyes "cannot be considered a Member of the House of Representatives," as declared by the Supreme Court *En Banc* in G.R. No. 207264. It further stresses:

> "x x x there was no basis for the proclamation of petitioner [Regina Reyes] on 18 May 2013. Without the proclamation, the petitioner's oath of office is likewise baseless, and without a precedent oath of office, there can be no valid and effective assumption of office."

The Supreme Court has spoken. Its pronouncements must be respected. Being the ultimate guardian of the Constitution, and by constitutional design, the Supreme Court is "supreme in its task of adjudication; x x x. As a rule, all decisions and determinations in the exercise of judicial power ultimately go to and stop at the Supreme Court whose judgment is final." This Tribunal, as all other courts, must take their bearings from the decisions and rulings of the Supreme Court.[39]

Incidentally, it appears that an Information against Reyes for violation of Article 177 (Usurpation of Official Functions) of the Revised Penal Code, dated August 3, 2015, has been filed in court,[40] entitled "*People of the Philippines v. Regina Ongsiako Reyes.*"[41]

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[39] *Id.* at 3-5.

[40] Metropolitan Trial Court, Branch 41, Quezon City.

[41] Petitioner Velasco's *Manifestation* dated January 6, 2016, with attachments, Annex "B".

The Issue

The issue for this Court's resolution boils down to the propriety of issuing a writ of *mandamus* to compel Speaker Belmonte, Jr. and Sec. Gen. Barua-Yap to perform the specific acts sought by Velasco in this petition.

The Ruling

The petition has merit.

At the outset, this Court observes that the respondents have taken advantage of this petition to re-litigate what has been settled in G.R. No. 207264. Respondents are reminded to respect the *Entry of Judgment* that has been issued therein on October 22, 2013.

After a painstaking evaluation of the allegations in this petition, it is readily apparent that this special civil action is really one for *mandamus* and not a *quo warranto* case, contrary to the asseverations of the respondents.

A petition for *quo warranto* is a proceeding to determine the right of a person to the use or exercise of a franchise or office and to oust the holder from its enjoyment, if his claim is not well-founded, or if he has forfeited his right to enjoy the privilege. Where the action is filed by a private person, he must prove that he is entitled to the controverted position; otherwise, respondent has a right to the undisturbed possession of the office.[42] In this case, given the present factual milieu, *i.e.*, (*i*) the final and executory resolutions of this Court in G.R. No. 207264; *(ii)* the final and executory resolutions of the COMELEC in SPA No. 13-053 (DC) cancelling Reyes's Certificate of Candidacy; and *(iii)* the final and executory resolution of the COMELEC in SPC No. 13-010 declaring null and void the proclamation of Reyes and proclaiming Velasco as the winning candidate for the position of Representative for the Lone District

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[42] *Austria v. Amante,* 79 Phil. 780, 783 (1948); *Caraan-Medina v. Quizon,* 124 Phil. 1171, 1178 (1966); *Castro v. Del Rosario,* 125 Phil. 611, 615-616 (1967).

of the Province of Marinduque – it cannot be claimed that the present petition is one for the determination of the right of Velasco to the claimed office.

To be sure, what is prayed for herein is merely the enforcement of clear legal duties and not to try disputed title. That the respondents make it appear so will not convert this petition to one for *quo warranto.*

Section 3, Rule 65 of the Rules of Court, as amended, provides that any person may file a verified petition for *mandamus* "when any tribunal, corporation, board, officer or person unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station, or unlawfully excludes another from the use and enjoyment of a right or office to which such other is entitled, and there is no other plain, speedy and adequate remedy in the ordinary course of law." A petition for *mandamus* will prosper if it is shown that the subject thereof is a *ministerial* act or duty, and *not purely discretionary* on the part of the board, officer or person, and that the petitioner has a well-defined, clear and certain right to warrant the grant thereof.[43]

The difference between a ministerial and discretionary act has long been established. A purely ministerial act or duty is one which an officer or tribunal performs in a given state of facts, in a prescribed manner, in obedience to the mandate of a legal authority, without regard to or the exercise of his own judgment upon the propriety or impropriety of the act done. If the law imposes a duty upon a public officer and gives him the right to decide how or when the duty shall be performed, such duty is discretionary and not ministerial. The duty is ministerial only when the discharge of the same requires neither the exercise of official discretion or judgment.[44]

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[43] *Codilla, Sr. v. De Venecia, supra* note 25 at 189.

[44] *Nazareno v. City of Dumaguete,* 607 Phil. 768, 801 (2009), citing *Codilla, Sr. v. De Venecia, supra* note 25 at 189.

As the facts stand in this case, Speaker Belmonte, Jr. and Sec. Gen. Barua-Yap have no discretion whether or not to administer the oath of office to Velasco and to register the latter's name in the Roll of Members of the House of Representatives, respectively. It is beyond cavil that there is in existence final and executory resolutions of this Court in G.R. No. 207264 affirming the final and executory resolutions of the COMELEC in SPA No. 13-053 (DC) cancelling Reyes's Certificate of Candidacy. There is likewise a final and executory resolution of the COMELEC in SPC No. 13-010 declaring null and void the proclamation of Reyes, and proclaiming Velasco as the winning candidate for the position of Representative for the Lone District of the Province of Marinduque.

The foregoing state of affairs collectively lead this Court to consider the facts as settled and beyond dispute — **Velasco is the proclaimed winning candidate for the Representative of the Lone District of the Province of Marinduque.**

Reyes argues in essence that this Court is devoid of original jurisdiction to annul her proclamation. Instead, it is the HRET that is constitutionally mandated to resolve any questions regarding her election, the returns of such election, and her qualifications as a Member of the House of Representatives especially so that she has already been proclaimed, taken her oath, and started to discharge her duties as a Member of the House of Representatives representing the Lone District of the Province of Marinduque. But the confluence of the three acts in this case — **her proclamation, oath and assumption of office —** has not altered the legal situation between Velasco and Reyes.

The important point of reference should be the date the COMELEC finally decided to cancel the Certificate of Candidacy (COC) of Reyes which was on May 14, 2013. The **most crucial time** is when Reyes's COC was cancelled due to her non-eligibility to run as Representative of the Lone District of the Province of Marinduque — **for without a valid COC, Reyes could not be treated as a candidate in the election and much less as a duly proclaimed winner.** That particular decision of the

COMELEC was promulgated even before Reyes's proclamation, and which was affirmed by this Court's final and executory *Resolutions* dated June 25, 2013 and October 22, 2013.

This Court will not give premium to the illegal actions of a subordinate entity of the COMELEC, the PBOC who, despite knowledge of the May 14, 2013 resolution of the COMELEC *En Banc* cancelling Reyes's COC, still proclaimed her as the winning candidate on May 18, 2013. Note must also be made that as early as May 16, 2013, a couple of days before she was proclaimed, Reyes had already received the said decision cancelling her COC. These points clearly show that the much argued proclamation was made in clear defiance of the said COMELEC *En Banc* Resolution.

That Velasco now has a well-defined, clear and certain right to warrant the grant of the present petition for *mandamus* is supported by the following undisputed facts that should be taken into consideration:

First. At the time of Reyes's proclamation, her COC was already cancelled by the COMELEC *En Banc* in its final finding in its resolution dated May 14, 2013, the effectivity of which was not enjoined by this Court, as Reyes did not avail of the prescribed remedy which is to seek a restraining order within a period of five (5) days as required by Section 13(b), Rule 18 of COMELEC Rules. Since no restraining order was forthcoming, the PBOC should have refrained from proclaiming Reyes.

Second. This Court upheld the COMELEC decision cancelling respondent Reyes's COC in its Resolutions of June 25, 2013 and October 22, 2013 and these Resolutions are already final and executory.

Third. As a consequence of the above events, the COMELEC in SPC No. 13-010 cancelled respondent Reyes's proclamation and, in tum, proclaimed Velasco as the duly elected Member of the House of Representatives in representation of the Lone District of the Province of Marinduque. **The said proclamation has not been challenged or questioned by Reyes in any proceeding.**

Fourth. When Reyes took her oath of office before respondent Speaker Belmonte, Jr. in open session, Reyes had **NO** valid COC **NOR** a valid proclamation.

Thus, to consider Reyes's proclamation and treating it as a material fact in deciding this case will paradoxically alter the well-established legal milieu between her and Velasco.

Fifth. In view of the foregoing, Reyes **HAS ABSOLUTELY NO LEGAL BASIS** to serve as a Member of the House of Representatives for the Lone District of the Province of Marinduque, and therefore, she **HAS NO LEGAL PERSONALITY** to be recognized as a party-respondent at a *quo warranto* proceeding before the HRET.

And this is precisely the basis for the HRET's December 14, 2015 Resolution acknowledging and ruling that it has no jurisdiction over the twin petitions for *quo warranto* filed against Reyes. Its finding was based on the existence of a final and executory ruling of this Court in G.R. No. 207264 that Reyes is not a *bona fide* member of the House of Representatives for lack of a *valid proclamation.* To reiterate this Court's pronouncement in its Resolution, entitled *Reyes v. Commission on Elections*[45] —

> The averred proclamation is the critical pointer to the correctness of petitioner's submission. The crucial question is whether or not petitioner [Reyes] could be proclaimed on 18 May 2013. Differently stated, was there basis for the proclamation of petitioner on 18 May 2013?
>
> Dates and events indicate that there was no basis for the proclamation of petitioner on 18 May 2013. Without the proclamation, the petitioner's oath of office is likewise baseless, and without a precedent oath of office, there can be no valid and effective assumption of office.
>
> x x x x x x x x x
>
> "More importantly, we cannot disregard a fact basic in this controversy — that before the proclamation of petitioner

[45] G.R. No. 207264, October 22, 2013, 708 SCRA 197, 219.

> on 18 May 2013, the COMELEC *En Banc* had already finally disposed of the issue of petitioner's [Reyes] lack of Filipino citizenship and residency via its Resolution dated 14 May 2013. After 14 May 2013, there was, before the COMELEC, no longer any pending case on petitioner's qualifications to run for the position of Member of the House of Representatives. x x x."

As the point has obviously been missed by the petitioner [Reyes] who continues to argue on the basis of her "due proclamation," the instant motion gives us the opportunity to highlight the undeniable fact we here repeat that **the proclamation which petitioner secured on 18 May 2013 was WITHOUT ANY BASIS."** (Emphasis supplied.)

Put in another way, contrary to the view that the resort to the jurisdiction of the HRET is a plain, speedy and adequate remedy, such recourse is not a legally available remedy to any party, specially to Velasco, who should be the sitting Member of the House of Representatives if it were not for the disregard by the leadership of the latter of the binding decisions of a constitutional body, the COMELEC, and the Supreme Court

Though the earlier existence of the twin *quo warranto* petitions filed against Reyes before the HRET had actually no bearing on the status of finality of the decision of the COMELEC in SPC No. 13-010. Nonetheless, their dismissal pursuant to the HRET's December 14, 2015 Resolution sustained Velasco's well-defined, clear and certain right to the subject office.

The present Petition for *Mandamus* seeks the issuance of a writ of *mandamus* to compel respondents Speaker Belmonte, Jr. and Sec. Gen. Barua-Yap to **acknowledge** and **recognize** the final and executory Decisions and Resolution of this Court and of the COMELEC by administering the oath of office to Velasco and entering the latter's name in the Roll of Members of the House of Representatives. In other words, the Court is called upon to determine whether or not the prayed for acts, *i.e., (i)* the administration of the oath of office to Velasco; and *(ii)* the inclusion of his name in the Roll of Members, are ministerial in character *vis-a-vis* the factual and legal milieu of this case. As we have previously stated, the administration of

oath and the registration of Velasco in the Roll of Members of the House of Representatives for the Lone District of the Province of Marinduque **are no longer a matter of discretion or judgment** on the part of Speaker Belmonte, Jr. and Sec. Gen. Barua-Yap. They are legally duty-bound to recognize Velasco as the duly elected Member of the House of Representatives for the Lone District of Marinduque in view of the ruling rendered by this Court and the COMELEC'S compliance with the said ruling, now both final and executory.

It will not be the first time that the Court will grant Mandamus to compel the Speaker of the House of Representatives to administer the oath to the rightful Representative of a legislative district and the Secretary- General to enter said Representative's name in the Roll of Members of the House of Representatives. In *Codilla, Sr. v. De Venecia,*[46] the Court decreed:

> Under Rule 65, Section 3 of the 1997 Rules of Civil Procedure, any person may file a verified petition for *mandamus* "when any tribunal, corporation, board, officer or person unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station, or unlawfully excludes another from the use and enjoyment of a right or office to which such other is entitled, and there is no other plain, speedy and adequate remedy in the ordinary course of law." For a petition for *mandamus* to prosper, it must be shown that the subject of the petition for *mandamus* is a *ministerial* act or duty, and *not purely discretionary* on the part of the board, officer or person, and that the petitioner has a well-defined, clear and certain right to warrant the grant thereof.
>
> The distinction between a ministerial and discretionary act is well delineated. A purely ministerial act or duty is one which an officer or tribunal performs in a given state of facts, in a prescribed manner, in obedience to the mandate of a legal authority, without regard to or the exercise of his own judgment upon the propriety or impropriety of the act done. If the law imposes a duty upon a public officer and gives him the right to decide how or when the duty shall be performed, such duty is discretionary and not ministerial The duty is ministerial only when the discharge of the same requires neither the exercise of official discretion or judgment.

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[46] *Supra* note 25 at 188-190.

In the case at bar, the administration of oath and the registration of the petitioner in the Roll of Members of the House of Representatives representing the 4th legislative district of Leyte is no longer a matter of discretion on the part of the public respondents. The facts are settled and beyond dispute: petitioner garnered 71,350 votes as against respondent Locsin who only got 53,447 votes in the May 14, 2001 elections. The COMELEC Second Division initially ordered the proclamation of respondent Locsin; on Motion for Reconsideration the COMELEC *en banc* set aside the order of its Second Division and ordered the proclamation of the petitioner. The Decision of the COMELEC *en banc* has not been challenged before this Court by respondent Locsin and said Decision has become final and executory.

In sum, the issue of who is the rightful Representative of the 4th legislative district of Leyte has been finally settled by the COMELEC *en banc,* the constitutional body with jurisdiction on the matter. *The rule of law demands that its Decision be obeyed by all officials of the land. There is no alternative to the rule of law except the reign of chaos and confusion.*

IN VIEW WHEREOF, the Petition for *Mandamus* is granted. Public Speaker of the House of Representatives shall administer the oath of petitioner EUFROCINO M. CODILLA, SR., as the duly-elected Representative of the 4th legislative district of Leyte. Public respondent Secretary-General shall likewise register the name of the petitioner in the Roll of Members of the House of Representatives after he has taken his oath of office. This decision shall be immediately executory. (Citations omitted.)

Similarly, in this case, by virtue of ***(i)*** COMELEC *en banc* Resolution dated May 14, 2013 in SPA No. 13-053 (DC); ***(ii)*** Certificate of Finality dated June 5, 2013 in SPA No. 13-053 (DC); ***(iii)*** COMELEC *en banc* Resolution dated June 19, 2013 in SPC No. 13-010; ***(iv)*** COMELEC *en banc* Resolution dated July 10, 2013 in SPA No. 13-053 (DC); and ***(v)*** Velasco's Certificate of Proclamation dated July 16, 2013, **Velasco is the rightful Representative of the Lone District of the Province of Marinduque; hence, entitled to a writ of *Mandamus*.**

As to the view of Reyes and the OSG that since Velasco, Speaker Belmonte, Jr. and Sec. Gen. Barua-Yap are not parties to G.R. No. 207264, Velasco can neither ask for the enforcement

of the Decision rendered therein nor argue that the doctrine of *res judicata* by conclusiveness of judgment applies to him and the public respondents, this Court maintains that such contention is incorrect. Velasco, along with public respondents Speaker Belmonte, Jr. and Sec. Gen. Barua-Yap, are all legally bound by this Court's judgment in G.R. No. 207264, *i.e.,* essentially, that the COMELEC correctly cancelled Reyes's COC for Member of the House of Representatives for the Lone District of the Province of Marinduque on the ground that the latter was ineligible for the subject position due to her failure to prove her Filipino citizenship and the requisite one-year residency in the Province of Marinduque. A contrary view would have our dockets unnecessarily clogged with petitions to be filed in every direction by any and all registered voters not a party to a case to question the final decision of this Court. Such restricted interpretation of *res judicata* is intolerable for it will defeat this Court's ruling in G.R. No. 207264. To be sure, Velasco who was duly proclaimed by COMELEC is a proper party to invoke the Court's final judgment that Reyes was ineligible for the subject position.[47]

It is well past the time for everyone concerned to accept what has been adjudicated and take judicial notice of the fact that Reyes's ineligibility to run for and be elected to the subject position had already been long affirmed by this Court. Any ruling deviating from such established ruling will be contrary to the *Rule of Law* and should not be countenanced.

In view of finality of the rulings in G.R. No. 207264, SPA No. 13-053 (DC) and SPC No. 13-010, there is no longer any issue as to who is the rightful Representative of the Lone District of the Province of Marinduque; therefore, to borrow the pronouncement of this Court, speaking through then Associate Justice Reynato S. Puno, in *Codilla, Sr. v. De Venecia,*[48] *"[t]he rule of law demands that its Decision be obeyed by all officials of the land. There is no alternative to the rule of law except the reign of chaos and confusion."*

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[47] *Cañero v. University of the Philippines,* 481 Phil. 249, 270 (2004).

[48] *Supra* note 25 at 190.

WHEREFORE, the Petition for *Mandamus* is **GRANTED.** Public respondent Hon. Feliciano R. Belmonte, Jr., *Speaker,* House of Representatives, shall administer the oath of office of petitioner Lord Allan Jay Q. Velasco as the duly-elected Representative of the Lone District of the Province of Marinduque. And public respondent Hon. Marilyn B. Barua- Yap, *Secretary General,* House of Representatives, shall register the name of petitioner Lord Allan Jay Q. Velasco in the Roll of Members of the House of Representatives after he has taken his oath of office. This Decision shall be **IMMEDIATELY EXECUTORY.**

SO ORDERED.

Sereno, C.J., Bersamin, Villarama, Jr., and *Reyes, JJ.,* concur.

Carpio, J., joins the concurring opinion of *J.* Leonen.

Perez, J., concurs and submits a concurring opinion.

Leonen, J., see separate concurring opinion.

Brion, J., see dissenting opinion.

Velasco, Jr., Peralta, del Castillo, Mendoza, Perlas-Bernabe, and *Jardeleza, JJ.,* no part.

CONCURRING OPINION

PEREZ, *J.*:

The *ponencia,* upon which this concurrence hinges, postulates that the administration of oath and the registration of petitioner Lord Allan Jay Velasco (Velasco) in the Roll of Members of the House of Representatives for the Lone District of the Province of Marinduque is no longer a matter of discretion on the part of respondents House Speaker Feliciano R. Belmonte, Jr. (Belmonte) and Secretary General Marilyn B. Barua-Yap (Barua-Yap).[1] Hence, the petition for *mandamus* must be granted.

[1] *Ponencia,* p. 13.

I join the *ponencia* in the vote to grant the instant petition.

I

Preliminarily, the theory of respondent Regina Ongsiako Reyes (Reyes) — that the instant petition is in actuality an election contest, a veiled action for *quo warranto* — is rejected.

While *quo warranto* and *mandamus* are often concurrent remedies, there exists a clear distinction between the two. The authorities are agreed that *quo warranto* is the remedy to try the right to an office or franchise and to oust the holder from its enjoyment, while *mandamus* only lies to enforce clear legal duties.[2] In the case at bench, I concur with the *ponencia* that the present petition seeks the "enforcement of clear legal duties" as it does not seek to try disputed title.[3] It no longer puts in issue the validity of Reyes's claim to office — a question that has long been resolved by the Court in its twin Resolutions in the antecedent case of *Reyes v. COMELEC (Reyes),*[4] docketed as G.R. No. 207264, wherein the Court sustained the polling commission's cancellation of respondent Reyes' Certificate of Candidacy (CoC) on the ground that she does not possess the necessary eligibility to hold elective office as a member of Congress. In *Reyes,* the Court pronounced in no less than categorical terms that:[5]

> As to the issue of whether the petitioner failed to prove her Filipino citizenship, as well as her one-year residency in Marinduque, suffice it to say that the COMELEC committed no grave abuse of discretion in finding her ineligible for the position of Member of the House of Representatives.

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[2] *Lota v. Court of Appeals,* G.R. No. L-14803, June 30, 1961, 2 SCRA 715, 718.

[3] *Ponencia,* p. 12.

[4] G.R. No. 207264, June 25, 2013, 699 SCRA 522, 538, and G.R. No. 207264, October 22, 2013, 708 SCRA 197.

[5] *Id*.

Our edict became final and executory, as a matter of course, upon denial of Reyes' motion for reconsideration on October 22, 2013. There is, consequently, no "disputed title" to speak of which ought to be resolved through a *quo warranto* proceeding.

Instead, the primordial issue, in this case for *mandamus,* is whether or not respondents Belmonte and Barua-Yap can and should be compelled (1) to swear in petitioner as the duly elected Representative of the lone legislative district of Marinduque, and (2) to include petitioner's name and delete that of Reyes' in the Roll of Members of the House of Representatives, respectively. Petitioner asserts that in the aftermath of *Reyes,* his clear and enforceable legal right to assume office must be recognized.

The claim is meritorious.

It is a fundamental precept in remedial law that for the extraordinary writ of *mandamus* to be issued, it is essential that the petitioner has a **clear legal right to the thing demanded and** it must be **the imperative duty of the respondent to perform the act reguired**.[6] As will be demonstrated, it is beyond cavil that the dual elements for the *mandamus* petition to prosper evidently obtain in the case at bar.

a. Petitioner's clear legal right

Well-settled is that the legal right of the petitioner to the performance of the particular act which is sought to be compelled by *mandamus* must be clear and complete. A clear legal right within the meaning of this rule means a right clearly founded in, or granted by law; a right which is inferable as a matter of law.[7]

Here, petitioner indubitably established his right to be acknowledged as a member of the House of Representatives.

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[6] *Philippine Coconut Authority v. Primex Coco Products, Inc.,* G.R. No. 163088, July 20, 2006, 495 SCRA 763, 777.

[7] *Palileo v. Ruiz Castro,* G.R. No. L-3261, December 29, 1949, 85 Phil. 272, 275.

To elucidate, there were only two (2) candidates in the 2013 congressional race for the Lone District of Marinduque: petitioner Velasco and respondent Reyes. In the initial canvassing results, Reyes garnered more votes than Velasco.[8] Before she could be proclaimed the winner, however, the COMELEC First Division, acting on the Petition to Deny Due Course or Cancel the Certificate of Candidacy[9] filed by one Joseph Socorro Tan and docketed as SPA No. 13-053,[10] by Resolution dated March 27, 2013, cancelled Reyes' CoC.[11] Borrowing the words of the Court in *Reyes:*

> The COMELEC First Division found that, contrary to the declarations that she made in her COC, [Reyes] is not a citizen of the Philippines because of her failure to comply with the requirements of Republic Act (R.A.) No. 9225 or the *Citizenship Retention and Re-acquisition Act of 2003,* namely: (1) to take an oath of allegiance to the Republic of the Philippines; and (2) to make a personal and sworn renunciation of her American citizenship before any public officer authorized to administer an oath. In addition, the COMELEC First Division ruled that she did not have the one-year residency requirement under Section 6, Article VI of the 1987 Constitution. **Thus, she is ineligible to run for the position of Representative for the lone district of Marinduque.** (Emphasis and words in brackets added)

The division ruling, in no time, was elevated to the COMELEC *en banc,* only to be affirmed on May 14, 2013.[12] Reyes would receive a copy of the *en banc* Resolution two (2) days later on May 16, 2013. Nevertheless, she would only assail the ruling *via* petition for certiorari with the Court on June 7, 2013. Needless to say, no injunctive writ was issued by the Court in the interim.

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[8] *J.* Leonen, Dissenting Opinion, p. 11.

[9] Filed on October 10, 2012.

[10] Petition for Cancellation of Certificate of Candidacy, entitled *Joseph Socorro Tan v. Regina Ongsiako Reyes.*

[11] See *Reyes v. COMELEC, supra* note 4 at 529.

[12] *Id.* at 530.

There was, effectively, no restraint against the enforcement of Reyes' disqualification, a legal bar to a valid proclamation. As held in *Reyes:*[13]

It is error to argue that the five days should pass before the petitioner is barred from being proclaimed. Petitioner lost in the COMELEC as respondent. Her certificate of candidacy has been ordered cancelled. She could not be proclaimed because there was a final finding against her by the COMELEC. She needed a restraining order from the Supreme Court to avoid the final finding. After the five days when the decision adverse to her became executory, the need for Supreme Court intervention became even more imperative. She would have to base her recourse on the position that the COMELEC committed grave abuse of discretion in cancelling her certificate of candidacy and that a restraining order, which would allow her proclamation, will have to be based on irreparable injury and demonstrated possibility of grave abuse of discretion on the part of the COMELEC. In this case, before and after the 18 May 2013 proclamation, there was not even an attempt at the legal remedy, clearly available to her, to permit her proclamation. What petitioner did was to "take the law into her hands" and secure a proclamation

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[13] Footnote No. 3 of the October 22, 2013 Resolution distinguished between a final judgment and one that is final and executory in the following wise: "The concept of 'final' judgment, as distinguished from one which has 'become final' (or 'executory' as of right [final and executory]), is definite and settled. A 'final' judgment or order is one that finally disposes of a case, leaving nothing more to be done by the Court in respect thereto, *e.g.*, an adjudication on the merits which, on the basis of the evidence presented at the trial, declares categorically what the rights and obligations of the parties are and which party is in the right; or a judgment or order that dismisses an action on the ground, for instance, of *res adjudicata* or prescription. Once rendered, the task of the Court is ended, as far as deciding the controversy or determining the rights and liabilities of the litigants is concerned. Nothing more remains to be done by the Court except to await the parties' next move (which among others, may consist of the filing of a motion for new trial or reconsideration, or the taking of an appeal) and ultimately, of course, to cause the execution of the judgment once it becomes 'final' or, to use the established and more distinctive term, 'final and executory.' See *Investments Inc. v. Court of Appeals,* 231 Phil. 302, 307 (1987)."

in complete disregard of the COMELEC *En Banc* decision that was final on 14 May 2013 and final and executory five days thereafter.

SPA No. 13-053 eventually made its way to this Court (the *Reyes* case), docketed as G.R. No. 207264, but We dismissed Reyes' petition and subsequent motion for reconsideration questioning the findings of the COMELEC for lack of merit on June 25, 2013 and October 22, 2013, respectively.[14] Undeterred, Reyes, on November 27, 2013, filed a Motion for Leave of Court to File and Admit Motion for Reconsideration, which was treated as a second motion for reconsideration, a prohibited pleading. Unavoidably, the motion was denied on December 3, 2013, serving as the final nail in the coffin, laying the highly-contested issue regarding Reyes' eligibility to rest.[15]

Upon resolving with finality that Reyes is ineligible to run for Congress and that her CoC is a nullity, the only logical consequence is to declare Velasco, Reyes' only political rival in the congressional race, as the victor in the polling exercise. This finds basis in the seminal case of *Aratea v. COMELEC (Aratea),*[16] wherein it was held that a void CoC cannot give rise to a valid candidacy, and much less to valid votes.[17] Hence, as concluded in *Aratea:*[18]

> Lonzanida's certificate of candidacy was cancelled, because he was ineligible or not qualified to run for Mayor. Whether his certificate of candidacy is cancelled before or after the elections is immaterial because the cancellation on such ground means he was never a candidate from the very beginning, his certificate of candidacy being void *ab initio.* There was only one qualified candidate for Mayor in the May 2010 elections — Antipolo, who therefore received the highest number of votes.

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[14] *Supra* note 4.

[15] *Ponencia,* p. 6.

[16] G.R. No. 195229, October 9, 2012, 683 SCRA 105.

[17] See also *Hayudini v. COMELEC,* G.R. No. 207900, April 22, 2014, 723 SCRA 223.

[18] *Supra* note 16.

Thus, notwithstanding the margin of votes Reyes garnered over Velasco, the votes cast in her favor are considered strays since she is not eligible for the congressional post, a non-candidate in the bid for the coveted seat of Representative for the Lone District of Marinduque. Following the doctrinal teaching in *Aratea,* Velasco, as the only remaining qualified candidate in the congressional race, is, for all intents and purposes, the rightful member of the lower house.

Associate Justice Marvic M.V.F. Leonen (Justice Leonen), however, echoing the position of the OSG and that of the respondents, asserts in his Dissent that Velasco is a second-placer during the elections who is not entitled to hold the subject position. The honorable Justice suggests that petitioner cannot seek refuge under the Court's pronouncements in *Aratea* and the subsequent cases of *Jalosjos v. COMELEC*[19] and *Maquiling v. COMELEC*[20] because the positions involved in the said cases were not for members of Congress.[21]

What the Dissent failed to take into account though is the most significant similarity of the present petition to the above-mentioned cases — that there exists a final and executory decision of the COMELEC ordering the cancellation of the CoC of the candidate who committed false material representations therein and declaring them ineligible to hold public office. In all these cases, and as it should likewise be in this case, the Court ruled that the CoC was deemed *void ab initio* and as such:

"If the certificate of candidacy is void ab initio, then legally the person who filed such void certificate of candidacy was never a candidate in the elections at any time. All votes for such non-candidate are stray votes and should not be counted. Thus, such non-candidate can never be a first-placer in the elections. If a certificate of candidacy

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[19] *Jalosjos, Jr. v. COMELEC,* G.R. No. 193237, October 9, 2012, 683 SCRA 1.

[20] G.R. No. 195649, April l6, 2013, 696 SCRA 420.

[21] *J.* Leonen, Dissenting Opinion, p. 13.

void ab initio is cancelled on the day, or before the day, of the election, prevailing jurisprudence holds that all votes for that candidate are stray votes. If a certificate of candidacy void ab initio is cancelled one day or more after the elections, all votes for such candidate should also be stray votes because the certificate of candidacy is void from the very beginning. x x x"[22]

In *Maquiling,* this Court also said:

Thus, the votes cast in favor of the ineligible candidate are not considered at all in determining the winner of an election.

Even when the votes for the ineligible candidate are disregarded, the will of the electorate is still respected, and even more so. The votes cast in favor of an ineligible candidate do not constitute the sole and total expression of the sovereign voice. The votes cast in favor of eligible and legitimate candidates form part of that voice and must also be respected.

As in any contest, elections are governed by rules that determine the qualifications and disqualifications of those who are allowed to participate as players. When there are participants who turn out to be ineligible, their victory is voided and the laurel is awarded to the next in rank who does not possess any of the disqualifications nor lacks any of the qualifications set in the rules to be eligible as candidates.

x x x x x x x x x

The electorate's awareness of the candidate's disqualification is not a prerequisite for the disqualification to attach to the candidate. The very existence of a disqualifying circumstance makes the candidate ineligible. Knowledge by the electorate of a candidate's disqualification is not necessary before a qualified candidate who placed second to a disqualified one can be proclaimed as the winner. The second-placer in the vote count is actually the first-placer among the qualified candidates.

That the disqualified candidate has already been proclaimed and has assumed office is of no moment. The subsequent disqualification based on a substantive ground that existed prior to the filing of the

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[22] *Jalosjos, Jr. v. COMELEC, supra* note 19 at 32.

certificate of candidacy voids not only the COC but also the proclamation.[23]

In *Velasco* v. *COMELEC,* this Court further expounded:

x x x. Section 78 may likewise be emasculated as mere delay in the resolution of the petition to cancel or deny due course to a COC can render a Section 78 petition useless if a candidate with false COC data wins. To state the obvious, candidates may risk falsifying their COC qualifications if they know that an election victory will cure any defect that their COCs may have. Election victory then becomes a magic formula to bypass election eligibility requirements.

In the process, the rule of law suffers; the clear and unequivocal legal command, framed by a Congress representing the national will, is rendered inutile because the people of a given locality has decided to vote a candidate into office despite his or her lack of the qualifications Congress has determined to be necessary.

In the present case, Velasco is not only going around the law by his claim that he is registered voter when he is not, as has been determined by a court in a final judgment. Equally important is that he has made a material misrepresentation *under oath in his COC* regarding his qualification. For these violations, he must pay the ultimate price — the nullification of his election victory. He may also have to account in a criminal court for making a false statement under oath, but this is a matter for the proper authorities to decide upon.

We distinguish our ruling in this case from others that we have made in the past by the clarification that COC defects *beyond matters of form* and that involve *material misrepresentations* cannot avail of the benefit of our ruling that COC mandatory requirements before elections are considered merely directory after the people shall have spoken. A mandatory and material election law requirement involves more than the will of the people in any given locality. Where a *material COC misrepresentation under oath* is made, thereby violating both our election and criminal laws, we are faced as well with an assault on the will of the people of the Philippines as expressed in our laws. In a choice between provisions on material qualifications of elected officials, on the one hand, and the will of the electorate

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[23] *Maquiling v. COMELEC, supra* note 20 at 462-463.

in any given locality, on the other, we believe and so hold that we cannot choose the electorate will. The balance must always tilt in favor of upholding and enforcing the law. To rule otherwise is to slowly gnaw at the rule of law.[24]

Therefore, considering that Reyes' CoC was cancelled and was deemed *void ab initio* by virtue of the final and executory decisions rendered by the COMELEC and this Court, Velasco is not a second-placer as claimed by the Dissent; rather, Velasco is the **only placer and the winner** during the May elections and thus, for all intents and purposes, Velasco has a clear legal right to office as Representative of the Lone District of Marinduque.

Unconvinced, Justice Leonen would protest in his Dissent that petitioner Velasco, a non-party to SPC No. 13-053 and G.R. No. 207264, is a stranger to the case and cannot be bound by Our factual findings and rulings therein.[25]

The proposition is devoid of merit.

Sec. 1, Rule 23 of the COMELEC Rules of Procedure, as amended, pertinently reads:

Section 1. Ground for Denial or Cancellation of Certificate of Candidacy.— A verified Petition to Deny Due Course to or Cancel a Certificate of Candidacy for any elective office **may be filed by any registered voter** or a duly registered political party, organization, or coalition of political parties on the exclusive ground that any material representation contained therein as required by law is false. xxx (emphasis added)

By lodging a petition for denial or cancellation of CoC, a voter seeks to ensure that the candidate who purports to be qualified to represent his or her constituents is indeed eligible to do so. Such petition, therefore, is for and in benefit of the electorate, and not for one's personal advantage. This is in clear consonance with the afore-quoted rule, which never required

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[24] *Velasco v. COMELEC,* G.R. No. 180051, December 24, 2008, 575 SCRA 590, 614-615.

[25] *J.* Leonen, Dissenting Opinion, p. 8.

the petition to be filed by a candidate's political rival. Otherwise stated, it is not required for petitioner Tan in SPA No. 13-053 to have a claim to the contested electoral post to be permitted by law to challenge the validity of Reyes' CoC. At the same time, petitioner Velasco herein is not under any legal obligation to intervene in SPA No. 13-053 and G.R. No. 207264 before he could benefit directly or indirectly from the ruling. Unlike civil cases which only involve private rights, petitions to deny or cancel certificates of candidacy are so imbued with public interest that they cannot be deemed binding only to the parties thereto. Indeed, it would be an absurd situation, after all, to declare Reyes ineligible only insofar as Tan is concerned, and presumed eligible as to the rest of the Marinduqueños, including Velasco.

Furthermore, for a petition for *mandamus* to prosper, Sec. 3, Rule 65 of the Rules of Court provides:

> **Section 3.** *Petition for mandamus.*— When any tribunal, corporation, board, officer or person unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station, or unlawfully excludes another from the use and enjoyment of a right or office to which such other is entitled, and there is no other plain, speedy and adequate remedy in the ordinary course of law, the person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered commanding the respondent, immediately or at some other time to be specified by the court, to do the act required to be done to protect the rights of the petitioner, and to pay the damages sustained by the petitioner by reason of the wrongful acts of the respondent.

Apparently, there is nothing in foregoing provision which requires that the person applying for a writ of *mandamus* should establish that he or she was the prevailing party litigant to a prior case *(i.e.* a petitioner, respondent or an intervenor) to be entitled to the writ's issuance. Contrary to the opinion espoused in the Dissent, Sec. 3, Rule 65 merely requires the applicant to establish a clear legal right to the ministerial function to be performed, without distinction on whether this right emanates from a final judgment in a prior case or not. Thus, there is no

basis to the opinion that Velasco should have been a party in *Reyes* in order for this Court to grant a of writ of *mandamus* in his favor.

b. Respondent Belmonte and Barua-Yap's ministerial duties

Anent the second element for *mandamus* to lie, it is critical that the duty the performance of which is to be compelled be ministerial in nature, rather than discretionary. A purely ministerial act or duty is one that an officer or tribunal performs in a given state of facts, in a prescribed manner, in obedience to the mandate of a legal authority, without regard to or the exercise of its own judgment upon the propriety or impropriety of the act done.[26] The writ neither confers powers nor imposes duties. It is simply a command to exercise a power already possessed and to perform a duty already imposed.[27]

Without a doubt, petitioner herein seeks the performance of a ministerial act, without which he is unjustly deprived of the enjoyment of an office that he is clearly entitled to, as earlier discussed. It must be borne in mind that this petition was brought to fore because, despite repeated demands from petitioner and their receipt of the *"Certificate of Canvass of Votes and Proclamation of Winning Candidate for the position of Member of House of Representatives for the Lone District of Marinduque,"* respondents Belmonte and Barua-Yap refused to allow Velasco to sit in the Lower House as Marinduque Representative.

The non-discretionary function of respondents Belmonte and Barua-Yap is underscored in *Codilla, Sr. v. De Venecia (Codilla)*[28] wherein the Court held that the House Speaker and the Secretary General of the Lower House are duty-bound to

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[26] *Special People, Inc. Foundation v. Canda,* G.R. No. 160932, January 14, 2013, 688 SCRA 403, 424.

[27] *Philippine Coconut Authority v. Primex Coco Products, Inc., supra* note 6.

[28] G.R. No. 150605, December 10, 2002, 393 SCRA 639, 681.

recognize the legally elected district representatives as members of the House of Representatives. In the concluding statements of *Codilla,* the Court, speaking through retired Chief Justice Reynato Puno, instructs that:

> In the case at bar, the administration of oath and the registration of the petitioner in the Roll of Members of the House of Representatives representing the 4th legislative district of Leyte is no longer a matter of discretion on the part of the public respondents. The facts are settled and beyond dispute: petitioner garnered 71,350 votes as against respondent Locsin who only got 53, 447 votes in the May 14, 2001 elections. The COMELEC Second Division initially ordered the proclamation of respondent Locsin; on Motion for Reconsideration the COMELEC *en banc* set aside the order of its Second Division and ordered the proclamation of the petitioner. The Decision of the COMELEC *en banc* has not been challenged before this Court by respondent Locsin and said Decision has become final and executory.
>
> In sum, the issue of who is the rightful Representative of the 4th legislative district of Leyte has been finally settled by the COMELEC *en banc,* the constitutional body with jurisdiction on the matter. **The rule of law demands that its Decision be obeyed by all officials of the land. There is no alternative to the rule of law except the reign of chaos and confusion.**[29] (Emphasis in the original)

As in *Codilla,* the fact of Reyes' disqualification can no longer be disputed herein, in view of the consecutive rulings of the COMELEC and the Court in SPA No. 13-053, G.R. No. 207624, and SPA No. 13-010. Reyes' ineligibility and Velasco's consequent membership in the Lower House is then beyond the discretion of respondents Belmonte and Barua-Yap, and the rulings upholding the same must therefore be recognized and respected. To hold otherwise — that the Court is not precluded from entertaining questions on Reyes' eligibility to occupy Marinduque's congressional seat — would mean substantially altering, if not effectively vacating, Our ruling in *Reyes* that has long attained finality, a blatant violation of the immutability of judgments. Under the doctrine, a decision that has acquired

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[29] *Id*.

finality becomes immutable and unalterable, and may no longer be modified in any respect, even if the modification is meant to correct erroneous conclusions of fact and law, and whether it be made by the court that rendered it or by the Highest Court of the land. Any act which violates this principle must immediately be struck down.[30] Justice Leonen, however, urges this Court to revisit, nay re-litigate, *Reyes* two (2) years after the date of its finality and abandon the same, in clear contravention of the doctrine of immutability and finality of Supreme Court decisions.

It matters not that respondents Belmonte and Barua-Yap are non-parties to *Reyes.* It is erroneous to claim that Our final ruling therein is not binding against Belmonte and Barua-Yap on ground that they were neither petitioners nor respondents in the said case,[31] and that they were not given the opportunity to be heard on the issues raised therein.[32] Again, SPA No. 13-053, G.R. No. 207264, and SPA No. 13-010 are not civil cases and do not involve purely private rights which requires notice and full participation of respondents Belmonte and Barua- Yap. It must also be noted that the said case originated as petition to deny or cancel Reyes' COC, which does not require the participation of the Speaker and Secretary General of the House of Representatives. In fact, there is nothing in BP 881, the COMELEC Rules of Procedure, nor in Rule 64, in relation to Rule 65 of the Rules of Court, which requires that the Speaker and Secretary General to be included either in the original petition for cancellation of CoC or when the case is elevated to this Court via petition for certiorari. In any event, the fact that they were not made parties in *Reyes* does not mean that the public respondents are not bound by the said decision considering that the same already form part of the legal system of the Philippines.[33]

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[30] *FGU Insurance Corporation v. Regional Trial Court of Makati City, Br. 66,* G.R. No. 161282, February 23, 2011, 644 SCRA 50, 56.

[31] Memorandum for the OSG in behalf of public respondents, p. 9.

[32] *Ibid*, p. 12.

[33] Article 8, Civil Code of the Philippines.

The Dissent endeavors to divert our attention to the peculiarities of *Codilla* that allegedly preclude the Court from applying its doctrine in the case at bar. It was noted that (i) the petitioner in *Codilla* acquired the plurality of votes, which according to the dissent is the primary reason for the grant of the petition;[34] (ii) that respondent Reyes' proclamation was never nullified in SPA 13-053;[35] and (iii) that the second placer rule was not yet abandoned when *Codilla* was promulgated.[36]

With all due respect, the arguments are bereft of merit. Their rehashed version fails to persuade now as they did before in *Reyes.*

First, the ruling on *Codilla* was not primarily hinged on the plurality of votes acquired by petitioner therein, but on the **certainty** as to who the lawfully elected candidate was. To reiterate the holding in *Codilla: "the issue of who is the rightful Representative xxx has been* ***finally settled*** *by the COMELEC en banc, the constitutional body with jurisdiction on the matter.* " (Emphasis added) Hence, it became ministerial on the part of then House Speaker Jose de Venecia and then Secretary General Roberto P. Nazareno of the House of Representatives to swear in and include the name of petitioner Eufrocino Codilla (Codilla) in the Roll of Members.

Acquiring the plurality of votes may be one way of asserting one's claim to office, but the cancellation of the CoC of the candidate who garnered the highest number of votes is likewise a viable alternative in light of *Aratea.* Thus, in spite of the initial determination that Velasco failed to obtain the plurality of votes, he could still validly claim that his right to be seated as Marinduque's Representative in Congress has been settled by virtue of Reyes' disqualification.

Second, the ruling in *Reyes* may have been silent as to the validity of her proclamation, but the Dissent failed to take into

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[34] *J.* Leonen, Dissenting Opinion, p. 10.

[35] *Id.* at 11.

[36] *Id.* at 12.

account the developments in SPC No. 13-010, wherein Velasco assailed the proceedings of the Provincial Board of Canvassers (PBOC) and prayed before the COMELEC that the May 18, 2013 proclamation of Reyes be declared null and void.[37]

On June 19, 2013, the COMELEC would deny Velasco's petition. But on reconsideration, the COMELEC *en banc,* on July 9, 2013, made a reversal and declared null and void and without legal effect the proclamation of Reyes, and, in the very issuance, declared petitioner Velasco as the winning candidate.[38] And so it was that on July 16, 2013, Velasco would be proclaimed by a newly constituted PBOC as the duly elected member of the House of Representatives for the Lone District of Marinduque, in congruence with the COMELEC's rulings in SPA No. 13-053 and SPC No. 13-010.[39] This proclamation was never questioned by Reyes before any judicial or quasi-judicial forum.

This sequence of events bears striking resemblance with the factual milieu of *Codilla* wherein Codilla, on June 20, 2001, seasonably moved for reconsideration of the June 14, 2001 order for his disqualification and additionally questioned therein the validity of the proclamation of Ma Victoria Locsin (Locsin). On the next day, he would lodge a separate petition challenging the validity of Locsin's proclamation anew. The petition, however, would suffer the same fate of being initially decided against his favor. It will not be until August 29, 2001 when the COMELEC *en banc,* by a 4-3 vote, would reverse the rulings that disqualified Codilla and upheld the validity of Locsin's proclamation. Notably, Locsin did not appeal from this Resolution annulling her proclamation and so the COMELEC *en banc's* ruling then became final and executory.

Thereafter, on September 6, 2001, the COMELEC *en banc* reconstituted the PBOC of Leyte to implement its August 29, 2001 Resolution, and to proclaim the candidate who obtained

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[37] *Ponencia,* p. 4.

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

[39] *Id.* at 6.

the highest number of votes in the district as the duly elected Representative of the 4th Legislative District of Leyte. So it was that on September 12, 2001, petitioner Codilla was proclaimed winner of the congressional race.

With the finality of the COMELEC ruling disqualifying Locsin and nullifying her proclamation, and the consequent proclamation of Codilla as the lawfully elected Representative of the 4th District of Leyte, the Court saw no legal obstacle in directing then House Speaker Jose de Venecia and then Secretary General Roberto Nazareno of the House of Representatives to swear in and include petitioner Codilla's name in the Roll of Members of the House of Representatives. This very same outcome in *Codilla* should be observed in the present case.

Third, that the second placer rule was not yet abandoned when *Codilla* was decided is inconsequential in this case. As earlier discussed, what is of significance in *Codilla* is the **certainty** on who the rightful holder of the elective post is. It may be that when *Codilla* was decided, plurality of votes and successional rights, in disqualifications cases, may have been the key considerations, but as jurisprudence has been enriched by *Aratea* and by the subsequent cases that followed,[40] the qualified second placer rule was added to the enumeration. Synthesizing *Aratea* with *Codilla,* petitioner Velasco may now successfully invoke the qualified second placer rule to prove the certainty of his claim to office, and compel the respondent Speaker and Secretary General to administer his oath and include his name in the Roll of Members of the House of Representatives.

With the presence of the twin requirements, the extraordinary writ of *mandamus* must be issued in the case at bar.

II

We now discuss the collateral issues raised.

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[40] *Jalosjos Jr. v. COMELEC, supra* note 19; *Maquiling v. COMELEC, supra* note 20.

The Dissent cites the cases of *Tañada v. COMELEC (Tañada), Limkaichong v. COMELEC (Limkaichong),* and *Vinzons-Chato v. COMELEC (Vinzons-Chato),* to persuade Us to revisit the ruling in *Reyes v. COMELEC,* and divest the COMELEC of its jurisdiction over the issue of Reyes' qualification in favor of the House of Representatives Electoral Tribunal (HRET). Similarly, respondents raised the issue of jurisdiction arguing that the proclamation alone of the winning candidate is the operative act that triggers the commencement of HRET's exclusive jurisdiction,[41] and insisted that to rule otherwise would result in the clash of jurisdiction between the HRET and the COMELEC.[42]

On the outset, I express my strong reservations on revisiting herein the issue on the HRET's jurisdiction, which has already been settled with finality in *Reyes,* for **it is not at issue in this petition for *mandamus*.** I SHARE THE OBSERVATION BY THE *PONENCIA* THAT RESPONDENTS ARE TAKING ADVANTAGE OF THIS PETITION TO RE-LITIGATE WHAT HAS BEEN SETTLED IN *REYES* AND DOES NOT SEEM TO RESPECT THE ENTRY OF JUDGMENT THAT HAS BEEN ISSUED THEREIN ON OCTOBER 22, 2013. Nevertheless, assuming *in arguendo* that there is no impropriety in taking a second look at the issue in this case, I see no irreconcilability between *Reyes,* on the one hand, and the cases cited in the Dissent, on the other.

As a review, the doctrine in *Reyes* is that the HRET only has jurisdiction over **Members** of the House of Representatives. To be considered a Member of the House of Representatives, the following requisites must concur: (1) a valid proclamation, (2) a proper oath, and (3) assumption of office.[43]

Our ruling in *Reyes* does not run in conflict with *Tañada,* which was decided by the Court *en banc* by a unanimous vote, as our esteemed colleague pointed out. As held in *Tañada:*

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[41] Memorandum of the OSG, p. 16.

[42] *Id*. at 24.

[43] *Reyes v. COMELEC, supra* note 4 at 535.

In the foregoing light, considering that Angelina **had already been proclaimed** as Member of the House of Representatives for the 4th District of Quezon Province on May 16, 2013, **as she has in fact taken her oath** and **assumed office** past noon time of June 30, 2013, the Court is now without jurisdiction to resolve the case at bar. As they stand, the issues concerning the conduct of the canvass and the resulting proclamation of Angelina as herein discussed are matters which fall under the scope of the terms "election" and "returns" as above-stated and hence, properly fall under the HRET's sole jurisdiction. (Emphasis added)

Hence, the Court's ruling in *Tañada,* disclaiming jurisdiction in favor of the HRET, is premised on the concurrence of the three (3) requirements laid down in *Reyes.* In any case, *Tañada* is a Minute Resolution not intended to amend or abandon *Reyes,* as was made evident by the subsequent case *Bandara v. COMELEC*,[44] to wit:

It is a well-settled rule that once a winning candidate has been proclaimed, taken his oath, and assumed office as a Member of the House of representatives, the jurisdiction of the Commission on Elections (COMELEC) over election contests relating to his/her election, returns, and qualification ends, and the HRET's own jurisdiction begins. Consequently, the instant petitions for certiorari are not the proper remedies for the petitioners in both cases to question the propriety of the National Board of Canvassers' proclamation, and the events leading thereto.

Limkaichong is even more blunt as the Court decided the case with the following opening statement:[45]

Once a **winning candidate** has been **proclaimed, taken his oath,** and **assumed office** as a Member of the House of Representatives, the **jurisdiction of the House of Representatives Electoral Tribunal begins. x x x.** (Emphasis in the original)

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[44] G.R. Nos. 207144 and 208141, February 3, 2015.

[45] *Limkaichong v. COMELEC,* G.R. Nos. 178831-32 and 179120, 179132-33, 179240-41, April 1, 2009, 583 SCRA 1, 8-9.

And in *Vinzons-Chato v. COMELEC:*[46]

x x x [I]n an electoral contest where the validity of the **proclamation of a winning candidate who has taken his oath of office and assumed his post as Congressman** is raised, that issue is best addressed to the HRET. The reason for this ruling is self-evident, for it avoids duplicity of proceedings and a clash of jurisdiction between constitutional bodies, with due regard to the people's mandate. (Emphasis added)

Verily, *Reyes* delineated the blurred lines between the jurisdictions of the COMELEC and the HRET, explicitly ruling where one ends and the other begins. Our ruling therein was not wanting in jurisprudential basis and is in fact supported by cases cited by in the Dissent no less.

Certainly, the principle in *Reyes* does not offend Art. VI, Sec. 17 of the Constitution nor does it undermine the adjudicatory powers of the HRET. On the contrary, it strictly adheres to the textual tenor of the constitutional provision, to wit:

Section 17. The Senate and the House of Representatives shall each have an Electoral Tribunal which shall be the sole judge of all contests relating to the election, returns, and qualifications **of their respective Members.** Each Electoral Tribunal shall be composed of nine Members, three of whom shall be Justices of the Supreme Court to be designated by the Chief Justice, and the remaining six shall be Members of the Senate or the House of Representatives, as the case may be, who shall be chosen on the basis of proportional representation from the political parties and the parties or organizations registered under the party-list system represented therein. The senior Justice in the Electoral Tribunal shall be its Chairman. (Emphasis added)

It has to be emphasized that the Court, in deciding *Reyes,* did not divest the Senate and House of Representative Electoral Tribunals of their jurisdiction over their respective members, but merely set the parameters on who these "Members" are.

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[46] G.R. No. 172131, April 2, 2007, 520 SCRA 166, 180, citing *Guerrero v. COMELEC,* G.R. No. 105278, November 18, 1993, 228 SCRA 36, 43.

The jurisprudence earlier reviewed are in unison in holding that to be considered a "Member" within the purview of the constitutional provision, the three indispensable elements must concur.

As to the alleged clash of jurisdiction, the Court, in its October 22, 2013 Resolution in *Reyes,* explained:

"11. It may need pointing out that there is no conflict between the COMELEC and the HRET insofar as the petitioner's being a Representative of Marinduque is concerned. The COMELEC covers the matter of petitioner's certificate of candidacy, and its due course or its cancellation, which are the pivotal conclusions that determines who can be legally proclaimed. The matter can go to the Supreme Court but not as a continuation of the proceedings in the COMELEC, which has in fact ended, but on an original action before the Court grounded on more than mere error of judgment but on error of jurisdiction for grave abuse of discretion. At and after the COMELEC *En Banc* decision, there is no longer any certificate cancellation matter than can go to the HRET. In that sense, the HRET's constitutional authority opens, over the qualification of its MEMBER, who becomes so only upon a duly and legally based proclamation, the first and unavoidable step towards such membership. The HRET jurisdiction over the qualification of the Member of the House of Representatives is original and exclusive, and as such, proceeds *de novo* unhampered by the proceedings in the COMELEC which, as just stated has been terminated. The HRET proceedings is a regular, not summary, proceeding. It will determine who should be the Member of the House. **It must be made clear though, at the risk of repetitiveness, that no hiatus occurs in the representation of Marinduque in the House because there is such a representative who shall sit as the HRET proceedings are had till termination. Such representative is the duly proclaimed winner resulting from the terminated case of cancellation of certificate of candidacy of petitioner. The petitioner [Reyes] is not, cannot, be that representative.** And this, all in all, is the crux of the dispute between the parties: who shall sit in the House in representation of Marinduque, while there is yet no HRET decision on the qualifications of the Member.[47] (Emphasis and words in brackets added)

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[47] G.R. No. 207264, October 22, 2013, 708 SCRA 197, 231-232.

It thus appears that there is no conflict of jurisdiction, and that if a *quo warranto* case should be filed before HRET as espoused by the respondents and in the Dissent, it cannot be one against Reyes who never became a member of the House of Representatives over whom the HRET could exercise jurisdiction.

III

The Dissent also claims that when respondent Reyes was proclaimed by the PBOC as the duly elected Representative of the Lone District of Marinduque on May 18, 2013, petitioner Velasco should have continued his election protest *via* a *quo warranto* petition before the HRET.[48]

This suggestion is legally flawed considering that the HRET is without authority to review, modify, more so annul, the illegal acts of PBOC. On the contrary, this authority is lodged with the COMELEC and is incidental to its power of "direct control and supervision over the Board of Canvassers."[49] Therefore, the COMELEC is the proper entity that can legally and validly nullify the acts of the PBOC. As held by this Court held in *Mastura v. COMELEC*:[50]

"Pursuant to its administrative functions, the COMELEC exercises direct supervision and control over the proceedings before the Board of Canvassers. In *Aratuc v. Commission on Elections*[51] we held —

"While nominally, the procedure of bringing to the Commission objections to the actuations of boards of canvassers has been quite loosely referred to in certain quarters, even by the Commission and by this Court. . . as an appeal, the fact of the matter is that the

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[48] *J.* Leonen, Dissenting Opinion, p. 6.

[49] Section 227, Omnibus Election Code:

Section 227. **Supervision and control over board of canvassers. –** The Commission shall have direct control and supervision over the board of canvassers.

[50] G.R. No. 124521, January 29, 1998, 285 SCRA 493, 499-500.

[51] G.R. Nos. L-49705-09 and L-49717-21, February 8, 1979, 88 SCRA 251.

authority of the Commission in reviewing such actuations does not spring from any appellate jurisdiction conferred by any specific provision of law, for there is none such provision anywhere in the Election Code, but from the plenary prerogative of direct control and supervision endowed to it by the above-quoted provisions of Section 168. And in administrative law, it is a too well settled postulate to need any supporting citation here, that a superior body or office having supervision and control over another may do directly what the latter is supposed to do or ought to have done. xxx"

Furthermore, the illegal proclamation of the PBOC cannot operate to automatically oust the COMELEC of its supervisory authority over the PBOC. As clearly explained in *Reyes:*

"More importantly, we cannot disregard a fact basic in this controversy — that before the proclamation of petitioner on 18 May 2013, the COMELEC *En Banc* had already finally disposed of the issue of petitioner's lack of Filipino citizenship and residency via its Resolution dated 14 May 2013. **After 14 May 2013, there was, before the COMELEC, no longer any pending case on petitioner's qualifications to run for the position of Member of the House of Representative.** We will inexcusably disregard this fact if we accept the argument of the petitioner that the COMELEC was ousted of jurisdiction when she was proclaimed, which was four days after the COMELEC *En Banc* decision. **The Board of Canvasser which proclaimed petitioner cannot by such act be allowed to render nugatory a decision of the COMELEC En Banc which affirmed a decision of the COMELEC First Division."**[52] (Emphasis supplied.)

It must likewise be noted that the COMELEC *en banc*'s May 14, 2013 Decision in SPA No. 13-053 was already final as "there was, before the COMELEC, no longer any pending case on petitioner's qualifications to run for the position of Member of the House of Representative," and in the absence of a restraining order from this Court, it became executory. Thus, as held in *Reyes,* it was an error for the PBOC to proclaim Reyes, a non-candidate, on May 18, 2013. As aptly observed by Chief Justice Sereno in her Concurring Opinion in the said case:[53]

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[52] *Supra* note 4, at 537.

[53] Chief Justice Sereno, Concurring Opinion, *supra* note 4 at 243-248, dated October 22, 2013.

"On 14 May 2013, the COMELEC *En Banc* had already resolved the Amended Petition to Deny Due Course or to Cancel the Certificate of Candidacy filed against Reyes. Based on Sec. 3, Rule 37 of the COMELEC Rules of Procedure, this Resolution was already final and should have become executory five days after its promulgation. **But despite this unrestrained ruling of the COMELEC *En Banc* the PBOC still proclaimed Reyes as the winning candidate on 18 May 2013.**

On 16 May 2013, petitioner had already received the judgment cancelling her Certificate of Candidacy. As mentioned, two days thereafter, the PBOC still proclaimed her as the winner. Obviously, the proclamation took place notwithstanding that petitioner herself already knew of the COMELEC *En Banc* Resolution.

It must also be pointed out that even the PBOC already knew of the cancellation of the Certificate of Candidacy of petitioner when it proclaimed her. The COMELEC *En Banc* Resolution dated 9 July 2013 and submitted to this Court through the Manifestation of private respondent, quoted the averments in the Verified Petition of petitioner therein as follows:

xxx While the proceedings of the PBOC is suspended or in recess, the process server of this Honorable Commission, who identified himself as PEDRO P. STA. ROSA II ('Sta. Rosa.' for brevity), arrived at the session hall of the Sangguniang Panlalawigan of Marinduque where the provincial canvassing is being held.

xxx The process server, Sta. Rosa, was in possession of certified true copies of the *Resolution* promulgated by the Commission on Elections *En Banc* on 14 May 2013 in SPA No. 13-053 (DC) entitled Joseph Socorro B. Tan vs. Atty. Regina Ongsiako Reyes' and an *Order* dated 15 May 2013 to deliver the same to the Provincial Election Supervisor of Marinduque. The said Order was signed by no less than the Chairman of the Commission on Elections, the Honorable Sixto S. Brillantes, Jr.

xxx Process Server Pedro Sta. Rosa II immediately approached Atty. Edwin Villa, the Provincial Election Supervisor (PES) of Marinduque upon his arrival to serve a copy of the aforementioned Resolution dated 14 May 2013 in SPA No. 13-053 (DC). Despite his proper identification that he is a process server from the COMELEC Main Office, the PES totally ignored Process Server Pedro Sta. Rosa II.

xxx Interestingly, the PES likewise refused to receive the copy of the Commission on Elections En Banc Resolution dated 14 May 2013 in SPA No. 13-053 (DC) despite several attempts to do so.

xxx Instead, the PES immediately declared the resumption of the proceedings of the PBOC and instructed the Board Secretary to immediately read its Order proclaiming Regina Ongsiako Reyes as winner for the position of Congressman for the Lone District of Marinduque.

This narration of the events shows that **the proclamation was in contravention of a COMELEC *En Banc* Resolution cancelling the candidate's Certificate of Candidacy.**

The PBOC, a subordinate body under the direct control and supervision of the COMELEC, cannot simply disregard a COMELEC *En Banc* Resolution brought before its attention and hastily proceed with the proclamation by reasoning that it has not officially received the resolution or order.

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The PBOC denied the motion to proclaim candidate Velasco on the ground that neither the counsel of petitioner nor the PBOC was duly furnished or served an official copy of the COMELEC *En Banc* Resolution dated 14 May 2013 and forthwith proceeded with the proclamation of herein petitioner, whose Certificate of Candidacy has already been cancelled, bespeaks *mala fide* on its part.

As early as 27 March 2013, when the COMELEC First Division cancelled petitioner's Certificate of Candidacy, the people of Marinduque, including the COMELEC officials in the province, were already aware of the impending disqualification of herein petitioner upon the finality of the cancellation of her Certificate of Candidacy. When the COMELEC *En Banc* affirmed the cancellation of the certificate of candidacy on the day of the elections, but before the proclamation of the winner, it had the effect of declaring that herein petitioner was not a candidate.

Thus, **when the PBOC proclaimed herein petitioner, it proclaimed not a winner but a non-candidate.**

The proclamation of a non-candidate cannot take away the power vested in the COMELEC to enforce and execute its decisions. It is a power that enjoys precedence over that

emanating from any other authority, except the Supreme Court, x x x." (Emphasis supplied.)

Hence, at that moment, the COMELEC is not only bestowed with the authority, but more so, duty-bound to rectify the PBOC's mistake. Consequently, the COMELEC *En Banc,* in its July 9, 2013 Resolution in SPC No. 13-010, nullified the proclamation of Reyes, proceeded to constitute a special PBOC and on July 9, 2013, proclaimed Velasco as the winning Representative for the Lone District of Marinduque for the 2013-2016 term. As emphasized in the *ponencia,* this proclamation of Velasco was never questioned before this Court and likewise became final and executory.[54]

The Dissent makes much of the cases questioning Reyes' eligibility that are pending before the HRET, and argues that the Court should deny the instant petition and defer to the action of the electoral tribunal.[55]

The argument is specious.

It is of no moment that there are two *quo warranto* cases currently pending before the HRET that seek to disqualify Reyes from holding the congressional office.[56] These cases cannot oust the COMELEC and the Court of their jurisdiction over the issue on Reyes' eligibility, which they have already validly acquired and exercised in SPA No. 13-053 and *Reyes.* The petitioners in the *quo warranto* cases themselves recognize the enforceability of the COMELEC and the Court's ruling in SPA No. 13-053 and *Reyes,* and even invoked the rulings therein to support their respective petitions. They seek not a trial *de novo* for the determination of whether or not Reyes is eligible to hold office as Representative, but seek the implementation of the final and executory decisions of the COMELEC and of the High Court.

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[54] *Ponencia,* p. 12.

[55] *J.* Leonen, Dissenting Opinion, p. 7.

[56] HRET Case No. 13-036, entitled *"Noeme Mayores Lim and Jeasseca L. Mapacpac v. Regina Ongsiako Reyes,"* and HRET Case No. 13-037, entitled *"Eric D. Junio v. Regina Ongsiako Reyes."*

Interestingly, Reyes merely prayed for the dismissal of these cases, but never asked the HRET for any affirmative relief to counter the executory rulings in SPA No. 13-053, G.R. No. 207264, and SPA No. 13-010.

IV

All told, We cannot turn a blind eye to the undisputed fact that the Court's pronouncements in *Reyes* and the pertinent resolutions of the COMELEC have established that the title and clear right to the contested office belongs to petitioner. In reinforcing this conclusion, the *ponencia* aptly observed that:[57]

> xxx In this case, given the present factual milieu, *i.e.* the final and executory resolutions of this Court in G.R. No. 207264, the final and executory resolutions of the COMELEC in SPA No. 13-053 (DC) cancelling Reyes' Certificate of Candidacy, and the final and executory resolution of the COMELEC in SPA No. 13-010 declaring null and void the proclamation of Reyes and proclaiming Velasco as the winning candidate for the position of Representative for the Lone District of the Province of Marinduque, it cannot be claimed that the present petition is one for the determination of the right of Velasco to the claimed office.

It has thus been conclusively proven that Velasco is the winning candidate for the position of Representative for the Lone District of Marinduque during the May 2013 Elections. As a consequence, when respondents Belmonte and Barua-Yap received the *"Certificate of Canvass of Votes and Proclamation of Winning Candidate for the position of Member of House of Representatives for the Lone District of Marinduque"* issued by the COMELEC in favor of the herein petitioner, they should have, without delay, abide by their respective ministerial duties to administer the oath in favor of the petitioner and to register his name in Roll of Members of the House of Representatives for the 2013-2016 term. Upon their unlawful refusal to do so despite repeated demands from petitioner, the extraordinary writ of *mandamus* ought to lie.

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[57] *Ponencia,* p. 12.

In the end, Reyes has no legal basis whatsoever to continue exercising the rights and prerogatives as the Lone District Representative of Marinduque as there is at present no pending action or petition which was instituted by her either before the HRET or the Court challenging petitioner Velasco's proclamation. Respondents Belmonte and Barua-Yap must thus honor the rights of petitioner and execute the final COMELEC and Supreme Court Resolutions in accordance with and furtherance of the rule of law.

May I just be permitted one last word.

In what was in all ill designed as a master stroke, Reyes, after all have been said and done by this Court in the petition, she herself filed, submitted a motion to withdraw that petition, G.R. No. 207264, *Regina Ongsiako Reyes v. COMELEC and Tan*.[58] I had the opportunity to say, in the Court's denial of her motion to reconsider the dismissal of her petition, that:

x x x x x x x x x

> The motion to withdraw petition filed AFTER the Court has acted thereon, is noted. It may well be in order to remind petitioner that jurisdiction, once acquired, is not lost upon the instance of the parties, but continues until the case is terminated. When petitioner filed her Petition for Certiorari, jurisdiction vested in the Court and, in fact, the Court exercised such jurisdiction when it acted on the petition. Such jurisdiction cannot be lost by the unilateral withdrawal of the petition by petitioner.
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> More importantly, the Resolution dated 25 June 2013, being a valid court issuance, undoubtedly has legal consequences. Petitioner cannot, by the mere expediency of withdrawing the petition, negative and nullify the Court's Resolution and its legal effects. At this point, we counsel petitioner against trifling with court processes. Having

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[58] October 22, 2013, 708 SCRA 197, 233.

sought the jurisdiction of the Supreme Court, petitioner cannot withdraw her petition to erase the ruling adverse to her interests. Obviously, she cannot, as she designed below, subject to her predilections the supremacy of the law.

I cannot be moved one bit away from the conclusion, then as now, that parties to cases cannot trifle with our Court processes. If we deny the petition at hand, we will ourselves do for Reyes what we said in judgment cannot be done by her.

WHEREFORE, premises considered, I register my vote to **GRANT** the petition.

CONCURRING OPINION

LEONEN, *J.*:

I concur in the result.

The quo warranto cases[1] filed before the House of Representatives Electoral Tribunal have been dismissed in the Resolution[2] dated December 14, 2015. The proper constitutional body, the House of Representatives Electoral Tribunal, has already ruled on the basis of Lord Allan Jay Velasco's (Velasco) claim to a seat in Congress. There is thus no pending proceeding nor matter that bars this court from issuing the writ of mandamus in favor of Velasco.

Under the situation attendant in this case, I therefore concur in the grant of the Petition for Mandamus.

I

Election contests assailing Regina Ongsiako Reyes' (Reyes) title as a member of the House of Representatives were filed.

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[1] *Rollo,* p. 788, Regina Ongsiako Reyes' Memorandum. These cases were docketed as HRET Case Nos. 13-036 and 13-037.

[2] Petitioner's Manifestation dated January 6, 2016, Annex D.

Velasco filed an electoral protest before the House of Representatives Electoral Tribunal.[3] For reasons only he understood, he opted to withdraw his case against Reyes before the House of Representatives Electoral Tribunal and, instead, after Reyes had taken her oath and proceeded to represent the Lone District of Marinduque, filed the present Petition for Mandamus.

However, three quo warranto cases were also filed against Reyes before the House of Representatives Electoral Tribunal.[4]

When Velasco filed this Petition for Mandamus, the House of Representatives Electoral Tribunal had yet to rule on Velasco's title to a seat in Congress. The quo warranto cases were still pending before the House of Representatives Electoral Tribunal.

While election contests were pending before the House of Representatives Electoral Tribunal, this Petition for Mandamus was, in effect, an election contest.[5] It was a procedural vehicle to raise "contests relating to the election, returns, and qualifications"[6] of a Member of the House of Representatives. This action set up the title of Velasco to a public office. Velasco claims a clear and better legal right as against the occupant. An election contest is a suit that can be filed by a candidate to question the title of an incumbent to a public office.[7]

The power to be the "sole judge"[8] of all these contests is vested by our Constitution itself in the House of

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[3] *Rollo,* p. 630, Hon. Speaker Feliciano R. Belmonte and Secretary General Marilyn B. Barua-Yap's Memorandum. The case was docketed as HRET Case No. 13-028.

[4] *Id*. at 629-630.

[5] HRET Rules, Rule 15. The action filed may be an election protest or *quo warranto* under the HRET Rules.

[6] CONST., Art VI, Sec. 17.

[7] HRET Rules, Rules 15-17.

[8] CONST., Art. VI, Sec. 17.

Representatives Electoral Tribunal to the exclusion of all others.[9]

The Constitution clearly provides:

SECTION 17. The Senate and the House of Representatives shall each have an Electoral Tribunal which shall be the sole judge of all contests relating to the election, returns, and qualifications of their respective Members. Each Electoral Tribunal shall be composed of nine Members, three of whom shall be Justices of the Supreme Court to be designated by the Chief Justice, and the remaining six shall be Members of the Senate or the House of Representatives, as the case may be, who shall be chosen on the basis of proportional representation from the political parties and the parties or organizations registered under the party-list system represented therein. The senior Justice in the Electoral Tribunal shall be its Chairman.[10]

An election contest, whether an election protest[11] or petition

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[9] CONST., Art. VI, Sec. 17. See also *Angara v. Electoral Commission,* 63 Phil. 139 (1936) [Per *J.* Laurel, *En Banc*].

[10] CONST., Art. VI, Sec. 17.

[11] HRET Rules, Rule 16 provides:

RULE 16. Election Protest. – *A* verified petition contesting the election or returns of any Member of the House of Representatives shall be filed by any candidate who has duly filed a certificate of candidacy and has been voted for the same office, within fifteen (15) days after the proclamation of the winner. The party filing the protest shall be designated as the protestant while the adverse party shall be known as the protestee.

No joint election protest shall be admitted, but the Tribunal, for good and sufficient reasons, may consolidate individual protests and hear and decide them jointly. Thus, where there are two or more protests involving the same protestee and common principal causes of action, the subsequent protests shall be consolidated with the earlier case to avoid unnecessary costs or delay. In case of objection to the consolidation, the Tribunal shall resolve the same. An order resolving a motion for or objection to the consolidation shall be unappealable.

The protest is verified by an affidavit that the affiant has read it and that the allegations therein are true and correct of his knowledge and belief or based on verifiable information or authentic records. A verification based on "information and belief," or upon "knowledge, information and belief," is not a sufficient verification.

for quo warranto,[12] is a remedy "to dislodge the winning candidate from office"[13] and "to establish who is the *actual winner* in the election."[14] The action puts in issue the validity of the incumbent's claim to the office.

A contest contemplated by the Constitution settles disputes as to who is rightfully entitled to a position.[15] It is not this court but the House of Representatives Electoral Tribunal that has sole jurisdiction of contests involving Members of the House of Representatives. This can be filed through (a) an election protest under Rule 16 of the 2011 Rules of the House of Representatives Electoral Tribunal; and (b) quo warranto under

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An election protest shall state:

1. The date of proclamation of the winner and the number of votes obtained by the parties per proclamation;
2. The total number of contested individual and clustered precincts per municipality or city;
3. The individual and clustered precinct numbers and location of the contested precincts; and
4. The specific acts or omissions complained of constituting the electoral frauds, anomalies or irregularities in the contested precincts.

[12] HRET Rules, Rule 17 provides:

RULE 17. *Quo Warranto*. – A verified petition for *quo warranto* contesting the election of a Member of the House of Representatives on the ground of ineligibility or of disloyalty to the Republic of the Philippines shall be filed by any registered voter of the district concerned within fifteen (15) days from the date of the proclamation of the winner. The party filing the petition shall be designated as the petitioner while the adverse party shall be known as the respondent.

The provisions of the preceding paragraph to the contrary notwithstanding, a petition for *quo warranto* may be filed by any registered voter of the district concerned against a member of the House of Representatives, on the ground of citizenship, at any time during his tenure.

The rule on verification and consolidation provided in Section 16 hereof shall apply to petitions for *quo warranto*.

[13] *Tecson v. Commission on Elections,* 468 Phil. 421, 461 (2004) [Per *J.* Vitug, *En Banc*].

[14] *Lerias v. House of Representatives Electoral Tribunal,* 279 Phil. 877, 898 (1991) [Per *J.* Paras, *En Banc*].

[15] CONST., Art. VI, Sec. 17.

Rule 17 of the 2011 Rules of the House of Representatives Electoral Tribunal.

Thus, while the petitions for quo warranto were pending before the House of Representatives Electoral Tribunal, this court did not have the jurisdiction to rule on this Petition for Mandamus. A grant of the writ of mandamus would have openly defied the Constitution and, in all likelihood, would muddle the administration of justice as it would have rendered the quo warranto cases properly pending before the House of Representatives Electoral Tribunal moot and academic. We would have arrogated upon ourselves the resolution of then pending House of Representatives Electoral Tribunal cases.

II

Notwithstanding the pendency of the quo warranto cases before the House of Representatives Electoral Tribunal, Velasco relies on the Decision in *Reyes v. Commission on Elections*[16] upholding the jurisdiction of the Commission on Elections and affirming the Resolution of the Commission on Elections cancelling Reyes' Certificate of Candidacy for the grant of the writ of mandamus.

The Resolution on the Motion for Reconsideration in *Reyes v. Commission on Elections*[17] was denied by a divided court.[18] Five Justices[19] voted to deny the Motion for Reconsideration filed by Reyes, and four justices[20] voted to grant the Motion for Reconsideration.

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[16] G.R. No. 207264, June 25, 2013, 699 SCRA 522 [Per *J.* Perez, *En Banc*].

[17] G.R. No. 207264, October 22, 2013,708 SCRA 197 [Per *J.* Perez, *En Banc*].

[18] *Id.* at 234.

[19] The five justices were Chief Justice Maria Lourdes P. A. Sereno and Associate Justices Teresita J. Leonardo-de Castro, Roberto A. Abad, Jose P. Perez, and Bienvenido L. Reyes.

[20] The four justices were Associate Justices Antonio T. Carpio, Arturo D. Brion, Martin S. Villarama, Jr., and Marvic Mario Victor F. Leonen.

On the same day that the Resolution was promulgated, this court En Banc decided *Tañada, Jr. v. Commission on Elections*[21] ***by a unanimous vote.***[22] In *Tañada,* this court once again upheld the jurisdiction of the House of Representatives Electoral Tribunal "over disputes relating to the election, returns, and qualifications of the proclaimed representative[.]"[23] The issue on the validity of the proclamation of a Member of Congress is included in the term "returns." We said:

> Case law states that the proclamation of a congressional candidate following the election divests the COMELEC of jurisdiction over disputes relating to the election, returns, and qualifications of the proclaimed representative in favor of the HRET. The phrase "election, returns, and qualifications" refers to all matters affecting the validity of the contestee's title. In particular, the term "election" refers to the conduct of the polls, including the listing of voters, the holding of the electoral campaign, and the casting and counting of the votes; "returns" refers to the canvass of the returns and the proclamation of the winners, including questions concerning the composition of the board of canvassers and the authenticity of the election returns; and "qualifications" refers to matters that could be raised in a quo warranto proceeding against the proclaimed winner, such as his disloyalty or ineligibility or the inadequacy of his CoC.[24] (Citation omitted)

In *Limkaichong v. Commission on Elections, et al.*:[25]

> Petitioners (in G.R. Nos. 179120, 179132-33, and 179240-41) steadfastly maintained that Limkaichong's proclamation was tainted with irregularity, which will effectively prevent the HRET from acquiring jurisdiction.
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> The fact that the proclamation of the winning candidate, as in this case, was alleged to have been tainted with irregularity does

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[21] G.R. Nos. 207199-200, October 22, 2013, 708 SCRA 188 [Per *J.* Perlas-Bernabe, *En Banc*].

[22] *Id.* at 196.

[23] *Id.* at 195.

[24] *Id.* at 195-196.

[25] 601 Phil. 751 (2009) [Per *J.* Peralta, *En Banc*].

not divest the HRET of its jurisdiction. The Court has shed light on this in the case of *Vinzons-Chato,* to the effect that:

> In the present case, it is not disputed that respondent Unico has already been proclaimed and taken his oath of office as a Member of the House of Representatives (Thirteenth Congress); hence, the COMELEC correctly ruled that it had already lost jurisdiction over petitioner Chato's petition. The issues raised by petitioner Chato essentially relate to the canvassing of returns and alleged invalidity of respondent Unico's proclamation. These are matters that are best addressed to the sound judgment and discretion of the HRET. Significantly, the allegation that respondent Unico's proclamation is null and void does not divest the HRET of its jurisdiction:
>
> > x x x [I]n an electoral contest where the validity of the proclamation of a winning candidate who has taken his oath of office and assumed his post as congressman is raised, that issue is best addressed to the HRET. The reason for this ruling is self- evident, for it avoids duplicity of proceedings and a clash of jurisdiction between constitutional bodies, with due regard to the people's mandate.
>
> Further, for the Court to take cognizance of petitioner Chato's election protest against respondent Unico would be to usurp the constitutionally mandated functions of the HRET.

In fine, any allegations as to the invalidity of the proclamation will not prevent the HRET from assuming jurisdiction over all matters essential to a member's qualification to sit in the House of Representatives.

. . . . . .

Accordingly, after the proclamation of the winning candidate in the congressional elections, the remedy of those who may assail one's eligibility/ineligibility/qualification/disqualification is to file before the HRET a petition for an election protest, or a petition for *quo warranto,* within the period provided by the HRET Rules. In *Pangilinan v. Commission on Elections,* we ruled that where the candidate has already been proclaimed winner in the congressional elections, the remedy of petitioner is to file an electoral protest with

the Electoral Tribunal of the House of Representatives.[26] (Emphasis in the original, citations omitted)

In *Vinzons-Chato v. Commission on Elections,*[27] this court ruled that:

> once a winning candidate has been proclaimed, taken his oath, and assumed office as a Member of the House of Representatives, the COMELEC's jurisdiction over election contests relating to his election, returns, and qualifications ends, and the HRET's own jurisdiction begins. *Stated in another manner, where the candidate has already been proclaimed winner in the congressional elections, the remedy of the petitioner is to file an electoral protest with the HRET.*[28] (Emphasis supplied, citations omitted)

When Reyes was proclaimed by the Provincial Board of Canvassers as the duly elected Representative of the Lone District of Marinduque on May 18, 2013, Velasco should have continued his election protest or filed a quo warranto Petition before the House of Representatives Electoral Tribunal.[29] Instead, Velasco filed a Petition to annul the proceedings of the Provincial Board of Canvassers and the proclamation of Reyes on May 20, 2013 before the Commission on Elections.[30] At that time, the Commission on Elections no longer had jurisdiction over the Petition that was filed after Reyes' proclamation.

Any alleged invalidity of the proclamation of a Member of the House of Representatives does not divest the House of Representatives Electoral Tribunal of jurisdiction.[31]

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[26] *Id*. at 782-783.

[27] 548 Phil. 712 (2007) [Per *J*. Callejo, Sr., *En Banc*].

[28] *Id*. at 725-726.

[29] HRET Rules, Rules 16-17.

[30] *Rollo,* p. 574, Lord Allan Jay Q. Velasco's Consolidated Reply. The Petition was docketed as SPC No. 13-010.

[31] *Gonzalez v. Commission on Elections, et al.,* 660 Phil. 225, 267 (2011) [Per *J*. Villarama, Jr., *En Banc*].

Should there have been pending cases at the House of Representatives Electoral Tribunal, we should have deferred to the action of the constitutional body given the competence to act initially on the matter. Thus, in the Dissenting Opinion in *Reyes v. Commission on Elections:*

> In case of doubt, there are fundamental reasons for this Court to be cautious in exercising its jurisdiction to determine who the members are of the House of Representatives. We should maintain our consistent doctrine that proclamation is the operative act that removes jurisdiction from this Court or the Commission on Elections and vests it on the House of Representatives Electoral Tribunal (HRET).
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> The first reason is that the Constitution unequivocably grants this discretion to another constitutional body called the House of Representative Electoral Tribunal (HRET). This is a separate organ from the Judiciary.
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> . . . . . .
>
> The second fundamental reason for us to exercise caution in determining the composition of the House of Representatives is that this is required for a better administration of justice. Matters relating to factual findings on election, returns, and qualifications must first be vetted in the appropriate electoral tribunal before these are raised in the Supreme Court.[32]

The House of Representatives Electoral Tribunal is the sole judge of contests involving Members of the House of Representatives.[33] This is a power conferred by the sovereign through our Constitution.

Again, as in my dissent in *Reyes v. Commission on Elections*:[34]

> This Court may obtain jurisdiction over questions regarding the validity of the proclamation of a candidate vying for a seat in Congress

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[32] *J.* Leonen, Dissenting Opinion in *Reyes v. Commission on Elections,* G.R. No. 207264, October 22, 2013, 708 SCRA 197, 327-344 [Per *J.* Perez, *En Banc*].

[33] CONST., Art. VI, Sec. 17.

[34] G.R. No. 207264, October 22, 2013, 708 SCRA 197 [Per *J.* Perez, *En Banc*].

without encroaching upon the jurisdiction of a constitutional body, the electoral tribunal. "[The remedies of] *certiorari* and prohibition will not lie in this case [to annul the proclamation of a candidate] considering that there is an available and adequate remedy in the ordinary course of law; [that is, the filing of an electoral protest before the electoral tribunals]." *These remedies, however, may lie only after a ruling by the House of Representatives Electoral Tribunal or the Senate Electoral Tribunal.*[35] (Emphasis supplied)

However, the House of Representatives Electoral Tribunal already ruled on the two quo warranto cases against Reyes that were consolidated.[36] The House of Representatives Electoral Tribunal held that it had no jurisdiction to resolve the petitions for quo warranto relying on this court's Decision in *Reyes v. Commission on Elections.*[37] In their Resolution, the House of Representatives pronounced:

Such element is obviously absent in the present cases as Regina Reyes' proclamation was ***nullified*** by the COMELEC, which nullification was ***upheld*** by the Supreme Court. On this ground alone, the Tribunal is without power to assume jurisdiction over the present petitions since Regina Reyes **"cannot be considered a Member of the House of Representatives,"** as declared by the Supreme Court *En Banc* in G.R. No. 207264.[38] (Emphasis in the original, citation omitted)

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[35] *J.* Leonen, Dissenting Opinion in *Reyes v. Commission on Elections,* G.R. No. 207264, October 22, 2013, 708 SCRA 197, 342 [Per *J.* Perez, *En Banc*], *quoting Barbers v. Commission on Elections,* 499 Phil. 570, 585 (2005) [Per *J.* Carpio, *En Banc*].

[36] *Rollo,* p. 788, Regina Ongsiako Reyes' Memorandum. HRET Case No. 13-036 was entitled *Noeme Mayores Tan & Jeasseca L. Mapacpac v. Regina Ongsiako Reyes.* HRET Case No. 13-037 was entitled *Eric D. Junio v. Regina Ongsiako Reyes.*

[37] G.R. No. 207264, June 25, 2013, 699 SCRA 522 [Per *J.* Perez, *En Banc*].

[38] Petitioner's Manifestation dated January 6, 2016, Annex D, p. 4. Annex D refers to HRET Resolution in HRET Case Nos. 13-036 and 13-037.

The tribunal dismissed the quo warranto cases holding that the Commission on Elections' cancellation of Reyes' certificate of candidacy resulted in the nullification of her proclamation.[39] Thus:

> **WHEREFORE,** in view of the foregoing, the September 23, 2014 Motion for Reconsideration of Victor Vela Sioco is hereby **GRANTED**. The September 11, 2014 Resolution of Tribunal is hereby **REVERSED** and **SET ASIDE**. Accordingly, the present *Petitions for Quo Warranto* are hereby **DISMISSED** for lack of jurisdiction.[40] (Emphasis in the original)

In effect, the decision by the sole judge of all electoral contests acknowledges Reyes' lack of qualifications. While maintaining my dissent in *Reyes v. Commission on Elections,* I now acknowledge that there is no other remedy in law or equity to enforce a final decision of this court except through mandamus.

Applying *Codilla, Sr. v. Han. de Venecia*,[41] this Petition for Mandamus should be granted.

III

Aratea v. Commission on Elections[42] qualified the second-placer rule. The candidate receiving the next highest number of votes would be entitled to the position if the Certificate of Candidacy of the candidate receiving the highest number of votes had been initially declared valid at the time of filing but had to be subsequently cancelled.[43] Additionally, if the Certificate of Candidacy of the candidate receiving the highest number of votes was void ab initio, the votes of the candidate should be considered stray and not counted.[44] This would entitle the candidate

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[39] *Id.* at 3.

[40] *Id.* at 5.

[41] 442 Phil. 139 (2002) [Per *J.* Puno, *En Banc*].

[42] G.R. No. 195229, October 9, 2012, 683 SCRA 105 [Per *J.* Carpio, *En Banc*].

[43] *Id.* at 146.

[44] *Id.*

receiving the next highest number of votes to the position.[45] Thus:

> Decisions of this Court holding that the second-placer cannot be proclaimed winner if the first-placer is disqualified or declared ineligible should be limited to situations where the certificate of candidacy of the first-placer was **valid at the time of filing** but subsequently had to be cancelled because of a violation of law that took place, or a legal impediment that took effect, after the filing of the certificate of candidacy. If the certificate of candidacy is void *ab initio,* then legally the person who filed such void certificate of candidacy was never a candidate in the elections at any time. All votes for such non-candidate are stray votes and should not be counted. Thus, such non-candidate can never be a first- placer in the elections. If a certificate of candidacy void *ab initio* is cancelled on the day, or before the day, of the election, prevailing jurisprudence holds that all votes for that candidate are stray votes. If a certificate of candidacy void *ab initio* is cancelled one day or more after the elections, all votes for such candidate should also be stray votes because the certificate of candidacy is void from the beginning. This is the more equitable and logical approach on the effect of the cancellation of a certificate of candidacy that is void *ab initio.* Otherwise, a certificate of candidacy void *ab initio* can operate to defeat one or more valid certificates of candidacy for the same position.[46] (Emphasis in the original, citations omitted)

The Decision in *Aratea* was subsequently reiterated in *Jalosjos, Jr. v. Commission on Elections*[47] and *Maquiling v. Commission on Elections.*[48]

ACCORDINGLY, I vote to **GRANT** the Petition for Mandamus.

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[45] *Id.*

[46] *Jalosjos, Jr. v. Commission on Elections,* G.R. No. 193237, October 9, 2012, 683 SCRA 1, 31-32 [Per *J.* Carpio, *En Banc*].

[47] G.R. No. 193237, October 9, 2012, 683 SCRA 1 [Per *J.* Carpio, *En Banc*].

[48] G.R. No. 195649, April 16, 2013, 696 SCRA 420 [Per *C.J.* Sereno, *En Banc*].

DISSENTING OPINION

BRION, *J.*:

Before the Court is the petition for *mandamus*[1] filed by Lord Allan Jay Q. Velasco[2] *(Velasco)* against Hon. Feliciano R. Belmonte, Jr., (as Speaker of the House of Representatives, *Speaker Belmonte),* Secretary General Marilyn B. Barua-Yap *(Sec. Gen. Barua-Yap),* and Representative Regina Ongsiako-Reyes *(Reyes).*

I. THE PETITION

The petition seeks to compel: Speaker Belmonte to administer the proper oath in favor of Velasco and allow him to assume office as Representative for Marinduque and exercise the powers and prerogatives attached to the office; and Sec. Gen Barua-Yap to remove the name of Reyes, and register his name in her place, in the Roll of Members of the House of Representatives *(HOR).* It also seeks to restrain Reyes from further exercising the powers and prerogatives attached to the position and to direct her to immediately vacate it.

Velasco asserts· that ***"he has a well-defined and clear legal right and basis to warrant the grant of the writ of mandamus."*** He argues that the final and executory resolutions of the **Commission on Elections** ("COMELEC") **in SPA No. 13-053 and SPC No. 13-010** and of the **Court in GR No. 207264**, with his proclamation as Representative of Marinduque, grant him this clear legal right to claim and assume the congressional seat.

Because of this clear legal right, Velasco reasons out that **Speaker Belmonte has the ministerial duty to *"administer the oath to [him] and allow him to assume and exercise the prerogatives of the congressional seat. x x x."* Sec. Gen.**

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[1] *Rollo,* pp. 3-26.

[2] Petitioner Velasco is the son of incumbent Supreme Court Justice Presbitero J. Velasco, Jr.

Barua-Yap, on the hand, has the ministerial duty to *"register [his] name x x x as the duly elected member of the [HOR] and delete the name of respondent Reyes from the Roll of Members."* Velasco cites *Codilla v. De Venecia*[3] to support his claim.

He claims that Speaker Belmonte and Sec. Gen. Barua-Yap are unlawfully neglecting the performance of these ministerial duties, thus, illegally excluding him from the enjoyment of his right as the duly elected Marinduque Representative.

As regards **Reyes**, Velasco asserts that the *"**continued usurpation and unlawful holding of such position by respondent Reyes has worked injustice and serious prejudice to [him] in that she has already received the salaries, allowances, bonuses and emoluments that pertain to the [office] since June 30, 2013 up to the present x x x.**"*

For these reasons, he argues that a writ of *mandamus* should be issued to compel Speaker Belmonte and Sec. Gen. Barua-Yap to perform their ministerial duties; and that a TRO and a writ of permanent injunction should also be issued to restrain, prevent, and prohibit Reyes from usurping the position that rightfully belongs to him.

II. THE *PONENCIA*'S RULING

The *ponencia* grants the petition; it views the petition merely as a plea to the Court for the enforcement of what it perceives as clear legal duties on the part of the respondents.

To the *ponencia,* any issue on who is the rightful Representative of the Lone District of Marinduque has been settled with the finality of the rulings in GR No. 207264, SPA No. 13-035, and SPC No. 13-010.

Recognizing it settled that Velasco is the proclaimed winning candidate for the Marinduque Representative position, the *ponencia* concludes that the administration of oath and the registration of Velasco in the Roll of Members of the HOR are

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[3] 442 Phil. 139 (2002).

no longer matters of discretion on the part of Speaker Belmonte and Sec. Gen. Barua-Yap. Hence, the writ of *mandamus* must issue.

III. MY DISSENT

I submit this **Dissenting Opinion** to object to the *ponencia's* GRANT of the petition, as I disagree with the *ponencia's* premises and conclusion that Velasco is entitled to the issuance of a writ of *mandamus*. I likewise believe that Velasco's petition should be dismissed because:

(1) he failed to satisfy the requirements for the issuance of the writ of *mandamus;* and

(2) the grant of the writ is a patent violation of the principle of the separation of powers that will disturb, not only the Court's relations with the HOR, a co-equal branch of government. As well, it will result in upsetting the established lines of jurisdiction among the Comelec, the House of Representatives Electoral Tribunal *(HRET),* and the Court.

Needless to state, the HOR may very well have its own views about the admission of its Members and can conceivably prefer its own views to those of the Court on matters that it believes are within its competence and jurisdiction to decide as an equal and separate branch of government.

Additionally, as I reminded the Court in my writings on the cases affecting Velasco, the Court should be keenly aware of the sensitivity involved in handling the case. ***Velasco is the son of a colleague, Associate Justice Presbitero Velasco, who is also the Chair of the HRET.*** Thus, we should be very clear and certain if we are to issue the writ in order to avoid any charge that the Court favors its own.

IV. DISCUSSION

IV.A. Mandamus: Nature and Concept

Mandamus is a command issuing from a court of law of competent jurisdiction, in the name of the state or sovereign,

directed to some ***inferior*** *court, tribunal, or board, or to some corporation or person,* requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law.[4]

The writ of *mandamus* is an ***extraordinary remedy*** *issued only in cases of extreme necessity* where the *ordinary course of procedure is powerless to afford an adequate and speedy relief* to one who has a *clear legal right to the performance of the act* to be compelled.[5]

As a peremptory writ, *mandamus* must be issued with utmost circumspection, and should always take into consideration existing laws, rules and jurisprudence on the matter, particularly the principles underlying our Constitution.

Moreover, the remedy of *mandamus* is employed to compel the performance of a ***ministerial duty*** after performance of the duty has been refused. As a rule, it cannot be used to direct the exercise of judgment or discretion; if at all, the obligated official carrying the duty can only be directed by *mandamus* to act, but not to act in a particular way. The courts can only interfere when the refusal to act already constitutes inaction amounting to grave abuse of discretion, manifest injustice, palpable excess of authority, or other causes affecting jurisdiction.[6]

IV.A.l. Mandamus as a remedy under Rule 65 of the Rules of Court

In this jurisdiction, the remedy of *mandamus* is governed by Section 3, Rule 65 of the Rules of Court. Under Section 3, *mandamus* is the remedy available when *"a tribunal, corporation, board, officer or person unlawfully neglects the performance*

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[4] Feria-Noche, *Civil Procedure Annotated*, (2001), p. 486, citing 34 Am. Jur. *Mandamus,* S. 2.

[5] See *Spouses Dacudao v. Secretary of Justice Raul M. Gonzales,* G.R. No. 188056, January 8, 2013.

[6] Feria-Noche, *Civil Procedure Annotated*, (2001), p. 486.

*of an act which the law specifically enjoins as a duty resulting from an office, trust, or station, or unlawfully excludes another from the use and enjoyment of a right or office to which such other is entitled, [**and**], there is no other plain, speedy, and adequate remedy in the ordinary course of law."*

The person aggrieved by the unlawful neglect or unlawful exclusion of the tribunal, corporation, board, officer, or person may file the petition for *mandamus* with the proper court.

IV.A.2. Ministerial v. discretionary acts

"Discretion," when applied to public functionaries, means the power or right conferred upon them by law of acting officially, under certain circumstances, uncontrolled by the judgment or sense of propriety of others. If the law imposes a duty upon a public officer and gives him the right to decide how and when the duty shall be performed, such duty is discretionary and not ministerial.[7]

In contrast, a purely ministerial act or duty is one which an officer or tribunal performs under a given state of facts, in a prescribed manner, in obedience to the mandate of a legal authority, without regard to or the exercise of his own judgment on the propriety or impropriety of the act done.[8] The duty is ministerial only when the discharge of the same requires neither the exercise of official discretion or judgment.[9]

A ministerial act is one as to which nothing is left to the discretion of the person who must perform. It is **a simple, definite duty arising under conditions admitted or proved to exist and imposed by law.** It is a precise act accurately marked out, enjoined upon particular officers for a particular purpose.[10]

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[7] See Feria-Noche, *Civil Procedure Annotated* (2001), p. 487 (citation omitted).

[8] See *Nazareno v. City of Dumaguete,* 607 Phil. 768 (2009).

[9] *Id*.

[10] See Feria-Noche, *Civil Procedure Annotated* (2001), p. 488 (citation omitted).

IV.B. Requirements for the issuance of the writ of *mandamus*

In the light of its nature, the writ of *mandamus* will issue only if the following requirements are complied with:

First, *the petitioner has a* ***clear and unmistakable legal right*** *to the act demanded.*

The clear and unmistakable right that the writ of *mandamus* requires pertains to those rights that are well-defined, clear and certain. The writ contemplates only those **rights** which are **founded in law, are specific, certain, clear, established, complete, undisputed or unquestioned, and are without any semblance or color of doubt.**[11]

In situations where the right claimed, or the petitioner's entitlement to it, is unclear, the writ of *mandamus* will not lie. The writ of *mandamus* will not issue to establish a right or to compel an official to give to the applicant anything to which he is not clearly entitled. ***Mandamus*** **never issues in doubtful cases, or to enforce a right which is in substantial dispute or to which substantial doubt exists.**[12]

Second, *it must be the duty of the respondent to perform the act because it is mandated by law.*

The act must be clearly and peremptorily enjoined by law or by reason of the respondent's official station. It must be the imperative duty of the respondent to perform the act required.[13]

Third, *the respondent unlawfully neglects the performance of the duty enjoined by law or unlawfully excludes the petitioner from the use or enjoyment of the right or office.*

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[11] See *Nazareno v. City of Dumaguete,* 607 Phil. 768 (2009); *Asia's Emerging Dragon Corporation v. Republic,* 602 Phil. 722 (2009). See also Feria-Noche, *Civil Procedure Annotated* (2001), p. 488 (citation omitted).

[12] See *Metropolitan Bank and Trust Company v. S.F. Naguiat Enterprises, Inc.,* G.R. No. 178407, March 18, 2015; and *Nazareno v. City of Dumaguete,* 607 Phil. 768 (2009).

[13] See *Nazareno v. City of Dumaguete, supra* note 11.

Fourth, *the act to be performed is ministerial, not discretionary.*

Fifth **and last,** *there is no other plain, speedy, and adequate remedy in the ordinary course of law.*

IV.C. Velasco's petition and the requirements for the issuance of the writ of *mandamus*

Velasco failed to comply **with all five requirements** for the issuance of a writ of *mandamus.*

IV.C.1. No showing of any clear and unmistakable right

Velasco failed to show that he has a clear, established, and unmistakable right to the position of Representative of Marinduque. Any right that Velasco may claim to hold is, at most, substantially doubtful or is in substantial dispute; in either case, the existence of doubt renders the Court unjustified in issuing a writ in Velasco's favor.

Velasco's cited legal grounds for the issuance of the writ of mandamus in his favor are the final rulings in the following cases: **SPA No. 13-053** and ***Reyes v. Comelec***, and **SPC No. 13-010.** Thus, a look into what these cases really are and what they say is in order.

IV.C.1.a. SPA No. 13-053 ***(Socorro B. Tan v. Regina Ongsiako-Reyes)*** and ***Reyes v. Comelec,*** **GR No. 207264**

SPA No. 13-053 involved the petition filed by Socorro B. Tan ***before the Comelec*** to deny due course to or cancel Reyes' CoC on the ground of the alleged material misrepresentations Reyes made. ***Velasco was not a party to this case.***

The Comelec cancelled Reyes' CoC in its May 14, 2013 resolution (in SPA No. 13-053). Note should be taken of the fact that this May 14, 2013 Comelec ruling became final and executory only on **May 19, 2013** or *"five (5) days after its promulgation"* per Section 13, Rule 18 of the 1993 Comelec

Rules of Procedure, in relation with Paragraph 2, Section 8 of Resolution No. 9523; and that the Comelec itself did not enjoin Reyes' proclamation. As a result, the Comelec, itself, proclaimed Reyes on **May 18, 2013**.

I point out that in the June 25, 2013 resolution in *Reyes v. Comelec,* this Court *expressly* characterized ***SPA No. 13-053*** to be ***summary in nature***.[14]

Reyes assailed the Comelec rulings in SPA No. 13-053 before this Court *via* a petition for *certiorari,* docketed as **GR No. 207264** ***(Reyes v. Comelec or "Reyes")***. The Court's majority, in this June 25, 2013 resolution, ***dismissed*** respondent Reyes' petition ***outright*** based solely on the face of the petition and its annexes.

Reyes carries several features that the Court should be aware of:

First. *Reyes* was a petition that respondent Reyes filed to question the Comelec's cancellation of her CoC in SPA No. 13-053. Respondent Reyes cited the violation of her right to due process and the Comelec's grave abuse of discretion as grounds for her petition.

Second. Only Tan (the petitioner before the Comelec) was the party respondent before the Court in *Reyes;* Velasco was not a party to the case as he was not a party to the challenged Comelec ruling.

Third. The Court did not see it fit to hear the respondent Tan (let alone Velasco who was not a party) before issuing its outright dismissal, although the Court subsequently heard Tan's arguments in her comment to herein respondent Reyes' motion for reconsideration (compelled perhaps by the vigorous dissent issued against the outright dismissal).[15]

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[14] See *Reyes* v. *Comelec,* G.R. No. 207264, June 25, 2013, 699 SCRA 522, 538-539.

[15] See Dissenting Opinion of *J.* Brion, joined in by Senior Associate Justice Antonio T. Carpio, and Associate Justices Martin S. Villarama, Jr. and Marvic Mario Victor F. Leonen.

Under the circumstances of the outright dismissal of the petition, the belated attempt at hearing Tan on the motion for reconsideration, however, does not change the character of the Court's rulings and proceedings as summary.

Fourth. In ***dismissing the petition outright*,** the Court only considered the Reyes petition itself, the assailed Comelec rulings (SPA No. 13-053), and the petition's other annexes. The outright dismissal was made ***despite*** the plea from the Dissent that ***the case be fully heard because it would benefit the son of a sitting Justice of the Court.***

Fifth. The Court's majority also chose not to hear anymore the **HRET**, the **Comelec**, or the **Office of the Solicitor General** on petitioner Reyes' positions and arguments, particularly on the ***issue of the delineation of jurisdiction between the HRET and the Comelec.***

Sixth. The Court's rulings — both in the June 25, 2013 outright dismissal of the *Reyes* petition and the October 22, 2013 resolution on the motion for reconsideration — **never declared nor recognized Velasco as the duly elected Representative of Marinduque.**

Seventh. The rulings in SPA No. 13-053 and *Reyes v. Comelec* did not consider and rule on any matter other than the material misrepresentation she allegedly committed.

Thus, any legal effect that these rulings carry should not be extended to matters outside of the issues and matters specifically addressed by these rulings, as these extraneous rulings are *obiter dicta.*

Specifically, these rulings and their legal effects cannot extend to Reyes' election, returns, and qualification as Marinduque Representative. Nor should these rulings vest in Velasco the title to hold the position, even assuming that petitioner Reyes' CoC was properly cancelled.

In resolving the present *mandamus* petition, the Court must appreciate that Velasco's cited rulings are simply summary determinations of the alleged material misrepresentation

committed by Reyes in her CoC, and cannot be used as basis for the requested issuance of the writ.

Eight. In the outright dismissal of Reyes' *certiorari* petition, the Court's majority declared that the Comelec retained its jurisdiction over respondent Reyes and the CoC cancellation proceeding against her because respondent Reyes was not a member of the HOR over whom the HRET can exercise its jurisdiction.

The majority reasoned out that a candidate is considered a Member of the HOR only after the candidate has been **proclaimed, has taken the proper oath, and has assumed office.**

This declaration is noteworthy because of the ***intervening factual developments*** that significantly altered the consequent legal effects of: (1) the Comelec's rulings in SPC No. 13-053 and of the Court's rulings in *Reyes v. Comelec*; and (2) the subsequent Comelec actions and rulings affecting respondent Reyes' right to hold her congressional seat.

These intervening factual developments, more fully discussed below, is another reason why the Court cannot issue the writ of *mandamus* ***for the reason alone*** that the rulings in SPC No. 13-053 and in *Reyes v. Comelec* had ***become final and executory.***

Lastly, the Court should sit up and take notice because of the *Reyes'* pronouncement on the jurisdictional divide between the HRET and the Comelec, a matter more extensively discussed below.

IV.C.1.b. SPC No. 13-010 ***(Rep. Lord Allan Jay Q. Velasco vs. New Members/Old Members of the Provincial Board of Canvassers [PBOC] of the Lone District of Marinduque and Regina Ongsiako-Reyes)***

SPC No. 13-010 was the petition that Velasco filed before the Comelec on May 20, 2013, to declare respondent Reyes' May 18, 2013 proclamation void.

The Comelec dismissed SPC No. 13-010 on June 19, 2013.

On July 9, 2013, however, the Comelec issued a resolution reversing its June 19, 2013 resolution; this reversal declared void and without legal effect respondent Reyes' proclamation.

In between these dates — *i.e.,* from May 20, 2013, when Velasco initiated SPC No. 13-010 before the Comelec, and the Comelec's July 9, 2013 resolution — respondent Reyes had already taken her oath (on June 7, 2013) and had assumed office on June 30, 2013. Significantly, as of June 30, 2013, when respondent Reyes assumed office, the challenge to respondent Reyes' proclamation **stood dismissed** by the Comelec and was entered in its records.

Thus, **as of June 30, 2013, respondent Reyes was the candidate the Comelec recognized as the duly proclaimed winner of the Marinduque congressional seat**. She was proclaimed pursuant to the electorate's mandate through the majority of the votes cast in Marinduque. More importantly, at the time Reyes assumed the office on June 30, 2013 — after she had been proclaimed and had taken her oath — there was no standing challenge against her proclamation.

Significantly, the records of *Reyes* show that soon after assumption to office on June 30, 2013, she started discharging the functions of her office by filing bills with the HOR.

These developments and dates are pointed out because of their critical significance. In resolving the present petition, the Court cannot simply undertake a mechanistic reading of the cited rulings and on this basis rely on the finality doctrine. The Court must appreciate that at the time respondent Reyes assumed office on June 30, 2013, the Comelec had cast aside the challenge to her proclamation and her oath was properly taken.

To be sure, the Comelec eventually declared respondent Reyes' proclamation void, but this reversal happened only on July 9, 2013, and only after Reyes had taken her oath and assumed office based on a standing proclamation. The proclamation, oath, and assumption **effectively altered the legal situation**

as respondent Reyes — instead of being a mere candidate waiting for proclamation — had already become a Member of the HOR whose election, returns, and qualification are subject to the jurisdiction of the HRET.

This altered legal situation cannot but affect how the petition for *mandamus* should be resolved.

IV.C.1.c. The intervening factual developments; *Reyes v. Comelec* versus the present petition

Another critical point the Court should not fail to consider in determining whether Velasco has a clear legal right to a writ of *mandamus* are the various factual developments that intervened (from the Comelec's rulings in SPA No. 13-053 and the Court's ruling in *Reyes v. Comelec,* to the filing of the present petition) that substantially and substantively differentiate the present *mandamus* case from *Reyes v. Comelec.*

These factual developments are:

First, while respondent Reyes took her oath and assumed the office of Representative of Marinduque after the Comelec cancelled her CoC in SPA No. 13-053, she did not simply accept the cancellation and forthwith proceeded to question it before this Court through a petition for *certiorari* entitled *Reyes v. Comelec.* This petition was still pending at the time respondent Reyes took her oath and assumed office (on June 30, 2013); by then the case was pending based on the motion for reconsideration that respondent Reyes filed against the Court's June 25, 2013 Resolution. **As a result, Reyes had already assumed office even before *Reyes v. Comelec* became final and executory**.

It must be noted, too, that respondent Reyes' oath and assumption to office also occurred before the Comelec (in SPC No. 13-010 filed by Velasco) declared void respondent Reyes' proclamation as Marinduque Representative. The Comelec ruling only came on July 9, 2013. As discussed above, respondent Reyes took her oath and assumed office (on June 30, 2013) when the **standing Comelec ruling** in SPC No. 13-010 (to

cancel respondent Reyes' proclamation) was the June 19, 2013 dismissal of the Velasco petition.

Thus, as of June 30, 2013, Reyes had taken her oath and had assumed office based on a subsisting proclamation. The Comelec declared her proclamation void only on July 9, 2013; prior to this declaration, there was no pending legal challenge that could have impeded her oath and assumption of office.

Second, the Comelec granted Tan's motion for execution, in SPA No. 13-053, and directed the proclamation of Velasco as the duly elected Representative of Marinduque, only on **July 10, 2013**. Velasco was proclaimed by the new PBOC much later — on **July 16, 2013**.

These dates are stressed because when the Comelec took actions to enforce SPA No. 13-053 and to proclaim Velasco as the duly elected Representative of Marinduque, Reyes was already a member of the HOR — she had by then been proclaimed, taken her oath, and assumed office.

Significantly, **these developments were not considered in *Reyes v. Comelec;* neither were they considered in SPC No. 13-010.** In these lights, I submit that this *mandamus* petition is not a continuation of *Reyes v. Comelec* and should not be resolved on the basis of the bare finality of SPA No. 13-053 and *Reyes v. Comelec,* and of SPC No. 13-010.

Since the present case substantially and substantively differs from *Reyes v. Comelec,* the latter's finality (as well as the finality of the Comelec rulings in SPA No. 13-053 that *Reyes v. Comelec* passed upon) should not control the resolution of the present petition and must not be determinative of Velasco's right to the issuance of a writ of *mandamus.*

Moreover, as I stated above, these intervening tactual developments significantly altered the *consequent legal effects* of the Comelec's rulings in SPC No. 13-053 and of this Court's rulings in *Reyes v. Comelec,* the Comelec's ruling in SPC No. 13-010, and the subsequent Comelec actions and rulings affecting respondent Reyes' right to hold her congressional seat.

IV.C.1.d. The proper appreciation of SPA No. 13-053, *Reyes v. Comelec* and SPC No. 13-010 *vis-a-vis* the intervening factual developments in the context of the present petition

If only for emphasis, I call attention again to the fact that as of June 30, 2013, Reyes had been proclaimed, had taken her oath, and assumed office as the elected and proclaimed Representative of Marinduque.

Section 17, Article VI of the Constitution provides that the Electoral Tribunal of the HOR shall be the *"sole judge of all contests relating to the election, returns, and qualifications of [its] Members.*"[16]

I highlight, too, that in *Reyes v. Comelec,* the majority declared that a winning candidate becomes subject to the jurisdiction of the HRET only after he or she becomes a member of the HOR. The majority stressed that a candidate **becomes a member of the HOR** only after he or she has been **proclaimed, taken his or her oath, and assumed the office.**

In other words, the majority in *Reyes v. Comelec* required the concurrence of all three events — proclamation, oath, and assumption to office — to trigger the jurisdiction of the HRET over election contests relating to the winning candidate's election, returns, and qualifications. **All three events duly took place in the case of respondent Reyes,** such that the HRET at this point should have jurisdiction over questions relating to respondent Reyes' election, even on the basis of the majority's ***own*** standards.

(Note in this regard that in my Dissent in *Reyes v. Comelec,* I considered this majority action a "major **retrogressive** jurisprudential development that can emasculate the HRET."

I still maintain that the proclamation of the winning candidate — the last operative act in the election process that is subject

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[16] See also Rule 14 of the 2011 Rules of the House of Representatives Electoral Tribunal.

to Comelec jurisdiction — triggers and opens the way for the HRET's own jurisdiction.

This was the position I took, backed up by jurisprudence,[17] in my Dissent in *Reyes v. Comelec.* I said:

> *[T]he proclamation of the winning candidate is the operative fact that triggers the jurisdiction of the HRET over election contests relating to the winning candidate's election, returns and qualifications x x x the proclamation of the winning candidate divests the Comelec of its jurisdiction over matters pending before it at the time of the proclamation and the party questioning the qualifications of the winning candidate should now present his or her case in a proper proceeding (i.e., quo warranto) before the HRET, who, by constitutional mandate, has the sole jurisdiction to hear and decide cases involving the election, returns and qualifications of members of the [HOR]).*

Thus, even by the Court majority's own standard[18] as defined in *Reyes v. Comelec,* respondent Reyes became a member of the HOR as of June 30, 2013. To reiterate, respondent Reyes was proclaimed on May 16, 2013. She then took her oath on June 7, 2013, and assumed office on June 30, 2013, pursuant to a subsisting proclamation. The Comelec ruling that declared respondent Reyes' proclamation void came only after she had already fully complied with *Reyes v. Comelec's* defined standard.

In these lights, the Comelec had already been divested of jurisdiction over any issue that may have affected respondent Reyes' proclamation (including all consequent legal effects her proclamation carries) at the time the Comelec declared her proclamation void on July 9, 2013. As well, the Comelec was

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[17] See *Limkaichong v. Commission on Elections,* 601 Phil. 751 (2009); *Jalosjos v. Commission on Elections,* G.R. Nos. 192474, 192704, 193566, June 26, 2012; and *Perez v. Comelec,* 548 Phil. 712 (2007). See also *Guerrero v. Commission on Elections,* 391 Phil. 344 (2000); *Vinzons-Chato v. Commission on Elections,* 548 Phil. 712 (2007); and *Aggabao v. Commission on Elections,* 391 Phil. 344 (2000).

[18] See *J.* Brion's Dissenting Opinion in *Reyes v. Comelec,* June 25, 2013 Resolution.

already without jurisdiction when it granted Tan's motion for execution on July 10, 2013, and proclaimed Velasco (through the new PBOC) as the duly elected Marinduque Representative on July 16, 2013.[19]

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[19] See *J.* Brion's Dissenting Opinion in *Reyes v. Comelec,* June 25, 2013 Resolution. Pertinent are the following discussions:

> *The ponencia's holding on the COMELEC's jurisdiction vis-a-vis the HRET is inconsistent with the HRET Rules*
>
> The view that the proclamation of the winning candidate is the operative fact that triggers the jurisdiction of the HRET is also supported by the HRET Rules. They state:
>
> RULE 14. *Jurisdiction.* – The Tribunal is the sole judge of all contests relating to the election, returns, and qualifications of the Members of the House of Representatives.
>
> RULE 15. *How Initiated.* – An election contest is initiated by the filing of a verified petition of protest or a verified petition for *quo warranto* against a Member of the House of Representatives. An election protest shall not include a petition for *quo warranto.* Neither shall a petition for *quo warranto* include an election protest.
>
> RULE 16. *Election Protest.* – A verified petition contesting the election or returns of any Member of the House of Representatives shall be filed by any candidate who has duly filed a certificate of candidacy and has been voted for the same office, within fifteen (15) days after the proclamation of the winner. The party filing the protest shall be designated as the protestant while the adverse party shall be known as the protestee. x x x
>
> RULE 17. *Quo Warranto.* – A verified petition for quo warranto contesting the election of a Member of the House of Representatives on the ground of ineligibility or of disloyalty to the Republic of the Philippines shall be filed by any registered voter of the district concerned within fifteen (15) days from the date of the proclamation of the winner. The party filing the petition shall be designated as the petitioner while the adverse party shall be known as the respondent[.]
>
> Based on the above Rules, it appears clear that as far as the HRET is concerned, the proclamation of the winner in the congressional

Under Section 2(2), Article IX-C of the Constitution, the Comelec has the *"exclusive jurisdiction over all contests relating to the election, returns, and qualifications of all* ***elective regional, provincial, and city officials*** *x x x."* In other words, the Constitution vests the Comelec this exclusive jurisdiction only with respect to *elective regional, provincial, and city officials.* **The Comelec, by express constitutional mandate, has no jurisdiction over the election, returns, and qualifications of members of the HOR (or of the Senate) as Article VI vests this jurisdiction with the HRET (or the SET)**.

The validity of the proclamation of respondent Reyes who became a member of the HOR on June 30, 2013, and the right of either respondent Reyes or Velasco to hold the contested congressional seat are **election contests** relating to a Member's election, returns, and qualifications. By *Reyes v. Comelec's* own defined standard, the jurisdiction over these election contests affecting respondent Reyes already rested with the HRET beginning June 30, 2013.

To be sure, the validity of this Comelec resolution in SPC No. 13-010 was never challenged before this Court such that the ruling lapsed to finality. Under existing legal principles, the Court cannot pass upon the validity of this Comelec ruling without violating the doctrine of finality of judgments and the principle of separation of powers with the principle of judicial non-interference that it carries.

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elections serves as the reckoning point as well as the trigger that brings any contests relating to his or her election, return and qualifications within its sole and exclusive jurisdiction.

In the context of the present case, by holding that the COMELEC retained jurisdiction (because Reyes, although a proclaimed winner, has not yet assumed office), the majority effectively emasculates the HRET of its jurisdiction as it allows the filing of an election protest or a petition for *quo warranto* only after the assumption to office by the candidate *(i.e.,* on June 30 in the usual case). To illustrate using the dates of the present case, any election protest or a petition for *quo warranto* filed after June 30 or more than fifteen (15) days from Reyes' proclamation on May 18, 2013, shall certainly be dismissed outright by the HRET for having been filed out of time under the HRET rules.

Nonetheless, the Court also cannot and should not simply rely on this Comelec ruling to grant Velasco's present *mandamus* petition and compel the HOR to admit him as its member. The fact that these Comelec rulings and actions all occurred after Reyes had fully complied with the restrictive *Reyes v. Comelec* standard creates substantial doubt on their validity and efficacy. In view of these substantial doubts, the Court should consider them with utmost caution.

In this respect, I submit that any legal significance the Court may accord to the Comelec's ruling in SPC No. 13-010 (as well as its July 10, 2013 execution order) in considering Velasco's present move to compel, *via mandamus,* the HOR to admit him as its member must be limited to:

one, the fact of their issuance;

two, the fact that the Comelec declared void Reyes' proclamation on July 9, 2013; and

three, the fact that Velasco was proclaimed on July 16, 2013,

without prejudice to whatever ruling that the HRET and this Court may render in the future on the validity or invalidity of the Comelec rulings that were made after HOR jurisdiction had vested.

Any other legal significance which these rulings may have on the right of either Reyes or Velasco to the congressional seat must now be left to the judgment and discretion of the HRET which must appreciate them in a properly filed action.

Additionally and finally on this point, the HRET now has jurisdiction to rule upon **all questions** relating to respondent Reyes' election, returns, and qualifications that may still be fit and proper for its resolution in accordance with existing laws and its own rules of procedure. This Court itself cannot assume jurisdiction over any aspect of HRET jurisdiction unless it relates to a matter filed or pending with us on a properly filed petition, taking into account the clear conferment and delineation of the Court's jurisdiction and those of the HRET under the Constitution.

In sum, the Comelec's rulings in SPA No. 13-053 and SPC No. 13- 010, and the Court's rulings in *Reyes v. Comelec* did not establish a clear and unmistakable right in Velasco's favor to the position of the Representative of Marinduque.

At most, Velasco's right to hold the congressional seat based on these rulings is substantially doubtful. Unless this substantial doubt is settled, Velasco cannot claim as of right any entitlement, and cannot also compel the respondents to admit him, to HOR membership through the Court's issuance of a writ of *mandamus.*

In the absence of any other clear and unmistakable legal source for his claimed right to the contested congressional seat, Velasco's petition must necessarily fail.

IV.C.1.e. Reyes' holding of the office could not have worked injustice and seriously prejudiced Velasco with her receipt of the salaries, allowances, bonuses, and emoluments that pertain to the office.

Finally, I find tenuous Velasco's claim that Reyes' continued holding of the contested Congressional seat has *"worked injustice and serious prejudice to [him] in that she has already received the salaries, allowances, bonuses and emoluments that pertain to the [office] since June 30, 2013 up to the present x x x."*

This argument clearly forgets that public office is a public trust.[20] Public service and public duty are and must be the primary and utmost consideration in entering the public service. Any remuneration, salaries, and benefits that a public officer or employee receives in return must be a consideration merely secondary to public service.

Accordingly, any salary, allowance, bonus, and emoluments pertaining to an office must be received by one who is not only qualified for the office, but by one whose right to the office is

[20] See Article XI, Section 1 of the Constitution.

clearly and unmistakably without doubt and beyond dispute. In the case of an elective public office, this right is, at the very least, established by the mandate of the majority of the electorate. More importantly, of course, the right to receive the salaries, allowances, bonuses, and emoluments that pertain to an office must be received by one who actually perform the duties called for by the office.

Here, Velasco may be qualified for the office. His right to hold the congressional seat, however, is at most substantially doubtful or in substantial dispute; worse, he has not performed the duties of the office. In short, Reyes' receipt of the salaries, etc. that pertain to the congressional seat obviously could not have worked injustice to and seriously prejudiced him.

IV.C.2. Clear, established, and specific legal duty and unlawful neglect in the performance of ministerial acts

For the same factual and legal reasons discussed above, I submit that Velasco likewise failed to show that Speaker Belmonte and Sec. Gen. Barua-Yap have the clear and specific duty, founded in law, to administer the required oath, to allow Velasco to assume the duties of the office, and to register his name in the Roll of Members as the duly elected Representative of Marinduque. He also failed to show that the respondents unlawfully refused or neglected to admit him as member.

At the very least, he failed to show that the respondents have the clear and specific legal duty to allow a second-placer candidate like him whose right to the contested congressional seat is substantially doubtful, to assume the office until such time that all doubts are resolved in his favor.

Thus, in the absence of any law specifically requiring Speaker Belmonte and Sec. Gen. Barua-Yap to act, and to act in a particularly clear manner, the Court cannot compel these respondents to undertake the action that Velasco prays for *via* a writ of *mandamus.*

Additionally, the HOR in this case simply acted pursuant to law and jurisprudence when it admitted respondent Reyes as the duly elected Representative of Marinduque. After this admission, the HOR and its officers cannot be compelled to remove her without an order from the tribunal having the exclusive jurisdiction to resolve all contests affecting HOR members, of which Reyes has become one. This tribunal, of course, is the HOR's own HRET.

IV.C.3. Absence of any other plain, speedy and adequate remedy

Lastly, I submit that Velasco failed to show that there is **no other plain, speedy, and adequate remedy** available in the ordinary course of law to secure to him the congressional seat.

I reiterate and emphasize once more that respondent Reyes became a Member of the HOR on June 30, 2013, after her proclamation, oath, and assumption to office. Whether the Court views these circumstances under the restrictive standard of *Reyes v. Comelec* to be the legally correct standard or simply the applicable one[21] under the circumstance of the petition, respondent Reyes undoubtedly has complied with the conditions for HOR membership that *Reyes v. Comelec* laid down.

Since Reyes is a member of the HOR, any challenge against her right to hold the congressional seat or which may have the effect of removing her from the office — whether pertaining to her election, returns or qualifications — now rests with the HRET.

Viewed by itself and in relation to the surrounding cited cases and circumstances, Velasco's present petition cannot but be a

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[21] As I discussed in my Dissenting Opinion to the June 25, 2013 Resolution in *Reyes v. Comelec,* this reasonable standard is the proclamation of the winning candidate. There, I said that: "[t]he proclamation of the winning candidate is the operative fact that triggers the jurisdiction of the HRET over election contests relating to the winning candidate's election, returns and qualifications."

challenge against respondent Reyes' election, returns, and qualifications, hiding behind the cloak of a petition for *mandamus.* In other words, although presented as a petition that simply seeks to enforce a final Court ruling, the petition is an original one that ultimately seeks to oust Reyes from the congressional seat. The relationships between and among the cited cases and the present case, read in relation with the relevant developments, all point to this conclusion.

Thus, rather than recognize this roundabout manner of contesting respondent Reyes' seat, the Court should recognize this kind of challenge for what it really is — a challenge that properly belongs to the domain of the HRET and one that should be raised before that tribunal through the proper action. The Court, in other words, should acknowledge that it has no jurisdiction to act on the present petition.

Under the 2011 Rules of the HRET,[22] the proper actions in coming before the HRET are: (1) a verified petition of protest (election protest) to contest the election or returns of the member; or (2) a verified petition for *quo warranto* to contest the election of a member on the ground of ineligibility or disloyalty to the Republic of the Philippines.[23] Both petitions should be filed within fifteen (15) days after the proclamation of the winner[24] save in the case of a petition for *quo warranto* on the ground of citizenship which may be filed at any time during the member's tenure.[25] The failure to file the appropriate petition before the

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[22] Issued pursuant to the HRET's rule-making that necessarily flows from the general power granted to it by the Constitution as the sole judge of all contests relating to the election, returns, and qualifications of its members (see *Angara v. Electoral Commission,* 63 Phil. 139 [1936]).

[23] See Rules 16 and 17 of the 2011 Rules of the House of Representatives Electoral Tribunal.

[24] See Rule 16, paragraph 1, and Rule 17, paragraph 1 of the 2011 Rules of the House of Representatives Electoral Tribunal.

[25] See Rule 17, paragraph 2 of the 2011 Rules of the House of Representatives Electoral Tribunal.

HRET within the prescribed periods will bar the contest.[26] These are the rules that must guide Velasco in his quest for a remedy.

To be sure, though, this remedy has been within Velasco's knowledge and contemplation as on May 31, 2013,[27] he filed an **election protest** before the HRET, docketed as HRET Case No. 13-028.[28] Very obviously, he recognized that, as early as May 31, 2013, any challenge against respondent Reyes's election, returns, or qualifications should be raised before the HRET — the sole judge of all contests relating to the election, returns, and qualifications of HOR members.

Why he now appears to have glossed over this legal reality in the present petition (especially since Reyes is now a clearly recognized member of the HOR after satisfying the restrictive *Reyes v. Comelec* standard) is a question I would not dare speculate on; only the attendant facts and the legal realities can perhaps sufficiently provide the answer.[29]

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[26] See Rule 19 of the 2011 Rules of the House of Representatives Electoral Tribunal. It reads: RULE 19. Periods Non-Extendible. – The period for the filing of the appropriate petition, as prescribed in Rules 16 and 17, is jurisdictional and cannot be extended

[27] In fact, also on May 31, 2013, a *quo warranto* petition was filed by a certain Matienzo before the HRET against Reyes; this was docketed as HRET Case No. 13-027.

[28] See *rollo,* p. 399. As of April 1, 2014, the HRET records show that *Matienzo v. Reyes* and *Velasco v. Reyes* have been withdrawn.

[29] A possible answer may be drawn from these facts: *first,* the two *quo warranto* petitions — HRET Case No. 13-036 entitled *"Noeme Mayores Tan and Jeasseca L. Mapacpac v. Regina Ongsiako Reyes"* (filed on July 13, 2013) and HRET No. 13-037 entitled *"Eric Del Mundo v. Regina Ongsiako Reyes"* (filed on December 13, 2013) — filed against Reyes have been pending before the HRET, of which a Member of this Court, Associate Justice Presbitero Velasco, is petitioner Velasco's father, for more or less two years without any action by the HRET. The only action the HRET has taken so far in these cases was in relation with the petition-for-intervention filed by Victor Vela Sioco seeking the dismissal of the *quo warranto* petitions for lack of jurisdiction where it required *(via* Resolution No. 14-081) Reyes to comment thereon.

In reality, two other cases — both of them *quo warranto* petitions — were subsequently filed against Reyes. The first is HRET Case No. 13-036 entitled *"Noeme Mayores Tan and Jeasseca L. Mapacpac v. Regina Ongsiako Reyes."* The second is HRET No. 13-037 entitled *"Eric Del Mundo v. Regina Ongsiako Reyes.*"

On March 14, 2014, the HRET issued a resolution in HRET Case No. 13-036 and HRET No. 13-037 stating that *"the proclamation of Representative Reyes as the winning candidate for the position of Representative ofthe Lone District of Marinduque is and remains valid and subsisting until annulled by HRET."*

In a modified *ponencia* circulated on January 11, 2016 (for deliberation on January 12, 2016), *it was alleged* that the HRET promulgated a Resolution on December 14, 2015, dismissing HRET Case Nos. 13-036 and 13-037 — the twin petitions for *quo warranto* filed against Reyes.

Allegedly, the HRET held that *"the final Supreme Court ruling in G.R. No. 207264 is the COGENT REASON to set aside the September 11, 2014 Resolution."* The HRET ruling allegedly reversed its own ruling of September 11, 2014 that

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Second, the HRET has recently revised its Rules of Procedure incorporating the restrictive *Reyes v. Comelec* standards that requires the concurrence of proclamation, oath, and assumption of office before the elected candidate is considered a member of the HOR over whom the HRET can exercise jurisdiction. The 2015 HRET Rules of Procedure was published in the Philippine Star on November 1, 2015, and took effect fifteen days thereafter. Rule 80 of the 2015 HRET Rules provides for its application to all pending actions save "when substantive rights are affected as may be determined by the Tribunal."

Third, per the November 5, 2015 letter-petition — Urgent Follow-Up on the Petition for Recall of the Designation of Justice Presbitero J. Velasco, Jr. to the HRET — to the Court *En Banc* by Reyes' counsel Roque and Butuyan Law Offices (letter signed by H. Harry L. Roque, Jr., Joel Ruiz Butuyan, and Roger R. Rayel), the HRET has deferred action on its February 3, 2015 manifestation/motion that from thereon it shall act as Reyes' lead counsel and been refusing to furnish it copies, at their expense, of all documents, pleadings *etc*. pertaining to the two *quo warranto* cases.

ordered the dismissal of the petition of Victor Vela Sioco in the twin petitions for *quo warranto* for "lack of merit," and for the hearings in the petitions against Reyes to proceed.

Under these attendant facts, the circumstances surrounding the Reyes- Velasco dispute becomes more confused and all the more should this Court refrain from acting on the present petition.

If indeed there is already a HRET ruling as alleged, then the proper remedy now is for the HRET to present this ruling, certified as a final and executory one, to the HOR for that body's action in light of its own Tribunal's decision.

To state the obvious, the admission of a member and his or her exclusion is primarily an internal affair that the HOR should first resolve before this Court should step in through the coercive power of a writ of mandamus. The principles of separation of powers and judicial non- interference demand that the Court respect and give due recognition to the HOR in its internal affairs.

By granting the petition and issuing a writ of mandamus, the Court, not only disrespects the HOR, but sows confusion as well into the HRET's jurisdiction — a jurisprudential minefield in the coming elections.

IV.D. The Separation of Powers Principle Demands the Dismissal of the Present Petition.

IV.D.1. The principle of separation of powers.

An issue that the Court cannot but recognize in the present case is whether it can, under the circumstances of this case, compel a House of Congress — a co-equal branch — to act. The resolution of this issue calls for the consideration of several principles, foremost of which is the principle of separation of powers that underlie our governmental structure.

The Constitution does not specifically provide for the principle of separation of powers. Instead of a distinct express provision, the Constitution divides the governmental powers among the three branches — the legislative, the executive, and the judiciary. Under this framework, the Constitution confers on the Legislature the duty to make the law, on the Executive the duty to execute the law, and on the Judiciary the duty to construe and apply the law.[30]

Underlying the principle of separation of powers is the general scheme that each department is supreme within their respective spheres of influence, and the exercise of their powers to the full extent cannot be questioned by another department. Outside of these spheres, neither of the great governmental departments has any power; and neither may any of them validly exercise any of the powers conferred upon the others.[31]

Thus, as a fundamental principle, the separation of powers provides that each of the three departments of our government is distinct and not directly subject to the control of another department. The power to control is the power to abrogate; and the power to abrogate is the power to usurp.[32] In short, for one branch to control the other is to usurp its power. In this situation, the exercise of control by one department over another would clearly violate the principle of separation of powers.

In this light, the question that we ask next is: whether the Court can compel Speaker Belmonte and Sec. Gen. Barua-Yap — who are admittedly officers of the HOR — to perform the acts specifically prayed for by Velasco *via mandamus.* To properly answer this question, we must hark back to our earlier discussion of *mandamus,* and consider it in the context of the principle of separation of powers.

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[30] See Defensor-Santiago, Constitutional Law, citing *U.S. v. Ang Tang Ho,* 43 Phil. 1 (1922).

[31] See Defensor-Santiago, *Constitutional Law*.

[32] See *Alejandrino v. Quezon, et al.,* 46 Phil. 83 (1924).

IV.D.2. Mandamus against a co-equal branch

Over and above the usual requirements of *mandamus* earlier discussed, it must be appreciated that the remedy of *mandamus* is essentially a discretionary remedy that is contingent upon compelling equitable grounds for its grant. As a peremptory writ, a presumption exists strongly against its grant; it will and must issue only in the most extraordinary of circumstances and always with great caution.

In the context of the separation of powers principle, I submit that the Court must proceed with greater caution before issuing the writ against a co-equal branch, notwithstanding the concurrence of the requirements.

As a general rule, *mandamus* will not lie against a coordinate branch.[33] The rule proceeds from the obvious reason that none of the three departments is inferior to the others; by its very nature, the writ of *mandamus* is available against an **inferior** court, tribunal, body, corporation, or person. With respect to a coordinate and co-equal branch, the issuance can be justified only under the Court's expanded jurisdiction under Article VIII, Section 1 of the Constitution[34] and under the ***most compelling circumstances*** and ***equitable reasons.***[35]

I submit that no grave abuse of discretion intervened in the present case to justify resort to the Court's expanded jurisdiction. Neither are there compelling and equitable reasons to justify a

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[33] *Id*.

[34] Section 1, Article VIII of the Constitution reads in full:

SECTION 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law. Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

[35] *Supra* note 32.

grant as ***there is a remedy in law that was available to petitioner Velasco*** (for reasons of his own, he has failed to pursue the remedy before the HRET to its full fruition) and ***that is available now*** — to present the final rulings in the cited HRET cases to the HOR for its own action on an internal matter it zealously guards.

The Comelec petition to contest respondent Reyes' proclamation was filed by Velasco, but this was a case solely addressing respondent Reyes' proclamation and voiding it. Beyond this, the ruling made no other directive. But even given all these, there is indisputably the live question of whether the Comelec still had jurisdiction when it issued its rulings as Reyes had by then become a member of the HOR. At the very least, this complication leaves the continued validity of the Comelec ruling in doubt.

Another point to consider is the filing and withdrawal by Velasco of an election protest case with the HRET against respondent Reyes. By doing this and despite the withdrawal of his petition, Velasco recognized the jurisdiction of the HRET. Can he now turn around and simply say that the Comelec and the Court are, after all, correct in its rulings and that he would now avail of these rulings although he was never a party to them? I provide no answers but again this development effectively brings the propriety of Velasco's use of *mandamus* within the realm of doubt.

A further point to consider is that Speaker Belmonte and Sec. Gen. Barua-Yap are officers of the HOR chosen by its members.[36] As HOR officers, their acts made in the performance of their duties and functions are acts of the HOR. The acts Velasco wants this Court to compel Speaker Belmonte and Sec. Gen. Barua-Yap to perform pertain to their official positions.

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[36] See Section 16 (1), Article VI of the Constitution. It reads:

SECTION 16. (1) The Senate shall elect its President and **the House of Representatives its Speaker,** by a **majority vote of all its respective Members. Each House shall choose such other officers** as it may deem necessary. [emphases supplied]

Hence, any *mandamus* that will be issued against them is a *mandamus* issued against the HOR. As I have stated before, *mandamus* does not and will not lie against a coordinate branch.

Notably, under the attendant facts, significantly altered by the intervening factual developments and the consequent legal considerations, the acts sought to be performed — the exclusion of sitting members and the admission of replacement members — are not ministerial acts for which *mandamus* will lie. That much is implied, if not directly held, as early as *Angara v. Electoral Commission,*[37] and many other cases relating to this situation followed.[38] Their common thread is that ***Congress takes the admission (or exclusion) of its members as a very serious concern that is reserved for itself to decide, save only when a superior law or ruling with undoubted validity intervenes.*** Such freedom from doubt, however, is not apparent in the present petition.

Appeal to ***"compelling and equitable circumstances"*** that call for the application of the equitable remedy of *mandamus* is, at best, a murky proposition in light of the circumstances surrounding the May 2013 Marinduque election situation as a whole.

It should not be forgotten that Reyes won by a convincing margin over Velasco, but the latter chose to fight his electoral battle in the Comelec, bypassing thereby the verdict against him of the people of Marinduque. The merits of the Comelec ruling is likewise not beyond doubt from the point of view of the imputed due process violations, as the Dissent in *Reyes* and the close vote in Court showed.

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[37] 63 Phil. 139 (1936).

[38] See *Suanes v. The Chief Accountant, Accounting Division, Senate, et al.* 81 Phil. 818 (1948); *Co v. Electoral Tribunal,* 276 Phil. 758 (1991); *Lazatin v. House of Representatives Electoral Tribunal,* 250 Phil. 390 (1988); *Vilando v. House of Representatives Electoral Tribunal,* 671 Phil. 524 (2011); *Duenas v. House of Representatives Electoral Tribunal,* 619 Phil. 730 (2009), to name a few.

In any case, mandamus is, by its nature, a discretionary remedy that can be denied when no compelling equitable grounds exist. In particular, in situations where the constitutional separation-of-powers principle is involved, *mandamus,* as a rule, will not lie against a co-equal branch notwithstanding the petitioner's compliance with the requirements necessary for its grant, as discussed above. To justify the issuance of the writ, the petitioner must not only comply with the requirements; the petitioner must, more importantly, show that *mandamus* is ***demanded by the most compelling reasons or circumstances and by the demands of equity.*** These exception-inducing factors, as discussed above, are simply not present in this case.

Thus, the Court cannot dictate action under the present petition without committing gross usurpation of power. The risk for the Court in ruling under these circumstances is to be accused of ruling under a situation of doubt and uncertainty in favor of the son of a colleague. In a worse scenario, Congress — even if it does not frontally rebuff the Court — may raise issues that would effectively disregard the writ issued by the Court. While no constitutional crisis may result, the Court would have tested the limits of its constitutional powers and failed. The situation does not bode well for the Court's integrity, reputation, and credibility — the essential attributes that allow it to occupy the moral high ground in undertaking its functions within the Constitution's tripartite system.

The better view, under the circumstances and as posited above, is to allow internal matters within the HOR to take their natural course. This position best addresses the confused situation that is the Marinduque May 2013 elections, while respecting the interests of all concerned parties, including those of the Court's.

V. CONCLUSION

In sum, the present petition for *mandamus* must be dismissed as petitioner Velasco failed to comply with all five requirements for the issuance of the writ of *mandamus.* Most importantly, the petitioner's speedy remedy to address his situation lies with

the HRET and the HOR, not with the Court. In any case, the remedy of *mandamus* does not lie against the HOR, a co-equal branch, *under the circumstances of the case* and would be an unwarranted intrusion and impermissible usurpation by this Court of the authority and functions of the HOR and of the HRET.

For these reasons, I vote to dismiss the petition.

EN BANC

[G.R. No. 212426. January 12, 2016]

RENE A.V. SAGUISAG, WIGBERTO E. TAÑADA, FRANCISCO "DODONG" NEMENZO, JR., SR. MARY JOHN MANANZAN, PACIFICO A. AGABIN, ESTEBAN "STEVE" SALONGA, H. HARRY L. ROQUE, JR., EVALYN G. URSUA, EDRE U. OLALLA, DR. CAROL PAGADUAN- ARAULLO, DR. ROLAND SIMBULAN, AND TEDDY CASIÑO, *petitioners, vs.* **EXECUTIVE SECRETARY PAQUITO N. OCHOA, JR., DEPARTMENT OF NATIONAL DEFENSE SECRETARY VOLTAIRE GAZMIN, DEPARTMENT OF FOREIGN AFFAIRS SECRETARY ALBERT DEL ROSARIO, JR., DEPARTMENT OF BUDGET AND MANAGEMENT SECRETARY FLORENCIO ABAD, AND ARMED FORCES OF THE PHILIPPINES CHIEF OF STAFF GENERAL EMMANUEL T. BAUTISTA,** *respondents.*

[G.R. No. 212444. January 12, 2016]

BAGONG ALYANSANG MAKABAYAN (BAYAN), REPRESENTED BY ITS SECRETARY GENERAL RENATO M. REYES, JR., BAYAN MUNA PARTY-

LIST REPRESENTATIVES NERI J. COLMENARES AND CARLOS ZARATE, GABRIELA WOMEN'S PARTY-LIST REPRESENTATIVES LUZ ILAGAN AND EMERENCIANA DE JESUS, ACT TEACHERS PARTY-LIST REPRESENTATIVE ANTONIO L. TINIO, ANAKPAWIS PARTY-LIST REPRESENTATIVE FERNANDO HICAP, KABATAAN PARTY-LIST REPRESENTATIVE TERRY RIDON, MAKABAYANG KOALISYON NG MAMAMAYAN (MAKABAYAN), REPRESENTED BY SATURNINO OCAMPO AND LIZA MAZA, BIENVENIDO LUMBERA, JOEL C. LAMANGAN, RAFAEL MARIANO, SALVADOR FRANCE, ROGELIO M. SOLUTA, AND CLEMENTE G. BAUTISTA, *petitioners, vs.* **DEPARTMENT OF NATIONAL DEFENSE (DND) SECRETARY VOLTAIRE GAZMIN, DEPARTMENT OF FOREIGN AFFAIRS SECRETARY ALBERT DEL ROSARIO, EXECUTIVE SECRETARY PAQUITO N. OCHOA, JR., ARMED FORCES OF THE PHILIPPINES CHIEF OF STAFF GENERAL EMMANUEL T. BAUTISTA, DEFENSE UNDERSECRETARY PIO LORENZO BATINO, AMBASSADOR LOURDES YPARRAGUIRRE, AMBASSADOR J. EDUARDO MALAYA, DEPARTMENT OF JUSTICE UNDERSECRETARY FRANCISCO BARAAN III, AND DND ASSISTANT SECRETARY FOR STRATEGIC ASSESSMENTS RAYMUND JOSE QUILOP AS CHAIRPERSON AND MEMBERS, RESPECTIVELY, OF THE NEGOTIATING PANEL FOR THE PHILIPPINES ON EDCA,** *respondents.*

KILUSANG MAYO UNO, REPRESENTED BY ITS CHAIRPERSON, ELMER LABOG, CONFEDERATION FOR UNITY, RECOGNITION AND ADVANCEMENT OF GOVERNMENT EMPLOYEES (COURAGE), REPRESENTED BY ITS NATIONAL PRESIDENT FERDINAND GAITE,

NATIONAL FEDERATION OF LABOR UNIONS-KILUSANG MAYO UNO, REPRESENTED BY ITS NATIONAL PRESIDENT JOSELITO USTAREZ, NENITA GONZAGA, VIOLETA ESPIRITU, VIRGINIA FLORES, AND ARMANDO TEODORO, JR., *petitioners-in-intervention,* **RENE A. Q. SAGUISAG, JR.,** *petitioner-in-intervention.*

SYLLABUS

1. POLITICAL LAW; CONSTITUTIONAL LAW; JUDICIAL DEPARTMENT; POWER OF JUDICIAL REVIEW; EXPLAINED.— Distinguished from the general notion of judicial power, the power of judicial review specially refers to both the authority and the duty of this Court to determine whether a branch or an instrumentality of government has acted beyond the scope of the latter's constitutional powers. As articulated in Section 1, Article VIII of the Constitution, the power of judicial review involves the power to resolve cases in which the questions concern the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation. In *Angara v. Electoral Commission*, this Court exhaustively discussed this "moderating power" as part of the system of checks and balances under the Constitution. In our fundamental law, the role of the Court is to determine whether a branch of government has adhered to the specific restrictions and limitations of the latter's power[.] x x x The power of judicial review has since been strengthened in the 1987 Constitution. The scope of that power has been extended to the determination of whether in matters traditionally considered to be within the sphere of appreciation of another branch of government, an exercise of discretion has been attended with grave abuse. The expansion of this power has made the political question doctrine "no longer the insurmountable obstacle to the exercise of judicial power or the impenetrable shield that protects executive and legislative actions from judicial inquiry or review." This moderating power, however, must be exercised carefully and only if it cannot be completely avoided. We stress that our Constitution is so incisively designed that it identifies the spheres of expertise within which the different branches

of government shall function and the questions of policy that they shall resolve. Since the power of judicial review involves the delicate exercise of examining the validity or constitutionality of an act of a coequal branch of government, this Court must continually exercise restraint to avoid the risk of supplanting the wisdom of the constitutionally appointed actor with that of its own.

2. ID.; ID.; ID.; ID.; LIMITATIONS AND REQUIREMENTS IN THE EXERCISE OF THE POWER OF JUDICIAL REVIEW.— Even as we are left with no recourse but to bare our power to check an act of a coequal branch of government – in this case the executive – we must abide by the stringent requirements for the exercise of that power under the Constitution. *Demetria v. Alba* and *Francisco v. House of Representatives* cite the "pillars" of the limitations on the power of judicial review as enunciated in the concurring opinion of U.S. Supreme Court Justice Brandeis in *Ashwanter v. Tennessee Valley Authority. Francisco* redressed these "pillars" under the following categories: 1. That there be **absolute necessity of deciding** a case 2. That rules of constitutional law shall be **formulated only as required by the facts** of the case 3. That judgment **may not be sustained on some other ground** 4. That there be **actual injury sustained by the party** by reason of the operation of the statute 5. That the **parties are not in *estoppel*** 6. That the Court upholds the **presumption of constitutionality.** These are the specific safeguards laid down by the Court when it exercises its power of judicial review. Guided by these pillars, it may invoke the power only when the following four stringent requirements are satisfied: (a) there is an actual case or controversy; (b) petitioners possess *locus standi*; (c) the question of constitutionality is raised at the earliest opportunity; and (d) the issue of constitutionality is the *lis mota* of the case.

3. ID.; ID.; ID.; ID.; ID.; PETITIONERS HAVE SHOWN THE PRESENCE OF AN ACTUAL CASE OR CONTROVERSY.— It must be emphasized that the Senate has already expressed its position through SR 105. Through the Resolution, the Senate has taken a position contrary to that of the OSG. As the body tasked to participate in foreign affairs by ratifying treaties, its belief that EDCA infringes upon its constitutional role indicates that an actual controversy —

albeit brought to the Court by non-Senators, exists. Moreover, we cannot consider the sheer abstention of the Senators from the present proceedings as basis for finding that there is no actual case or controversy before us. We point out that the focus of this requirement is the ripeness for adjudication of the matter at hand, as opposed to its being merely conjectural or anticipatory. The case must involve a definite and concrete issue involving real parties with conflicting legal rights and legal claims admitting of specific relief through a decree conclusive in nature. It should not equate with a mere request for an opinion or advice on what the law would be upon an abstract, hypothetical, or contingent state of facts. x x x We find that the matter before us involves an actual case or controversy that is already ripe for adjudication. The Executive Department has already sent an official confirmation to the U.S. Embassy that "all internal requirements of the Philippines x x x have already been complied with." By this exchange of diplomatic notes, the Executive Department effectively performed the last act required under Article XII(l) of EDCA before the agreement entered into force. Section 25, Article XVIII of the Constitution, is clear that the presence of foreign military forces in the country shall only be allowed by virtue of a treaty concurred in by the Senate. Hence, the performance of an official act by the Executive Department that led to the entry into force of an executive agreement was sufficient to satisfy the actual case or controversy requirement.

4. ID.; ID.; ID.; ID.; ID.; REQUIREMENT OF *LOCUS STANDI,* EXPLAINED.— The question of *locus standi* or legal standing focuses on the determination of whether those assailing the governmental act have the right of appearance to bring the matter to the court for adjudication. They must show that they have a personal and substantial interest in the case, such that they have sustained or are in immediate danger of sustaining, some direct injury as a consequence of the enforcement of the challenged governmental act. Here, "interest" in the question involved must be material — an interest that is in issue and will be affected by the official act — as distinguished from being merely incidental or general. Clearly, it would be insufficient to show that the law or any governmental act is invalid, and that petitioners stand to suffer in some indefinite way. They must show that they have a particular interest in bringing the

suit, and that they have been or are about to be denied some right or privilege to which they are lawfully entitled, or that they are about to be subjected to some burden or penalty by reason of the act complained of. The reason why those who challenge the validity of a law or an international agreement are required to allege the existence of a personal stake in the outcome of the controversy is "to assure the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."

5. **ID.; ID.; ID.; ID.; ID.; PETITIONERS HAVE NO LEGAL STANDING TO ASSAIL THE CONSTITUTIONALITY OF THE ENHANCED DEFENSE COOPERATION AGREEMENT (EDCA); THE PRESENT PETITIONS CANNOT QUALIFY AS CITIZENS', TAXPAYERS', OR LEGISLATORS' SUITS.—** In assailing the constitutionality of a governmental act, petitioners suing as citizens may dodge the requirement of having to establish a direct and personal interest if they show that the act affects a public right. In arguing that they have legal standing, they claim that the case they have filed is a concerned citizen's suit. But aside from general statements that the petitions involve the protection of a public right, and that their constitutional rights as citizens would be violated, they fail to make any specific assertion of a particular public right that would be violated by the enforcement of EDCA. **For their failure to do so, the present petitions cannot be considered by the Court as citizens' suits that would justify a disregard of the aforementioned requirements.** In claiming that they have legal standing as taxpayers, petitioners aver that the implementation of EDCA would result in the unlawful use of public funds. They emphasize that Article X(1) refers to an appropriation of funds; and that the agreement entails a waiver of the payment of taxes, fees, and rentals. During the oral arguments, however, they admitted that the government had not yet appropriated or actually disbursed public funds for the purpose of implementing the agreement. The OSG, on the other hand, maintains that petitioners cannot sue as taxpayers. Respondent explains that EDCA is neither meant to be a tax measure, nor is it directed at the disbursement of public funds. A taxpayer's suit concerns a case in which the official act complained of directly involves the illegal

disbursement of public funds derived from taxation. Here, those challenging the act must specifically show that they have sufficient interest in preventing the illegal expenditure of public money, and that they will sustain a direct injury as a result of the enforcement of the assailed act. Applying that principle to this case, they must establish that EDCA involves the exercise *by Congress* of its taxing or spending powers. We agree with the OSG that the petitions cannot qualify as taxpayers' suits. We emphasize that a taxpayers' suit contemplates a situation in which there is already an appropriation or a disbursement of public funds. A reading of Article X(1) of EDCA would show that there has been neither an appropriation nor an authorization of disbursement of funds. The cited provision reads: All obligations under this Agreement are **subject to the availability of appropriated funds** authorized for these purposes. This provision means that if the implementation of EDCA would require the disbursement of public funds, the money must come from *appropriated* funds that are specifically *authorized* for this purpose. Under the agreement, before there can even be a disbursement of public funds, there must first be a legislative action. **Until and unless the Legislature appropriates funds for EDCA, or unless petitioners can pinpoint a specific item in the current budget that allows expenditure under the agreement, we cannot at this time rule that there is in fact an appropriation or a disbursement of funds that would justify the filing of a taxpayers' suit.** x x x [T]he power to concur in a treaty or an international agreement is an institutional prerogative granted by the Constitution to the Senate, not to the entire Legislature. In *Pimentel v. Office of the Executive Secretary,* this Court did not recognize the standing of one of the petitioners therein who was a member of the House of Representatives. The petition in that case sought to compel the transmission to the Senate for concurrence of the signed text of the Statute of the International Criminal Court. Since that petition invoked the power of the Senate to grant or withhold its concurrence in a treaty entered into by the Executive Department, only then incumbent Senator Pimentel was allowed to assert that authority of the Senate of which he was a member. Therefore, **none of the initial petitioners in the present controversy has the standing to maintain the suits as legislators.**

6. ID.; ID.; ID.; ID.; ID.; SINCE PETITIONERS PRESENTED ISSUES INVOLVING MATTERS OF TRANSCENDENTAL IMPORTANCE, THE COURT TAKES A LIBERAL STAND TOWARDS THE REQUIREMENT OF *LOCUS STANDI* AND RULES THAT THE PRESENT CASE IS A PROPER SUBJECT OF JUDICIAL REVIEW.— In a number of cases, this Court has indeed taken a liberal stance towards the requirement of legal standing, especially when paramount interest is involved. Indeed, when those who challenge the official act are able to craft an issue of transcendental significance to the people, the Court may exercise its sound discretion and take cognizance of the suit. It may do so in spite of the inability of the petitioners to show that they have been personally injured by the operation of a law or any other government act. While this Court has yet to thoroughly delineate the outer limits of this doctrine, we emphasize that not every other case, however strong public interest may be, can qualify as an issue of transcendental importance. Before it can be impelled to brush aside the essential requisites for exercising its power of judicial review, it must at the very least consider a number of factors: (1) the character of the funds or other assets involved in the case; (2) the presence of a clear case of disregard of a constitutional or statutory prohibition by the public respondent agency or instrumentality of the government; and (3) the lack of any other party that has a more direct and specific interest in raising the present questions. An exhaustive evaluation of the memoranda of the parties, together with the oral arguments, shows that petitioners have presented serious constitutional issues that provide ample justification for the Court to set aside the rule on standing. The transcendental importance of the issues presented here is rooted in the Constitution itself. Section 25, Article XVIII thereof, cannot be any clearer: there is a much stricter mechanism required before foreign military troops, facilities, or bases may be allowed in the country. The DFA has already confirmed to the U.S. Embassy that "all internal requirements of the Philippines x x x have already been complied with." It behooves the Court in this instance to take a liberal stance towards the rule on standing and to determine forthwith whether there was grave abuse of discretion on the part of the Executive Department. **We therefore rule that this case is a proper subject for judicial review.**

7. ID.; ID.; EXECUTIVE DEPARTMENT; THE ROLE OF THE PRESIDENT AS EXECUTOR OF THE LAWS INCLUDES THE DUTY TO DEFEND THE STATE, FOR WHICH REASON HE MAY USE SUCH POWER IN THE CONDUCT OF FOREIGN RELATIONS.— [T]he duty to faithfully execute the laws of the land is inherent in executive power and is intimately related to the other executive functions. These functions include the faithful execution of the law in autonomous regions; the right to prosecute crimes; the implementation of transportation projects; the duty to ensure compliance with treaties, executive agreements and executive orders; the authority to deport undesirable aliens; the conferment of national awards under the President's jurisdiction; and the overall administration and control of the executive department. These obligations are as broad as they sound, for a President cannot function with crippled hands, but must be capable of securing the rule of law within all territories of the Philippine Islands and be empowered to do so within constitutional limits. Congress cannot, for instance, limit or take over the President's power to adopt implementing rules and regulations for a law it has enacted. More important, this mandate is self-executory by virtue of its being inherently executive in nature. x x x **The import of this characteristic is that the manner of the President's execution of the law, even if not expressly granted by the law, is justified by necessity and limited only by law, since the President must "take necessary and proper steps to carry into execution the law."** x x x In light of this constitutional duty, it is the President's prerogative to do whatever is legal and necessary for Philippine defense interests. It is no coincidence that the constitutional provision on the faithful execution clause was followed by that on the President's commander-in-chief powers, which are specifically granted during extraordinary events of lawless violence, invasion, or rebellion. And this duty of defending the country is unceasing, even in times when there is no state of lawlesss violence, invasion, or rebellion. At such times, the President has full powers to ensure the faithful execution of the laws. It would therefore be remiss for the President and repugnant to the faithful-execution clause of the Constitution to do nothing when the call of the moment requires increasing the military's defensive capabilities, which could include forging alliances with states that hold a common interest with the Philippines

or bringing an international suit against an offending state. x x x [T]he President's duty to execute the laws and protect the Philippines is inextricably interwoven with his foreign affairs powers, such that he must resolve issues imbued with both concerns to the full extent of his powers, subject only to the limits supplied by law. In other words, apart from an expressly mandated limit, or an implied limit by virtue of incompatibility, the manner of execution by the President must be given utmost deference.

8. **ID.; ID.; ID.; THE CONSTITUTIONAL PROHIBITION ON THE ENTRY OF FOREIGN MILITARY BASES, TROOPS, AND FACILITIES EXCEPT BY WAY OF A TREATY CONCURRED IN BY THE SENATE IS A CLEAR LIMITATION ON THE PRESIDENT'S DUAL ROLE AS DEFENDER OF THE STATE AND AS SOLE AUTHORITY IN FOREIGN RELATIONS.—** Despite the President's roles as defender of the State and sole authority in foreign relations, the 1987 Constitution expressly limits his ability in instances when it involves the entry of foreign military bases, troops or facilities. The initial limitation is found in Section 21 of the provisions on the Executive Department: "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate." The specific limitation is given by Section 25 of the Transitory Provisions, x x x It is quite plain that the Transitory Provisions of the 1987 Constitution intended to add to the basic requirements of a treaty under Section 21 of Article VII. This means that both provisions must be read as additional limitations to the President's overarching executive function in matters of defense and foreign relations.

9. **ID.; ID.; ID.; ID.; THE CONSTITUTIONAL RESTRICTION REFERS SOLELY TO THE INITIAL ENTRY OF THE FOREIGN MILITARY BASES, TROOPS, OR FACILITIES; *VERBA LEGIS* RULE, APPLIED.—** [A] plain textual reading of Article XIII, Section 25, inevitably leads to the conclusion that it applies only to a proposed agreement between our government and a foreign government, whereby military bases, troops, or facilities of such foreign government would be "allowed" or would "gain entry" Philippine territory. Note that the provision "shall not be allowed" is a negative injunction. This wording signifies that the President is not

authorized by law to allow foreign military bases, troops, or facilities to enter the Philippines, except under a treaty concurred in by the Senate. Hence, the constitutionally restricted authority pertains to the entry of the bases, troops, or facilities, and not to the activities to be done after entry. Under the principles of constitutional construction, of paramount consideration is the plain meaning of the language expressed in the Constitution, or the *verba legis* rule. It is presumed that the provisions have been carefully crafted in order to express the objective it seeks to attain. It is incumbent upon the Court to refrain from going beyond the plain meaning of the words used in the Constitution. It is presumed that the framers and the people meant what they said when they said it, and that this understanding was reflected in the Constitution and understood by the people in the way it was meant to be understood when the fundamental law was ordained and promulgated. x x x It is only in those instances in which the constitutional provision is unclear, ambiguous, or silent that further construction must be done to elicit its meaning. x x x [T]he phrase "shall not be allowed in the Philippines" plainly refers to the entry of bases, troops, or facilities in the country. x x x The verb "allow" is followed by the word "in," which is a preposition used to indicate "place or position in space or anything having material extension: Within the limits or bounds of, within (any place or thing).'' That something is the Philippines, which is the noun that follows. It is evident that the constitutional restriction refers solely to the initial entry of the foreign military bases, troops, or facilities. Once entry is authorized, the subsequent acts are thereafter subject only to the limitations provided by the rest of the Constitution and Philippine law, and not to the Section 25 requirement of validity through a treaty.

10. ID.; ID.; ID.; THE PRESIDENT MAY GENERALLY ENTER INTO EXECUTIVE AGREEMENTS WITHOUT SENATE CONCURRENCE; INSTANCES WHEN AN EXECUTIVE AGREEMENT MAY BE CONCLUDED.— The power of the President to enter into *binding* executive agreements without Senate concurrence is already well-established in this jurisdiction. That power has been alluded to in our present and past Constitutions, in various statutes, in Supreme Court decisions, and during the deliberations of the Constitutional Commission. They cover a wide array of subjects with varying

scopes and purposes, including those that involve the presence of foreign military forces in the country. As the sole organ of our foreign relations and constitutionally assigned chief architect of our foreign policy, the President is vested with the exclusive power to conduct and manage the country's interface with other states and governments. Being the principal representative of the Philippines, the Chief Executive speaks and listens for the nation; initiates, maintains, and develops diplomatic relations with other states and governments; negotiates and enters into international agreements; promotes trade, investments, tourism and other economic relations; and settles international disputes with other states. As previously discussed, this constitutional mandate emanates from the inherent power of the President to enter into agreements with other states, including the prerogative to conclude *binding* executive agreements that do not require further Senate concurrence. The existence of this presidential power is so well-entrenched that Section 5(2)(a), Article VIII of the Constitution, even provides for a check on its exercise. x x x One of the distinguishing features of executive agreements is that their validity and effectivity are not affected by a lack of Senate concurrence. This distinctive feature was recognized as early as in *Eastern Sea Trading* (1961), *viz:* **Treaties** are **formal documents** which **require ratification with the approval** of two-thirds of the **Senate. Executive agreements** become **binding through executive action without the need** of a **vote by the Senate** or by Congress. x x x x [T]he **right of the Executive** to **enter into binding agreements *without* the necessity of subsequent Congressional approval** has been ***confirmed by long usage*.** x x x That notion was carried over to the present Constitution. x x x The inapplicability to executive agreements of the requirements under Section 21 was again recognized in *Bayan v. Zamora* and in *Bayan Muna v. Romulo.* These cases, both decided under the aegis of the present Constitution, quoted *Eastern Sea Trading* in reiterating that executive agreements are valid and binding even without the concurrence of the Senate. Executive agreements may dispense with the requirement of Senate concurrence because of the legal mandate with which they are concluded. As culled from the afore-quoted deliberations of the Constitutional Commission, past Supreme Court Decisions, and works of noted scholars, executive agreements merely involve arrangements on the implementation of *existing*

policies, rules, laws, or agreements. They are concluded (1) to adjust the details of a treaty; (2) pursuant to or upon confirmation by an act of the Legislature; or (3) in the exercise of the President's independent powers under the Constitution. The *raison d' être* of executive agreements hinges on *prior* constitutional or legislative authorizations.

11. ID.; ID.; ID.; ID.; INTERNATIONAL AGREEMENTS MAY TAKE DIFFERENT FORMS; UNDER INTERNATIONAL LAW, THE DISTINCTION AS TO FORM IS IRRELEVANT FOR PURPOSES OF DETERMINING INTERNATIONAL RIGHTS AND OBLIGATIONS; BUT THERE REMAIN TWO IMPORTANT FEATURES THAT DISTINGUISH TREATIES FROM EXECUTIVE AGREEMENTS UNDER THE DOMESTIC SETTING.— The special nature of an executive agreement is not just a domestic variation in international agreements. International practice has accepted the use of various forms and designations of international agreements, ranging from the traditional notion of a treaty – which connotes a formal, solemn instrument to engagements concluded in modern, simplified forms that no longer necessitate ratification. An international agreement may take different forms: treaty, act, protocol, agreement, *concordat, compromis d' arbitrage,* convention, covenant, declaration, exchange of notes, statute, pact, charter, agreed minute, memorandum of agreement, *modus vivendi,* or some other form. Consequently, under international law, the distinction between a treaty and an international agreement or even an executive agreement is irrelevant for purposes of determining international rights and obligations. However, this principle does not mean that the domestic law distinguishing *treaties, international agreements,* and *executive agreements* is relegated to a mere variation in form, or that the constitutional requirement of Senate concurrence is demoted to an optional constitutional directive. There remain two very important features that distinguish *treaties* from *executive agreements* and translate them into terms of art in the domestic setting. *First,* executive agreements must remain traceable to an express or implied authorization under the Constitution, statutes, or treaties. The absence of these precedents puts the validity and effectivity of executive agreements under serious question for the main function of the Executive is to enforce the Constitution and the laws enacted by the Legislature, not to defeat or interfere

in the performance of these rules. In turn, executive agreements cannot create new international obligations that are not expressly allowed or reasonably implied in the law they purport to implement. *Second,* treaties are, by their very nature, considered superior to executive agreements. Treaties are products of the acts of the Executive and the Senate unlike executive agreements, which are solely executive actions. Because of legislative participation through the Senate, a treaty is regarded as being on the same level as a statute. If there is an irreconcilable conflict, a later law or treaty takes precedence over one that is prior. An executive agreement is treated differently. Executive agreements that are inconsistent with either a law or a treaty are considered ineffective. Both types of international agreements are nevertheless subject to the supremacy of the Constitution.

12. ID.; ID.; ID.; THE PRESIDENT HAD THE CHOICE TO ENTER INTO EDCA BY WAY OF AN EXECUTIVE AGREEMENT OR A TREATY; THE TASK OF THE COURT IS TO DETERMINE WHETHER SUCH AGREEMENT IS CONSISTENT WITH THE APPLICABLE LIMITATION.— No court can tell the President to desist from choosing an executive agreement over a treaty to embody an international agreement, unless the case falls squarely within Article VIII, Section 25. As can be gleaned from the debates among the members of the Constitutional Commission, they were aware that legally binding international agreements were being entered into by countries in forms other than a treaty. At the same time, it is clear that they were also keen to preserve the concept of "executive agreements" and the right of the President to enter into such agreements. x x x In *Bayan Muna v. Romulo,* we ruled that the President acted within the scope of her constitutional authority and discretion when she chose to enter into the RP-U.S. Non-Surrender Agreement in the form of an executive agreement, instead of a treaty, and in ratifying the agreement without Senate concurrence. x x x Indeed, in the field of external affairs, the President must be given a larger measure of authority and wider discretion, subject only to the least amount of checks and restrictions under the Constitution. The rationale behind this power and discretion was recognized by the Court in *Vinuya*

v. Executive Secretary, cited earlier. Section 9 of Executive Order No. 459, or the Guidelines in the Negotiation of International Agreements and its Ratification, thus, correctly reflected the inherent powers of the President when it stated that the DFA "shall determine whether an agreement is an executive agreement or a treaty." Accordingly, in the exercise of its power of judicial review, the Court does not look into whether an international agreement should be in the form of a treaty or an executive agreement, save in cases in which the Constitution or a statute requires otherwise. Rather, in view of the vast constitutional powers and prerogatives granted to the President in the field of foreign affairs, the task of the Court is to determine whether the international agreement is consistent with the applicable limitations.

13. ID.; ID.; CONSTITUTIONALITY OF EDCA; EDCA IS CONSISTENT WITH THE CONTENT, PURPOSE, AND FRAMEWORK OF THE MUTUAL DEFENSE TREATY (MDT) AND THE VISITING FORCES AGREEMENT (VFA); EDCA DOES NOT DEAL WITH THE ENTRY INTO THE COUNTRY OF U.S. PERSONNEL AND CONTRACTORS *PER SE*; SINCE THE VFA ALREADY ALLOWS THE PRESENCE OF U.S. MILITARY AND CIVILIAN PERSONNEL, EDCA MERELY REGULATES AND LIMITS THE PRESENCE OF SUCH PERSONNEL IN THE COUNTRY.— A thorough evaluation of **how EDCA is phrased clarifies that the agreement does not deal with the entry into the country of U.S. personnel and contractors *per se*.** While Articles I(1)(b) and II(4) speak of "the right to access and use" the Agreed Locations, their wordings indicate the presumption that these groups have already been allowed entry into Philippine territory, for which, unlike the VFA, EDCA has no specific provision. x x x By virtue of Articles I and III of the VFA, the Philippines already allows U.S. military and civilian personnel to be "temporarily" in the Philippines," so long as their presence is "in connection with activities approved by the Philippine Government." The Philippines, through Article III, even guarantees that it shall facilitate the admission of U.S. personnel into the country and grant exemptions from passport and visa regulations. The VFA does not even limit their temporary presence to specific locations. Based on the above provisions, the **admission and presence**

of U.S. military and civilian personnel in Philippine territory are already allowed under the VFA, the treaty supposedly being implemented by EDCA. What EDCA has effectively done, in fact, is merely provide the mechanism to identify the locations in which U.S. personnel may perform allowed activities pursuant to the VFA. As the implementing agreement, it regulates and limits the presence of U.S. personnel in the country.

14. ID.; ID.; ID.; ID.; EDCA DOES NOT GUARANTEE ADMISSION OF U.S. CONTRACTORS INTO THE PHILIPPINES; THEIR ENTRY, PRESENCE, AND ACTIVITIES ARE SUBJECT TO OUR IMMIGRATION, PENAL, AND LABOR LAWS AS WELL AS TREATIES APPLICABLE WITHIN THE PHILIPPINE TERRITORY.— Nowhere in EDCA are U.S. contractors guaranteed immediate admission into the Philippines. Articles III and IV, in fact, merely grant them the right of access to, and the authority to conduct certain activities within the Agreed Locations. Since Article II(3) of EDCA specifically leaves out *U.S. contractors* from the coverage of the VFA, they shall not be granted the same entry accommodations and privileges as those enjoyed by U.S. military and civilian personnel under the VFA. x x x [W]e emphasize that U.S. contractors are explicitly excluded from the coverage of the VFA. As visiting aliens, their entry, presence, and activities are subject to all laws and treaties applicable within the Philippine territory. They may be refused entry or expelled from the country if they engage in illegal or undesirable activities. There is nothing that prevents them from being detained in the country or being subject to the jurisdiction of our courts. Our penal laws, labor laws, and immigrations laws apply to them and therefore limit their activities here.

15. ID.; ID.; ID.; ID.; THE "ACTIVITIES" OF U.S. PERSONNEL REFERRED TO IN THE VFA ARE MEANT TO BE SPECIFIED AND IDENTIFIED IN FURTHER AGREEMENTS; EDCA IS ONE SUCH AGREEMENT THAT CLARIFIES SAID ACTIVITIES.— Article I of the VFA indicates that the presence of U.S. military and civilian personnel in the Philippines is " in connection with activities approved by the Philippine Government." While the treaty does not expressly enumerate or detail the nature of activities

of U.S. troops in the country, its Preamble makes explicit references to the reaffirmation of the obligations of both countries under the MDT. These obligations include the strengthening of international and regional security in the Pacific area and the promotion of common security interests. The Court has already settled in *Lim v. Executive Secretary* that the phrase "activities approved by the Philippine Government" under Article I of the VFA was intended to be ambiguous in order to afford the parties flexibility to adjust the details of the purpose of the visit of U.S. personnel. x x x The joint report of the Senate committees on foreign relations and on national defense and security further explains the wide range and variety of activities contemplated in the VFA, and how these activities shall be identified. x x x **What can be gleaned from the provisions of the VFA, the joint report of the Senate committees on foreign relations and on national defense and security, and the ruling of this Court in *Lim* is that the "activities" referred to in the treaty are meant to be specified and identified in *further* agreements. EDCA is one such agreement.** EDCA seeks to be an instrument that enumerates the Philippine-approved activities of U.S. personnel referred to in the VFA. EDCA allows U.S. military and civilian personnel to perform "activities by the Philippines, as those terms are defined in the VFA" and clarifies that these activities include those conducted within the Agreed Locations[.]

16. ID.; ID.; ID.; EDCA DOES NOT ALLOW THE PRESENCE OF U.S. OWNED OR CONTROLLED MILITARY FACILITIES AND BASES IN THE PHILIPPINES.— Petitioners Saguisag, *et al.* claim that EDCA permits the establishment of U.S. military bases through the "euphemistically" termed "Agreed Locations." Alluding to the definition of this term in Article II(4) of EDCA, they point out these locations are actually military bases, as the definition refers to facilities and areas to which U.S. military forces have access for a variety of purposes. Petitioners claim that there are several badges of exclusivity in the use of the Agreed Locations by U.S. forces. *First*, Article V(2) of EDCA alludes to a "return" of these areas once they are no longer needed by U.S. forces, indicating that there would be some transfer of use. *Second*, Article IV(4) of EDCA talks about American forces' unimpeded access to the Agreed Locations for all matters relating to the prepositioning and storage of U.S.

military equipment, supplies, and materiel. Third, Article VII of EDCA authorizes U.S. forces to use public utilities and to operate their own telecommunications system. x x x As a preliminary observation, petitioners have cherry-picked provisions of EDCA by presenting so-called "badges of exclusivity," despite the presence of contrary provisions within the text of the agreement itself. First, they clarify the word "return" in Article V(2) of EDCA. However, the use of the word "return" is within the context of a lengthy provision. x x x [T]he return of an Agreed Location would be within the parameters of an activity that the Mutual Defense Board (MDB) and the Security Engagement Board (SEB) would authorize. Thus, possession by the U.S. prior to its return of the Agreed Location would be based on the authority given to it by a joint body co-chaired by the "AFP Chief of Staff and Commander, U.S. PACOM with representatives from the Philippines' Department of National Defense and Department of Foreign Affairs sitting as members." The terms shall be negotiated by both the Philippines and the U.S., or through their Designated Authorities. This provision, seen as a whole, contradicts petitioners' interpretation of the return as a "badge of exclusivity." In Fact, it shows the cooperation and partnership aspect of EDCA in full bloom. Second, the term "unimpeded access" must likewise be viewed from a contextual perspective. Article IV(4) states that U.S. forces and U.S. contractors shall have "unimpeded access to Agreed Locations for all matters relating to the prepositioning and storage of defense equipment, supplies, and materiel, including delivery, management, inspection, use, maintenance, and removal of such equipment, supplies and materiel." At the beginning of Article IV, EDCA states that the Philippines gives the U.S. the authority to bring in these equipment, supplies, and materiel through the MDB and SEB security mechanism. These items are owned by the U.S., are exclusively for the use of the U.S. and, after going through the joint consent mechanisms of the MDB and the SEB, are within the control of the U.S. More importantly, before these items are considered prepositioned, they must have gone through the process of prior authorization by the MDB and the SEB and given proper notification to the AFP. Therefore, this "unimpeded access" to the Agreed Locations is a necessary adjunct to the ownership, use, and control of the U.S. over its own equipment, supplies, and materiel and must have first

been allowed by the joint mechanisms in play between the two states since the time of the MDT and the VFA. It is not the use of the Agreed Locations that is exclusive *per se*; it is mere access to items in order to exercise the rights of ownership granted by virtue of the Philippine Civil Code.

17. ID.; ID.; ID.; ID.; LEGAL STANDARDS TO DETERMINE WHETHER A MILITARY BASE OR FACILITY IN THE PHILIPPINES IS FOREIGN OR REMAINS A PHILIPPINE MILITARY BASE OR FACILITY; INDEPENDENCE FROM FOREIGN CONTROL, DISCUSSED; "OPERATIONAL CONTROL" MEANS THE EXERCISE OF AUTHORITY OVER U.S. PERSONNEL AND NOT OVER THE AGREED LOCATIONS.— We can thereby determine whether a military base or facility in the Philippines, which houses or is accessed by foreign military troops, is foreign or remains a Philippine military base or facility. The legal standards we find applicable are: independence from foreign control, sovereignty and applicable law, and national security and territorial integrity. x x x Very clearly, much of the opposition to the U.S. bases at the time of the Constitution's drafting was aimed at asserting Philippine independence from the U.S., as well as control over our country's territory and military. x x x In this case, EDCA explicitly provides that ownership of the Agreed Locations remains with the Philippine government. What U.S. personnel have a right to, pending mutual agreement, is access to and use of these locations. x x x EDCA, in respect of its provisions on Agreed Locations, is essentially a contract of use and access. Under its pertinent provisions, it is the Designated Authority of the Philippines that shall, when requested, assist in facilitating transit or access to public land and facilities. The activities carried out within these locations are subject to agreement as authorized by the Philippine government. Granting the U.S. operational control over these locations is likewise subject to EDCA's security mechanisms, which are bilateral procedures involving Philippine consent and cooperation. Finally, the Philippine designated Authority or a duly designated representative is given access to the Agreed Locations. To our mind, these provisions do not raise the spectre of U.S. control, which was so feared by the Constitutional Commission. In fact, they seem to have been the product of deliberate negotiation from the point of view of

the Philippine government, which balanced constitutional restrictions on foreign military bases and facilities against the security needs of the country. In the 1947 MBA, the U.S. forces had "the right, power and authority x x x to construct (including dredging and filling), operate, maintain, utilize, occupy, garrison and control the bases." No similarly explicit provision is present in EDCA. x x x Under Article VI(3) of EDCA, U.S. forces are authorized to act as necessary for "operational control and defense." The term "operational control" has led petitioners to regard U.S. control over the Agreed Locations as unqualified and, therefore, total. x x x Operational control, as cited by both petitioner and respondents, is a military term referring to [t]he authority to perform those functions of command over subordinate forces involving organizing and employing commands and forces, assigning tasks, designating objective, and giving authoritative direction necessary to accomplish the mission. x x x Thus, the legal concept of operational control involves authority over personnel in a commander-subordinate relationship and does not include control over the Agreed Locations in this particular case. Though not necessarily in EDCA provisions, this interpretation is readily implied by the reference to the taking of "appropriate measures to protect United States forces and United States contractors." It is but logical, even necessary, for the U.S. to have operational control over its own forces, in much the same way that the Philippines exercises operational control over its own units.

18. ID.; ID.; ID.; ID.; ID.; OPERATIONAL CONTROL DISTINGUISHED FROM EFFECTIVE COMMAND AND CONTROL.— Command and control encompasses the exercise of authority, responsibility, and direction by a commander over assigned and attached forces to accomplish the mission. Command at all levels is the art of motivating and directing people and organizations into action to accomplish missions. Control is inherent in command. To control is to manage and direct forces and functions consistent with a commander's command authority. Control of forces and functions helps commanders and staffs compute requirements, allocate means, and integrate efforts. x x x Operational control is defined thus: x x x It is the authority to perform those functions of command over subordinate forces involving organizing and employing commands and forces, assigning tasks, designating objectives,

and giving authoritative direction over all aspects of military operations and joint training necessary to accomplish the mission. x x x Operational control is therefore the delegable aspect of combatant command, while command and control is the overall power and responsibility exercised by the commander with reference to a mission. Operational control is a narrower power and must be given, while command and control is plenary and vested in a commander. Operational control does not include the planning, programming, budgeting, and execution process input; the assignment of subordinate commanders; the building of relationships with Department of Defense agencies; or the directive authority for logistics, whereas these factors are included in the concept of command and control.

19. ID.; ID.; ID.; ID.; ID.; EDCA'S GRANT OF LIMITED OPERATIONAL CONTROL TO THE U.S. OVER THE AGREED LOCATIONS IS ONLY FOR CONSTRUCTION ACTIVITIES.— EDCA indeed contains a specific provision that gives to the U.S. operational control within the Agreed Locations during construction activities. This exercise of operational control is premised upon the approval by the MDB and the SEB of the construction activity through consultation and mutual agreement on the requirements and standards of the construction, alteration, or improvement. Despite this grant of operational control to the U.S., it must be emphasized that the grant is only for construction activities. The narrow and limited instance wherein the U.S. is given operational control within an Agreed Location cannot be equated with foreign military control, which is so abhorred by the Constitution. The clear import of the provision is that in the absence of construction activities, operational control over the Agreed Location is vested in the Philippine authorities. This meaning is implicit in the specific grant of operational control only during construction activities. The principle of constitutional construction, "*expressio unius est exclusio alterius*," means the failure to mention the thing becomes the ground for inferring that it was deliberately excluded. Following this construction, since EDCA mentions the existence of U.S. operational control over the Agreed Locations for construction activities, then it is quite logical to conclude that it is not exercised over other activities. Limited control does not violate the Constitution. The fear of the commissioners was total control, to the point

that the foreign military forces might dictate the terms of their acts within the Philippines. More important, limited control does not mean an abdication or derogation of Philippine sovereignty and legal jurisdiction over the Agreed Locations. It is more akin to the extension of diplomatic courtesies and rights to diplomatic agents, which is a waiver of control on a limited scale and subject to the terms of the treaty.

20. ID.; ID.; ID.; ID.; ID.; SOVEREIGNTY AND APPLICABLE LAW AS THE SECOND STANDARD, EXPLAINED; EDCA RETAINS THE PHILIPPINE SOVEREIGNTY AND JURISDICTION OVER THE AGREED LOCATIONS.— From the text of EDCA itself, Agreed Locations are territories of the Philippines that the U.S. forces are allowed to access and use. By withholding ownership of these areas and retaining unrestricted access to them, the government asserts sovereignty over its territory. That sovereignty exists as long as the Filipino people exist. Significantly, the Philippines retains primary responsibility for security with respect to the Agreed Locations. Hence, Philippine law remains in force therein, and it cannot be said that jurisdiction has been transferred to the U.S. Even the previously discussed necessary measures for operational control and defense over U.S. forces must be coordinated with Philippine authorities. Jurisprudence bears out the fact that even under the former legal regime of the MBA, Philippine laws continue to be in force within the bases. The difference between then and now is that EDCA retains the primary jurisdiction of the Philippines over the security of the Agreed Locations, an important provision that gives it actual control over those locations. Previously, it was the provost marshal of the U.S. who kept the peace and enforced Philippine law in the bases. In this instance, Philippine forces act as peace officers, in stark contrast to the 1947 MBA provisions on jurisdiction.

21. ID.; ID.; ID.; ID.; ID.; THE LAST STANDARD CONSIDERED BY THE COURT IS WHETHER THE EDCA PROVISIONS ON AGREED LOCATIONS RESPECT NATIONAL SECURITY AND TERRITORIAL INTEGRITY OF THE PHILIPPINES; EDCA DOES NOT CREATE A SITUATION WHICH WOULD MAKE THE PHILIPPINES A LEGITIMATE TARGET BY U.S. ENEMY; THERE IS NO BASIS TO INVALIDATE EDCA ON FEARS THAT IT INCREASES THE THREAT TO OUR

NATIONAL SECURITY.— The last standard this Court must set is that the EDCA provisions on the Agreed Locations must not impair or threaten the national security and territorial integrity of the Philippines. x x x [P]etitioners make the point that the Agreed Locations, by granting access and use to U.S. forces and contractors, are U.S. bases under a different name. More important, they claim that the Agreed Locations invite instances of attack on the Philippines from enemies of the U.S. We believe that the raised fear of an attack on the Philippines is not in the realm of law, but of politics and policy. At the very least, we can say that under international law, EDCA does not provide a legal basis for a justified attack on the Philippines. In the first place, international law disallows any attack on the Agreed Locations simply because of the presence of U.S. personnel. Article 2(4) of the United Nations Charter states that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Any unlawful attack on the Philippines breaches the treaty, and triggers Article 51 of the same charter, which guarantees the inherent right of individual or collective self-defence. x x x [A]ny armed attack by forces of a third state against an Agreed Location can only be legitimate under international humanitarian law if it is against a *bona fide* U.S. military base, facility, or installation that directly contributes to the military effort of the U.S. Moreover, the third state's forces must take all measures to ensure that they have complied with the principle of distinction (between combatants and non-combatants). There is, then, ample legal protection for the Philippines under international law that would ensure its territorial integrity and national security in the event an Agreed Location is subjected to attack. As EDCA stands, it does not create the situation so feared by petitioners – one in which the Philippines, while not participating in an armed conflict, would be *legitimately targeted* by an enemy of the U.S. x x x The provisions in EDCA dealing with Agreed Locations are analogous to those in the aforementioned executive agreements. Instead of authorizing the building of temporary structures as previous agreements have done, EDCA authorizes the U.S. to build permanent structures or alter or improve existing ones for, and to be owned by, the Philippines. EDCA is clear that

the Philippines retains ownership of altered or improved facilities and newly constructed permanent or non-relocatable structures. Under EDCA, U.S. forces will also be allowed to use facilities and areas for "training; x x x; support and related activities; x x x; temporary accommodation of personnel; communications" and agreed activities. Concerns on national security problems that arise from foreign military equipment being present in the Philippines must likewise be contextualized. Most significantly, **the VFA already authorizes the presence of U.S. military equipment in the country.** Article VII of the VFA already authorizes the U.S. to import into or acquire in the Philippines "equipment, materials, supplies, and other property" that will be used "in connection with activities" contemplated therein. The same section also recognizes that "[t]itle to such property shall remain" with the US and that they have the discretion to "remove such property from the Philippines at any time." There is nothing novel, either, in the EDCA provision on the prepositioning and storing of "defense equipment supplies, and materiel," since these are sanctioned in the VFA. x x x Therefore, there is no basis to invalidate EDCA on fears that it increases the threat to our national security. If anything, EDCA increases the likelihood that, in an event requiring a defensive response, the Philippines will be prepared alongside the U.S. to defend its islands and insure its territorial integrity pursuant to a relationship built on the MDT and VFA.

22. ID.; ID.; ID.; SINCE THE PHILIPPINE GOVERNMENT STANDS TO BENEFIT NOT ONLY FROM THE STRUCTURES TO BE BUILT BUT ALSO FROM THE JOINT TRAINING WITH U.S. FORCES, THE PROVISION ON THE GOVERNMENT ASSUMPTION OF TAX LIABILITY DOES NOT CONSTITUTE A TAX EXEMPTION.— [P]etitioners allege that EDCA creates a tax exemption, which under the law must originate from Congress. This allegation ignores jurisprudence on the government's assumption of tax liability. EDCA simply states that the taxes on the use of water, electricity, and public utilities are for the account of the Philippine Government. This provision creates a situation in which a contracting party assumes the tax liability of the other. In *National Power Corporation v. Province of Quezon*, we distinguished between enforceable and

unenforceable stipulations on the assumption of tax liability. Afterwards, we concluded that an enforceable assumption of tax liability requires the party assuming the liability to have actual interest in the property taxed. This rule applies to EDCA, since the Philippine Government stands to benefit not only from the structures to be built thereon or improved, but also from the joint training with U.S. forces, disaster preparation, and the preferential use of Philippine suppliers. Hence, the provision on the assumption of tax liability does not constitute a tax exemption as petitioners have posited.

CARPIO, *J.*, *separate concurring opinion*:

1. POLITICAL LAW; CONSTITUTIONAL LAW; PHILIPPINE "NATIONAL TERRITORY" DEFINED AND EXPLAINED; IT REFERS TO AREAS OVER WHICH THE PHILIPPINES HAS "SOVEREIGNTY" OR "JURISDICTION".— The 1987 Constitution defines the "national territory" to include not only islands or rocks above water at high tide but also the seabed, subsoil and other submarine areas "over which the Philippines has sovereignty **or jurisdiction**." x x x Thus, the Philippine "national territory" refers to areas over which the Philippines has "sovereignty ***or*** jurisdiction." The Constitution mandates: "The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and **exclusive economic zone**, and reserve its use and enjoyment exclusively to Filipino citizens." Under both customary international law and the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the Philippines has "sovereign rights" and "**jurisdiction**" to exploit exclusively all the living and non-living resources within its EEZ. Under the UNCLOS, the Philippines has the sovereign rights to exploit exclusively the mineral resources within its ECS. Under the UNCLOS, the Philippines also has sole "**jurisdiction**" to create artificial islands or install structures within its EEZ and ECS. In short, under international law and in particular under the UNCLOS, the Philippines has **jurisdiction** over its EEZ and ECS. Thus, under domestic law, the Philippines' EEZ and ECS form part of Philippine "national territory" since the Constitution defines "national territory" to include areas over which the Philippines has "**jurisdiction**," a term which means less than sovereignty. However, under international law, the

Philippine "national territory" refers to the areas over which the Philippines has **sovereignty**, referring to the Philippines' land territory, archipelagic waters and territorial sea, excluding areas over which the Philippines exercises only jurisdiction like its EEZ and ECS.

2. ID.; ID.; CONSTITUTIONALITY OF THE ENHANCED DEFENSE COOPERATION AGREEMENT (EDCA); EDCA IS ABSOLUTELY NECESSARY AND ESSENTIAL TO IMPLEMENT THE PURPOSE OF THE 1951 MUTUAL DEFENSE TREATY (MDT).— China has already invaded **repeatedly** Philippine "national territory" in two separate areas, one in the Kalayaan Island Group in the Spratlys and the other in Scarborough Shoal. When China seized in 1988 Subi Reef, a submerged area within the Philippines' ECS and beyond the territorial sea of any high tide feature, China invaded Philippine national territory as defined in the Constitution. When China seized in 1995 Mischief Reef, a submerged area within the Philippines' EEZ and beyond the territorial sea of any high tide feature, China invaded Philippine national territory as defined in the Constitution. When China seized in 2012 Scarborough Shoal, a rock above water at high tide and constituting land territory under international law, China invaded Philippine national territory as defined in the Constitution and as understood in international law. Republic Act No. 9522, amending the Philippine Baselines Law, expressly declares that Scarborough Shoal is part of Philippine territory over which the Philippines exercises "**sovereignty** and jurisdiction." After China's seizure of Scarborough Shoal in 2012, the Philippines finally woke up and summoned the political will to address the serial and creeping Chinese invasion of Philippine national territory. Thus, the EDCA was born, to give much needed teeth to the MDT as a deterrent to further Chinese aggression in the West Philippine Sea. Without the EDCA, the MDT remains a toothless paper tiger. With the EDCA, the MDT acquires a real and ready firepower to deter any armed aggression against Philippine public vessels or aircrafts operating in the West Philippine Sea. With the EDCA, China will think twice before attacking Philippine military re-supply ships to Philippine-occupied islands in the Spratlys. With the EDCA, the Philippines will have a fighting chance to hold on to Philippine-occupied islands in the Spratlys. With

the EDCA, China will think twice before attacking Philippine navy and coast guard vessels patrolling the West Philippine Sea. This will give the Philippines a fighting chance to ward off China's impending enforcement of its 9-dashed lines as China's "national boundaries" as shown in its 2013 official vertical map. The number and sites of the "agreed locations" to place the prepositioned war materials must necessarily remain numerous and anonymous. The "agreed locations" must be numerous enough to survive repeated or surprise armed attacks. There must not only be redundant "agreed locations" but also dummy "agreed locations" to mislead the enemy. The sites of many of the "agreed locations" cannot be disclosed publicly because that will give the enemy the fixed coordinates of the "agreed locations", making them easy targets of long-range enemy cruise missiles. The number and sites of the "agreed locations" are matters best left to the sound discretion of the Executive, who is the implementing authority of the MDT for the Philippines. x x x Article VIII of the MDT provides: "This Treaty shall remain in force indefinitely. Either party may terminate it one year after notice is given to the other Party." Neither the Philippines nor the United States has terminated the MDT. On the contrary, the 1998 Visiting Forces Agreement between the Philippines and the United States, which the Philippine Senate has ratified, expressly states that the parties are "[r]eaffirming their obligations under the Mutual Defense Treaty of August 30, 1951." Thus, the continued validity and relevance of the MDT cannot be denied. Moreover, the Senate ratification of the MDT complies with the requirement of Section 25, Article XVIII of the 1987 Constitution that any agreement allowing foreign military facilities in the Philippines, like the prepositioning of U.S. war materials, must be embodied in a treaty and ratified by two-thirds vote of the Senate. That treaty is the MDT which the Philippine Senate ratified by two-thirds vote on 12 May 1952 and which the U.S. Senate ratified on 20 March 1952. In summary, the EDCA is absolutely necessary and essential to implement the purpose of the MDT, which on the part of the Philippines, given the existing situation in the West Philippine Sea, is to deter or repel any armed attack on Philippine territory or on any Philippine public vessel or aircraft operating in the West Philippine Sea. To hold that the EDCA cannot take effect without Senate ratification is to render the MDT, our sole mutual self-defense treaty, totally inutile to

meet the grave, even existentialist, national security threat that the Philippines is now facing in the West Philippine Sea.

3. ID.; ID.; ID.; BEING ESSENTIALLY AND ENTIRELY AN IMPLEMENTATION OF THE MDT, EDCA IS WITHIN THE SOLE AUTHORITY OF THE PRESIDENT TO ENTER INTO AS AN EXECUTIVE AGREEMENT; THE PRESIDENT'S ACT OF ENTERING INTO THE EDCA DOES NOT VIOLATE ANY PROVISION OF THE CONSTITUTION.— The implementation of the MDT is a purely Executive function since the Senate has already ratified the MDT. The implementation of the MDT is also part of the purely Executive function of the President as Commander-in-Chief of the Armed Forces. As executor and "chief architect" of the country's relations with foreign countries, including our treaty ally the United States, the President is constitutionally vested with ample discretion in the implementation of the MDT. EDCA, being essentially and entirely an implementation of the MDT, is within the sole authority of the President to enter into as an executive agreement with the U.S. x x x **China has already invaded several geologic features comprising part of Philippine "national territory" as defined in the Constitution**. The territorial integrity of the Philippines has been violated openly and repeatedly. The President, as Commander-in-Chief of the Armed Forces, "chief architect" of foreign policy and implementer of the MDT, has decided on the urgent need to fortify Philippine military defenses by prepositioning war materials of our treaty ally on Philippine soil. This Court should not erect roadblocks to the President's implementation of the MDT, particularly since time is of the essence and the President's act of entering into the EDCA on his own does not violate any provision of the Constitution.

LEONARDO-DE CASTRO, *J.*, *concurring and dissenting opinion*:

1. POLITICAL LAW; CONSTITUTIONAL LAW; CONSTITUTIONALITY OF THE ENHANCED DEFENSE COOPERATION AGREEMENT (EDCA); EDCA IS NOT A MERE IMPLEMENTING AGREEMENT OF THE 1951 MUTUAL DEFENSE TREATY (MDT) OR THE 1998 VISITING FORCES AGREEMENT (VFA).— As can be seen in the above table of comparison, **these EDCA provisions**

establishes military areas similar to that in the Military Bases Agreement, and for that reason alone, the EDCA is far greater in scope than both the Mutual Defense Treaty and Visiting Forces Agreement. The EDCA is not a mere implementing agreement of either the MDT or the VFA. The EDCA is **an international agreement** that **allows the presence in the Philippines of foreign military bases, troops and facilities**, and thus requires that the three requisites under Section 25, Article XVIII be complied with. The EDCA must be submitted to the Senate for concurrence. The majority opinion posits, *inter alia,* that the President may enter into an **executive agreement** on foreign military bases, troops, or facilities if: (a) it "is not the **principal agreement that first allowed their entry or presence in the Philippines**," or (b) it merely aims to implement an existing law or treaty. Likewise, the President alone had the choice to enter into the EDCA by way of an executive agreement or a treaty. Also, the majority suggests that executive agreements may cover the matter of foreign military forces if it involves detail adjustments of previously existing international agreements. The above arguments fail to consider that Section 25, Article XVIII of the Constitution covers three distinct and mutually independent situations: the presence of foreign military bases or troops or facilities. The grant of entry to foreign military troops does not necessarily allow the establishment of military bases or facilities. x x x [I]t must be emphasized that while in [*Bayan Muna v. Romulo*], the Court called attention to "one type of executive agreement which is a **treaty-authorized** or a **treaty-implementing** executive agreement, which necessarily would cover the same matter subject of the underlying treaty," still, the Court cited the special situation covered by Section 25, Article XVIII of the Constitution which explicitly prescribes the form of the international agreement. x x x Clearly, the Court had since ruled that when the situation and matters contemplated in Sec. 25, Article XVIII obtains, *i.e*., when the subject matter of an international agreement involves the presence of foreign military bases, troops or facilities, a treaty is required and that the same must be submitted to the Senate for the latter's concurrence. In *BAYAN v. Zamora,* the Court held that Section 25, Article XVIII, like Section 21, Article VII, embodies a phrase in the negative, *i.e*., "shall not be allowed" and therefore, the concurrence of the Senate is indispensable to render the treaty or international agreement valid and effective.

What the majority did is to carve out exceptions to Section 25, Article XVIII when none is called for. x x x Compared closely with the provisions of the MDT and the VFA, the EDCA transcends in scope and substance of the subject matters covered by the aforementioned treaties. Otherwise stated, the EDCA is an entirely new agreement unto itself.

2. ID.; ID.; ID.; ID.; THE MDT DID NOT CONTEMPLATE THE PRESENCE OF FOREIGN MILITARY BASES, TROOPS, OR FACILITIES WHILE THE PROVISIONS OF EDCA UNDOUBTEDLY DEAL WITH THE PRESENCE OF MILITARY BASES, TROOPS, AND FACILITIES IN THE PHILIPPINES; HENCE, THE PRESENCE OF SUCH MILITARY BASES, TROOPS, AND FACILITIES UNDER THE EDCA CANNOT BE TRACED TO THE MDT.— [T]he thrust of the MDT pertains to the furtherance of the avowed purpose of the parties thereto of maintaining and developing their individual and collective capacity to resist external armed attack **only** in the metropolitan territory of either party or in their island territories in the Pacific Ocean. **Accordingly, the territories of the parties other than those mentioned are not covered by the MDT**. Conspicuously absent from the MDT are specific provisions regarding the presence in Philippine territory – whether permanent or temporary – of foreign military bases, troops, or facilities. The MDT did not contemplate the presence of foreign military bases, troops, or facilities in our country in view of the fact that it was already expressly covered by the MBA that was earlier entered into by the Philippines and the United States in 1947. Moreover, the MDT contains no delegation of power to the President to enter into an agreement relative to the establishment of foreign military bases, troops, or facilities in our country. The MDT cannot also be treated as allowing an exception to the requirements of Section 25, Article XVIII of the Constitution, which took effect in 1987. As explained above, the reference to constitutional processes of either party in the MDT renders it obligatory that the Philippines follow Section 25, Article XVIII of the Constitution. Indeed, the MDT covers defensive measures to counter an armed attack against either of the parties' territories or armed forces but there is nothing in the MDT that specifically authorizes the presence, whether temporary or permanent, of a party's

bases, troops, or facilities in the other party's territory even during peace time or in mere anticipation of an armed attack. On the other hand, the very clear-cut focal point of the EDCA is the authority granted to the United States forces and contractors to have unimpeded access to so-called Agreed Locations – which can be anywhere in the Philippines – and to build there military facilities and use the same to undertake various military activities. The very wording of the EDCA shows that it undoubtedly deals with the presence of foreign military bases, troops, and facilities in the Philippine territory. Thus, contrary to the posturing of the majority, the presence of foreign military bases, troops, or facilities provided under the EDCA cannot be traced to the MDT. Moreover, the general provisions of the MDT cannot prevail over the categorical and specific provision of Section 25, Article XVIII of the Constitution.

3. ID.; ID.; ID.; ID.; THE VFA AND THE EDCA COVER ENTIRELY DIFFERENT SUBJECT MATTERS AND THEY CREATE DISTINCT RIGHTS AND OBLIGATIONS ON THE PART OF THE PHILIPPINES AND THE UNITED STATES; EDCA GOES FAR BEYOND THE ARRANGEMENT CONTEMPLATED BY THE VFA; INTERVENTION OF THE SENATE IS IMPERATIVE AND INDISPENSABLE FOR VALIDITY AND EFFECTIVITY OF EDCA.— [W]hat is abundantly clear with the foregoing enumeration is that the EDCA is an entirely new creation. The provisions of the EDCA are not found in or have no corresponding provisions in the VFA. They cover entirely different subject matters and they create new and distinct rights and obligations on the part of the Philippines and the United States. Furthermore, as to the nature of the presence of foreign military troops in this country, the VFA is explicit in its characterization that it is an agreement between the governments of the Philippines and the United States regarding the treatment of United States Armed Forces **visiting** the Philippines. The Preamble of the VFA likewise expressly provides that, "noting that **from time to time** elements of the United States armed forces may **visit** the Republic of the Philippines" and "recognizing the desirability of defining the treatment of United States personnel **visiting** the Republic of the Philippines" the parties to the VFA agreed to enter into the said treaty. The

use of the word visit is very telling. x x x [T]he word visit implies the temporariness or impermanence of the presence at a specific location. On the other hand, under the EDCA, United States forces and United States contractors are permitted to stay in the Agreed Locations to undertake military activities therein **without any clear limitations as to the duration of their stay**. Moreover, they are given unimpeded access to Agreed Locations to conduct different activities that definitely were not contemplated under the VFA. x x x The EDCA likewise allows the construction of permanent buildings, which the United States forces can utilize until such time that they no longer need the use thereof. The construction of permanent buildings, including the alteration or improvement by the United States of existing buildings, structures and assemblies affixed to the land, are certainly necessary not only for the accommodation of its troops, bunkering of vessels, maintenance of its vehicles, but also the creation of the proper facilities for the storage and prepositioning of its defense materiel. This grant of authority to construct new buildings and the improvement of existing buildings inside the Agreed Locations – which buildings are to be used indefinitely – further evinces the permanent nature of the stay of United States forces and contractors in this country under the EDCA. This is a far cry from the temporary visits of United States armed forces contemplated in the VFA. x x x Article II(4) of the EDCA states that the Agreed Locations shall be provided by the Philippine Government **through the AFP**. What is readily apparent from said article is that the AFP is given a broad discretion to enter into agreements with the United States with respect to the Agreed Locations. The grant of such discretion to the AFP is without any guideline, limitation, or standard as to the size, area, location, boundaries and even the number of Agreed Locations to be provided to the United States forces. As there is no sufficient standard in the EDCA itself, and no means to determine the limits of authority granted, the AFP can exercise unfettered power that may have grave implications in national security. The intervention of the Senate through the constitutionally ordained treaty-making process in defining the new national policy concerning United States access to Agreed Locations enunciated in the EDCA, which has never been before expressly or impliedly authorized, is **imperative** and **indispensible** for the validity and effectivity of the EDCA. The above distinctions between the EDCA and

the VFA, therefore, negate the OSG's argument that the EDCA merely involves "adjustments in detail" of the VFA. To my mind, the EDCA is the general framework for the access and use of the Agreed Locations by the United States forces and contractors rather than an implementing instrument of both the MDT and the VFA.

BRION, *J.*, *dissenting opinion*:

1. POLITICAL LAW; CONSTITUTIONAL LAW; JUDICIAL DEPARTMENT; JUDICIAL REVIEW; REQUIREMENT OF *LOCUS STANDI*, EXPLAINED; IN VIEW OF THE IMPORTANCE OF THE ISSUES INVOLVED IN THE PRESENT CASE, EVEN A PLAIN CITIZEN SUFFICIENTLY KNOWLEDGEABLE OF THE OUTSTANDING ISSUES SHOULD BE ALLOWED TO SUE.— Judicial review is part of the exercise of judicial power under Article VIII, Section 1 of the Constitution, particularly when it is exercised under the judiciary's expanded power (*i.e.,* when courts pass upon the actions of other agencies of government for the grave abuse of discretion they committed), or when the Supreme Court reviews, on appeal or *certiorari*, the constitutionality or validity of any law or other governmental instruments under Section 5(2)(a) and (b) of Article VIII of the Constitution. A basic requirement is the existence of an *actual case or controversy* that, viewed correctly, is a limit on the exercise of judicial power or the more specific power of judicial review. Whether such case or controversy exists depends on the existence of a *legal right* and *violation of this right*, giving rise to a dispute between or among adverse parties. Under the expanded power of judicial review, the actual case or controversy arises when an official or agency of government is alleged to have committed grave abuse of discretion in the exercise of its functions. *Locus standi* is a requirement for the exercise of judicial review and is in fact an aspect of the actual case or controversy requirement viewed *from the prism of the complaining party whose right has been violated.* When a violation of a *private right* is asserted, the *locus standi* requirement is sharp and narrow because the claim of violation accrues only to the complainant or the petitioner whose right is alleged to have been violated. On the other hand, when

violation of a *public right* is asserted – *i.e.*, a right that belongs to the public in general and whose violation ultimately affects every member of the public – the *locus standi* requirement cannot be sharp or narrow; it must correspond in width to the right violated. Thus, the standing of even a plain citizen sufficiently able to bring and support a suit, should be recognized as he or she can then be deemed to be acting in representation of the general public. x x x [T]he use of transcendental importance as a justification is replete with risks of abuse as subjective evaluation is involved. To be sure, this level of importance can be used as justification in considering *locus standi* with liberality, but *it can never be an excuse to find an actual controversy when there is none*. To hold otherwise is to give the courts an unlimited opportunity for the exercise of judicial power – a situation that is outside the Constitution's intent in the grant of judicial power. In the present cases, a violation of the Constitution, no less, is alleged by the petitioners through the commission of grave abuse of discretion. The violation potentially affects our national sovereignty, security, and defense, and the integrity of the Constitution – concerns that touch on the lives of the citizens as well as on the integrity and survival of the nation. In particular, they involve the nation's capability for self-defense; the potential hazards the nation may face because of our officials' decisions on defense and national security matters; and our sovereignty as an nation as well as the integrity of the Constitution that all citizens, including the highest officials, must protect. In these lights, I believe that the issues involved in the present case are so important that a plain citizen *sufficiently knowledgeable of the outstanding issues*, should be allowed to sue. The petitioners – *some of whom are recognized legal luminaries or are noted for their activism on constitutional matters* – should thus be recognized as parties with proper standing to file and pursue their petitions before this Court.

2. ID.; ID.; ID.; ID.; RIPENESS OF THE ISSUES RAISED FOR ADJUDICATION AS A REQUIREMENT IN THE EXERCISE OF THE POWER OF JUDICIAL REVIEW, DISCUSSED; WHEN THE PRESIDENT RATIFIED THE ENHANCED DEFENSE COOPERATION AGREEMENT (EDCA) AS AN EXECUTIVE AGREEMENT AND CERTIFIED TO THE U.S. THAT ALL INTERNAL

PROCESSES HAVE BEEN COMPLIED WITH, THE ISSUE OF ITS COMPLIANCE WITH THE CONSTITUTIONAL REQUIREMENTS BECAME RIPE FOR JUDICIAL INTERVENTION.— Like *locus standi*, ripeness for adjudication is an aspect of the actual case or controversy requirement in the exercise of judicial power. x x x In the present case, Article [X]VIII, Section 25 of the Constitution lays down in no uncertain terms the conditions under which foreign military bases, troops, and facilities may be allowed into the country: there should at least be the concurrence of the Senate. Under these terms, the refusal to allow entry of foreign military bases, troops, and facilities into the country without the required Senate concurrence is a prerogative that the people of this country adopted for themselves under their Constitution: they want participation in this decision, however indirect this participation might be. This prerogative is exercised through the Senate; thus, a violation of this constitutional prerogative is not only a transgression against the Senate but one against the people who the Senate represents. The violation in this case occurred when the President ratified the EDCA as an executive agreement and certified to the other contracting party (the U.S.) that all internal processes have been complied with, leading the latter to believe that the agreement is already valid and enforceable. Upon such violation, the dispute between the President and the Filipino people ripened.

3. ID.; ID.; EXECUTIVE DEPARTMENT; POWERS OF THE CHIEF EXECUTIVE ARE SUBJECT TO CONSTITUTIONAL LIMITATIONS; MODERNIZATION OF THE MILITARY AND EXTENT OF DEFENSE INITIATIVES ARE NATIONAL POLICY MATTERS THAT THE PRESIDENT CANNOT UNDERTAKE ALONE.— The Constitution prescribes the limitations to the otherwise awesome powers of the Executive who wields the power of the sword and shares in the power of the purse. I also do not agree that constitutional limitations, such as the need for Senate concurrence in treaties, can be disregarded if they unduly "tie the hands" of the President. These limitations are democratic safeguards that place the responsibility over national policy beyond the hands of a single official. Their existence is the hallmark of a strong and healthy democracy. In treaty-making, this is how the people participate – through their duly-elected Senate – or directly when the Congress so

requires. *When the Constitution so dictates, the President must act through the medium of a treaty and is left with no discretion on the matter*. This is the situation under Article XVIII, Section 25 of the Constitution, whose application is currently in dispute. Let it be noted that noble objectives do not authorize the President to bypass constitutional safeguards and limits to his powers. x x x [T]he President cannot, by himself, usurp the prerogatives of a co-equal branch to carry out what he believes is necessary for the country's defense interests. His position as the Commander-in-Chief of the Armed Forces of the Philippines (*AFP*) does not give him the sole discretion to increase our military's defensive capabilities; his role as commander-in-chief only gives him control of the military's chain of command. It grants him the power to call out the armed forces to prevent/suppress lawless violence, invasion, insurrection, or rebellion. The modernization of the military, in particular, is a joint responsibility of the political branches of the State because the Congress is responsible for crafting relevant laws and for allocating funds for the AFP through the General Appropriations Act. The increase or decrease of funds and the extent of defense initiatives to be undertaken are national policy matters that the President cannot undertake alone.

4. ID.; ID.; ID.; ID.; THE PRESIDENT'S FOREIGN RELATIONS POWER, PARTICULARLY WHEN IT COMES TO ENTRY INTO INTERNATIONAL AGREEMENTS, IS A SHARED FUNCTION AMONG THE THREE BRANCHES OF GOVERNMENT.— While the President's role as the country's lead official in the conduct of foreign affairs is beyond question, his authority is not without limit. When examined within the larger context of how our tripartite system of government works (where each branch of government is supreme within its sphere but coordinate with the others), we can see that the conduct of foreign affairs, particularly when it comes to international agreements, is a *shared function* among all three branches of government. The President is undeniably the chief architect of foreign policy and is the country's representative in international affairs. He is vested with the authority to preside over the nation's foreign relations which involve, among others, dealing with

foreign states and governments, extending or withholding recognition, maintaining diplomatic relations, and entering into treaties. In the realm of treaty-making, the President has the sole authority to negotiate with other States. x x x This wide grant of authority, however, does not give him the license to conduct foreign affairs to the point of disregarding or bypassing the separation of powers that underlies our established constitutional system. Thus, while the President has the sole authority to negotiate and enter into treaties, Article VII, Section 21 of the 1987 Constitution at the same time provides the limitation that two-thirds of the members of the Senate should give their concurrence for the treaty to be valid and effective. x x x The requirement of Senate concurrence to the executive's treaty-making powers is a check on the prerogative of the Executive, in the same manner that the Executive's veto on laws passed by Congress is a check on the latter's legislative powers. Even the **executive agreements** that the President enters into without Senate concurrence has legislative participation – they are implementations of existing laws Congress has passed or of treaties that the Senate had assented to. The President's authority to negotiate and ratify these executive agreements springs from his power to ensure that these laws and treaties are executed. The judicial branch of government's participation in international agreements is largely passive, and is only triggered when cases reach the courts. The courts, in the exercise of their judicial power, have the duty to ensure that the Executive and Legislative stay within their spheres of competence; they ensure as well that constitutional standards and limitations set by the Constitution for the Executive and the Congress to follow are not violated.

5. ID.; ID.; CONSTITUTIONALITY OF EDCA; EDCA IS NOT A MERE IMPLEMENTATION OF THE 1951 MUTUAL DEFENSE TREATY (MDT) OR THE 1998 VISITING FORCES AGREEMENT (VFA); IT IS AN AGREEMENT THAT INTRODUCES NEW TERMS AND OBLIGATIONS AND THUS REQUIRES THE CONCURRENCE OF THE SENATE.— To summarize, the **EDCA has two main purposes**: ***First***, it is intended as a framework for activities for defense cooperation in accordance with the 1951 MDT and the 1998 VFA. ***Second***, it grants to the U.S. military the right to use certain identified portions of the Philippine territory referred to in the EDCA as

Agreed Locations. *This right is fleshed out in the EDCA when the agreement identifies the privileges granted to the U.S. in bringing in troops and facilities, in constructing structures, and in conducting activities.* The EDCA is effective for 10 years, unless both the U.S. and the Philippines formally agree to alter it. The U.S. is bound to hand over any and all facilities in the "Agreed Locations" to the Philippine government upon the termination of the Agreement. **In terms of contents**, EDCA may be divided into two: ***First***, it reiterates the purposes of the 1951 MDT and the 1998 VFA in that it affirms the continued conduct of joint activities between the U.S. and the Philippines in pursuit of defense cooperation. ***Second***, it contains ***an entirely new agreement*** pertaining to Agreed Locations, the right of the U.S. military to stay in these areas and conduct activities which may not be imbued with mutuality of interests since they do not involve defense cooperation. The latter provides support for two interrelated arguments that I will forward in this Opinion. ***First***, the EDCA refers to the presence of foreign military bases, troops, and facilities in this jurisdiction. ***Second***, the EDCA is not a mere implementation of, but goes beyond, the 1951 MDT and the 1998 VFA. It is an agreement that introduces new terms and obligations not found in the 1951 MDT and the 1998 VFA, and thus requires the concurrence of the Senate. x x x That the 1998 VFA and the EDCA are not dissimilar in terms of their treatment of U.S. forces and U.S. personnel, does not automatically mean that the EDCA simply implements the 1998 VFA, given the additional obligations that the EDCA introduces for the Philippine government. As earlier discussed, the EDCA introduces military bases in the Philippines within the concept of the 1987 Constitution, and ***it is in light of these additional obligations that the EDCA's affirmation of the 1998 VFA should be viewed: the EDCA adds new dimensions to the treatment of U.S. Personnel and U.S. forces provided in the 1998 VFA, and these dimensions cannot be ignored in determining whether the EDCA merely implements the 1998 VFA.*** Thus, while the EDCA affirms the treatment of U.S. personnel and U.S. forces in the Philippines, it at the same time ***introduces the Philippines' obligation to recognize the authority of U.S. Forces in the "Agreed Locations."*** Under the EDCA, U.S. forces can now ***preposition and store*** defense equipment, supplies, and materiel at Agreed Locations. They

shall have ***unimpeded access*** to Agreed Locations for all the matters relating to the prepositioning and storage of defense equipment, supplies, and materiel. Lastly, the EDCA ***authorizes the U.S. forces to exercise all rights and authorities within the Agreed Locations*** that are necessary for their operational control or defense. In contrast, the 1998 VFA only refers to the tax and duty-free entry to U.S. Government equipment in connection with the activities during their visit. In the same manner, and despite being in a different class as U.S. personnel and U.S. forces, ***U.S. contractors are also allowed "unimpeded access" to the Agreed Locations*** when it comes to all matters relating to the ***prepositioning and storage of defense equipment, supplies and materiel.*** Thus, these groups of people (U.S. personnel, U.S. forces and U.S. contractors) have been referred to in the EDCA not merely to implement the 1998 VFA, but to further their roles in the Agreed Locations that the EDCA authorizes. From these perspectives, the EDCA cannot be considered to be a simple implementation of the 1998 VFA. Rather, it is a continuation of the 1998 VFA under new dimensions. These dimensions should not and cannot be hidden behind reaffirmations of existing 1998 VFA obligations. These added dimensions reinforce the idea of military bases, as it allows them access to the Agreed Locations that, as I had earlier mentioned, is the cornerstone of the EDCA. From the legal end, ***the obligations under the EDCA, not its policy declarations and characterization***, should be decisive in determining whether Section 25, Article XVIII applies.

6. ID.; ID.; ID.; EDCA PERTAINS TO THE PRESENCE IN THE PHILIPPINES OF A FOREIGN MILITARY BASE OR ITS MODERN EQUIVALENT; THE EXTENT OF U.S.' RIGHT TO USE THE AGREED LOCATIONS IS BROAD ENOUGH TO INCLUDE EVEN THE STOCKFILING OF WEAPONS AND THE SHELTER AND REPAIR OF VESSELS OVER WHICH THE U.S. PERSONNEL HAS EXCLUSIVE CONTROL; THIS IS A MILITARY BASE AS THIS TERM IS ORDINARILY UNDERSTOOD.— A reading of the EDCA will reveal that it pertains to the presence in this country of a foreign military base or the modern equivalent of one. While Article XVIII, Section 25 mentions no definition of what a foreign military base, troops, or facility is, these terms, at the time the 1987 Constitution was drafted, carried

a special meaning. In fact, this meaning was the compelling force that convinced the framers to include Article XVIII, Section 25 in the 1987 Constitution. x x x [T]he concept of military bases as illustrated in the 1947 MBA should be taken into account in ascertaining whether the EDCA contemplates the establishment of foreign military bases. This reality renders a comparison of the 1947 MBA and the EDCA appropriate. x x x A first material point to note is that ***the obligations under the EDCA are similar to the obligations found in the 1947 MBA***. x x x While the 1947 MBA grants broader powers to the U.S., due perhaps to the geopolitical context under which the agreement was forged (the 1947 MBA had an international, in contrast with EDCA's Asian, focus). The EDCA and the 1947 MBA essentially pursue the same purpose – ***the identification of portions of Philippine territory over which the U.S. is granted certain rights for its military activities.*** These rights may be categorized into four: (1) the right to construct structures and other facilities for the proper functioning of the bases; (2) the right to perform activities for the defense or security of the bases or Agreed Locations; (3) the right to preposition defense equipment, supplies and materiel; and, (4) other related rights such as the use of public utilities and public services. *Only those who refuse to see cannot discern these undeniable parallelisms*. Further, even independently of the concept of military bases under the 1947 MBA, the provisions of the EDCA itself provide a compelling argument that it seeks to allow in this country what Article XVIII, Section 25 intends to regulate. There exists no rigid definition of a military base. However, it is a term used in the field of military operations and thus has a *generally accepted connotation*. The U.S. Department of Defense (*DoD*) Dictionary of Military and Associated Terms defines a base as "*an area or locality containing installations which provide logistic or other support*"; *home airfield; or home carrier*. Under our laws, we find the definition of a military base in Presidential Decree No. 1227 which states that a military base is "any military, air, naval, coast guard reservation, base, fort, camp, arsenal, yard, station, or installation in the Philippines." A military base connotes the presence, in a relatively permanent degree, of troops and facilities in a particular area. x x x [EDCA] notably allows the U.S. to use the Agreed Locations for the following activities: "*training, transit, support and related activities, refueling of aircraft; bunkering*

of vessels; temporary maintenance of vehicles, vessels, and aircraft; temporary accommodation of personnel; communications, prepositioning of equipment, supplies, and materiel; deploying forces and materiel and such other activities as the Parties may agree." In order to carry out these activities, the EDCA allows U.S. military personnel *to enter and remain in Philippine territory.* It grants the U.S. the right *to construct structures and assemblies.* It allows the U.S. to *preposition defense equipment, supplies and materiel*. The U.S. personnel may also use the Agreed Locations *to refuel aircraft and bunker vessels*. x x x In sum, the Agreed Locations mentioned in the EDCA are areas where the U.S. can perform military activities in structures built by its personnel. The extent of the U.S.' right to use of the Agreed Locations is broad enough to include even the *stockpiling of weapons* and the *shelter and repair of vessels* over which the U.S. personnel has exclusive control. Clearly, this is a military base as this term is ordinarily understood.

LEONEN, *J.*, *dissenting opinion*:

1. POLITICAL LAW; CONSTITUTIONAL LAW; CONSTITUTIONALITY OF ENHANCED DEFENSE COOPERATION AGREEMENT (EDCA); EDCA DOES NOT SIMPLY IMPLEMENT THE VISITING FORCES AGREEMENT (VFA), IT SUBSTANTIALLY MODIFIES OR AMENDS THE VFA.— [T]he Enhanced Defense Cooperation Agreement (EDCA) does not simply implement the Agreement Between the Government of the United States of America and the Government of the Republic of the Philippines Regarding the Treatment of United States Armed Forces Visiting the Philippines (Visiting Forces Agreement or VFA). The EDCA substantially modifies or amends the VFA. An executive agreement cannot amend a treaty. Nor can any executive agreement amend any statute, most especially a constitutional provision. The EDCA substantially modifies or amends the VFA in the following aspects: First, the EDCA does not only regulate the "visits" of foreign troops. It also allows the temporary stationing on a rotational basis of US military personnel and their contractors in physical locations with permanent facilities and pre-positioned military materiel. Second, unlike the VFA, the EDCA allows pre-positioning of

military materiel, which can include various types of warships, fighter planes, bombers, and vessels, as well as land and amphibious vehicles and their corresponding ammunition. Third, the VFA contemplates the entry of troops for various training exercises. The EDCA allows our territory to be used by the United States to launch military and paramilitary operations to be conducted within our territory or against targets in other states. Fourth, the EDCA introduces the following concepts not contemplated in the VFA or in the 1951 Mutual Defense Treaty, namely: (a) agreed locations; (b) contractors; (c) pre-positioning of military materiel; and (d) operational control. Lastly, the VFA does not have provisions that may be construed as a restriction or modification of obligations found in existing statutes. The EDCA contains provisions that may affect various statutes, including (a) the jurisdiction of courts, (b) local autonomy, and (c) taxation. There is no showing that the new matters covered in the EDCA were contemplated by the Senate when it approved the VFA. Senate Resolution No. 105, Series of 2015, which expresses the sentiment of that legislative chamber, is a definite and unequivocal articulation of the Senate: the VFA was not intended to cover the matters now included in the EDCA.

2. ID.; ID.; ID.; EDCA IS A TREATY AND SHOULD COMPLY WITH THE REQUIREMENTS OF ARTICLE XVIII, SECTION 25 OF THE CONSTITUTION; BY UPHOLDING THE VALIDITY OF EDCA, THE MAJORITY UNDERMINES THE MEASURES BUILT INTO OUR PRESENT CONSTITUTION TO ALLOW THE SENATE, CONGRESS AND OUR PEOPLE TO PARTICIPATE IN THE SHAPING OF FOREIGN POLICY.— [T]he EDCA should be in treaty form [and] should comply with Article XVIII, Section 25 of the Constitution. x x x Informed by our history and to ensure that the independence of our foreign policy is not compromised by the presence of foreign bases, troops, or facilities, the Constitution now provides for treaty recognition, Senate concurrence, and public ratification when required by Congress through Article XVIII, Section 25[.] x x x The prohibition in Article XVIII, Section 25 relates only to international agreements involving foreign military bases, troops, or facilities. It does not prohibit the President from entering into other types of agreements that relate to other aspects of his powers as Commander-in-Chief. x x x The

ponencia, among others, interprets "shall not be allowed" as being limited to the "initial entry" of bases, troops, or facilities. Subsequent acts are treated as no longer being subject to Article XVIII, Section 25 and are, therefore, only limited by other constitutional provisions and relevant laws. This interpretation is specious and ahistorical. There is nothing in Article XVIII, Section 25 that defines the extent and scope of the presence of foreign military bases, troops, or facilities, thereby justifying a distinction between their initial entry and subsequent activities. Its very structure shows that Article XVIII, Section 25 is not a mere gateway for the entry of foreign troops or facilities into the Philippines for them to carry out any activity later on. The provision contains measures designed to protect our country in the broader scheme of international relations. Military presence shapes both foreign policy and political relations. x x x With respect to the entry and presence of foreign military bases, troops, and facilities, Article XVIII, Section 25 of the 1987 Constitution enables government to politically negotiate with other states from a position of equality. The authority is not exclusively granted to the President. It is shared with the Congress. The Senate participates because no foreign base, troop, or facility may enter unless it is authorized by a treaty. There is more evidence in the text of the provision of a sovereign intent to require conscious, deliberate, and public discussion regarding these issues. The provision gives Congress, consisting of the Senate and the House of Representatives, the option to require that the treaty become effective only when approved by a majority of the people in a referendum. Furthermore, there is the additional requirement that the authority will be absent if the other state does not treat the same instrument that allows their bases, troops, and facilities to enter our territory as a treaty. The provision ensures equality by requiring a higher level of public scrutiny.

3. ID.; ID.; ID.; SECTION 21, ARTICLE VII OF THE CONSTITUTION COVERS BOTH "TREATY AND INTERNATIONAL AGREEMENT" THAT REQUIRE SENATE CONCURRENCE; EDCA'S CLASSIFICATION AS A MERE "EXECUTIVE AGREEMENT" IS INVALID; AN AGREEMENT THAT ALLOWS THE PRESENCE OF FOREIGN TROOPS, BASES, AND FACILITIES MUST

BE EMBODIED IN A TREATY CONCURRED IN BY THE SENATE.— Article VII, Section 21 of the Constitution complements Article XVIII, Section 25 as it provides for the requisite Senate concurrence, thus: Section 21. No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate. The provision covers both "*treaty and international agreement*." Treaties are traditionally understood as international agreements entered into between states or by states with international organizations with international legal personalities. The deliberate inclusion of the term "international agreement" is the subject of a number of academic discussions pertaining to foreign relations and international law. Its addition cannot be mere surplus. Certainly, Senate concurrence should cover more than treaties. That the President may enter into international agreements as chief architect of the Philippines' foreign policy has long been acknowledged. However, whether an international agreement is to be regarded as a treaty or an executive agreement depends on the subject matter covered by and the temporal nature of the agreement. x x x ***Executive agreements*** are international agreements that pertain to mere adjustments of detail that carry out well-entrenched national policies and traditions in line with the functions of the Executive. It includes enforcement of existing and valid treaties where the provisions are clear. It involves arrangements that are of a temporary nature. More importantly, it does not amend existing treaties, statutes, or the Constitution. In contrast, international agreements that are considered ***treaties*** under our Constitution involve key political issues or changes of national policy. These agreements are of a permanent character. It requires concurrence by at least two-thirds of all the members of the Senate. Even if we assume that the EDCA's nomenclature as an "executive agreement" is correct, it is still the type of international agreement that needs to be submitted to the Senate for concurrence. It involves a key political issue that substantially alters or reshapes our national and foreign policy. Fundamentally however, the President's classification of the EDCA as a mere "executive agreement" is invalid. Article XVIII Section 25 requires that the presence of foreign troops, bases, and facilities must be covered by an internationally binding agreement in the form of a treaty concurred in by the Senate.

4. ID.; ID.; ID.; EDCA DOES NOT MERELY IMPLEMENT THE 1951 MUTUAL DEFENSE TREATY (MDT); IT IS NOT THE TREATY CONTEMPLATED IN ARTICLE XVIII, SECTION 25 OF THE CONSTITUTION.— The 1951 Mutual Defense Treaty cannot be the treaty contemplated in Article XVIII, Section 25. Its implementation through an executive agreement, which allows foreign military bases, troops, and facilities, is not enough. If the Mutual Defense Treaty is the basis for the EDCA as a mere executive agreement, Article XVIII, Section 25 of the Constitution will make no sense. An absurd interpretation of the Constitution is no valid interpretation. The Mutual Defense Treaty was entered into by representatives of the Philippines and the United States on August 30, 1951 and concurred in by the Philippine Senate on May 12, 1952. The treaty acknowledges that this is in the context of our obligations under the Charter of the United Nations. x x x [T]he constitutional provision reads: Section 25. ***After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases,*** foreign military bases, troops or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State. There is a time stamp to the obligation under this provision. The prohibition against "foreign military bases, troops, or facilities," unless covered by treaty or allowed through a referendum, becomes effective "after the expiration in 1991 of the Agreement . . . concerning Military Bases." The treaty about to expire refers to the 1947 Military Bases Agreement as amended. This was still in effect at the time of the drafting, submission, and ratification of the 1987 Constitution. The constitutional timeline is unequivocal. The 1951 Mutual Defense Treaty was in effect at the time of the ratification of the Constitution in 1987. It was also in effect even after the expiration of the Military Bases Agreement in 1991. We could reasonably assume that those who drafted and ratified the 1987 Constitution were aware of this legal situation and of the broad terms of the 1951 treaty yet did not expressly mention the 1951 Mutual Defense Treaty in Article XVIII, Section 25. We can conclude, with sturdy and unassailable logic, that the 1951 treaty is not the treaty contemplated in Article XVIII, Section 25.

5. ID.; ID.; JUDICIAL DEPARTMENT; JUDICIAL REVIEW, FOUR REQUISITES FOR THE EXERCISE THEREOF.— Jurisprudence abounds on these four requisites for the exercise of judicial review. It must be shown that an actual case or controversy exists; that petitioners have legal standing; that they raised the constitutionality question at the earliest possible opportunity; and that the constitutionality question is the very *lis mota* of the case. This court can only exercise its power of judicial review after determining the presence of all requisites, such as an actual case or controversy, in consideration of the doctrine of separation of powers. It cannot issue advisory opinions nor overstep into the review of the policy behind actions by the two other co-equal branches of government. It cannot assume jurisdiction over political questions.

6. ID.; ID.; ID.; ID.; POLITICAL QUESTION DOCTRINE, APPLIED; THE COURT MUST REFRAIN FROM MAKING ANY CLEAR AND CATEGORICAL RULINGS ON THE CONSTITUTIONAL CHALLENGES TO THE EDCA SINCE IT IS THE SENATE THAT WAS GIVEN EXCLUSIVE DISCRETION TO MAKE THE INITIAL INQUIRY AS TO WHETHER ITS CONCURRENCE IS NECESSARY.— There is still a political act that must happen before the agreement can become valid and binding. The Senate can still address the constitutional challenges with respect to the contents of the EDCA. Thus, the challenges to the substantive content of the EDCA are, at present, in the nature of political questions. x x x In *Diocese of Bacolod v. COMELEC,* this court held that the political question doctrine never precludes this court's exercise of its power of judicial review when the act of a constitutional body infringes upon a fundamental individual or collective right. However, this will only be true if there is no other constitutional body to whom the discretion to make inquiry is preliminarily granted by the sovereign. Ruling on the challenge to the content of the EDCA will preclude and interfere with any future action on the part of the Senate as it inquires into and deliberates as to whether it should give its concurrence to the agreement or whether it should advise the President to reopen negotiations to amend some of its provisions. It is the Senate, through Article VII, Section 21 in relation to Article XVIII, Section 25, that was given the discretion to make this initial inquiry exclusive of all other

constitutional bodies, including this court. A policy of deference and respect for the allocation of such power by the sovereign to a legislative chamber requires that we refrain from making clear and categorical rulings on the constitutional challenges to the content of the EDCA.

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Rachel F. Pastores, Amylyn B. Sato, Francis Anthony P. Principe, Sandra Jill S. Santos & Carlos A. Montemayor for petitioners in G.R. No. 212444.

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Remigio D. Saladero, Jr., Noel V. Neri and *Vicente Jaime M. Topacio* for petitioners-intervenors.

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The Solicitor General for public respondents.

D E C I S I O N

SERENO, *C.J.*:

The petitions[1] before this Court question the constitutionality of the Enhanced Defense Cooperation Agreement (EDCA) between the Republic of the Philippines and the United States of America (U.S.). Petitioners allege that respondents committed grave abuse of discretion amounting to lack or excess of jurisdiction when they entered into EDCA with the U.S.,[2] claiming that the instrument violated multiple constitutional provisions.[3]

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[1] Petition of Saguisag, *et al., rollo* (G.R. No. 212426, Vol. I), pp. 3-66; Petition of Bayan *et al., rollo* (G.R. No. 212444, Vol. I), pp. 3-101.

[2] Petition of Saguisag, *et al.,* p. 5, *rollo* (G.R. No. 212426, Vol. I), p. 7; Petition of Bayan, *et al.,* p. 5, *rollo* (G.R. No. 212444, Vol. I), p. 7.

[3] Principally the following provisions under the Constitution: Art. VII, Sec. 21; Art. XVIII, Sec. 25; Art. I; Art. II, Secs. 2, 7, & 8; Art. VI,

In reply, respondents argue that petitioners lack standing to bring the suit. To support the legality of their actions, respondents invoke the 1987 Constitution, treaties, and judicial precedents.[4]

A proper analysis of the issues requires this Court to lay down at the outset the basic parameters of the constitutional powers and roles of the President and the Senate in respect of the above issues. A more detailed discussion of these powers and roles will be made in the latter portions.

I. BROAD CONSTITUTIONAL CONTEXT OF THE POWERS OF THE PRESIDENT: DEFENSE, FOREIGN RELATIONS, AND EDCA

A. The Prime Duty of the State and the Consolidation of Executive Power in the President

> *Mataimtim kong pinanunumpaan (o pinatotohanan) na tutuparin ko nang buong katapatan at sigasig ang aking mga tungkulin bilang Pangulo (o Pangalawang Pangulo o Nanunungkulang Pangulo) ng Pilipinas, pangangalagaan at ipagtatanggol ang kanyang Konstitusyon, ipatutupad ang mga batas nito, magiging makatarungan sa bawat tao, at itatalaga ang aking sarili sa paglilingkod sa Bansa. Kasihan nawa ako ng Diyos.*
>
> *— Panunumpa sa Katungkulan ng Pangulo ng Pilipinas ayon sa Saligang Batas*[5]

Sec. 28(4); and Art. VIII, Sec. 1. *See* Petition of Saguisag, *et al.,* pp. 23-59, *rollo* (G.R. No. 212426, Vol. I), pp. 25-61; Petition of Bayan, *et al., rollo,* pp. 23-93, (G.R. No. 212444, Vol. I), pp. 25-95.

[4] Memorandum of the OSG, pp. 8-38, *rollo* (G.R. No. 212426, Vol. I), pp. 438-468.

[5] *The Protocol, Ceremony, History, and Symbolism of the Presidential Inauguration,* THE PRESIDENTIAL MUSEUM AND LIBRARY, available at <http://malacanang.gov.ph/1608-the-protocol-ceremony-history-and-symbolism-of-the-presidential-inauguration> (last visited 5 Nov. 2015).

The 1987 Constitution has "vested the executive power in the President of the Republic of the Philippines."[6] While the vastness of the executive power that has been consolidated in the person of the President cannot be expressed fully in one provision, the Constitution has stated the prime duty of the government, of which the President is the head:

> The **prime duty of the Government is to serve and protect the people.** The Government may call upon the people to defend the State and, in the fulfillment thereof, all citizens may be required, under conditions provided by law, to render personal military or civil service.[7] (Emphases supplied)

B. The duty to protect the territory and the citizens of the Philippines, the power to call upon the people to defend the State, and the President as Commander-in-Chief

The duty to protect the State and its people must be carried out earnestly and effectively throughout the whole territory of the Philippines in accordance with the constitutional provision on national territory. Hence, the President of the Philippines, as the sole repository of executive power, is the guardian of the Philippine archipelago, including all the islands and waters embraced therein and all other territories over which it has sovereignty or jurisdiction. These territories consist of its terrestrial, fluvial, and aerial domains; including its territorial sea, the seabed, the subsoil, the insular shelves, and other submarine areas; and the waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions.[8]

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[6] CONSTITUTION, Art. VII, Sec.1.

[7] CONSTITUTION, Art. II, Sec. 4.

[8] CONSTITUTION, Art. I.

To carry out this important duty, the President is equipped with authority over the Armed Forces of the Philippines (AFP),[9] which is the protector of the people and the state. The AFP's role is to secure the sovereignty of the State and the integrity of the national territory.[10] In addition, the Executive is constitutionally empowered to maintain peace and order; protect life, liberty, and property; and promote the general welfare.[11] In recognition of these powers, Congress has specified that the President must oversee, ensure, and reinforce our defensive capabilities against external and internal threats[12] and, in the same vein, ensure that the country is adequately prepared for all national and local emergencies arising from natural and man-made disasters.[13]

To be sure, this power is limited by the Constitution itself. To illustrate, the President may call out the AFP to prevent or suppress instances of lawless violence, invasion or rebellion,[14] but not suspend the privilege of the writ of habeas corpus for a period exceeding 60 days, or place the Philippines or any part thereof under martial law exceeding that same span. In the exercise of these powers, the President is also duty-bound to submit a report to Congress, in person or in writing, within 48 hours from the proclamation of martial law or the suspension of the privilege of the writ of habeas corpus; and Congress may in turn revoke the proclamation or suspension. The same provision provides for the Supreme Court's review of the factual

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[9] CONSTITUTION, Art. II, Sec. 3.

[10] *Id.*

[11] CONSTITUTION, Art. II, Sec. 5.

[12] *See* CONSTITUTION, Art. VII, Sec. 18 in relation to Art. II, Secs. 3, 4 & 7; Executive Order No. 292 (Administrative Code of 1987), Book IV (Executive Branch), Title VIII (National Defense), Secs. I, 15, 26 & 33 [hereinafter Administrative Code of 1987].

[13] Administrative Code of 1987, Book IV (Executive Branch), Title XII (Local Government), Sec. 3(5).

[14] CONSTITUTION, Art. VII, Sec. 18.

basis for the proclamation or suspension, as well as the promulgation of the decision within 30 days from filing.

C. *The power and duty to conduct foreign relations*

The President also carries the mandate of being the sole organ in the conduct of foreign relations.[15] Since every state has the capacity to interact with and engage in relations with other sovereign states,[16] it is but logical that every state must vest in an agent the authority to represent its interests to those other sovereign states.

The conduct of foreign relations is full of complexities and consequences, sometimes with life and death significance to the nation especially in times of war. It can only be entrusted to that department of government which can act on the basis of the best available information and can decide with decisiveness. x x x It is also the President who possesses the most comprehensive and the most confidential information about foreign countries for our diplomatic and consular officials regularly brief him on meaningful events all over the world. He has also unlimited access to ultra-sensitive military intelligence data. In fine, the presidential role in foreign affairs is dominant and the President is traditionally accorded a wider degree of discretion in the conduct of foreign affairs. The regularity, nay, validity of his actions are adjudged under less stringent standards, lest their judicial repudiation lead to breach of an

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[15] *See* CONSTITUTION, Art. VII, Sec. 1 *in relation to* Administrative Code of 1987, Book IV (Executive Branch), Title I (Foreign Affairs), Secs. 3(1) and 20; *Akbayan Citizens Action Party v. Aquino,* 580 Phil. 422 (2008); *Pimentel v. Office of the Executive Secretary,* 501 Phil. 303 (2005); *People's Movement for Press Freedom v. Manglapus,* G.R. No. 84642, 13 September 1988 (unreported) (citing *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304 [1936]); JOAQUIN BERNAS, *FOREIGN RELATIONS IN CONSTITUTIONAL LAW, 101 (1995);* IRENE R. CORTES, *THE PHILIPPINE PRESIDENCY: A STUDY OF EXECUTIVE POWER 187 (1966);* VICENTE G. SINCO, *PHILIPPINE POLITICAL LAW: PRINCIPLES AND CONCEPTS* 297 (10th ed., 1954).

[16] *See* 1933 Montevideo Convention on the Rights and Duties of States, Art. 1, 165 LNTS 19; JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 61 (2nd ed. 2007).

international obligation, rupture of state relations, forfeiture of confidence, national embarrassment and a plethora of other problems with equally undesirable consequences.[17]

The role of the President in foreign affairs is qualified by the Constitution in that the Chief Executive must give paramount importance to the sovereignty of the nation, the integrity of its territory, its interest, and the right of the sovereign Filipino people to self-determination.[18] In specific provisions, the President's power is also limited, or at least shared, as in Section 2 of Article II on the conduct of war; Sections 20 and 21 of Article VII on foreign loans, treaties, and international agreements; Sections 4(2) and 5(2)(a) of Article VIII on the judicial review of executive acts; Sections 4 and 25 of Article XVIII on treaties and international agreements entered into prior to the Constitution and on the presence of foreign military troops, bases, or facilities.

D. The r elationship between the two major presidential functions and the role of the Senate

Clearly, the power to defend the State and to act as its representative in the international sphere inheres in the person of the President. This power, however, does not crystallize into absolute discretion to craft whatever instrument the Chief Executive so desires. As previously mentioned, the Senate has a role in ensuring that treaties or international agreements the President enters into, as contemplated in Section 21 of Article VII of the Constitution, obtain the approval of two-thirds of its members.

Previously, treaties under the 1973 Constitution required ratification by a majority of the *Batasang Pambansa,*[19] except

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[17] *Vinuya v. Executive Secretary,* 633 Phil. 538, 570 (2010) (quoting the Dissenting Opinion of then Assoc. Justice Reynato S. Puno in *Secretary of Justice v. Lantion,* 379 Phil. 165, 233-234 [2004]).

[18] CONSTITUTION, Art. II, Sec. 7.

[19] CONSTITUTION (1973, as amended), Art. VIII, Sec. 14(1).

in instances wherein the President "may enter into international treaties or agreements as the national welfare and interest may require."[20] This left a large margin of discretion that the President could use to bypass the Legislature altogether. This was a departure from the 1935 Constitution, which explicitly gave the President the power to enter into treaties only with the concurrence of two-thirds of all the Members of the Senate.[21] The 1987 Constitution returned the Senate's power[22] and, with it, the legislative's traditional role in foreign affairs.[23]

The responsibility of the President when it comes to treaties and international agreements under the present Constitution is therefore shared with the Senate. This shared role, petitioners claim, is bypassed by EDCA.

II. HISTORICAL ANTECEDENTS OF EDCA

A. U.S. takeover of Spanish colonization and its military bases, and the transition to Philippine independence

The presence of the U.S. military forces in the country can be traced to their pivotal victory in the 1898 Battle of Manila

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[20] CONSTITUTION (1973, as amended), Art. VIII, Sec. 16.

[21] CONSTITUTION (1935), Art. VII, Sec. 10(7).

[22] CONSTITUTION, Art. VII, Sec. 21.

[23] Quoth the Court: "For the role of the Senate in relation to treaties is essentially legislative in character; the Senate, as an independent body possessed of its own erudite mind, has the prerogative to either accept or reject the proposed agreement, and whatever action it takes in the exercise of its wide latitude of discretion, pertains to the wisdom rather than the legality of the act. In this sense, the Senate partakes a principal, yet delicate, role in keeping the principles of separation of powers and of checks and balances alive and vigilantly ensures that these cherished rudiments remain true to their form in a democratic government such as ours. The Constitution thus animates, through this treaty-concurring power of the Senate, a healthy system of checks and balances indispensable toward our nation's pursuit of political maturity and growth." *Bayan v. Zamora,* 396 Phil. 623 (2000).

Bay during the Spanish-American War.[24] Spain relinquished its sovereignty over the Philippine Islands in favor of the U.S. upon its formal surrender a few months later.[25] By 1899, the Americans had consolidated a military administration in the archipelago.[26]

When it became clear that the American forces intended to Impose colonial control over the Philippine Islands, General Emilio Aguinaldo immediately led the Filipinos into an all-out war against the U.S.[27] The Filipinos were ultimately defeated in the Philippine-American War, which lasted until 1902 and led to the downfall of the first Philippine Republic.[28] The Americans henceforth began to strengthen their foothold in the country.[29] They took over and expanded the former Spanish Naval Base in Subic Bay, Zambales, and put up a cavalry post called Fort Stotsenberg in Pampanga, now known as Clark Air Base.[30]

When talks of the eventual independence of the Philippine Islands gained ground, the U.S. manifested the desire to maintain military bases and armed forces in the country.[31] The U.S. Congress later enacted the Hare- Hawes-Cutting Act of 1933, which required that the proposed constitution of an independent

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[24] FOREIGN SERVICE INSTITUTE, AGREEMENTS ON UNITED STATES MILITARY FACILITIES IN PHILIPPINE MILITARY BASES 1947-1985 ix (Pacifico A. Castro revised ed. 1985).

[25] Treaty of Peace Between the United States of America and the Kingdom of Spain, 10 Dec. 1898, 30 US Stat. 1754, T.S. No. 343 (1898) (entered into force 11 Apr. 1899).

[26] FOREIGN SERVICE INSTITUTE, *supra* note 24 at ix.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*; ROLAND G. SIMBULAN, *THE BASES OF OUR INSECURITY: A STUDY OF THE US MILITARY BASES IN THE PHILIPPINES* 13 (2nd ed. 1985).

Philippines recognize the right of the U.S. to maintain the latter's armed forces and military bases.[32] The Philippine Legislature rejected that law, as it also gave the U.S. the power to unilaterally designate any part of Philippine territory as a permanent military or naval base of the U.S. within two years from complete independence.[33]

The U.S. Legislature subsequently crafted another law called the Tydings-McDuffie Act or the Philippine Independence Act of 1934. Compared to the old Hare-Hawes-Cutting Act, the new law provided for the surrender to the Commonwealth Government of "all military and other reservations" of the U.S. government in the Philippines, except "naval reservations

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[32] Hare-Hawes-Cutting Act, ch. 11, Sec. 2(1), 47 US Stat. 761 (1933) According to the law: "Sec. 2. The **constitution formulated and drafted** shall be republican in form, shall contain a bill of rights, and **shall**, either as a part thereof or in an ordinance appended thereto, **contain provisions to the effect** that, **pending the final and complete withdrawal of the sovereignty** of the United States over the Philippine Islands — (1) The Philippine Islands **recognizes the right of the United States** x x x **to maintain military and other reservations and armed forces in the Philippines** x x x."

[33] Hare-Hawes-Cutting Act, Sees. 5 & 10. According to the law: "Sec. 5. **All the property and rights** which may have been **acquired in the Philippine Islands by the United States** under the treaties mentioned in the first section of this Act, **except such land or other property as has heretofore been designated by the President of the United States for military and other reservations of the Government of the United States** x x x are hereby granted to the government of the Commonwealth of the Philippine Islands when constituted. x x x." "Sec. 10. On the 4th day of July, **immediately following the expiration of a period of ten years from the date of the inauguration of the new government** under the constitution provided for in this Act, **the President of the United States shall by proclamation withdraw and surrender** all right of possession, supervision, jurisdiction, control, or **sovereignty** then existing and exercised by the United States **in and over the territory and people** of the Philippine Islands, **including all military and other reservations** of the Government of the United States in the Philippines (**except such land or property reserved under Section 5 as may be redesignated by the President of the United States** not later than two years after the date of such proclamation)." *See* FOREIGN SERVICE INSTITUTE, *supra* note 24, at ix; SIMBULAN, *supra* note 31.

and refueling stations."[34] Furthermore, the law authorized the U.S. President to enter into negotiations for the adjustment and settlement of all questions relating to naval reservations and fueling stations within two years after the Philippines would have gained independence. [35] Under the Tydings-McDuffie Act, the U.S. President would proclaim the American withdrawal and surrender of sovereignty over the islands 10 years after the inauguration of the new government in the Philippines.[36] This law eventually led to the promulgation of the 1935 Philippine Constitution.

The original plan to surrender the military bases changed.[37] At the height of the Second World War, the Philippine and the U.S. Legislatures each passed resolutions authorizing their respective Presidents to negotiate the matter of retaining military bases in the country after the planned withdrawal of the U.S.[38] Subsequently, in 1946, the countries entered into the Treaty of General Relations, in which the U.S. relinquished all control

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[34] Philippine Independence Act, US Pub. L. No. 73-127, Secs. 5 & 10, 48 US Stat. 456 (1934) [hereinafter Philippine Independence Act]. According to the law: "SEC. 10. (a) On the 4th day of July **immediately following the expiration of a period of ten years from the date of the inauguration of the new government** under the constitution provided for in this Act the **President of the United States shall by proclamation withdraw and surrender** all right of possession, supervision, jurisdiction, control, or **sovereignty** then existing and exercised by the United States **in and over the territory and people** of the Philippine Islands, **including all military and other reservations** of the Government of the United States in the Philippines **(except such naval reservations and fueling stations as are reserved** under Section 5) x x x." *See* FOREIGN SERVICE INSTITUTE, *supra* note 24.

[35] Philippine Independence Act, Secs. 5 & 10; FOREIGN SERVICE INSTITUTE, *supra* note 24.

[36] Philippine Independence Act, Sec. 10.

[37] FOREIGN SERVICE INSTITUTE, *supra* note 24, at x ; SIMBULAN, *supra* note 31 at 13-14.

[38] *See* Agreement Between the Republic of the Philippines and the United States of America Concerning Military Bases, preamble, 14 Mar. 1947, 43 UNTS 271 (entered into force 26 Mar. 1947) [hereinafter 1947 Military Bases Agreement]; FOREIGN SERVICE INSTITUTE, *supra* note 24, at x.

and sovereignty over the Philippine Islands, *except* the areas that would be covered by the American military bases in the country.[39] This treaty eventually led to the creation of the post-colonial legal regime on which would hinge the continued presence of U.S. military forces until 1991: the Military Bases Agreement (MBA) of 1947, the Military Assistance Agreement of 1947, and the Mutual Defense Treaty (MDT) of 1951.[40]

B. Former legal regime on the presence of U.S. armed forces in the territory of an independent Philippines (1946-1991)

Soon after the Philippines was granted independence, the two countries entered into their first military arrangement pursuant to the Treaty of General Relations — the 1947 MBA.[41] The Senate concurred on the premise of "mutuality of security interest,"[42] which provided for the presence and operation of

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[39] Treaty of General Relations between the Republic of the Philippines and the United States of America, Art. I, 4 Jul. 1946, 7 UNTS 3 (1946) (entered into force 22 Oct. 1946) [hereinafter 1946 Treaty of General Relations]. According to the treaty: "The **United States of America** agrees to withdraw and surrender, and does **hereby withdraw and surrender, all rights of** possession, supervision, jurisdiction, control or **sovereignty** existing and exercised by the United States of America in and over the **territory and the people** of the Philippine Islands, **except the use of such bases, necessary appurtenances to such bases**, and the rights incident thereto, **as the United States of America, by agreement with the Republic of the Philippines may deem necessary to retain for the mutual protection** of the Republic of the Philippines and of the United States of America. x x x." The Philippine Senate concurred in this treaty (S. Res. 11, 1st Cong. [1946]). See also: *Nicolas v. Romulo,* 598 Phil. 262 (2009).

[40] FOREIGN SERVICE INSTITUTE, *supra* note 24, at x-xi; *Bayan v. Zamora, supra* note 23.

[41] 1947 Military Bases Agreement.

[42] S. Res. 29, 1st Cong. (1946); Philippine instrument of ratification was signed by the President on 21 Jan. 1948 and the treaty entered into force on 26 Mar. 1947; *Nicolas v. Romulo, supra* note 39.

23 U.S. military bases in the Philippines for 99 years or until the year 2046.[43] The treaty also obliged the Philippines to negotiate with the U.S. to allow the latter to expand the existing bases or to acquire new ones as military necessity might require.[44]

A number of significant amendments to the 1947 MBA were made.[45] With respect to its duration, the parties entered into the Ramos-Rusk Agreement of 1966, which reduced the term of the treaty from 99 years to a total of 44 years or until 1991.[46] Concerning the number of U.S. military bases in the country, the Bohlen-Serrano Memorandum of Agreement provided for the return to the Philippines of 17 U.S. military bases covering a total area of 117,075 hectares.[47] Twelve years later, the U.S. returned Sangley Point in Cavite City through an exchange of notes.[48] Then, through the Romulo-Murphy Exchange of Notes of 1979, the parties agreed to the recognition of Philippine sovereignty over Clark and Subic Bases and the reduction of the areas that could be used by the U.S. military.[49] The agreement also provided for the mandatory review of the treaty every five years.[50] In 1983, the parties revised the 1947 MBA through the Romualdez- Armacost Agreement.[51] The revision pertained to the operational use of the military bases by the U.S. government within the context of Philippine sovereignty,[52] including the need

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[43] FOREIGN SERVICE INSTITUTE, *supra* note 24, at xi; SIMBULAN, *supra* note 31, at 76-79.

[44] 1947 Military Bases Agreement, Art. 1(3); FOREIGN SERVICE INSTITUTE, *supra* note 24, at xii; SIMBULAN, *supra* note 31, at 78-79.

[45] FOREIGN SERVICE INSTITUTE, *supra* note 24, at xii-xv.

[46] *Id*., at xiii.

[47] *Id*., at xii.

[48] *Id*., at xiii.

[49] *Id*.

[50] *Id*.

[51] *Id*., at xiii-xiv.

[52] *Id*.

for prior consultation with the Philippine government on the former's use of the bases for military combat operations or the establishment of long-range missiles.[53]

Pursuant to the legislative authorization granted under Republic Act No. 9,[54] the President also entered into the 1947 Military Assistance Agreement [55] with the U.S. This executive agreement established the conditions under which U.S. military assistance would be granted to the Philippines,[56] particularly the provision of military arms, ammunitions, supplies, equipment, vessels, services, and training for the latter's defense forces.[57] An exchange of notes in 1953 made it clear that the agreement would remain in force until terminated by any of the parties.[58]

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[53] *Id.*

[54] Republic Act No. 9— *Authority of President to Enter into Agreement with US under Republic of the Phil. Military Assistance Act* (1946). According to Section 1 thereof: "**The President** of the Philippines is **hereby authorized to enter into agreement or agreements** with the President of the United States, or with any of the agencies or instrumentalities of the Government of the United States, **regarding military assistance to the armed forces of the Republic of the Philippines, in the form of transfer of property and information, giving of technical advice and lending of personnel to instruct and train them**, pursuant to the provisions of United States Public Act Numbered Four hundred and fifty-four, commonly called the 'Republic of the Philippines Military Assistance Act,' **under the terms and conditions provided in this Act**."

[55] Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America on Military Assistance to the Philippines, 45 UNTS 47 (entered into force 21 Mar. 1947) [hereinafter 1947 Military Assistance Agreement].

[56] FOREIGN SERVICE INSTITUTE, *supra* note 24, at xi; SIMBULAN, *supra* note 31, at 79-89.

[57] 1947 Military Assistance Agreement, Sec. 6.

[58] Exchange of Notes Constituting an Agreement Extending the Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America on Military Assistance to the Philippines, 26 Jun. 1953, 213 UNTS 77 (entered into force 5 Jul. 1953) *reproduced in* FOREIGN SERVICE INSTITUTE, *supra* note 24, at 197-203. See Mutual Logistics Support Agreement (21 Nov. 2007). See generally: *People v. Nazareno,* 612 Phil. 753 (2009) (on the continued effectivity of the agreement).

To further strengthen their defense and security relationship,[59] the Philippines and the U.S. next entered into the MDT in 1951. Concurred in by both the Philippine[60] and the U.S.[61] Senates, the treaty has two main features: *first,* it allowed for mutual assistance in maintaining and developing their individual and collective capacities to resist an armed attack;[62] and *second,* it provided for their mutual self-defense in the event of an armed attack against the territory of either party.[63] The treaty was premised on their recognition that an armed attack on either of them would equally be a threat to the security of the other.[64]

C. Current legal regime on the presence of U.S. armed forces in the country

In view of the impending expiration of the 1947 MBA in 1991, the Philippines and the U.S. negotiated for a possible renewal of their defense and security relationship.[65] Termed as

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[59] *See* Mutual Defense Treaty between the Republic of the Philippines and the United States of America, 30 Aug. 1951, 177 UNTS 133 (entered into force 27 Aug. 1952) [hereinafter 1951 MDT]. According to its preamble: "The Parties to this Treaty x x x Desiring further to strengthen their present efforts to collective defense for the preservation of peace and security pending the development of a more comprehensive system of regional security in the Pacific Area x x x hereby agreed as follows[.]" See: *Bayan v. Zamora, supra* note 23.

[60] S. Res. 84, 2nd Cong. (1952); FOREIGN SERVICE INSTITUTE, *supra* note 24, at 193-194; The Philippine instrument of ratification was signed by the President on 27 August 1952 and it entered into force on the same date upon the exchange of ratification between the Parties (Philippines and U.S.), and was proclaimed by the President by virtue of Proc. No. 341, S. 1952.

[61] *Nicolas v. Romulo, supra* note 39 (citing U.S. Congressional Record, 82nd Congress, Second Session, Vol. 98 - Part 2, pp. 2594-2595).

[62] 1951 MDT, Art. II.

[63] 1951 MDT, Arts. IV-V.

[64] COLONEL PATERNO C. PADUA, REPUBLIC OF THE PHILIPPINES UNITED STATES DEFENSE COOPERATION: OPPORTUNITIES AND CHALLENGES, A FILIPINO PERSPECTIVE 6 (2010).

[65] *Bayan v. Zamora, supra* note 23; *People's Movement for Press Freedom v. Manglapus, supra* note 15.

the Treaty of Friendship, Cooperation and Security, the countries sought to recast their military ties by providing a new framework for their defense cooperation and the use of Philippine installations.[66] One of the proposed provisions included an arrangement in which U.S. forces would be granted the use of certain installations within the Philippine naval base in Subic.[67] On 16 September 1991, the Senate rejected the proposed treaty.[68]

The consequent expiration of the 1947 MBA and the resulting paucity of any formal agreement dealing with the treatment of U.S. personnel in the Philippines led to the suspension in 1995 of large-scale joint military exercises.[69] In the meantime, the respective governments of the two countries agreed[70] to hold joint exercises at a substantially reduced level.[71]

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[66] *See* Treaty of Friendship, Cooperation and Security Between the Government of the Republic of the Philippines and the Government of the United States of America, 27 Aug. 1991 (rejected by the Senate on 16 Sept. 1991).

[67] *Id.*, Art. VII; Supplementary Agreement Two to the Treaty of Friendship, Cooperation and Security, Arts. I & II(9).

[68] *Bayan v. Zamora, supra* note 23.

[69] *Bayan v. Zamora, supra* note 23; Joint Report of the Committee on Foreign Relations and the Committee on National Defense and Security *reproduced in* SENATE OF THE PHILIPPINES, THE VISITING FORCES AGREEMENT: THE SENATE DECISION 206 (1999); *Lim v. Executive Secretary,* 430 Phil. 555 (2002).

[70] Agreement regarding the status of U.S. military and civilian personnel, Exchange of notes between the DFA and the U.S. Embassy in Manila on Apr. 2, and June 11 and 21, 1993, Hein's No. KAV 3594 (entered into force 21 June 1993) [hereinafter Status of Forces Agreement of 1993]. The agreement was extended on 19 September 1994; on 28 April 1995 *(See* Hein's No. KAV 4245); and 8 December 1995 *(See* Hein's No. KAV 4493). *See also* R. CHUCK MASON, *STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED?* 14 (2012).

[71] Joint Report of the Committee on Foreign Relations and the Committee on National Defense and Security *reproduced in* SENATE OF THE PHILIPPINES, *supra* note 69; *Lim v. Executive Secretary, supra* note 69; *Bayan v. Zamora, supra* note 23.

The military arrangements between them were revived in 1999 when they concluded the first Visiting Forces Agreement (VFA).[72]

As a "reaffirm[ation] [of the] obligations under the MDT,"[73] the VFA has laid down the regulatory mechanism for the treatment of U.S. military and civilian personnel visiting the country.[74] It contains provisions on the entry and departure of U.S. personnel; the purpose, extent, and limitations of their activities; criminal and disciplinary jurisdiction; the waiver of certain claims; the importation and exportation of equipment, materials, supplies, and other pieces of property owned by the U.S. government; and the movement of U.S. military vehicles, vessels, and aircraft into and within the country.[75] The Philippines and the U.S. also entered into a second counterpart agreement (VFA II), which in tum regulated the treatment of Philippine military and civilian personnel visiting the U.S.[76] The Philippine Senate concurred in the first VFA on 27 May 1999.[77]

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[72] Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines, Phil.-U.S., 10 Feb. 1998, TIAS No. 12931 (entered into force 1 Jun. 1999) [hereinafter VFA I], *reproduced in* SENATE OF THE PHILIPPINES, *supra*, at 257-266 (1999); *Lim v. Executive Secretary, supra* note 69.

[73] VFA I, preamble. See: *Lim v. Executive Secretary, supra* note 69. In *Lim,* we explained that "It is the VFA which gives continued relevance to the MDT despite the passage of years. Its primary goal is to facilitate the promotion of optimal cooperation between American and Philippine military forces in the event of an attack by a common foe."

[74] *Bayan v. Zamora, supra* note 23, at 637.

[75] VFA I; *Lim v. Executive Secretary, supra* note 69.

[76] Agreement between the Government of the United States of America and the Government of the Republic of the Philippines Regarding the Treatment of Republic of the Philippines Personnel Visiting the United States of America, Phil-U.S., 9 Oct. 1998, TIAS No. 12931 [hereinafter VFA II].

[77] Senate Resolution No. 18, 27 May 1999 *reproduced in* SENATE OF THE PHILIPPINES, *supra* note 63, at 185-190; *Bayan v. Zamora, supra* note 23.

Beginning in January 2002, U.S. military and civilian personnel started arriving in Mindanao to take part in joint military exercises with their Filipino counterparts.[78] Called *Balikatan,* these exercises involved trainings aimed at simulating joint military maneuvers pursuant to the MDT.[79]

In the same year, the Philippines and the U.S. entered into the Mutual Logistics Support Agreement to "further the interoperability, readiness, and effectiveness of their respective military forces"[80] in accordance with the MDT, the Military Assistance Agreement of 1953, and the VFA.[81] The new agreement outlined the basic terms, conditions, and procedures for facilitating the reciprocal provision of logistics support, supplies, and services between the military forces of the two countries.[82] The phrase "logistics support and services" includes billeting, operations support, construction and use of temporary structures, and storage services during an approved activity under the existing military arrangements.[83] Already extended twice, the agreement will last until 2017.[84]

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[78] *Lim v. Executive Secretary, supra* note 69.

[79] *Id.*

[80] Mutual Logistics Support Agreement Between the Department of Defense of the United States of America and the Department of National Defense of the Republic of the Philippines, Preamble, 21 Nov. 2002 [hereinafter 2002 MLSA]. According to the preamble thereof, the parties "have resolved to conclude" the agreement in light of their "desir[e] to further the interoperability, readiness, and effectiveness of their respective military forces through increased logistic cooperation in accordance with the RP-US Mutual Defense Treaty, RP-US Visiting Forces Agreement or the RP-US Military Assistance Agreement." Consequently, Article II of the agreement provides that: "[it] shall be implemented, applied and interpreted by the Parties in accordance with the provisions of the Mutual Defense Treaty, the Visiting Forces Agreement or the Military Assistance Agreement and their respective constitutions, national laws and regulations."

[81] 2002 MLSA, Preamble.

[82] 2002 MLSA, Art. I.

[83] 2002 MLSA, Art. IV(l)(a); PADUA, *supra* note 64, at 1-2.

[84] *See* Mutual Logistics Support Agreement Between the Department of Defense of the United States of America and the Department of National

D. The Enhanced Defense Cooperation Agreement

EDCA authorizes the U.S. military forces to have access to and conduct activities within certain "Agreed Locations" in the country. It was not transmitted to the Senate on the executive's understanding that to do so was no longer necessary.[85] Accordingly, in June 2014, the Department of Foreign Affairs (DFA) and the U.S. Embassy exchanged diplomatic notes confirming the completion of *all* necessary internal requirements for the agreement to enter into force in the two countries.[86]

According to the Philippine government, the conclusion of EDCA was the result of intensive and comprehensive negotiations in the course of almost two years.[87] After eight rounds of negotiations, the Secretary of National Defense and the U.S. Ambassador to the Philippines signed the agreement on 28 April

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Defense of the Republic of the Philippines, Art. IX, 8 Nov. 2007 (applied provisionally on 8 Nov. 2007; entered into force 14 Jan. 2009) [hereinafter 2007 MLSA]; Extension of the Mutual Logistics Support Agreement (RP-US-0 I) Between the Department of Defense of the United States of America and the Department of National Defense of the Republic of the Philippines (entered into force 6 Nov. 2012).

[85] Memorandum of the OSG, pp. 8, 24 *rollo* (G.R. No. 212426, Vol. 1), pp. 438, 454.

[86] *See* Note No. 1082 of the U.S. Embassy to the DFA dated 25 June 2014, Annex B of the Memorandum of the OSG, *rollo* (G.R. No. 212426, Vol. I), p. 477; Memorandum of the OSG, p. 8, *rollo* (G.R. No. 212426, Vol. 1), p. 438.

[87] *Statement of Secretary Albert F. del Rosario On the signing of the PH-U.S. EDCA,* DEPARTMENT OF FOREIGN AFFAIRS (28 Apr. 2014) available at <https://www.dfa.gov.ph/index.php/newsroom/dfa- releases/ 2694-statement-of-secretary-albert-f-del-rosario-on-the-signing-of-the-philippines-us-enhanced- defense-cooperation-agreement> (last visited 5 Nov. 2015); *Frequently Asked Questions (FAQ) on the Enhanced Defense Cooperation Agreement,* DEPARTMENT OF FOREIGN AFFAIRS (28 Apr. 2014) available at <https://www.dfa.gov.ph/index.php/newsroom/dfa-releases/ 2693-frequently-asked-questions-faqs-on-the- enhanced-defense-cooperation-agreement> (last visited 5 Nov. 2015).

2014.[88] President Benigno S. Aquino III ratified EDCA on 6 June 2014.[89] The OSG clarified during the oral arguments[90] that the Philippine and the U.S. governments had yet to agree formally on the specific sites of the Agreed Locations mentioned in the agreement.

Two petitions for *certiorari* were thereafter filed before us assailing the constitutionality of EDCA. They primarily argue that it should have been in the form of a treaty concurred in by the Senate, not an executive agreement.

On 10 November 2015, months after the oral arguments were concluded and the parties ordered to file their respective memoranda, the Senators adopted Senate Resolution No. (SR) 105.[91] The resolution expresses the "strong sense"[92] of the Senators that for EDCA to become valid and effective, it must first be transmitted to the Senate for deliberation and concurrence.

III. ISSUES

Petitioners mainly seek a declaration that the Executive Department committed grave abuse of discretion in entering into EDCA in the form of an executive agreement. For this reason, we cull the issues before us:

A. Whether the essential requisites for judicial review are present

B. Whether the President may enter into an executive agreement on foreign military bases, troops, or facilities

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[88] EDCA; Memorandum of OSG, p. 3, *rollo* (G.R. No. 212426, Vol. I), p. 433.

[89] Instrument of Ratification, Annex of A of the Memorandum of OSG, *rollo,* p. 476.

[90] Oral Arguments TSN, 25 November 2014, pp. 119-120.

[91] *Rollo* pp. 865-867, G.R. No. 212444.

[92] According to the Resolution: "Be it further resolved that this resolution expressing the strong sense of the Senate be formally submitted to the Supreme Court through the Chief Justice." *Rollo* (G.R. No. 212444), p. 867.

C. Whether the provisions under EDCA are consistent with the Constitution, as well as with existing laws and treaties

IV. DISCUSSION

A. Whether the essential requisites for judicial review have been satisfied

Petitioners are hailing this Court's power of judicial review in order to strike down EDCA for violating the Constitution. They stress that our fundamental law is explicit in prohibiting the presence of foreign military forces in the country, except under a treaty concurred in by the Senate. Before this Court may begin to analyze the constitutionality or validity of an official act of a coequal branch of government, however, petitioners must show that they have satisfied all the essential requisites for judicial review.[93]

Distinguished from the general notion of judicial power, the power of judicial review specially refers to both the authority and the duty of this Court to determine whether a branch or an instrumentality of government has acted beyond the scope of the latter's constitutional powers.[94] As articulated in Section 1, Article VIII of the Constitution, the power of judicial review involves the power to resolve cases in which the questions concern the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation.[95] In *Angara v.*

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[93] *Francisco v. House of Representatives,* 460 Phil. 830, 914 (2003).

[94] See: *Chavez v. Judicial and Bar Council,* G.R. No. 202242, 17 July 2012, 676 SCRA 579; *Tagolino v. House of Representatives Electoral Tribunal,* G.R. No. 202202, 19 March 2013, 693 SCRA 574; *Gutierrez v. House of Representatives Committee on Justice,* 658 Phil. 322 (2011); *Francisco v. House of Representatives, supra*; *Demetria v. Alba,* 232 Phil. 222 (1987).

[95] The Constitution provides: "SECTION 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be

Electoral Commission, this Court exhaustively discussed this "moderating power" as part of the system of checks and balances under the Constitution. In our fundamental law, the role of the Court is to determine whether a branch of government has adhered to the specific restrictions and limitations of the latter's power:[96]

> The separation of powers is a fundamental principle in our system of government. It obtains not through express provision but by actual division in our Constitution. **Each department of the government has exclusive cognizance of matters within its jurisdiction, and is supreme within its own sphere.** But it does not follow from the fact that the three powers are to be kept separate and distinct that the Constitution intended them to be absolutely unrestrained and independent of each other. **The Constitution has provided for an elaborate system of checks and balances** to secure coordination in the workings of the various departments of the government. x x x. **And the judiciary in turn,** with the Supreme Court as the final arbiter, **effectively checks the other departments in the exercise of its power to determine the law, and hence to declare executive and legislative acts void if violative of the Constitution.**
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> x x x x x x x x x
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> As any human production, **our Constitution** is of course lacking perfection and perfectibility, but as much as it was within the power of our people, acting through their delegates to so provide, that instrument **which is the expression of their sovereignty** however limited, **has established a republican government intended to operate and function as a harmonious whole, under a system of checks and balances, and subject to specific limitations and restrictions provided in the said instrument. The Constitution sets forth in no uncertain language the restrictions and limitations upon governmental powers and agencies. If these restrictions and limitations are transcended it would be inconceivable if the Constitution had not provided for a mechanism by which to direct**

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established by law. **Judicial power includes the duty of the courts** of justice to settle actual controversies involving rights which are legally demandable and enforceable, and **to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government**."

[96] *Angara v. Electoral Commission,* 63 Phil. 139, 156-158 (1936).

the course of government along constitutional channels, for then the distribution of powers would be mere verbiage, the bill of rights mere expressions of sentiment, and the principles of good government mere political apothegms. Certainly, the limitations and restrictions embodied in our Constitution are real as they should be in any living constitution. x x x. In our case, this moderating power is granted, if not expressly, by clear implication from Section 2 of Article VIII of [the 1935] Constitution.

The Constitution is a definition of the powers of government. Who is to determine the nature, scope and extent of such powers? The Constitution itself has provided for the instrumentality of the judiciary as the rational way. **And when the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not in reality nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them.** This is in truth all that is involved in what is termed "judicial supremacy" **which properly is the power of judicial review under the Constitution.** x x x. (Emphases supplied)

The power of judicial review has since been strengthened in the 1987 Constitution. The scope of that power has been extended to the determination of whether in matters traditionally considered to be within the sphere of appreciation of another branch of government, an exercise of discretion has been attended with grave abuse.[97] The expansion of this power has made the political question doctrine "no longer the insurmountable obstacle to the exercise of judicial power or the impenetrable

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[97] *Gutierrez v. House of Representatives Committee on Justice, supra* note 94; *Francisco v. House of Representatives, supra* note 94; *Tañada v. Angara,* 338 Phil. 546 (1997); *Oposa v. Factoran,* G.R. No. 101083, 30 July 1993, 224 SCRA 792, 809-810 (citing *Llamas v. Orbos,* 279 Phil. 920 [1991]; *Bengzon v. Senate Blue Ribbon Committee,* G.R. No. 89914, 20 November 1991, 203 SCRA 767; *Gonzales v. Macaraig,* G.R. No. 87636, 19 November 1990, 191 SCRA 452; *Coseteng v. Mitra,* G.R. No. 86649, 12 July 1990, 187 SCRA 377; *Daza v. Singson,* 259 Phil. 980 [1989]; and I RECORD, CONSTITUTIONAL COMMISSION 434-436 [1986]).

shield that protects executive and legislative actions from judicial inquiry or review."[98]

This moderating power, however, must be exercised carefully and only if it cannot be completely avoided. We stress that our Constitution is so incisively designed that it identifies the spheres of expertise within which the different branches of government shall function and the questions of policy that they shall resolve.[99] Since the power of judicial review involves the delicate exercise of examining the validity or constitutionality of an act of a coequal branch of government, this Court must continually exercise restraint to avoid the risk of supplanting the wisdom of the constitutionally appointed actor with that of its own.[100]

Even as we are left with no recourse but to bare our power to check an act of a coequal branch of government — in this case the executive — we must abide by the stringent requirements for the exercise of that power under the Constitution. *Demetria v. Alba*[101] and *Francisco v. House of Representatives*[102] cite the "pillars" of the limitations on the power of judicial review as enunciated in the concurring opinion of U.S. Supreme Court Justice Brandeis in *Ashwander v. Tennessee Valley Authority.*[103] *Francisco*[104] redressed these "pillars" under the following categories:

1. That there be **absolute necessity of deciding** a case
2. That rules of constitutional law shall be **formulated only as required by the facts** of the case

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[98] *Oposa v. Factoran, supra*, at 97.

[99] *Morfe v. Mutuc,* 130 Phil. 415, 442 (1968); *Angara v. Electoral Commission, supra* note 96, at 178.

[100] See: *Francisco v. House of Representatives, supra* note 93; *United States v. Raines,* 362 U.S. 17 (1960); and *Angara v. Electoral Commission, supra* note 96.

[101] *Demetria v. Alba, supra* note 94, at 226.

[102] *Francisco v. House of Representatives, supra* note 93, at 922-923.

[103] *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 346-348 (1936).

[104] *Francisco v. House of Representatives, supra* note 93, at 923.

3. That judgment **may not be sustained on some other ground**
4. That there be **actual injury sustained by the party** by reason of the operation of the statute
5. That the **parties are not in *estoppel***
6. That the Court upholds the **presumption of constitutionality**

(Emphases supplied)

These are the specific safeguards laid down by the Court when it exercises its power of judicial review.[105] Guided by these pillars, it may invoke the power only when the following four stringent requirements are satisfied: (a) there is an actual case or controversy; (b) petitioners possess *locus standi;* (c) the question of constitutionality is raised at the earliest opportunity; and (d) the issue of constitutionality is the *lis mota* of the case.[106] Of these four, the first two conditions will be the focus of our discussion.

1. Petitioners have shown the presence of an actual case or controversy.

The OSG maintains[107] that there is no actual case or controversy that exists, since the Senators have not been deprived of the opportunity to invoke the privileges of the institution they are representing. It contends that the non-participation of the Senators in the present petitions only confirms that even they believe that EDCA is a binding executive agreement that does not require their concurrence.

It must be emphasized that the Senate has already expressed its position through SR 105.[108] Through the Resolution, the Senate

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[105] *Id*., at 922.

[106] *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council,* 646 Phil. 452, 471 (2010); *David v. Macapagal-Arroyo,* 522 Phil. 705, 753 (2006); *Francisco v. House of Representatives, supra* note 93 at 892; *Angara v. Electoral Commission, supra* note 96, at 158.

[107] Memorandum of OSG, p. 6, *rollo,* p. 436.

[108] *Rollo* (G.R. No. 212444), pp. 865-867.

has taken a position contrary to that of the OSG. As the body tasked to participate in foreign affairs by ratifying treaties, its belief that EDCA infringes upon its constitutional role indicates that an actual controversy — albeit brought to the Court by non-Senators, exists.

Moreover, we cannot consider the sheer abstention of the Senators from the present proceedings as basis for finding that there is no actual case or controversy before us. We point out that the focus of this requirement is the ripeness for adjudication of the matter at hand, as opposed to its being merely conjectural or anticipatory.[109] The case must involve a definite and concrete issue involving real parties with conflicting legal rights and legal claims admitting of specific relief through a decree conclusive in nature.[110] It should not equate with a mere request for an opinion or advice on what the law would be upon an abstract, hypothetical, or contingent state of facts.[111] As explained in *Angara v. Electoral Commission:*[112]

> [The] power of **judicial review is limited to actual cases and controversies to be exercised after full opportunity of argument by the parties,** and limited further to the constitutional question raised or the very *lis mota* presented. **Any attempt at abstraction could only lead to dialectics and barren legal questions and to sterile**

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[109] *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council, supra* note 106, at 479.

[110] *Information Technology Foundation of the Philippines v. Commission on Elections,* 499 Phil. 281, 304-305 (2005) (citing *Aetna Life Insurance Co. v. Hayworth,* 300 U.S. 227 [1937]); *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council, supra* note 106, at 480; *David v. Macapagal-Arroyo, supra* note 106, at 753 (2006); *Francisco v. House of Representatives, supra* note 93, 879-880; *Angara v. Electoral Commission, supra* note 96, at 158.

[111] *Information Technology Foundation of the Philippines v. Commission on Elections, supra* (citing *Aetna Life Insurance Co. v. Hayworth,* 300 U.S. 227 [1937]); *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council, supra* note 106, at 480; *Lozano v. Nograles,* 607 Phil. 334, 340 [2009]).

[112] *Angara v. Electoral Commission, supra* note 96, at 158-159.

conclusions of wisdom, justice or expediency of legislation. More than that, courts accord the presumption of constitutionality to legislative enactments, not only because the legislature is presumed to abide by the Constitution but also because **the judiciary in the determination of actual cases and controversies must reflect the wisdom and justice of the people as expressed through their representatives in the executive and legislative departments of the government.** (Emphases supplied)

We find that the matter before us involves an actual case or controversy that is already ripe for adjudication. The Executive Department has already sent an official confirmation to the U.S. Embassy that "all internal requirements of the Philippines x x x have already been complied with."[113] By this exchange of diplomatic notes, the Executive Department effectively performed the last act required under Article XII(1) of EDCA before the agreement entered into force. Section 25, Article XVIII of the Constitution, is clear that the presence of foreign military forces in the country shall only be allowed by virtue of a treaty concurred in by the Senate. Hence, the performance of an official act by the Executive Department that led to the entry into force of an executive agreement was sufficient to satisfy the actual case or controversy requirement.

2. While petitioners Saguisag *et al.,* do not have legal standing, they nonetheless raise issues involving matters of transcendental importance.

The question of *locus standi* or legal standing focuses on the determination of whether those assailing the governmental act have the right of appearance to bring the matter to the court for adjudication.[114] They must show that they have a

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[113] Memorandum of OSG, *supra* note 80. See also Note No. 1082, *supra* note 86.

[114] *Almario v. Executive Secretary,* G.R. No. 189028, 16 July 2013, 701 SCRA 269, 302; *Bayan Muna v. Romulo,* 656 Phil. 246 (2011).

personal and substantial interest in the case, such that they have sustained or are in immediate danger of sustaining, some direct injury as a consequence of the enforcement of the challenged governmental act.[115] Here, "interest" in the question involved must be material — an interest that is in issue and will be affected by the official act — as distinguished from being merely incidental or general.[116] Clearly, it would be insufficient to show that the law or any governmental act is invalid, and that petitioners stand to suffer in some indefinite way.[117] They must show that they have a particular interest in bringing the suit, and that they have been or are about to be denied some right or privilege to which they are lawfully entitled, or that they are about to be subjected to some burden or penalty by reason of the act complained of.[118] The reason why those who challenge the validity of a law or an international agreement are required to allege the existence of a personal stake in the outcome of the controversy is "to assure the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[119]

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[115] *Funa v.* CSC *Chairman,* G.R. No. 191672, 25 November 2014; *Almario v. Executive Secretary, supra* note 114, at 302; *Bayan Muna v. Romulo, supra* note 114, at 265; *Bayan v. Zamora, supra* note 23; *Francisco v. House of Representatives, supra* note 93, 895-896.

[116] *Bayan Muna v. Romulo, supra* note 114 at 265; *Pimentel v. Office of the Executive Secretary, supra* note 15; *Joya v. Presidential Commission on Good Government,* G.R. No. 96541, 24 August 1993, 225 SCRA 568.

[117] *Funa v. CSC Chairman, supra* note 115; *Almario v. Executive Secretary, supra* note 114 at 302; *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council, supra* note 106, at 472; *Francisco v. House of Representatives, supra* note 93 at 895-896.

[118] *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council, supra* note 106.

[119] *Bayan Muna v. Romulo, supra* note 114, at 265; *Francisco v. House of Representatives, supra* note 93, at 893.

The present petitions cannot qualify as citizens', taxpayers', or legislators' suits; the Senate as a body has the requisite standing, but considering that it has not formally filed a pleading to join the suit, as it merely conveyed to the Supreme Court its sense that EDCA needs the Senate's concurrence to be valid, petitioners continue to suffer from lack of standing.

In assailing the constitutionality of a governmental act, petitioners suing as citizens may dodge the requirement of having to establish a direct and personal interest if they show that the act affects a public right.[120] In arguing that they have legal standing, they claim[121] that the case they have filed is a concerned citizen's suit. But aside from general statements that the petitions involve the protection of a public right, and that their constitutional rights as citizens would be violated, they fail to make any specific assertion of a particular public right that would be violated by the enforcement of EDCA. **For their failure to do so, the present petitions cannot be considered by the Court as citizens' suits that would justify a disregard of the aforementioned requirements.**

In claiming that they have legal standing as taxpayers, petitioners[122] aver that the implementation of EDCA would

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[120] *Bayan Muna v. Romulo, supra* note 114, at 266-267; *Akbayan Citizens Action Party v. Aquino, supra* note 15; *Francisco v. House of Representatives, supra* note 93; *Tañada v. Tuvera,* 220 Phil. 422 (1985).

[121] Petition of Saguisag, *et al.,* p. 20, *rollo* (G.R. No. 212426, Vol. I), p. 22; Memorandum of Saguisag, *et al.,* p. 15, *rollo* (G.R. No. 212426, Vol. II), p. 985; Petition of Bayan, *et al.,* p. 9, *rollo* (G.R. No. 212444, Vol. I), p. 11; Memorandum of Bayan, *et al.,* pp. 19, 23, *rollo* (G.R. No. 212444, Vol. I), pp. 583, 587.

[122] Petition of Saguisag, *et al.,* p. 10, *rollo* (G.R. No. 212426, Vol. I), p. 12; Petition of Bayan, *et al.,,* pp. 9-10, *rollo* (G.R. No. 212444, Vol. I),

result in the unlawful use of public funds. They emphasize that Article X(1) refers to an appropriation of funds; and that the agreement entails a waiver of the payment of taxes, fees, and rentals. During the oral arguments, however, they admitted that the government had not yet appropriated or actually disbursed public funds for the purpose of implementing the agreement.[123] The OSG, on the other hand, maintains that petitioners cannot sue as taxpayers.[124] Respondent explains that EDCA is neither meant to be a tax measure, nor is it directed at the disbursement of public funds.

A taxpayer's suit concerns a case in which the official act complained of directly involves the illegal disbursement of public funds derived from taxation.[125] Here, those challenging the act must specifically show that they have sufficient interest in preventing the illegal expenditure of public money, and that they will sustain a direct injury as a result of the enforcement of the assailed act.[126] Applying that principle to this case, they must establish that EDCA involves the exercise *by Congress* of its taxing or spending powers.[127]

We agree with the OSG that the petitions cannot qualify as taxpayers' suits. We emphasize that a taxpayers' suit contemplates a situation in which there is already an appropriation

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pp. 11-12; Memorandum of Bayan, *et al.,* pp. 19, 23, *rollo* (G.R. No. 212444, Vol. I), pp. 583, 587.

[123] Oral Arguments TSN, 18 November 2014, pp. 19-20.

[124] Consolidated Comment of the OSG, p. 4, *rollo* (G.R. No. 212426, Vol. I), p. 241; Memorandum of OSG, p. 7, *rollo* (G.R. No. 212426, Vol. I), p. 437.

[125] *Bayan v. Zamora*, *supra* note 23.

[126] *Bayan v. Zamora, supra* note 23 (citing *Pascual v. Secretary of Public Works,* 110 Phil. 331 [1960]; *Maceda v. Macaraig,* G.R. No. 88291, 31 May 1991, 197 SCRA 771; *Lozada v. Commission on Elections,* 205 Phil. 283 [1983]; *Dumlao v. Commission on Elections,* 184 Phil. 369 [1980]; *Gonzales v. Marcos,* 160 Phil. 637 [1975]).

[127] See: *Bayan v. Zamora, supra* note 23 (citing *Bugnay Const. & Development Corp. v. Laron,* 257 Phil. 245 [1989]).

or a disbursement of public funds.[128] A reading of Article X(I) of EDCA would show that there has been neither an appropriation nor an authorization of disbursement of funds. The cited provision reads:

> All obligations under this Agreement are **subject to the availability of appropriated funds** authorized for these purposes. (Emphases supplied)

This provision means that if the implementation of EDCA would require the disbursement of public funds, the money must come from *appropriated* funds that are specifically *authorized* for this purpose. Under the agreement, before there can even be a disbursement of public funds, there must first be a legislative action. **Until and unless the Legislature appropriates funds for EDCA, or unless petitioners can pinpoint a specific item in the current budget that allows expenditure under the agreement, we cannot at this time rule that there is in fact an appropriation or a disbursement of funds that would justify the filing of a taxpayers' suit.**

Petitioners Bayan *et al.,* also claim[129] that their co-petitioners who are party-list representatives have the standing to challenge the act of the Executive Department, especially if it impairs the constitutional prerogatives, powers, and privileges of their office. While they admit that there is no incumbent Senator who has taken part in the present petition, they nonetheless assert that they also stand to sustain a derivative but substantial injury as legislators. They argue that under the Constitution, legislative power is vested in both the Senate and the House of Representatives; consequently, it is the entire Legislative Department that has a voice in determining whether or not the presence of foreign military should be allowed. They maintain that as members of the Legislature, they have the requisite

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[128] *Lozano v. Nograles, supra* note 111, at 342-343.

[129] Petition of Bayan, *et al.,* p. 10, *rollo* (G.R. No. 212444, Vol. I), p. 12; Memorandum of Bayan, *et al.,* pp. 19-20, *rollo* (G.R. No. 212444, Vol. I), pp. 583-584.

personality to bring a suit, especially when a constitutional issue is raised.

The OSG counters[130] that petitioners do not have any legal standing to file the suits concerning the lack of Senate concurrence in EDCA. Respondent emphasizes that the power to concur in treaties and international agreements is an "institutional prerogative" granted by the Constitution to the Senate. Accordingly, the OSG argues that in case of an allegation of impairment of that power, the injured party would be the Senate as an institution or any of its incumbent members, as it is the Senate's constitutional function that is allegedly being violated.

The legal standing of an institution of the Legislature or of any of its Members has already been recognized by this Court in a number of cases.[131] What is in question here is the alleged impairment of the constitutional duties and powers granted to, or the impermissible intrusion upon the domain of, the Legislature or an institution thereof.[132] In the case of suits initiated by the legislators themselves, this Court has recognized their standing to question the validity of any official action that they claim infringes the prerogatives, powers, and privileges vested by the Constitution in their office.[133] As aptly explained by Justice Perfecto in *Mabanag v. Lopez Vito:*[134]

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[130] Consolidated Comment of the OSG, pp. 3-4, *rollo* (G.R. No. 212444, Vol. I), pp. 240-241; Memorandum of the OSG, pp. 4-7, *rollo* (G.R. No. 212444, Vol. I), pp. 434-437.

[131] *Pimentel v. Office of the Executive Secretary, supra* note 15; *Bayan v. Zamora, supra* note 23; *Philippine Constitution Association. v. Enriquez,* G.R. Nos. 113105, 113174, 113766, 113888, 19 August 1994, 235 SCRA 506; *Gonzales v. Macaraig, supra* note 97; *Mabanag v. Lopez Vito,* 78 Phil. 1 (1947).

[132] *Philippine Constitution Association. v. Enriquez, supra*.

[133] *Pimentel v. Office of the Executive Secretary, supra* note 15; *Philippine Constitution Association. v. Enriquez, supra*.

[134] *Mabanag v. Lopez Vito* [Dis. Op., J. Perfecto], *supra* note 131, at 35.

Being members of Congress, **they are even duty bound to see that the latter act within the bounds of the Constitution** which, **as representatives of the people,** they should uphold, unless they are to commit a flagrant betrayal of public trust They are representatives of the sovereign people arid **it is their sacred duty to see to it that the fundamental law embodying the will of the sovereign people is not trampled upon.** (Emphases supplied)

We emphasize that in a legislators' suit, those Members of Congress who are challenging the official act have standing only to the extent that the alleged violation impinges on their right to participate in the exercise of the powers of the institution of which they are members.[135] Legislators have the standing "to maintain inviolate the prerogatives, powers, and privileges vested by the Constitution in *their office* and are allowed to sue to question the validity of any official action, which they claim infringes their prerogatives as legislators."[136] As legislators, they must clearly show that there was a direct injury to their persons or the institution to which they belong.[137]

As correctly argued by respondent, the power to concur in a treaty or an international agreement is an institutional prerogative granted by the Constitution to the Senate, not to the entire Legislature. In *Pimentel v. Office of the Executive Secretary,* this Court did not recognize the standing of one of the petitioners therein who was a member of the House of Representatives. The petition in that case sought to compel the transmission to the Senate for concurrence of the signed text of the Statute of the International Criminal Court. Since that petition invoked the power of the Senate to grant or withhold its concurrence in a treaty entered into by the Executive Department, only then incumbent Senator Pimentel was allowed to assert that authority of the Senate of which he was a member.

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[135] *Pimentel v. Office of the Executive Secretary, supra* note 15; *Bayan v. Zamora, supra* note 23; *Philippine Constitution Association. v. Enriquez, supra* note 131.

[136] *Pimentel v. Office of the Executive Secretary, supra* note 15.

[137] *Bayan v. Zamora, supra* note 23.

Therefore, **none of the initial petitioners in the present controversy has the standing to maintain the suits as legislators.**

Nevertheless, this Court finds that there is basis for it to review the act of the Executive for the following reasons.

In any case, petitioners raise issues involving matters of transcendental importance.

Petitioners[138] argue that the Court may set aside procedural technicalities, as the present petition tackles issues that are of transcendental importance. They point out that the matter before us is about the proper exercise of the Executive Department's power to enter into international agreements in relation to that of the Senate to concur in those agreements. They also assert that EDCA would cause grave injustice, as well as irreparable violation of the Constitution and of the Filipino people's rights.

The OSG, on the other hand, insists[139] that petitioners cannot raise the mere fact that the present petitions involve matters of transcendental importance in order to cure their inability to comply with the constitutional requirement of standing. Respondent bewails the overuse of "transcendental importance" as an exception to the traditional requirements of constitutional litigation. It stresses that one of the purposes of these requirements is to protect the Supreme Court from unnecessary litigation of constitutional questions.

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[138] Petition of Saguisag, *et al.,* pp. 21-22, *rollo* (G.R. No. 212426, Vol. 1), pp. 23-24; Memorandum of Saguisag, *et al.,* pp. 15-17, *rollo* (G.R. No. 212426, Vol. II), pp. 985-987; Petition of Bayan *et al.,* p. 6, *rollo* (G.R. No. 212444, Vol. 1) p. 8; Memorandum of Bayan, *et al.,* pp. 19, 23, *rollo* (G.R. No. 212444, Vol. 1), pp. 583, 587.

[139] Consolidated Comment of the OSG, pp. 4-5, *rollo* (G.R. No. 212444, Vol. I), pp. 241-242; Memorandum of the OSG, pp. 7-8, *rollo* (G.R. No. 212444, Vol. I), pp. 437-438.

In a number of cases,[140] this Court has indeed taken a liberal stance towards the requirement of legal standing, especially when paramount interest is involved. Indeed, when those who challenge the official act are able to craft an issue of transcendental significance to the people, the Court may exercise its sound discretion and take cognizance of the suit. It may do so in spite of the inability of the petitioners to show that they have been personally injured by the operation of a law or any other government act.

While this Court has yet to thoroughly delineate the outer limits of this doctrine, we emphasize that not every other case, however strong public interest may be, can qualify as an issue of transcendental importance. Before it can be impelled to brush aside the essential requisites for exercising its power of judicial review, it must at the very least consider a number of factors: (1) the character of the funds or other assets involved in the case; (2) the presence of a clear case of disregard of a constitutional or statutory prohibition by the public respondent agency or instrumentality of the government; and (3) the lack of any other party that has a more direct and specific interest in raising the present questions.[141]

An exhaustive evaluation of the memoranda of the parties, together with the oral arguments, shows that petitioners have presented serious constitutional issues that provide ample justification for the Court to set aside the rule on standing. The transcendental importance of the issues presented here is rooted

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[140] *Bayan Muna v. Romulo, supra* note 114, at 265 (citing *Constantino v. Cuisia,* 509 Phil. 486 [2005]; *Agan v. Philippine International Air Terminals Co., Inc.,* 450 Phil. 744 [2003]; *Del Mar v. Philippine Amusement and Gaming Corporation,* 400 Phil. 307 [2000]; *Tatad v. Garcia,* 313 Phil. 296 [1995]; *Kilosbayan v. Guingona,* G.R. No. 113375, 5 May 1994, 232 SCRA 110); *Integrated Bar of the Phil. v. Zamora,* 392 Phil. 618 (2000).

[141] *Kilosbayan, Inc. v. Guingona* [Con. Op., *J.* Feliciano], *supra*, at 155-156 (1995) (cited in *Magallona v. Ermita,* 671 Phil. 243 (2011); *Paguia v. Office of the President,* 635 Phil. 568 [2010]; *Francisco v. House of Representatives, supra* note 93, at 899).

in the Constitution itself. Section 25, Article XVIII thereof, cannot be any clearer: there is a much stricter mechanism required before foreign military troops, facilities, or bases may be allowed in the country. The DFA has already confirmed to the U.S. Embassy that "all internal requirements of the Philippines x x x have already been complied with."[142] It behooves the Court in this instance to take a liberal stance towards the rule on standing and to determine forthwith whether there was grave abuse of discretion on the part of the Executive Department.

We therefore rule that this case is a proper subject for judicial review.

B. Whether the President may enter into an executive agreement on foreign military bases, troops, or facilities

C. Whether the provisions under EDCA are consistent with the Constitution, as well as with existing laws and treaties

Issues ***B*** and ***C*** shall be discussed together *infra.*

1. The role of the President as the executor of the law includes the duty to defend the State, for which purpose he may use that power in the conduct of foreign relations

Historically, the Philippines has mirrored the division of powers in the U.S. government. When the Philippine government was still an agency of the Congress of the U.S., it was as an agent entrusted with powers categorized as executive, legislative, and judicial, and divided among these three great branches.[143] By this division, the law implied that the divided powers cannot be exercised except by the department given the power.[144]

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[142] Memorandum of OSG, *supra* note 80. See also Note No. 1082, *supra* note 86.

[143] *Government of the Philippine Islands v. Springer,* 50 Phil. 259 (1927).

[144] *Id*.

This divide continued throughout the different versions of the Philippine Constitution and specifically vested the supreme executive power in the Governor-General of the Philippines,[145] a position inherited by the President of the Philippines when the country attained independence. One of the principal functions of the supreme executive is the responsibility for the faithful execution of the laws as embodied by the oath of office.[146] The oath of the President prescribed by the 1987 Constitution reads thus:

> I do solemnly swear (or affirm) that **I will faithfully and conscientiously fulfill my duties as President** (or Vice-President or Acting President) of the Philippines, preserve and defend its Constitution, **execute its laws**, do justice to every man, and consecrate myself to the service of the Nation. So help me God. (In case of affirmation, last sentence will be omitted.)[147] (Emphases supplied)

This Court has interpreted the faithful execution clause as an obligation imposed on the President, and not a separate grant of power.[148] Section 17, Article VII of the Constitution, expresses this duty in no uncertain terms and includes it in the provision regarding the President's power of control over the executive department, *viz:*

> The President shall have control of all the executive departments, bureaus, and offices. He shall ensure that the laws be faithfully executed.

The equivalent provisions in the next preceding Constitution did not explicitly require this oath from the President. In the 1973 Constitution, for instance, the provision simply gives the President control over the ministries.[149] A similar language, not

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[145] *Id*.

[146] CONSTITUTION, Art. VII, Sec. 5; CONSTITUTION (1973, as amended), Art. VII, Sec. 7; CONSTITUTION (1935, as amended), Art. VII, Sec. 7.

[147] CONSTITUTION, Art. VII, Sec. 5.

[148] *Almario v. Executive Secretary, supra* note 114.

[149] CONSTITUTION (1973, as amended), Art. VII, Sec. 10: "The President shall have control of the ministries."

in the form of the President's oath, was present in the 1935 Constitution, particularly in the enumeration of executive functions.[150] By 1987, executive power was codified not only in the Constitution, but also in the Administrative Code:[151]

> SECTION 1. Power of Control. — The President shall have control of all the executive departments, bureaus, and offices. **He shall ensure that the laws be faithfully executed.** (Emphasis supplied)

Hence, the duty to faithfully execute the laws of the land is inherent in executive power and is intimately related to the other executive functions. These functions include the faithful execution of the law in autonomous regions;[152] the right to prosecute crimes;[153] the implementation of transportation projects;[154] the duty to ensure compliance with treaties, executive agreements and executive orders;[155] the authority to deport undesirable aliens;[156] the conferment of national awards under the President's jurisdiction;[157] and the overall administration and control of the executive department.[158]

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[150] CONSTITUTION (1935, as amended), Art. VII, Sec. 10(1): "The President shall have control of all executive departments, bureaus or offices, exercise general supervision over all local governments as may be provided by law, and take care that the laws be faithfully executed."

[151] Administrative Code of 1987, Book III, Title I, Sec. 1.

[152] CONSTITUTION, Art. X, Sec. 16: "The President shall exercise general supervision over autonomous regions to ensure that the laws are faithfully executed."

[153] *Ilusorio v. Ilusorio,* 564 Phil. 746 (2007); *Gonzalez v. Hongkong & Shanghai Banking Corp.,* 562 Phil. 841 (2007).

[154] *Metropolitan Manila Development Authority v. Viron Transportation Co., Inc.,* 557 Phil. 121 (2007).

[155] *La Perla Cigar & Cigarette Factory v. Capapas,* 139 Phil. 451 (I969).

[156] *In re: R. McCulloch Dick,* 38 Phil. 211 (1918).

[157] *Almario v. Executive Secretary, supra* note 114.

[158] Administrative Code of 1987, Book IV, Sec. 38.

These obligations are as broad as they sound, for a President cannot function with crippled hands, but must be capable of securing the rule of law within all territories of the Philippine Islands and be empowered to do so within constitutional limits. Congress cannot, for instance, limit or take over the President's power to adopt implementing rules and regulations for a law it has enacted.[159]

More important, this mandate is self-executory by virtue of its being inherently executive in nature.[160] As Justice Antonio T. Carpio previously wrote,[161]

> [i]f the rules are issued by the President in implementation or execution of self-executory constitutional powers vested in the President, the rule-making power of the President is not a delegated legislative power. The most important self-executory constitutional power of the President is the President's constitutional duty and mandate to "ensure that the laws be faithfully executed." The rule is that the President can execute the law without any delegation of power from the legislature.

The import of this characteristic is that the manner of the President's execution of the law, even if not expressly granted by the law, is justified by necessity and limited only by law, since the President must "take necessary and proper steps to carry into execution the law."[162] Justice George Malcolm states this principle in a grand manner:[163]

> The executive should be clothed with sufficient power to administer efficiently the affairs of state. He should have complete control of the instrumentalities through whom his responsibility is discharged. It is still true, as said by Hamilton, that "A feeble executive implies a feeble execution of the government. A feeble execution is but another

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[159] Concurring Opinion of *J.* Carpio, *Abakada Guro Party List v. Purisima,* 584 Phil. 246 (2008).

[160] *Id*.

[161] *Id.* at 297.

[162] *Philippine Constitution Association v. Enriquez, supra* note 131.

[163] *Government of the Philippine Islands v. Springer, supra* note 143.

phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be in practice a bad government." The mistakes of State governments need not be repeated here.

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Every other consideration to one side, this remains certain — The Congress of the United States clearly intended that the Governor-General's power should be commensurate with his responsibility. The Congress never intended that the Governor-General should be saddled with the responsibility of administering the government and of executing the laws but shorn of the power to do so. The interests of the Philippines will be best served by strict adherence to the basic principles of constitutional government.

In light of this constitutional duty, it is the President's prerogative to do whatever is legal and necessary for Philippine defense interests. It is no coincidence that the constitutional provision on the faithful execution clause was followed by that on the President's commander-in-chief powers,[164] which are specifically granted during extraordinary events of lawless violence, invasion, or rebellion. And this duty of defending the country is unceasing, even in times when there is no state of lawless violence, invasion, or rebellion. At such times, the President has full powers to ensure the faithful execution of the laws.

It would therefore be remiss for the President and repugnant to the faithful-execution clause of the Constitution to do nothing when the call of the moment requires increasing the military's defensive capabilities, which could include forging alliances with states that hold a common interest with the Philippines or bringing an international suit against an offending state.

The context drawn in the analysis above has been termed by Justice Arturo D. Brion's Dissenting Opinion as the beginning of a "patent misconception."[165] His dissent argues that this approach taken in analyzing the President's role as executor of

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[164] See CONSTITUTION, Art. VII, Secs. 17 & 18.

[165] Dissenting Opinion of Justice Arturo D. Brion, p. 17.

the laws is preceded by the duty to preserve and defend the Constitution, which was allegedly overlooked.[166]

In arguing against the approach, however, the dissent grossly failed to appreciate the nuances of the analysis, if read holistically and in context. The concept that the President cannot function with crippled hands and therefore can disregard the need for Senate concurrence in treaties[167] was never expressed or implied. Rather, the appropriate reading of the preceding analysis shows that the point being elucidated is the reality that the President's duty to execute the laws and protect the Philippines is inextricably interwoven with his foreign affairs powers, such that he must resolve issues imbued with both concerns to the full extent of his powers, subject only to the limits supplied by law. In other words, apart from an expressly mandated limit, or an implied limit by virtue of incompatibility, the manner of execution by the President must be given utmost deference. This approach is not different from that taken by the Court in situations with fairly similar contexts.

Thus, the analysis portrayed by the dissent does not give the President authority to bypass constitutional safeguards and limits. In fact, it specifies what these limitations are, how these limitations are triggered, how these limitations function, and what can be done within the sphere of constitutional duties and limitations of the President.

Justice Brion's dissent likewise misinterprets the analysis proffered when it claims that the foreign relations power of the President should not be interpreted in isolation.[168] The analysis itself demonstrates how the foreign affairs function, while mostly the President's, is shared in several instances, namely in Section 2 of Article II on the conduct of war; Sections 20 and 21 of Article VII on foreign loans, treaties, and international agreements; Sections 4(2) and 5(2)(a) of Article VIII on the

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[166] *Id*., at 18.

[167] *Id*., at 17-19.

[168] Dissenting Opinion of Justice Arturo D. Brion, pp. 19-20.

judicial review of executive acts; Sections 4 and 25 of Article XVIII on treaties and international agreements entered into prior to the Constitution and on the presence of foreign military troops, bases, or facilities.

In fact, the analysis devotes a whole subheading to the relationship between the two major presidential functions and the role of the Senate in it.

This approach of giving utmost deference to presidential initiatives in respect of foreign affairs is not novel to the Court. The President's act of treating EDCA as an executive agreement is not the principal power being analyzed as the Dissenting Opinion seems to suggest. Rather, the preliminary analysis is in reference to the expansive power of foreign affairs. We have long treated this power as something the Courts must not unduly restrict. As we stated recently in *Vinuya v. Romulo:*

> To be sure, not all cases implicating foreign relations present political questions, and courts certainly possess the authority to construe or invalidate treaties and executive agreements. However, the question whether the Philippine government should espouse claims of its nationals against a foreign government is a foreign relations matter, the authority for which is demonstrably committed by our Constitution not to the courts but to the political branches. In this case, the Executive Department has already decided that it is to the best interest of the country to waive all claims of its nationals for reparations against Japan in the Treaty of Peace of 1951. The wisdom of such decision is not for the courts to question. Neither could petitioners herein assail the said determination by the Executive Department via the instant petition for certiorari.

In the seminal case of *US v. Curtiss-Wright Export Corp.,* the US Supreme Court held that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign relations."

> It is quite apparent that if, in the maintenance of our international relations, embarrassment — perhaps serious embarrassment — is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field

> **must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible where domestic affairs alone involved.** Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials....

This ruling has been incorporated in our jurisprudence through *Bayan v. Executive Secretary* and *Pimentel v. Executive Secretary*; its overreaching principle was, perhaps, best articulated in (now Chief) Justice Puno's dissent in Secretary of Justice v. Lantion:

> . . . The conduct of foreign relations is full of complexities and consequences, sometimes with life and death significance to the nation especially in times of war. It can only be entrusted to that department of government which can act on the basis of the best available information and can decide with decisiveness. . . . It is also the President who possesses the most comprehensive and the most confidential information about foreign countries for our diplomatic and consular officials regularly brief him on meaningful events all over the world. He has also unlimited access to ultra-sensitive military intelligence data. **In fine, the presidential role in foreign affairs is dominant and the President is traditionally accorded a wider degree of discretion in the conduct of foreign affairs. The regularity, nay, validity of his actions are adjudged under less stringent standards, lest their judicial repudiation lead to breach of an international obligation, rupture of state relations, forfeiture of confidence, national embarrassment and a plethora of other problems with equally undesirable conseguences.**[169] (Emphases supplied)

Understandably, this Court must view the instant case with the same perspective and understanding, knowing full well the constitutional and legal repercussions of any judicial overreach.

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[169] *Vinuya v. Romulo, supra* note 17.

2. The plain meaning of the Constitution prohibits the entry of foreign military bases, troops or facilities, except by way of a treaty concurred in by the Senate — a clear limitation on the President's dual role as defender of the State and as sole authority in foreign relations.

Despite the President's roles as defender of the State and sole authority in foreign relations, the 1987 Constitution expressly limits his ability in instances when it involves the entry of foreign military bases, troops or facilities. The initial limitation is found in Section 21 of the provisions on the Executive Department: "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate." The specific limitation is given by Section 25 of the Transitory Provisions, the full text of which reads as follows:

> SECTION 25. After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State.

It is quite plain that the Transitory Provisions of the 1987 Constitution intended to add to the basic requirements of a treaty under Section 21 of Article VII. This means that both provisions must be read as additional limitations to the President's overarching executive function in matters of defense and foreign relations.

3. The President, however, may enter into an executive agreement on foreign military bases, troops, or facilities, if (a) it is not the instrument that allows the presence of foreign military bases, troops, or facilities; or (b) it merely aims to implement an existing law or treaty.

Again we refer to Section 25, Article XVIII of the Constitution:

SECTION 25. After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, **foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate** and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State. (Emphases supplied)

In view of this provision, petitioners argue[170] that EDCA must be in the form of a "treaty" duly concurred in by the Senate. They stress that the Constitution is unambiguous in mandating the transmission to the Senate of all international agreements concluded after the expiration of the MBA in 1991 — agreements that concern the presence of foreign military bases, troops, or facilities in the country. Accordingly, petitioners maintain that the Executive Department is not given the choice to conclude agreements like EDCA in the form of an executive agreement.

This is also the view of the Senate, which, through a majority vote of 15 of its members — with 1 against and 2 abstaining — says in SR 105[171] that EDCA must be submitted to the

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[170] Memorandum of Bayan, *et al.,* pp. 29-32, *rollo* (G.R. No. 212444), pp. 593-596; Memorandum of Saguisag *et al.,* pp. 17-29, 35-37, *rollo* (G.R. No. 212426, Vol. II), pp. 987-999, 1005-1007.

[171] The pertinent text of SR 105 is reproduced below:

WHEREAS, the treaty known as RP-US EDCA (Enhanced Defense Cooperation Agreement) is at present subject of Supreme Court proceedings

Senate in the form of a treaty for concurrence by at least two-thirds of all its members.

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on the question of whether this treaty is valid and effective, considering that the Senate has not concurred with the treaty;

WHEREAS, the Office of the President argues that the document is not a treaty but is instead an executive agreement that allegedly does not require Senate concurrence;

WHEREAS, the only constitutional ground for the position taken by the Executive is the mere inclusion of the term "executive agreement" in the Constitution which provides: "All cases involving the constitutionality of an ... executive agreement..." (Article VIII, Section 4, paragraph 2) as one of items included in the list of cases which the Supreme Court has power to decide.

WHEREAS, there is no other provision in the Constitution concerning a so-called executive agreement, and there is no mention at all of its definition, its requirements, the role of the Senate, or any other characteristic of, or protocol for, any such so-called "executive agreement";

WHEREAS, "executive agreement" is a term wandering alone in the Constitution, bereft of provenance and an unidentified constitutional mystery;

WHEREAS, in stark contrast to the lone mention of the term "executive agreement," the Constitution provides categorically:

(a) "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate," (Article VII, Section 21);

(b) "After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State", (Article XVIII, Section 25);

WHEREAS, on the one hand, the Constitution is clear and categorical that Senate concurrence is absolutely necessary for the validity and effectivity of any treaty, particularly any treaty that promotes for foreign military bases, troops and facilities, such as the EDCA;

WHEREAS, under the rules of constitutional and statutory construction, the two constitutional provisions on Senate concurrence are specific provisions, while the lone constitutional provision merely mentioning an "executive agreement" is a general provision, and therefore, the specific provisions on Senate concurrence prevail over the general provision on "executive agreement";

The Senate cites two constitutional provisions (Article VI, Section 21 and Article XVIII, Section 25) to support its position. Compared with the lone constitutional provision that the Office of the Solicitor General (OSG) cites, which is Article XVIII, Section 4(2), which includes the constitutionality of "executive agreement(s)" among the cases subject to the Supreme Court's power of judicial review, the Constitution clearly requires submission of EDCA to the Senate. Two specific provisions versus one general provision means that the specific provisions prevail. The term "executive agreement" is "a term wandering alone in the Constitution, bereft of provenance and an unidentified constitutional mystery."

The author of SR 105, Senator Miriam Defensor Santiago, upon interpellation even added that the MDT, which the Executive claims to be partly implemented through EDCA, is already obsolete.

There are two insurmountable obstacles to this Court's agreement with SR 105, as well as with the comment on interpellation made by Senator Santiago.

First, the concept of "executive agreement" is so well-entrenched in this Court's pronouncements on the powers of the President. When the Court validated the concept of "executive agreement," it did so with full knowledge of the Senate's role

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WHEREAS, the Senate is aware of and obeys the ruling of the Supreme Court in *Pimentel v. Office of the Executive Secretary,* 462 SCRA 622 (2005);

WHEREAS, the ruling cited above does not apply to the EDCA case, because the Senate makes no attempt to force the President of the Philippines to submit the EDCA treaty for concurrence by the Senate, by this Resolution, the Senate merely takes a definitive stand on the non-negotiable power of the Senate to decide whether a treaty will be valid and effective, depending on the Senate concurrence[;]

WHEREFORE, be it hereby resolved by the Senate that the RP-US EDCA treaty requires Senate concurrence, in order to be valid and effective;

Be it further resolved, That this Resolution expressing the strong sense of the Senate be formally submitted to the Supreme Court through the Chief Justice.

in concurring in treaties. It was aware of the problematique of distinguishing when an international agreement needed Senate concurrence for validity, and when it did not; and the Court continued to validate the existence of "executive agreements" even after the 1987 Constitution.[172] This follows a long line of similar decisions upholding the power of the President to enter into an executive agreement.[173]

Second, the MDT has not been rendered obsolescent, considering that as late as 2009[174] this Court continued to recognize its validity.

Third, to this Court, a plain textual reading of Article XIII, Section 25, inevitably leads to the conclusion that it applies only to a proposed agreement between our government and a foreign government, whereby military bases, troops, or facilities of such foreign government would be "allowed" or would "gain entry" Philippine territory.

Note that the provision "shall not be allowed" is a negative injunction. This wording signifies that the President is not authorized by law to allow foreign military bases, troops, or

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[172] *Arigo v. Swift,* G.R. No. 206510, 16 September 2014, 735 SCRA 102; *Land Bank v. Atlanta Industries, Inc.,* G.R. No. 193796, 2 July 2014, 729 SCRA 12; *Roxas v. Ermita,* G.R. No. 180030, June 10, 2014; *Bayan Muna v. Romulo, supra* note 114; *Vinuya v. Romulo, supra* note 17; *Nicolas v. Romulo, supra* note 39; *Akbayan Citizens Action Party v. Aquino, supra* note 15; *Suplico v. NEDA,* 580 Phil. 301 (2008); *Neri v. Senate Committee on Accountability of Public Officers and Investigations,* 572 Phil. 554 (2008); *Abaya v. Ebdane,* 544 Phil. 645 (2007); *Senate of the Philippines v. Ermita,* 522 Phil. 1 (2006); *Pimentel v. Office of the Executive Secretary, supra* note 15; *Bayan v. Zamora, supra* note 23; *Chavez v. PCGG,* 360 Phil. 133 (1998).

[173] *Republic v. Quasha,* 150-B Phil. 140 (1972); *Adolfo v. Court of First Instance of Zambales,* 145 Phil 264 (1970); *Commissioner of Internal Revenue v. Guerrero,* 128 Phil. 197 (1967); *Gonzales v. Hechanova,* 118 Phil. 1065 (1963); *Commissioner of Customs v. Eastern Sea Trading,* 113 Phil. 333 (1961); *USAFFE Veterans Ass'n. Inc. v. Treasurer of the Phil.,* 105 Phil. 1030 (1959); *Uy Matiao & Co., Inc. v. City of Cebu,* 93 Phil. 300 (1953); *Abbot Laboratories v. Agrava,* 91 Phil. 328 (1952).

[174] *Nicolas v. Romulo, supra* note 39.

facilities to enter the Philippines, except under a treaty concurred in by the Senate. Hence, the constitutionally restricted authority pertains to the entry of the bases, troops, or facilities, and not to the activities to be done after entry.

Under the principles of constitutional construction, of paramount consideration is the plain meaning of the language expressed in the Constitution, or the *verba legis* rule.[175] It is presumed that the provisions have been carefully crafted in order to express the objective it seeks to attain.[176] It is incumbent upon the Court to refrain from going beyond the plain meaning of the words used in the Constitution. It is presumed that the framers and the people meant what they said when they said it, and that this understanding was reflected in the Constitution and understood by the people in the way it was meant to be understood when the fundamental law was ordained and promulgated.[177] As this Court has often said:

> We look to the language of the document itself in our search for its meaning. We do not of course stop there, but that is where we begin. It is to be assumed that the words in which constitutional provisions are couched express the objective sought to be attained. **They are to be given their ordinary meaning except where**

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[175] *Chavez v. Judicial and Bar Council, supra* note 94; *Francisco v. House of Representatives, supra* note 93 (quoting *J.M Tuason & Co., Inc. v. Land Tenure Administration,* 142 Phil. 719 [1970]; citing *Baranda v. Gustilo,* 248 Phil. 205 [1988]; *Luz Farms v. Secretary of the Department of Agrarian Reform,* 270 Phil. 151 [1990]; *Ordillo v. Commission on Elections,* 270 Phil. 183 ([1990]).

[176] *Chavez v. Judicial and Bar Council, supra* note 94; *Ang Bagong Bayani-OFW v. Commission on Elections,* 412 Phil. 308 (2001) (citing *J.M Tuason & Co., Inc. v. Land Tenure Administration, supra*; *Gold Creek Mining Corp. v. Rodriguez,* 66 Phil. 259, 264 ([1938]; RUBEN C. AGPALO, *STATUTORY CONSTRUCTION* 311 ([1990]).

[177] *Chavez v. Judicial and Bar Council, supra* note 94; *Francisco v. House of Representatives, supra* note 93 (quoting *J.M. Tuason & Co., Inc. v. Land Tenure Administration, supra*; citing *Baranda v. Gustilo, supra*, at 770; *Luz Farms v. Secretary of the Department of Agrarian Reform, supra*; *Ordillo v. Commission on Elections, supra*); *Sarmiento v. Mison,* 240 Phil. 505 (1987); *Gold Creek Mining Corp. v. Rodriguez, supra*.

technical terms are employed in which case the significance thus attached to them prevails. As **the Constitution is not primarily a lawyer's document,** it being essential for the rule of law to obtain that it should ever be present in the people's consciousness, **its language as much as possible should be understood in the sense they have in common use.** What it says according to the text of the provision to be construed compels acceptance and negates the power of the courts to alter it, **based on the postulate that the framers and the people mean what they say. Thus, these are the cases where the need for construction is reduced to a minimum.**[178] (Emphases supplied)

It is only in those instances in which the constitutional provision is unclear, ambiguous, or silent that further construction must be done to elicit its meaning.[179] In *Ang Bagong Bayani-OFW v. Commission on Elections*,[180] we reiterated this guiding principle:

it [is] safer to construe the Constitution from what appears upon its face. The proper interpretation therefore depends more on **how it was understood by the people adopting it than in the framers' understanding thereof.** (Emphases supplied)

The effect of this statement is surprisingly profound, for, if taken literally, the phrase "shall not be allowed in the Philippines" plainly refers to the entry of bases, troops, or facilities in the country. The *Oxford English Dictionary* defines the word "allow" as a transitive verb that means "to permit, enable"; "to give consent to the occurrence of or relax restraint on (an action, event, or activity)"; "to consent to the presence or attendance of (a person)"; and, when with an adverbial of place, "to permit (a person or animal) to go, come, or be in, out, near, etc."[181]

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[178] *Francisco v. House of Representatives, supra* note 93 (quoting *J.M. Tuason & Co., Inc. v. Land Tenure Administration, supra*).

[179] *Ang Bagong Bayani-OFW v. Commission on Elections, supra* note 176.

[180] *Ang Bagong Bayani-OFW v. Commission on Elections, supra* note 176 (quoting the Separate Opinion of Justice Mendoza in *Civil Liberties Union v. Executive Secretary,* 272 Phil. 147 [1991]).

[181] OED Online, available at <http://www.oed.com/view/Entry/5460>, accessed on 28 October 2015; See also *Merriam-Webster Online Dictionary*,

Black's Law Dictionary defines the term as one that means "[t]o grant, approve, or permit."[182]

The verb "allow" is followed by the word "in," which is a preposition used to indicate "place or position in space or anything having material extension: Within the limits or bounds of, within (any place or thing)."[183] That something is the Philippines, which is the noun that follows.

It is evident that the constitutional restriction refers solely to the initial entry of the foreign military bases, troops, or facilities. Once entry is authorized, the subsequent acts are thereafter subject only to the limitations provided by the rest of the Constitution and Philippine law, and not to the Section 25 requirement of validity through a treaty.

The VFA has already allowed the entry of troops in the Philippines. This Court stated in *Lim v. Executive Secretary:*

> After studied reflection, it appeared farfetched that the ambiguity surrounding the meaning of the word "activities" arose from accident. In our view, it was deliberately made that way to give both parties a certain leeway in negotiation. **In this manner, visiting US forces may sojourn in Philippine territory for purposes other than military.** As conceived, the joint exercises may include training on new techniques of patrol and surveillance to protect the nation's marine resources, sea search-and-rescue operations to assist vessels in distress, disaster relief operations, civic action projects such as the building of school houses, medical and humanitarian missions, and the like.

Under these auspices, the VFA gives legitimacy to the current Balikatan exercises. It is only logical to assume that "Balikatan 02-1," a "mutual anti-terrorism advising, assisting and training

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"allow," available at <http://www.merriam-webster.com/dictionary/allow>, accessed on 28 October 2015.

[182] *BLACK'S LAW DICTIONARY* (2nd ed).

[183] OED Online, available at <http://www.oed.com/view/Entry/92970?rskey=JDaO&result=6>, accessed on 28 October 2015; See also *Merriam·Webster Online Dictionary*, available at <http://www.merriam-webster.com/dictionary/in>, accessed on 28 October 2015.

exercise," falls under the umbrella of sanctioned or allowable activities in the context of the agreement. Both the history and intent of the Mutual Defense Treaty and the VFA support the conclusion that combat-related activities – as opposed to combat itself-such as the one subject of the instant petition, are indeed authorized.[184] (Emphasis supplied)

Moreover, the Court indicated that the Constitution continues to govern the conduct of foreign military troops in the Philippines,[185] readily implying the legality of their initial entry into the country.

The OSG emphasizes that EDCA can be in the form of an executive agreement, since it merely involves "adjustments in detail" in the implementation of the MDT and the VFA.[186] It points out that there are existing treaties between the Philippines and the U.S. that have already been concurred in by the Philippine Senate and have thereby met the requirements of the Constitution under Section 25. Because of the status of these prior agreements, respondent emphasizes that EDCA need not be transmitted to the Senate.

The aforecited Dissenting Opinion of Justice Brion disagrees with the *ponencia's* application of *verba legis* construction to the words of Article XVIII, Section 25.[187] It claims that the provision is "neither plain, nor that simple."[188] To buttress its disagreement, the dissent states that the provision refers to a historical incident, which is the expiration of the 1947 MBA.[189] Accordingly, this position requires questioning the circumstances

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[184] G.R. No. 151445, 11 April 2002.

[185] In the words of the Court: "The present Constitution contains key provisions useful in determining the extent to which foreign military troops are allowed in Philippine territory." *Lim v. Executive Secretary, supra* note 69.

[186] Memorandum of OSG, pp. 14-27, *rollo,* pp. 444-457.

[187] Dissenting Opinion of Justice Arturo D. Brion, p. 29.

[188] *Id*., at 31.

[189] *Id*.

that led to the historical event, and the meaning of the terms under Article XVIII, Section 25.

This objection is quite strange. The construction technique of *verba legis* is not inapplicable just because a provision has a specific historical context. In fact, every provision of the Constitution has a specific historical context. The purpose of constitutional and statutory construction is to set tiers of interpretation to guide the Court as to how a particular provision functions. *Verba legis* is of paramount consideration, but it is not the only consideration. As this Court has often said:

> We look to the language of the document itself in our search for its meaning. **We do not of course stop there, but that is where we begin.** It is to be assumed that the words in which constitutional provisions are couched express the objective sought to be attained. **They are to be given their ordinary meaning except where technical terms are employed** in which case the significance thus attached to them prevails. As the Constitution is not primarily a lawyer's document, it being essential for the rule of law to obtain that it should ever be present in the people's consciousness, **its language as much as possible should be understood in the sense they have in common use.** What it says according to the text of the provision to be construed compels acceptance and negates the power of the courts to alter it, **based on the postulate that the framers and the people mean what they say. Thus, these are the cases where the need for construction is reduced to a minimum.**[190] (Emphases supplied)

As applied, *verba legis* aids in construing the ordinary meaning of terms. In this case, the phrase being construed is "shall not be allowed in the Philippines" and not the preceding one referring to "the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, foreign military bases, troops, or facilities." It is explicit in the wording of the provision itself that any interpretation goes beyond the text itself and into the discussion of the framers, the context of the Constitutional Commission's

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[190] *Francisco v. House of Representatives, supra* note 93 (quoting *J.M. Tuason & Co., Inc. v. Land Tenure Administration, supra* note 175).

time of drafting, and the history of the 1947 MBA. Without reference to these factors, a reader would not understand those terms. However, for the phrase "shall not be allowed in the Philippines," there is no need for such reference. The law is clear. No less than the Senate understood this when it ratified the VFA.

4. The President may generally enter into executive agreements subject to limitations defined by the Constitution and may be in furtherance of a treaty already concurred in by the Senate.

We discuss in this section why the President can enter into executive agreements.

It would be helpful to put into context the contested language found in Article XVIII, Section 25. Its more exacting requirement was introduced because of the previous experience of the country when its representatives felt compelled to consent to the old MBA.[191] They felt constrained to agree to the MBA in fulfilment of one of the major conditions for the country to gain independence from the U.S.[192] As a result of that experience, a second layer of consent for agreements that allow military bases, troops and facilities in the country is now articulated in Article XVIII of our present Constitution.

This second layer of consent, however, cannot be interpreted in such a way that we completely ignore the intent of our

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[191] *See* IV RECORD, CONSTITUTIONAL COMMISSION 759, (18 Sep. 1986): "By inequalities, is the Commissioner referring to the one-sided provisions, the onerous conditions of the RP-US Bases Agreement?," *Nicolas v. Romulo, supra* note 39, at 280 (2009).

[192] *See* Treaty of General Relations between the Republic of the Philippines and the United States of America, October 22, 1946, Art. 1 (1946); Philippine Independence Act (Tydings-McDuffie Act), Pub.L. 73-127, 48 Stat. 456, (24 March 1934), Secs. 5 and 10; FOREIGN SERVICE INSTITUTE, *supra* note 24, at ix-x.

constitutional framers when they provided for that additional layer, nor the vigorous statements of this Court that affirm the continued existence of that class of international agreements called "executive agreements."

The power of the President to enter into *binding* executive agreements without Senate concurrence is already well-established in this jurisdiction.[193] That power has been alluded to in our present and past Constitutions,[194] in various statutes,[195] in Supreme Court decisions,[196] and during the deliberations of

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[193] *Land Bank v. Atlanta Industries, Inc., supra* note 172; *Bayan Muna v. Romulo, supra* note 114; *Nicolas v. Romulo, supra* note 39; *Neri v. Senate Committee on Accountability of Public Officers and Investigations, supra* note 172; *DBM-PS v. Kolonwel Trading,* 551 Phil. 1030 (2007); *Abaya v. Ebdane, supra* note 172; *Republic v. Quasha, supra* note 173; *Adolfo v. Court of First Instance of Zambales, supra* note 173; *Commissioner of Internal Revenue v. Guerrero, supra* note 173; *Gonzales v. Hechanova, supra* note 173; *Commissioner of Customs v. Eastern Sea Trading, supra* note 173; *USAFFE Veterans Ass'n., Inc. v. Treasurer of the Phil., supra* note 173; *Uy Matiao & Co., Inc. v. City of Cebu, supra* note 173; *Abbot Laboratories v. Agrava, supra* note 173; II RECORD, CONSTITUTIONAL COMMISSION, 544-546 (31 July1986); CORTES, *supra* note 15, at 190; SINCO, *supra* note 15, at 303-305.

[194] CONSTITUTION, Art. VIII (Judicial Department), Secs. 4(2) & 5(2)(a); CONSTITUTION (1973, as amended), Art. X (The Judiciary), Secs. 2(2) & 5(2)(a), Art. XVII (Transitory Provisions), Sec. 12; CONSTITUTION (1935), Ordinance Appended to the Constitution or "Parity Amendment."

[195] Republic Act No. 9184 (Government Procurement Reform Act) (2003), Sec. 4; Administrative Code of 1987, Book II, Sec. 18(2)(a); Presidential Decree No. 1464, as amended (Tariff and Customs Code of 1978), Sec. 402(f); Republic Act No. 1789 (Reparations Law) (1957), Sec. 18.; Commonwealth Act No. 733 (Acceptance of Executive Agreement Under Title IV of [United States] Public Law 371—79th Congress) (1946).

[196] *Neri v. Senate Committee on Accountability of Public Officers and Investigations, supra* note 172; *Republic v. Quasha, supra* note 173; *Commissioner of Internal Revenue v. Guerrero, supra* note 173; *Gonzales v. Hechanova, supra* note 173; *Commissioner of Customs v. Eastern Sea Trading, supra* note 173; *USAFFE Veterans Ass'n., Inc. v. Treasurer of the Phil., supra* note 173; *Abbot Laboratories v. Agrava, supra* note 173.

the Constitutional Commission.[197] They cover a wide array of subjects with varying scopes and purposes,[198] including those that involve the presence of foreign military forces in the country.[199]

As the sole organ of our foreign relations[200] and the constitutionally assigned chief architect of our foreign policy,[201] the President is vested with the exclusive power to conduct and manage the country's interface with other states and governments. Being the principal representative of the Philippines, the Chief Executive speaks and listens for the nation; initiates, maintains, and develops diplomatic relations with other states and governments; negotiates and enters into international agreements; promotes trade, investments, tourism and other economic relations; and settles international disputes with other states.[202]

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[197] II RECORD, CONSTITUTIONAL COMMISSION, *supra* note 184.

[198] *Bayan Muna v. Romulo, supra* note 114. *See also* SINCO *supra* note 15.

[199] See generally: *Nicolas v. Romulo, supra* note 39; *Lim v. Executive Secretary, supra* note 69.

[200] See: *Akbayan Citizens Action Party v. Aquino, supra* note 15; *Pimentel v. Office of the Executive Secretary, supra* note 15. *See* CONSTITUTION, Art. VII, Sec. 1 *in relation to* Administrative Code of 1987, Book IV (Executive Branch), Title I (Foreign Affairs), Secs. 3(1) and 20; SINCO, *supra* note 15, at 297.

[201] *Pimentel v. Office of the Executive Secretary, supra* note 15. *See* CONSTITUTION, Art. VII, Sec. 1 *in relation to* Administrative Code of 1987, Book IV (Executive Branch), Title I (Foreign Affairs), Secs. 3(1) and 20; SINCO, *supra* note 15, at 298.

[202] See: CONSTITUTION, Art. VII, Sec. 1 *in relation to* Administrative Code of 1987, Book III (Office of the President), Title I (Powers of the President), Sec. 1 and Book IV (Executive Branch), Title I (Foreign Affairs), Secs. 3(1) and 20 and Title III (Justice), Sec. 35(10); *Pimentel v. Office of the Executive Secretary, supra* note 15 (on ratification of treaties); *Vinuya v. Executive Secretary, supra* note 17 (on espousing claims against foreign governments); *Abaya v. Ebdane, supra* note 172 (on contracting foreign loans); *People's Movement for Press Freedom v. Manglapus, supra* note 15 (on treaty negotiations with foreign states); SINCO, *supra* note 15, at 298.

As previously discussed, this constitutional mandate emanates from the inherent power of the President to enter into agreements with other states, including the prerogative to conclude *binding* executive agreements that do not require further Senate concurrence. The existence of this presidential power[203] is so well-entrenched that Section 5(2)(a), Article VIII of the Constitution, even provides for a check on its exercise. As expressed below, executive agreements are among those official governmental acts that can be the subject of this Court's power of judicial review:

> (2) **Review, revise, reverse, modify, or affirm** on appeal or *certiorari,* as the law or the Rules of Court may provide, **final judgments and orders of lower courts** in:
>
> (a) All **cases** in which the **constitutionality or validity** of **any treaty, international or executive agreement,** law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question. (Emphases supplied)

In *Commissioner of Customs v. Eastern Sea Trading,* executive agreements are defined as "international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature."[204] In *Bayan Muna v. Romulo,* this Court further clarified that executive agreements can cover a wide array of subjects that have various scopes and purposes.[205] They are no longer limited to the traditional subjects that are usually covered by executive agreements as identified in *Eastern Sea Trading*. The Court thoroughly discussed this matter in the following manner:

> The **categorization of subject matters** that may be **covered by international agreements** mentioned **in *Eastern Sea Trading*** is **not cast in stone.** x x x.

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[203] *See* SINCO, *supra* note 15, at 297-298.

[204] *Commissioner of Customs v. Eastern Sea Trading, supra* note 173.

[205] *Bayan Muna v. Romulo, supra* note 114. *See also* SINCO, *supra* note 15.

As may be noted, **almost half a century has elapsed since** the Court rendered its decision in ***Eastern Sea Trading***. Since then, the **conduct of foreign affairs has become more complex and the domain of international law wider,** as to include such subjects as human rights, the environment, and the sea. In fact, in the US alone, the executive agreements executed by its President from 1980 to 2000 covered subjects such as **defense**, **trade, scientific cooperation, aviation, atomic energy, environmental cooperation, peace corps, arms limitation, and nuclear safety, among others.** Surely, the **enumeration in *Eastern Sea Trading* cannot circumscribe the option of each state** on the matter of which the **international agreement format would be convenient to serve its best interest.** As Francis Sayre said in his work referred to earlier:

> . . . It would be **useless to undertake to discuss here the large variety of executive agreements as such concluded from time to time.** Hundreds of executive agreements, other than those entered into under the trade-agreement act, have been negotiated with foreign governments. . . They cover such subjects as the inspection of vessels, navigation dues, income tax on shipping profits, the admission of civil air craft, custom matters and commercial relations generally, international claims, postal matters, the registration of trademarks and copyrights, etc... (Emphases Supplied)

One of the distinguishing features of executive agreements is that their validity and effectivity are not affected by a lack of Senate concurrence.[206] This distinctive feature was recognized as early as in *Eastern Sea Trading* (1961), *viz:*

> **Treaties** are **formal documents** which **require ratification with the approval** of two-thirds of the **Senate**. **Executive agreements** become **binding through executive action without the need** of a **vote by the Senate** or by Congress.
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> x x x x x x x x x
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> [T]he **right of the Executive** to **enter into binding agreements *without* the necessity of subsequent Congressional approval** has been ***confirmed by long usage***. From the earliest days of our history we have entered into executive agreements covering such subjects

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[206] *Commissioner of Customs v. Eastern Sea Trading, supra* note 173.

as commercial and consular relations, most-favored-nation rights, patent rights, trademark and copyright protection, postal and navigation arrangements and the settlement of claims. *The* ***validity of these has never been seriously questioned by our courts.*** (Emphases Supplied)

That notion was carried over to the present Constitution. In fact, the framers specifically deliberated on whether the general term "international agreement" included executive agreements, and whether it was necessary to include an express proviso that would exclude executive agreements from the requirement of Senate concurrence. After noted constitutionalist Fr. Joaquin Bernas quoted the Court's ruling in *Eastern Sea Trading,* the Constitutional Commission members ultimately decided that the term "international agreements" as contemplated in Section 21, Article VII, does not include executive agreements, and that a proviso is no longer needed. Their discussion is reproduced below:[207]

MS. AQUINO: Madam President, first I would like a clarification from the Committee. We have retained the words "international agreement" which I think is the correct judgment on the matter because an international agreement is different from a treaty. A treaty is a contract between parties which is in the nature of international agreement and also a municipal law in the sense that the people are bound. So there is a conceptual difference. However, **I would like to be clarified if the international agreements include executive agreements.**

MR. CONCEPCION: That depends upon the parties. All parties to these international negotiations stipulate the conditions which are necessary for the agreement or whatever it may be to become valid or effective as regards the parties.

MS. AQUINO: Would that depend on the parties or would that depend on the nature of the executive agreement? According to common usage, there are **two types of executive agreement: one**

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[207] II RECORD, CONSTITUTIONAL COMMISSION 544-546 (31 July 1986). *See also* Miriam Defensor Santiago, *International Agreements in Constitutional Law: The Suspended RP-China (ZTE) Loan Agreement,* 53 ATENEO L.J. 537,539 (2008).

is **purely proceeding from an executive act which affects external relations independent of the legislative** and the other is an **executive act in pursuance of legislative authorization.** The **first kind** might take the form of just **conventions or exchanges of notes or protocol** while **the other**, which would be **pursuant to the legislative authorization**, may be in the **nature of commercial agreements.**

MR. CONCEPCION: **Executive agreements** are **generally made to implement a treaty already enforced or to determine the details for the implementation of the treaty.** We are speaking of executive agreements, not international agreements.

MS. AQUINO: I am in full agreement with that, except that it does not cover the first kind of executive agreement which is just protocol or an exchange of notes and this would be in the nature of reinforcement of claims of a citizen against a country, for example.

MR. CONCEPCION: The Commissioner is free to require ratification for validity insofar as the Philippines is concerned.

MS. AQUINO: **It is my humble submission** that we should **provide**, unless the Committee explains to us otherwise, an **explicit proviso** which would **except executive agreements** from the **requirement of concurrence of two-thirds of the Members of the Senate.** Unless I am enlightened by the Committee I propose that tentatively, the sentence should read. "No treaty or international agreement EXCEPT EXECUTIVE AGREEMENTS shall be valid and effective."

FR. BERNAS: I wonder if a **quotation from the Supreme Court decision [in Eastern Sea Trading] might help clarify this:**

> The **right of the executive to enter into binding agreements without the necessity of subsequent Congressional approval has been confirmed by long usage.** From the earliest days of our history, we have entered into executive agreements covering such subjects as commercial and consular relations, most favored nation rights, patent rights, trademark and copyright protection, postal and navigation arrangements and the settlement of claims. The validity of this has never been seriously questioned by our Courts.
>
> Agreements with respect to the registration of trademarks have been concluded by the executive of various countries under the Act of Congress of March 3, 1881 (21 Stat. 502) . . .

International agreements involving political issues or changes of national policy and those involving international agreements **of a permanent character** usually take the form of **treaties**. But international agreements embodying **adjustments of detail, carrying out well established national policies and traditions** and those involving **arrangements of a more or less temporary nature** usually take the form of **executive agreements**.

MR. ROMULO: Is the Commissioner, therefore, excluding the executive agreements?

FR. BERNAS: What we are referring to, therefore, **when we say international agreements which need concurrence** by at least two-thirds are **those which are permanent in nature.**

MS. AQUINO: And it may include commercial agreements which are executive agreements essentially but which are proceeding from the authorization of Congress. If that is our understanding, then I am willing to withdraw that amendment.

FR. BERNAS: **If it is with prior authorization of Congress, then it does not need subsequent concurrence by Congress.**

MS. AQUINO: In that case, I am withdrawing my amendment.

MR. TINGSON: Madam President.

THE PRESIDENT: Is Commissioner Aquino satisfied?

MS. AQUINO: Yes. There is **already an agreement among us on the definition of "executive agreements" and that would make unnecessary any explicit proviso on the matter.**

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MR. GUINGONA: I am not clear as to the meaning of "executive agreements" because I heard that these executive agreements must rely on treaties. In other words, there must first be treaties.

MR. CONCEPCION: No, I was speaking about the common use, as executive agreements being the implementation of treaties, details of which do not affect the sovereignty of the State.

MR. GUINGONA: But what about the matter of permanence, Madam President? Would 99 years be considered permanent? What would be the measure of permanency? I do not conceive of a treaty that is going to be forever, so there must be some kind of a time limit.

MR. CONCEPCION: I suppose the Commissioner's question is whether this type of agreement should be included in a provision of the Constitution requiring the concurrence of Congress.

MR. GUINGONA: It depends on the concept of the executive agreement of which I am not clear. **If the executive agreement partakes of the nature of a treaty, then it should also be included.**

MR. CONCEPCION: Whether it partakes or not of the nature of a treaty, it is within the power of the Constitutional Commission to require that.

MR. GUINGONA: Yes. **That is why I am trying to clarify whether the words "international agreements" would include executive agreements.**

MR. CONCEPCION: **No**, **not necessarily; generally no**.

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MR. ROMULO: I wish to be recognized first. I have only one question. Do we take it, therefore, that **as far as the Committee is concerned, the term "international agreements" does not include the term "executive agreements" as read by the Commissioner in that text?**

FR. BERNAS: **Yes.** (Emphases Supplied)

The inapplicability to executive agreements of the requirements under Section 21 was again recognized in *Bayan v. Zamora* and in *Bayan Muna v. Romulo*. These cases, both decided under the aegis of the present Constitution, quoted *Eastern Sea Trading* in reiterating that executive agreements are valid and binding even without the concurrence of the Senate.

Executive agreements may dispense with the requirement of Senate concurrence because of the legal mandate with which they are concluded. As culled from the afore-quoted deliberations of the Constitutional Commission, past Supreme Court Decisions, and works of noted scholars,[208] executive agreements merely

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[208] *Bayan Muna v. Romulo, supra* note 114, at 261; *Gonzales v. Hechanova, supra* note 173; *Commissioner of Customs v. Eastern Sea Trading, supra* note 173; II RECORD, CONSTITUTIONAL COMMISSION 544-546 (31 July 1986); CORTES, *supra* note 15; SINCO, *supra* note 15.

involve arrangements on the implementation of *existing* policies, rules, laws, or agreements. They are concluded (1) to adjust the details of a treaty;[209] (2) pursuant to or upon confirmation by an act of the Legislature;[210] or (3) in the exercise of the President's independent powers under the Constitution.[211] The *raison d'etre* of executive agreements hinges on *prior* constitutional or legislative authorizations.

The special nature of an executive agreement is not just a domestic variation in international agreements. International practice has accepted the use of various forms and designations of international agreements, ranging from the traditional notion of a treaty — which connotes a formal, solemn instrument — to engagements concluded in modem, simplified forms that no longer necessitate ratification.[212] An international agreement

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[209] See, *e.g.*: *Bayan Muna v. Romulo, supra* note 114 (on the transfer or surrender of US nationals in the Philippines who may be sued before international tribunals); *Nicolas v. Romulo, supra* note 39 (on agreement concerning the detention of a member of the U.S. Armed Forces, who was accused of committing a crime in the Philippines); *Adolfo v. Court of First Instance of Zambales, supra* note 173 (on exchange of notes pursuant to the 1947 MBA); Treaty of General Relations Between the Republic of the Philippines and the United States of America (1946).

[210] See, *e.g.*: *Republic v. Quasha, supra* note 173; *Commissioner of Internal Revenue v. Guerrero, supra* note 173; *Abbot Laboratories v. Agrava, supra* note 173 (on the interpretation of the provision in the Philippine Patent Law of 1947 concerning the reciprocity measure on priority rights to be granted to U.S. nationals); *Uy Matiao & Co., Inc. v. City of Cebu, supra* note 173; Republic Act No. 9 — *Authority of President to Enter into Agreement with US under Republic of the Phil. Military Assistance Act* (1946).

[211] See, *e.g.*: *Land Bank v. Atlanta Industries, Inc., supra* note 172 (on foreign loan agreement); *Bayan Muna v. Romulo, supra* note 114; *DBM-PS v. Kolonwel Trading, supra* note 193 (on foreign loan agreement); *Abaya v. Ebdane, supra* note 172 (on foreign loan agreement); *Commissioner of Customs v. Eastern Sea Trading, supra* note 173 (on foreign trade and financial agreements); *USAFFE Veterans Ass'n., Inc. v. Treasurer of the Phil., supra* note 173 (on conversion of unspent fund as a foreign loan). *But see* on limitations: *Gonzales v. Hechanova, supra* note 173.

[212] See generally: *Bayan v. Zamora, supra* note 23; Philippe Gautier, *1969 Vienna Convention, Article 2– Use of Terms, in* THE VIENNA

may take different forms: treaty, act, protocol, agreement, *concordat, compromis d'arbitrage,* convention, covenant, declaration, exchange of notes, statute, pact, charter, agreed minute, memorandum of agreement, *modus vivendi,* or some other form.[213] Consequently, under international law, the distinction between a treaty and an international agreement or even an executive agreement is irrelevant for purposes of determining international rights and obligations.

However, this principle does not mean that the domestic law distinguishing *treaties, international agreements,* and *executive agreements* is relegated to a mere variation in form, or that the constitutional requirement of Senate concurrence is demoted to an optional constitutional directive. There remain two very important features that distinguish *treaties* from *executive agreements* and translate them into terms of art in the domestic setting.

First, executive agreements must remain traceable to an express or implied authorization under the Constitution, statutes, or treaties. The absence of these precedents puts the validity and effectivity of executive agreements under serious question for the main function of the Executive is to enforce the Constitution and the laws enacted by the Legislature, not to defeat or interfere in the performance of these rules.[214] In tum, executive agreements cannot create new international obligations that are not expressly allowed or reasonably implied in the law they purport to implement.

CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY, VOL. I 35-36 (Olivier Corten & Pierre Klein eds. 20 II).

[213] See generally: *Bayan v. Zamora, supra* note 23; Philippe Gautier, *1969 Vienna Convention, Article 2– Use of Terms, in* THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY, VOL. I 37 (Olivier Corten & Pierre Klein eds. 2011) (quoting *Customs regime between Germany and Austria,* Advisory Opinion, 1931 PCIJ, Ser. A/B no. 41, p. 47).

[214] *Gonzales v. Hechanova, supra* note 173.

Second, treaties are, by their very nature, considered superior to executive agreements. Treaties are products of the acts of the Executive and the Senate[215] unlike executive agreements, which are solely executive actions.[216] Because of legislative participation through the Senate, a treaty is regarded as being on the same level as a statute.[217] If there is an irreconcilable conflict, a later law or treaty takes precedence over one that is prior.[218] An executive agreement is treated differently. Executive agreements that are inconsistent with either a law or a treaty are considered ineffective.[219] Both types of international agreement are nevertheless subject to the supremacy of the Constitution.[220]

This rule does not imply, though, that the President is given *carte blanche* to exercise this discretion. Although the Chief Executive wields the exclusive authority to conduct our foreign relations, this power must still be exercised within the context and the parameters set by the Constitution, as well as by existing domestic and international laws. There are constitutional provisions that restrict or limit the President's prerogative in concluding international agreements, such as those that involve the following:

a. The policy of freedom from nuclear weapons within Philippine territory[221]

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[215] *Bayan Muna v. Romulo, supra* note 114 (affirming *Adolfo v. Court of First Instance of Zambales, supra* note 173).

[216] See: *Bayan Muna v. Romulo, supra* note 114.

[217] *Pharmaceutical and Health Care Association v. Duque,* 561 Phil. 386 (2007); *Lim v. Executive Secretary, supra* note 69; *Secretary of Justice v. Lantion, supra* note 17; *Philip Morris, Inc. v. Court of Appeals,* G.R. No. 91332, 16 July 1993, 224 SCRA 576.

[218] See: *Bayan Muna v. Romulo, supra* note 114 (affirming *Adolfo v. Court of First Instance of Zambales, supra* note 173); CIVIL CODE, Art. 7.

[219] See: *Bayan Muna v. Romulo, supra* note 114; *Nicolas v. Romulo, supra* note 39; *Gonzales v. Hechanova, supra* note 173; CIVIL CODE, Art. 7.

[220] See CONSTITUTION, Art. VIII, Sec. 5(2); CIVIL CODE, Art. 7.

[221] CONSTITUTION, Art. II, Sec. 8.

b. The fixing of tariff rates, import and export quotas, tonnage and wharfage dues, and other duties or imposts, which must be pursuant to the authority granted by Congress[222]
c. The grant of any tax exemption, which must be pursuant to a law concurred in by a majority of all the Members of Congress[223]
d. The contracting or guaranteeing, on behalf of the Philippines, of foreign loans that must be previously concurred in by the Monetary Board[224]
e. The authorization of the presence of foreign military bases, troops, or facilities in the country must be in the form of a treaty duly concurred in by the Senate.[225]
f. For agreements that do not fall under paragraph 5, the concurrence of the Senate is required, should the form of the government chosen be a treaty.

5. The President had the choice to enter into EDCA by way of an executive agreement or a treaty.

No court can tell the President to desist from choosing an executive agreement over a treaty to embody an international agreement, unless the case falls squarely within Article VIII, Section 25.

As can be gleaned from the debates among the members of the Constitutional Commission, they were aware that legally binding international agreements were being entered into by countries in forms other than a treaty. At the same time, it is clear that they were also keen to preserve the concept of "executive agreements" and the right of the President to enter into such agreements.

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[222] CONSTITUTION, Art. VI, Sec. 28(2).

[223] CONSTITUTION, Art. VI, Sec. 28(4).

[224] CONSTITUTION, Art. VII, Sec. 20.

[225] CONSTITUTION, Art. XVIII, Sec. 25.

What we can glean from the discussions of the Constitutional Commissioners is that they understood the following realities:

1. Treaties, international agreements, and executive agreements are all constitutional manifestations of the conduct of foreign affairs with their distinct legal characteristics.

    a. Treaties are formal contracts between the Philippines and other States-parties, which are in the nature of international agreements, and also of municipal laws in the sense of their binding nature.[226]

    b. International agreements are similar instruments, the provisions of which may require the ratification of a designated number of parties thereto. These agreements involving political issues or changes in national policy, as well as those involving international agreements of a permanent character, usually take the form of treaties. They may also include commercial agreements, which are executive agreements essentially, but which proceed from previous authorization by Congress, thus dispensing with the requirement of concurrence by the Senate.[227]

    c. Executive agreements are generally intended to implement a treaty already enforced or to determine the details of the implementation thereof that do not affect the sovereignty of the State.[228]

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[226] II RECORD, CONSTITUTIONAL COMMISSION 544 (31 July 1986).

[227] II RECORD, CONSTITUTIONAL COMMISSION 545 (31 July 1986).

[228] II RECORD, CONSTITUTIONAL COMMISSION 545 (31 July 1986).

2. Treaties and international agreements that cannot be mere executive agreements must, by constitutional decree, be concurred in by at least two-thirds of the Senate.

3. However, an agreement — the subject of which is the entry of foreign military troops, bases, or facilities — is particularly restricted. The requirements are that it be in the form of a treaty concurred in by the Senate; that when Congress so requires, it be ratified by a majority of the votes cast by the people in a national referendum held for that purpose; and that it be recognized as a treaty by the other contracting State.

4. Thus, executive agreements can continue to exist as a species of international agreements.

That is why our Court has ruled the way it has in several cases.

In *Bayan Muna v. Romulo,* we ruled that the President acted within the scope of her constitutional authority and discretion when she chose to enter into the RP-U.S. Non-Surrender Agreement in the form of an executive agreement, instead of a treaty, and in ratifying the agreement without Senate concurrence. The Court *en bane* discussed this intrinsic presidential prerogative as follows:

> Petitioner parlays the notion that the Agreement is of dubious validity, partaking as it does of the nature of a treaty; hence, it must be duly concurred in by the Senate. x x x. Pressing its point, petitioner submits that the subject of the Agreement does not fall under any of the subject-categories that x x x may be covered by an executive agreement, such as commercial/consular relations, most-favored nation rights, patent rights, trademark and copyright protection, postal and navigation arrangements and settlement of claims.
>
> The categorization of subject matters that may be covered by international agreements mentioned in *Eastern Sea Trading* is not cast in stone. There are **no hard and fast rules on the propriety of entering,** on a given subject, **into a treaty or an executive agreement**

as an instrument of international relations. The **primary consideration in the choice** of the form of agreement is the **parties' intent and desire to craft an international agreement in the form they so wish to further their respective interests.** Verily, **the matter of form takes a back seat** when it comes to effectiveness and binding effect of the enforcement of a treaty or an executive agreement, as the parties in either international agreement each labor under the *pacta sunt servanda* principle.

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But over and above the foregoing considerations is **the fact that** — save for the situation and matters contemplated in Sec. 25, Art. XVIII of the Constitution — when a treaty is required, **the Constitution does not classify any subject, like that involving political issues, to be in the form of, and ratified as, a treaty.** What the Constitution merely prescribes is that treaties need the concurrence of the Senate by a vote defined therein to complete the ratification process.

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x x x. As the President wields vast powers and influence, her conduct in the external affairs of the nation is, as *Bayan* would put it, "executive altogether." **The right of the President to enter into or ratify binding executive agreements has been confirmed by long practice.**

In thus agreeing to conclude the Agreement thru E/N BFO-028-03, then President Gloria Macapagal-Arroyo, represented by the Secretary of Foreign Affairs, **acted within the scope of the authority and discretion vested in her by the Constitution.** At the end of the day, **the President – by ratifying, thru her deputies, the non-surrender agreement – did nothing more than discharge a constitutional duty and exercise a prerogative that pertains to her office.** (Emphases supplied)

Indeed, in the field of external affairs, the President must be given a larger measure of authority and wider discretion, subject only to the least amount of checks and restrictions under the Constitution.[229] The rationale behind this power and discretion

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[229] SINCO, *supra* note 15, at 297. *See: Vinuya v. Executive Secretary, supra* note 17 (on espousal of the claims of Philippine nationals against a foreign government); *Pimentel v. Office of the Executive Secretary, supra*

was recognized by the Court in *Vinuya v. Executive Secretary*, cited earlier.[230]

Section 9 of Executive Order No. 459, or the Guidelines in the Negotiation of International Agreements and its Ratification, thus, correctly reflected the inherent powers of the President when it stated that the DFA "shall determine whether an agreement is an executive agreement or a treaty."

Accordingly, in the exercise of its power of judicial review, the Court does not look into whether an international agreement should be in the form of a treaty or an executive agreement, save in cases in which the Constitution or a statute requires otherwise. Rather, in view of the vast constitutional powers and prerogatives granted to the President in the field of foreign affairs, the task of the Court is to determine whether the international agreement is consistent with the applicable limitations.

6. Executive agreements may cover the matter of foreign military forces if it merely involves detail adjustments.

The practice of resorting to executive agreements in adjusting the details of a law or a treaty that already deals with the presence of foreign military forces is not at all unusual in this jurisdiction. In fact, the Court has already implicitly acknowledged this practice in *Lim v. Executive Secretary.*[231] In that case, the Court was asked to scrutinize the constitutionality of the Terms of Reference of the *Balikatan 02-1* joint military exercises, which sought to implement the VFA. Concluded in the form of an executive agreement, the Terms of Reference

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note 15 (on ratification of international agreements); *Secretary of Justice v. Lantion, supra* note 17 (on temporarily withholding of the right to notice and hearing during the evaluation stage of the extradition process); *People's Movement for Press Freedom v. Manglapus, supra* note 15 (on the imposition of secrecy in treaty negotiations with foreign countries).

[230] *Vinuya v. Executive Secretary, supra* note 17.

[231] *Lim v. Executive Secretary, supra* note 69.

detailed the coverage of the term "activities" mentioned in the treaty and settled the matters pertaining to the construction of temporary structures for the U.S. troops during the activities; the duration and location of the exercises; the number of participants; and the extent of and limitations on the activities of the U.S. forces. The Court upheld the Terms of Reference as being consistent with the VFA. It no longer took issue with the fact that the *Balikatan* Terms of Reference was not in the form of a treaty concurred in by the Senate, even if it dealt with the regulation of the activities of foreign military forces on Philippine territory.

In *Nicolas v. Romulo*[232] the Court again impliedly affirmed the use of an executive agreement in an attempt to adjust the details of a provision of the VFA. The Philippines and the U.S. entered into the Romulo-Kenney Agreement, which undertook to clarify the detention of a U.S. Armed Forces member, whose case was pending appeal after his conviction by a trial court for the crime of rape. In testing the validity of the latter agreement, the Court precisely alluded to one of the inherent limitations of an executive agreement: it cannot go beyond the terms of the treaty it purports to implement. It was eventually ruled that the Romulo-Kenney Agreement was "not in accord" with the VFA, since the former was squarely inconsistent with a provision in the treaty requiring that the detention be "by Philippine authorities." Consequently, the Court ordered the Secretary of Foreign Affairs to comply with the VFA and "forthwith negotiate with the United States representatives for the appropriate agreement on detention facilities under Philippine authorities as provided in Art. V, Sec. 10 of the VFA."[233]

Culling from the foregoing discussions, we reiterate the following pronouncements to guide us in resolving the present controversy:

1. Section 25, Article XVIII of the Constitution, contains stringent requirements that must be fulfilled by the

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[232] *Nicolas v. Romulo, supra* note 39.

[233] *Nicolas v. Romulo, supra* note 39, at 291.

international agreement allowing the presence of foreign military bases, troops, or facilities in the Philippines: (a) the agreement must be in the form of a treaty, and (b) it must be duly concurred in by the Senate.

2. If the agreement is not covered by the above situation, then the President may choose the form of the agreement *(i.e.,* either an executive agreement or a treaty), provided that the agreement dealing with foreign military bases, troops, or facilities is not the principal agreement that first allows their entry or presence in the Philippines.

3. The executive agreement must not go beyond the parameters, limitations, and standards set by the law and/or treaty that the former purports to implement; and must not unduly expand the international obligation expressly mentioned or necessarily implied in the law or treaty.

4. The executive agreement must be consistent with the Constitution, as well as with existing laws and treaties.

In light of the President's choice to enter into EDCA in the form of an executive agreement, respondents carry the burden of proving that it is a mere implementation of existing laws and treaties concurred in by the Senate. EDCA must thus be carefully dissected to ascertain if it remains within the legal parameters of a valid executive agreement.

7. EDCA is consistent with the content, purpose, and framework of the MDT and the VFA

The starting point of our analysis is the rule that "an executive agreement x x x may not be used to amend a treaty."[234] In *Lim*

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[234] *Bayan Muna v. Romulo, supra* note 114, at 273. See also: *Nicolas v. Romulo, supra* note 39; *Adolfo v. Court of First Instance of Zambales, supra* note 173; *Abbot Laboratories v. Agrava, supra* note 173. Senate Resolution No. 18, dated 27 May 1999, which embodies the concurrence

v. *Executive Secretary* and in *Nicolas v. Romulo,* the Court approached the question of the validity of executive agreements by comparing them with the general framework and the specific provisions of the treaties they seek to implement.

In *Lim,* the Terms of Reference of the joint military exercises was scrutinized by studying "the framework of the treaty antecedents to which the Philippines bound itself,"[235] *i.e.,* the MDT and the VFA. The Court proceeded to examine the extent of the term "activities" as contemplated in Articles I[236] and II[237] of the VFA. It later on found that the term "activities" was deliberately left undefined and ambiguous in order to permit "a wide scope of undertakings subject only to the approval of the Philippine government"[238] and thereby allow the parties "a certain leeway in negotiation."[239] The Court eventually ruled that the Terms of Reference fell within the sanctioned or allowable activities, especially in the context of the VFA and the MDT.

The Court applied the same approach to *Nicolas v. Romulo.* It studied the provisions of the VFA on custody and detention to ascertain the validity of the Romulo-Kenney Agreement.[240]

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of the Senate in the VFA, stresses in its preamble that "**nothing in this Resolution or in the VFA** shall be construed as **authorizing the President of the Philippines alone to bind the Philippines to any amendment of any provision of the VFA**." (Emphases Supplied)

[235] *Lim v. Executive Secretary, supra* note 69, at 571.

[236] The provision states: "As used in this Agreement, **'United States personnel'** means United States military and civilian personnel **temporarily in the Philippines in connection with activities approved** by the Philippine Government. x x x." (Emphases supplied)

[237] The provision states: "It is the duty of United States personnel to respect the laws of the Republic of the Philippines and to **abstain from any activity inconsistent with the spirit of this agreement**, and, **in particular, from any political activity in the Philippines**. The Government of the United States shall take all measures within its authority to ensure that this is done." (Emphases supplied)

[238] *Lim v. Executive Secretary, supra* note 69, at 572.

[239] *Lim v. Executive Secretary*, *supra* note 69, at 575.

[240] According to the agreement: "[H]e will be detained at the first floor, Rowe (JUSMAG) Building, U.S. Embassy Compound in a room of

It eventually found that the two international agreements were not in accord, since the Romulo-Kenney Agreement had stipulated that U.S. military personnel shall be detained at The U.S. Embassy Compound and guarded by U.S. military personnel, instead of by Philippine authorities. According to the Court, the parties "recognized the difference between custody during the trial and detention after conviction."[241] Pursuant to Article V(6) of the VFA, the custody of a U.S. military personnel resides with U.S. military authorities during trial. Once there is a finding of guilt, Article V (10) requires that the confinement or detention be "by Philippine authorities."

Justice Marvic M.V.F. Leonen's Dissenting Opinion posits that EDCA "substantially modifies or amends the VFA"[242] and follows with an enumeration of the differences between EDCA and the VFA. While these arguments will be rebutted more fully further on, an initial answer can already be given to each of the concerns raised by his dissent.

The first difference emphasized is that EDCA does not only regulate visits as the VFA does, but allows temporary stationing on a rotational basis of U.S. military personnel and their contractors in physical locations with permanent facilities and pre-positioned military materiel.

This argument does not take into account that these permanent facilities, while built by U.S. forces, are to be owned by the Philippines once constructed.[243] Even the VFA allowed construction for the benefit of U.S. forces during their temporary visits.

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approximately 10 x 12 square feet. He will be guarded round the clock by U.S. military personnel. The Philippine police and jail authorities, under the direct supervision of the Philippine Department of Interior and Local Government (DILG) will have access to the place of detention to ensure the United States is in compliance with the terms of the VFA."

[241] *Nicolas v. Romulo, supra* note 39, at 287.

[242] Dissenting Opinion of Justice Marvic M.V.F. Leonen, p. 1.

[243] EDCA, Art. V (l) and (4).

The second difference stated by the dissent is that EDCA allows the prepositioning of military materiel, which can include various types of warships, fighter planes, bombers, and vessels, as well as land and amphibious vehicles and their corresponding ammunition.[244]

However, the VFA clearly allows the same kind of equipment, vehicles, vessels, and aircraft to be brought into the country. Articles VII and VIII of the VFA contemplates that U.S. equipment, materials, supplies, and other property are imported into or acquired in the Philippines by or on behalf of the U.S. Armed Forces; as are vehicles, vessels, and aircraft operated by or for U.S. forces in connection with activities under the VFA. These provisions likewise provide for the waiver of the specific duties, taxes, charges, and fees that correspond to these equipment.

The third difference adverted to by the Justice Leonen's dissent is that the VFA contemplates the entry of troops for training exercises, whereas EDCA allows the use of territory for launching military and paramilitary operations conducted in other states.[245] The dissent of Justice Teresita J. Leonardo-De Castro also notes that VFA was intended for non-combat activities only, whereas the entry and activities of U.S. forces into Agreed Locations were borne of military necessity or had a martial character, and were therefore not contemplated by the VFA.[246]

This Court's jurisprudence however established in no uncertain terms that combat-related activities, as opposed to actual combat, were allowed under the MDT and VFA, *viz:*

> Both the history and intent of the Mutual Defense Treaty and the VFA support the conclusion that combat-related activities as opposed to combat itself such as the one subject of the instant petition, are indeed authorized.[247]

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[244] Dissenting Opinion of Justice Leonen, *supra* note 242, p. 2.

[245] *Id*.

[246] Concurring and Dissenting Opinion of Justice Teresita J. Leonardo-De Castro, p. 25.

[247] *Lim vs. Executive Secretary, supra* note 69, at 575.

Hence, even if EDCA was borne of military necessity, it cannot be said to have strayed from the intent of the VFA since EDCA's combat-related components are allowed under the treaty.

Moreover, both the VFA and EDCA are silent on what these activities actually are. Both the VFA and EDCA deal with the presence of U.S. forces within the Philippines, but make no mention of being platforms for activity beyond Philippine territory. While it may be that, as applied, military operations under either the VFA or EDCA would be carried out in the future, the scope of judicial review does not cover potential breaches of discretion but only actual occurrences or blatantly illegal provisions. Hence, we cannot invalidate EDCA on the basis of the potentially abusive use of its provisions.

The fourth difference is that EDCA supposedly introduces a new concept not contemplated in the VFA or the MDT: Agreed Locations, Contractors, Pre-positioning, and Operational Control.[248]

As previously mentioned, these points shall be addressed fully and individually in the latter analysis of EDCA's provisions. However, it must already be clarified that the terms and details used by an implementing agreement need not be found in the mother treaty. They must be sourced from the authority derived from the treaty, but are not necessarily expressed word-for-word in the mother treaty. This concern shall be further elucidated in this Decision.

The fifth difference highlighted by the Dissenting Opinion is that the VFA does not have provisions that may be construed as a restriction on or modification of obligations found in existing statues, including the jurisdiction of courts, local autonomy, and taxation. Implied in this argument is that EDCA contains such restrictions or modifications.[249]

This last argument cannot be accepted in view of the clear provisions of EDCA. Both the VFA and EDCA ensure Philippine

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[248] Dissenting Opinion of Justice Leonen, *supra* note 242.

[249] *Id*.

jurisdiction in all instances contemplated by both agreements, with the exception of those outlined by the VFA in Articles III-VI. In the VFA, taxes are clearly waived whereas in EDCA, taxes are assumed by the government as will be discussed later on. This fact does not, therefore, produce a diminution of jurisdiction on the part of the Philippines, but rather a recognition of sovereignty and the rights that attend it, some of which may be waived as in the cases under Articles III-VI of the VFA.

Taking off from these concerns, the provisions of EDCA must be compared with those of the MDT and the VFA, which are the two treaties from which EDCA allegedly draws its validity.

"Authorized presence" under the VFA versus "authorized activities" under EDCA: (1) U.S. personnel and (2) U.S. contractors

The OSG argues[250] that EDCA merely details existing policies under the MDT and the VFA. It explains that EDCA articulates the *principle of defensive preparation* embodied in Article II of the MDT; and seeks to enhance the defensive, strategic, and technological capabilities of both parties pursuant to the objective of the treaty to strengthen those capabilities to prevent or resist a possible armed attack. Respondent also points out that EDCA simply implements Article I of the VFA, which already allows the entry of U.S. troops and personnel into the country. Respondent stresses this Court's recognition in *Lim v. Executive Secretary* that U.S. troops and personnel are authorized to conduct activities that promote the goal of maintaining and developing their defense capability.

Petitioners contest[251] the assertion that the provisions of EDCA merely implement the MDT. According to them, the treaty does

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[250] Memorandum of OSG, pp. 14-27, *rollo* (G.R. No. 212426), pp. 444-457.

[251] Memorandum of Saguisag, *et al.,* pp. 22-23, 38-49, *rollo* (G.R. No. 212426, Vol. II), pp. 992-993, 1008-1019; Memorandum of Bayan, *et al.,* pp. 35-41, *rollo* (G.R. No. 212444), pp. 599-605.

not specifically authorize the entry of U.S. troops in the country in order to maintain and develop the individual and collective capacities of both the Philippines and the U.S. to resist an armed attack. They emphasize that the treaty was concluded at a time when there was as yet no specific constitutional prohibition on the presence of foreign military forces in the country.

Petitioners also challenge the argument that EDCA simply implements the VFA. They assert that the agreement covers only *short-term* or *temporary visits* of U.S. troops "from time to time" for the specific purpose of *combined* military exercises with their Filipino counterparts. They stress that, in contrast, U.S. troops are allowed under EDCA to perform activities *beyond* combined military exercises, such as those enumerated in Articles 111(1) and IV(4) thereof. Furthermore, there is some degree of permanence in the presence of U.S. troops in the country, since the effectivity of EDCA is continuous until terminated. They proceed to argue that while troops have a "rotational" presence, this scheme in fact fosters their permanent presence.

a. Admission of U.S. military and civilian personnel into Philippine territory is already allowed under the VFA

We shall first deal with the recognition under EDCA of the presence in the country of three distinct classes of individuals who will be conducting different types of activities within the Agreed Locations: (1) U.S. military personnel; (2) U.S. civilian personnel; and (3) U.S. contractors. The agreement refers to them as follows:

"United States personnel" means **United States military** and **civilian personnel temporarily in the territory of the Philippines** in connection with activities approved by the Philippines, **as those terms are defined** in the **VFA**.[252]

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[252] EDCA, Art. II(I).

"United States forces" means the entity comprising United States **personnel** and all **property**, **equipment**, **and materiel** of the United States Armed Forces present in the territory of the Philippines.[253]

"United States contractors" means **companies and firms**, and **their employees, under contract or subcontract** to or on behalf of the United States Department of Defense. United States contractors are **not** included as part of the definition of **United States personnel** in this Agreement, including within the context of the VFA.[254]

United States forces may contract for **any materiel, supplies, equipment, and services** (including construction) to be furnished or undertaken in the territory of the Philippines without restriction as to choice of contractor, supplier, or person **who provides** such **materiel, supplies, equipment,** or **services**. Such contracts shall be solicited, awarded, and administered in accordance with the laws and regulations of the United States.[255] (Emphases Supplied)

A thorough evaluation of **how EDCA is phrased clarifies that the agreement does not deal with the entry into the country of U.S. personnel and contractors *per se*.** While Articles I (l)(b)[256] and II(4)[257] speak of "the right to access

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[253] EDCA, Art. II(2).

[254] EDCA, Art. II(3).

[255] EDCA, Art. VIII(l).

[256] According to this provision: "1. This Agreement deepens defense cooperation between the Parties and maintains and develops their individual and collective capacities, in furtherance of Article II of the MDT, which states that 'the Parties separately and jointly by self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack,' and within the context of the VFA. This includes: xxx (b) **Authorizing access to Agreed Locations** in the territory of the Philippines by United States forces on a rotational basis, as mutually determined by the Parties.

[257] According to this provision: **"Agreed Locations"** means **facilities and areas** that are provided by the Government of the Philippines through the AFP and **that United States forces, United States contractors**, and others as mutually agreed, **shall have the right to access and use pursuant** to this agreement. Such Agreed Locations may be listed in an annex to be appended to this Agreement, and may be further described in implementing arrangements.

and use" the Agreed Locations, their wordings indicate the presumption that these groups have already been allowed entry into Philippine territory, for which, unlike the VFA, EDCA has no specific provision. Instead, Article II of the latter simply alludes to the VFA in describing *U.S. personnel,* a term defined under Article I of the treaty as follows:

> As used in this Agreement, "United States personnel" means United States military and civilian personnel temporarily in the Philippines **in connection with activities approved** by the Philippine Government. Within this definition:
>
> 1. The term **"military personnel"** refers to **military members** of the **United States Army, Navy, Marine Corps, Air Force, and Coast Guard.**
>
> 2. The term **"civilian personnel"** refers to individuals who are **neither nationals of nor ordinarily resident in the Philippines** and who are **employed by the United States armed forces or who are accompanying the United States armed forces,** such as employees of the **American Red Cross** and the **United Services Organization**.[258]

Article II of EDCA must then be read with Article III of the VFA, which provides for the entry accommodations to be accorded to U.S. military and civilian personnel:

> 1. The Government of the **Philippines shall facilitate** the **admission of United States personnel** and their departure from the Philippines in connection with activities covered by this agreement.
>
> 2. United States **military personnel shall be exempt from passport and visa regulations upon entering** and departing the Philippines.
>
> 3. The following documents only, which shall be required in respect of United States military personnel who enter the Philippines; x x x.
>
> 4. United States **civilian personnel** shall be **exempt from visa requirements but shall present,** upon demand, **valid passports upon entry** and departure of the Philippines. (Emphases Supplied)

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[258] VFA I, Art. I.

By virtue of Articles I and III of the VFA, the Philippines already allows U.S. military and civilian personnel to be "temporarily in the Philippines," so long as their presence is "in connection with activities approved by the Philippine Government." The Philippines, through Article III, even guarantees that it shall facilitate the admission of U.S. personnel into the country and grant exemptions from passport and visa regulations. The VFA does not even limit their temporary presence to specific locations.

Based on the above provisions, the **admission and presence of U.S. military and civilian personnel in Philippine territory are already allowed under the VFA, the treaty supposedly being implemented by EDCA.** What EDCA has effectively done, in fact, is merely provide the mechanism to identify the locations in which U.S. personnel may perform allowed activities pursuant to the VFA. As the implementing agreement, it regulates and limits the presence of U.S. personnel in the country.

b. EDCA does not provide the legal basis for admission of U.S. contractors into Philippine territory; their entry must be sourced from extraneous Philippine statutes and regulations for the admission of alien employees or business persons.

Of the three aforementioned classes of individuals who will be conducting certain activities within the Agreed Locations, we note that only *U.S. contractors* are not explicitly mentioned in the VFA. This does not mean, though, that the recognition of their presence under EDCA is *ipso facto* an amendment of the treaty, and that there must be Senate concurrence before they are allowed to enter the country.

Nowhere in EDCA are U.S. contractors guaranteed immediate admission into the Philippines. Articles III and IV, in fact, merely

grant them the right of access to, and the authority to conduct certain activities within the Agreed Locations. Since Article II(3) of EDCA specifically leaves out *U.S. contractors* from the coverage of the VFA, they shall not be granted the same entry accommodations and privileges as those enjoyed by U.S. military and civilian personnel under the VFA.

Consequently, it is neither mandatory nor obligatory on the part of the Philippines to admit U.S. contractors into the country.[259] We emphasize that the admission of aliens into Philippine territory is "a matter of pure permission and simple tolerance which creates no obligation on the part of the government to permit them to stay."[260] Unlike U.S. personnel who are accorded entry accommodations, U.S. contractors are subject to Philippine immigration laws.[261] The latter must comply with our visa and passport regulations[262] and prove that they are not subject to exclusion under any provision of Philippine immigration laws.[263]

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[259] See: *Djumantan v. Domingo,* 310 Phil. 848 (1995).

[260] *Djumantan v. Domingo,* 310 Phil. 848, 854 (1995).

[261] Commonwealth Act No. 613 (The Philippine Immigration Act of 1940, as amended).

[262] Commonwealth Act No. 613 (The Philippine Immigration Act of 1940, as amended), Secs. 10 & 11.

[263] Commonwealth Act No. 613 (The Philippine Immigration Act of 1940, as amended), Secs. 29 & 30. Under Section 29, the following classes of aliens shall be excluded from entry into the Philippines: (1) Idiots or insane persons and persons who have been insane; (2) Persons afflicted with a loathsome or dangerous contagious disease, or epilepsy; (3) Persons who have been convicted of a crime involving moral turpitude; (4) Prostitutes, or procurers, or persons coming for any immoral purposes; (5) Persons likely to become, public charge; (6) Paupers, vagrants, and beggars; (7) Persons who practice polygamy or who believe in or advocate the practice of polygamy; (8) **Persons who believe in or advocate** the **overthrow by force and violence** of the **Government** of the Philippines, or of constituted lawful authority, or who disbelieve in or are opposed to organized government, or who **advocate the assault or assassination of public officials** because of their office, or who **advocate or teach principles, theories, or ideas contrary to the Constitution of the Philippines** or advocate or teach the unlawful destruction of property, or who are members of or affiliated with any organization entertaining or teaching such doctrines; (9) Persons

The President may also deny them entry pursuant to his absolute and unqualified power to prohibit or prevent the admission of aliens whose presence in the country would be inimical to public interest.[264]

In the same vein, the President may exercise the plenary power to expel or deport U.S.

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over fifteen years of age, physically capable of reading, who cannot read printed matter in ordinary use in any language selected by the alien, but this provision shall not apply to the grandfather, grandmother, father, mother, wife, husband or child of a Philippine citizen or of an alien lawfully resident in the Philippines; (10) Persons who are members of a family accompanying an excluded alien, unless in the opinion of the Commissioner of Immigration no hardship would result from their admission; (11) Persons accompanying an excluded person who is helpless from mental or physical disability or infancy, when the protection or guardianship of such accompanying person or persons is required by the excluded person, as shall be determined by the Commissioner of Immigration; (12) Children under fifteen years of age, unaccompanied by or not coming to a parent, except that any such children may be admitted in the discretion of the Commissioner of Immigration, if otherwise admissible; (13) Stowaways, except that any stowaway may be admitted in the discretion of the Commissioner of Immigration, if otherwise admissible; (14) Persons coming to perform unskilled manual labor in pursuance of a promise or offer of employment, express or implied, but this provision shall not apply to persons bearing passport visas authorized by Section Twenty of this Act; (15) **Persons who have been excluded or deported from the Philippines**, but this provision may be waived in the discretion of the Commissioner of Immigration: *Provided, however,* That the Commissioner of Immigration shall not exercise his discretion in favor of aliens excluded or deported on the ground of conviction for any crime involving moral turpitude or for any crime penalized under Sections [45] and [46] of this Act or on the ground of having engaged in hoarding, black-marketing or profiteering unless such aliens have previously resided in the Philippines immediately before his exclusion or deportation for a period of ten years or more or are married to native Filipino women; (16) Persons who have been removed from the Philippines at the expense of the Government of the Philippines, as indigent aliens, under the provisions of Section [43] of this Act, and who have not obtained the consent of the Board of Commissioners to apply for readmission; and (17) Persons not properly documented for admission as may be required under the provisions of this Act. (Emphasis supplied)

[264] *Djumantan v. Domingo, supra* note 259.

contractors[265] as may be necessitated by national security, public safety, public health, public morals, and national interest.[266] They may also be deported if they are found to be illegal or undesirable aliens pursuant to the Philippine Immigration Act[267]

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[265] Administrative Code of 1987, Book III (Office of the President), Title I (Powers of the President), Secs. 8 & 11 *in relation to* Commonwealth Act No. 613 (The Philippine Immigration Act of 1940), Sec. 52 and Act. No. 2711 (Revised Administrative Code of 19I7), Sec. 69. See: *Djumantan v. Domingo, supra* note 259; *Teo Tung v. Machlan,* 60 Phil. 9I6 (1934).

[266] *See:* Commonwealth Act No. 613 (The Philippine Immigration Act of 1940, as amended), Secs. 6, I2, 28 & 29; *Djumantan v. Domingo, supra* note 259; *Salazar v. Achacoso,* 262 Phil. 160 (1990); RONALDO P. LEDESMA, *DEPORTATION PROCEEDINGS: PRACTICE, PRECEDENTS, AND PROCEDURES* 96 (2013).

[267] Commonwealth Act No. 6I3 (The Philippine Immigration Act of 1940, as amended), Sec. 37. The provision enumerates as follows: (1) **Any alien who enters the Philippines** x x x by means of **false and misleading statements or without inspection and admission** by the immigration authorities x x x; (2) Any alien who enters the Philippines x x x, who was **not lawfully admissible at the time of entry**; (3) Any alien who, x x x, is **convicted in the Philippines** and sentenced for a term of one year or more for a **crime involving moral turpitude** committed within five years after his entry to the Philippines, or who, at any time after such entry, is so convicted and sentenced more than once; (4) Any alien who is convicted and sentenced for a violation of the law governing prohibited drugs; (5) Any alien who practices prostitution or is an inmate of a house of prostitution or is connected with the management of a house of prostitution, or is a procurer; (6) Any alien who becomes a public charge within five years after entry from causes not affirmatively shown to have arisen subsequent to entry; (7) Any alien who remains in the Philippines in **violation of any limitation or condition under which he was admitted as a non-immigrant**; (8) Any alien who **believes in, advises, advocates or teaches the overthrow by force and violence of the Government of the Philippines**, or of constituted law and authority, or who disbelieves in or is opposed to organized government or who advises, advocates, or teaches the assault or assassination of public officials because of their office, or who advises, advocates, or teaches the unlawful destruction of property, or who is a member of or affiliated with any organization entertaining, advocating or teaching such doctrines, or who in any manner whatsoever lends assistance, financial or otherwise, to the dissemination of such doctrines; (9) Any alien who commits any of the acts described in Sections [45] and [46] of this Act, independent of criminal action which may be brought

and the Data Privacy Act.[268] In contrast, Article III(5) of the VFA requires a request for removal from the Philippine government before a member of the U.S. personnel may be "dispos[ed] x x x outside of the Philippines."

c. Authorized activities of U.S. military and civilian personnel within Philippine territory are in furtherance of the MDT and the VFA

We begin our analysis by quoting the relevant sections of the MDT and the VFA that pertain to the activities in which U.S. military and civilian personnel may engage:

MUTUAL DEFENSE TREATY

Article II

In order more effectively to achieve the objective of this Treaty, the Parties separately and **jointly by** self-help and **mutual aid** will **maintain and develop their individual and collective capacity** to **resist armed attack.**

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against him: x x x; (10) Any alien who, at any time within five years after entry, shall have been **convicted of violating** the provisions of the Philippine Commonwealth Act [653], otherwise known as the **Philippine Alien Registration Act of 1941**, or who, at any time after entry, shall have been convicted more than once of violating the provisions of the same Act; (11) Any alien who engages in **profiteering, hoarding, or blackmarketing**, independent of any criminal action which may be brought against him; (12) Any alien who is **convicted of any offense** penalized under Commonwealth Act [473], otherwise known as the **Revised Naturalization Laws of the Philippines**, or any law relating to acquisition of Philippine citizenship; (13) Any alien who defrauds his creditor by absconding or alienating properties to prevent them from, being attached or executed. (Emphasis supplied)

[268] Republic Act No. l0173, Sec. 34. According to the provision, "[i]f the offender is an alien, he or she shall, **in addition to the penalties** herein prescribed, be **deported without further proceedings** after serving the penalties prescribed."

Article III

The Parties, **through their Foreign Ministers or their deputies,** will **consult together** from time to time regarding the **implementation of this Treaty** and whenever in the opinion of either of them the territorial integrity, political independence or security of either of the Parties is threatened by external armed attack in the Pacific.

VISITING FORCES AGREEMENT

Preamble

x x x x x x x x x

Reaffirming their obligations under the **Mutual Defense Treaty** of August 30, 1951;

Noting that from time to time elements of the United States armed forces may visit the Republic of the Philippines;

Considering that **cooperation** between the United States and the Republic of the Philippines **promotes their common security interests;**

x x x x x x x x x

Article I - Definitions

As used in this Agreement, "United States personnel" means United States military and civilian personnel temporarily in the Philippines in connection with **activities approved by the Philippine Government**. Within this definition: x x x

Article II -Respect for Law

It is the **duty of United States personnel to respect the laws of the Republic of the Philippines** and **to abstain from any activity inconsistent with the spirit of this agreement,** and, in particular, from **any political activity** in the Philippines. The Government of the United States shall take all measures within its authority to ensure that this is done.

Article VII - Importation and Exportation

1. United States Government **equipment, materials, supplies, and other property imported into or acquired** in the Philippines by or on behalf of the United States armed forces **in connection with**

activities to which this agreement applies, shall be free of all Philippine duties, taxes and other similar charges. Title to such property shall remain with the United States, which may remove such property from the Philippines at any time, free from export duties, taxes, and other similar charges. x x x.

Article VIII -Movement of Vessels and Aircraft

1. **Aircraft operated** by or for the **United States armed forces may enter the Philippines upon approval** of the Government of the Philippines **in accordance** with procedures stipulated in **implementing arrangements**.

2. **Vessels operated** by or for the **United States armed forces may enter** the Philippines **upon approval of the Government of the Philippines.** The movement of vessels shall be **in accordance with international custom and practice governing such vessels,** and **such agreed implementing arrangements as necessary**. x x x (Emphases Supplied)

Manifest in these provisions is the abundance of references to the creation of further "implementing arrangements" including the identification of "activities [to be] approved by the Philippine Government." To determine the parameters of these implementing arrangements and activities, we referred to the content, purpose, and framework of the MDT and the VFA.

By its very language, the MDT contemplates a situation in which both countries shall engage in *joint* activities, so that they can maintain and develop their defense capabilities. The wording itself evidently invites a reasonable construction that the *joint* activities shall involve *joint* military trainings, maneuvers, and exercises. Both the interpretation[269] and the

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[269] See: *Secretary of Justice v. Lantion, supra* note 17. According to the Court: "An **equally compelling factor to consider is the understanding of the parties themselves** to the RP-US Extradition Treaty x x x. The rule is recognized that while courts have the power to interpret treaties, **the meaning given them by the departments of government** particularly **charged with their negotiation and enforcement** is **accorded great weight**. x x x This interpretation by the two governments cannot be given scant significance. It will be presumptuous for the Court to assume that both governments did not understand the terms of the treaty they concluded." (Emphasis supplied)

subsequent practice[270] of the parties show that the MDT independently allows joint military exercises in the country. *Lim v. Executive Secretary*[271] and *Nicolas v. Romulo*[272] recognized that *Balikatan* exercises, which are activities that seek to enhance and develop the strategic and technological capabilities of the parties to resist an armed attack, "fall squarely under the provisions of the RP-US MDT."[273] In *Lim,* the Court especially noted that the Philippines and the U.S. continued to conduct joint military exercises even after the expiration of the MBA and even before the conclusion of the VFA.[274] These activities presumably related to the Status of Forces Agreement, in which the parties agreed on the status to be accorded to U.S. military and civilian personnel while conducting activities in the Philippines in relation to the MDT.[275]

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[270] See Status of Forces Agreement of 1993, *supra* note 70. The International Law Commission explains that the subsequent practice of states in the application of the treaty may be taken into account in ascertaining the parties' agreement in the interpretation of that treaty. This is "well-established in the jurisprudence of international tribunals" even before the Vienna Convention on the Law of Treaties was concluded. See International Law Commission, *Draft Articles on the Law of Treaties with Commentaries,* 1966(II) Y.B.I.L.C. 187, at 221-222 (citing *Russian Claim for Indemnities* [Russia/Turkey], XI R.I.A.A. 421, 433 [1912] [Nov. 11]; *Competence of the ILO to Regulate Agricultural Labour,* 1922 P.C.I.J. [ser. B] No. 2, 39 [Aug. 12]; *Interpretation of Article 3, paragraph 2, of the Treaty of Lausanne,* 1925 P.C.I.J. [ser. B] No. 12, 24 [Nov. 21]; *Brazilian Loans,* 1929 P.C.I.J. (ser. A) No. 21, 119 [Jul. 12]; and *Corfu Channel* [*U.K. v. Albania*], 1949 I.C.J. 4, 25 [Apr. 9]).

[271] *Lim v. Executive Secretary, supra* note 69, at 571-572.

[272] *Nicolas v. Romulo, supra* note 39, at 284.

[273] *Id*.

[274] *Lim v. Executive Secretary, supra* note 69, at 575; Joint Report of the Committee on Foreign Relations and the Committee on National Defense and Security *reproduced in* SENATE OF THE PHILIPPINES, *supra* note 69, at 206.

[275] Status of Forces Agreement of 1993, *supra* note 70. According to Note No. 93-2301 dated 11 June 1993 of the DFA to the U.S. Embassy, "The [DFA] x x x has the honor to reaffirm its position that all U.S. military and civilian personnel present in the Philippines participating in activities

Further, it can be logically inferred from Article V of the MDT that these *joint* activities may be conducted on Philippine or on U.S. soil. The article expressly provides that the term *armed attack* includes "an armed attack on the **metropolitan territory** of either of the Parties, or on the **island territories under its jurisdiction** in the Pacific or on its **armed forces, public vessels or aircraft** in the Pacific." Surely, in maintaining and developing our defense capabilities, an assessment or training will need to be performed, separately and jointly by self-help and mutual aid, in the territories of the contracting parties. It is reasonable to conclude that the assessment of defense capabilities would entail understanding the terrain, wind flow patterns, and other environmental factors unique to the Philippines.

It would also be reasonable to conclude that a simulation of how to respond to attacks in vulnerable areas would be part of the training of the parties to maintain and develop their capacity to resist an actual armed attack and to test and validate the defense plan of the Philippines. It is likewise reasonable to imagine that part of the training would involve an analysis of the effect of the weapons that may be used and how to be prepared for the eventuality. This Court recognizes that all of this may require training in the area where an armed attack might be directed at the Philippine territory.

The provisions of the MDT must then be read in conjunction with those of the VFA.

Article I of the VFA indicates that the presence of U.S. military and civilian personnel in the Philippines is "in connection with activities approved by the Philippine Government." While the treaty does not expressly enumerate or detail the nature of activities of U.S. troops in the country, its Preamble makes

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undertaken in relation to the Mutual Defense Treaty will be accorded the same status as the U.S. Embassy's technical and administrative personnel who are qualified to enter the Philippines under existing Philippine laws. The Department further proposes that the procedures as well as the arrangements for these MDT-related activities are to be mutually agreed upon by the MDB, subject to the guidelines of the Council of Ministers."

explicit references to the reaffirmation of the obligations of both countries under the MDT. These obligations include the strengthening of international and regional security in the Pacific area and the promotion of common security interests.

The Court has already settled in *Lim v. Executive Secretary* that the phrase "activities approved by the Philippine Government" under Article I of the VFA was intended to be ambiguous in order to afford the parties flexibility to adjust the details of the purpose of the visit of U.S. personnel.[276] In ruling that the Terms of Reference for the *Balikatan* Exercises in 2002 fell within the context of the treaty, this Court explained:

> After studied reflection, it appeared **farfetched** that the **ambiguity surrounding the meaning of the word "activities" arose from accident**. In our view, it was **deliberately made that way to give both parties a certain leeway in negotiation**. In this manner, **visiting US forces may sojourn in Philippine territory for purposes other than military**. As conceived, the joint exercises may include training on new techniques of patrol and surveillance to protect the nation's marine resources, sea search-and-rescue operations to assist vessels in distress, disaster relief operations, civic action projects such as the building of school houses, medical and humanitarian missions, and the like.
>
> Under these auspices, the VFA gives legitimacy to the current Balikatan exercises. **It is only logical to assume that "Balikatan 02-1," a "mutual anti-terrorism advising, assisting and training exercise," falls under the umbrella of sanctioned or allowable activities in the context of the agreement.** Both the history and intent of the Mutual Defense Treaty and the VFA support the conclusion that combat-related activities — as opposed to combat itself — such as the one subject of the instant petition, are indeed authorized. (Emphases Supplied)

The joint report of the Senate committees on foreign relations and on national defense and security further explains the wide

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[276] *Lim v. Executive Secretary, supra* note 69. See *also* Joint Report of the Committee on Foreign Relations and the Committee on National Defense and Security *reproduced in* SENATE OF THE PHILIPPINES, *supra* note 69, at 230-231.

range and variety of activities contemplated in the VFA, and how these activities shall be identified:[277]

These **joint exercises** envisioned in the VFA are **not limited to combat-related activities**; they have a **wide range and variety**. They include exercises that will reinforce the AFP's ability to **acquire new techniques of patrol and surveillance** to protect the country's maritime resources; **sea-search and rescue operations** to assist ships in distress; and **disaster-relief operations** to aid the civilian victims of natural calamities, such as earthquakes, typhoons and tidal waves.

x x x x x x x x x

Joint activities under the VFA will include combat maneuvers; training in aircraft maintenance and equipment repair; civic-action projects; and consultations and meetings of the Philippine-U.S. Mutual Defense Board. **It is at the level of the Mutual Defense Board**—which is headed jointly by the Chief of Staff of the AFP and the Commander in Chief of the U.S. Pacific Command-**that the VFA exercises are planned. Final approval of any activity** involving U.S. forces is, however, **invariably given by the Philippine Government**.

x x x x x x x x x

Siazon clarified that **it is not the VFA by itself that determines what activities will be conducted** between the armed forces of the U.S. and the Philippines. **The VFA regulates and provides the legal framework for the presence, conduct and legal status of U.S. personnel** while they are in the country for visits, joint exercises and other related activities. (Emphases Supplied)

What can be gleaned from the provisions of the VFA, the joint report of the Senate committees on foreign relations and on national defense and security, and the ruling of this Court in *Lim* is that the "activities" referred to in the treaty are meant to be specified and identified in *further* agreements. EDCA is one such agreement.

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[277] Joint Report of the Committee on Foreign Relations and the Committee on National Defense and Security *reproduced in* SENATE OF THE PHILIPPINES, *supra* note 69, at 205-206, 231.

EDCA seeks to be an instrument that enumerates the Philippine- approved activities of U.S. personnel referred to in the VFA. EDCA allows U.S. military and civilian personnel to perform "activities approved by the Philippines, as those terms are defined in the VFA"[278] and clarifies that these activities include those conducted within the Agreed Locations:

1. Security cooperation exercises; joint and combined training activities; humanitarian assistance and disaster relief activities; and such other activities as may be agreed upon by the Parties[279]
2. Training; transit; support and related activities; refueling of aircraft; bunkering of vessels; temporary maintenance of vehicles, vessels, and aircraft; temporary accommodation of personnel; communications; prepositioning of equipment, supplies, and materiel; deployment of forces and materiel; and such other activities as the Parties may agree[280]
3. Exercise of operational control over the Agreed Locations for construction activities and other types of activity, including alterations and improvements thereof[281]
4. Exercise of all rights and authorities within the Agreed Locations that are necessary for their operational control or defense, including the adoption of appropriate measures to protect U.S. forces and contractors[282]
5. Use of water, electricity, and other public utilities[283]

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[278] EDCA, Art. II(l).

[279] EDCA, Art. 1(3).

[280] EDCA, Art. III(I).

[281] EDCA, Art. III(4) & (6).

[282] EDCA, Art. VI(3).

[283] EDCA, Art. VII(I).

6. Operation of their own telecommunication systems, including the utilization of such means and services as are required to ensure the full ability to operate telecommunication systems, as well as the use of the necessary radio spectrum allocated for this purpose[284]

According to Article I of EDCA, one of the purposes of these activities is to maintain and develop, jointly and by mutual aid, the individual and collective capacities of both countries to resist an armed attack. It further states that the activities are in furtherance of the MDT and within the context of the VFA.

We note that these planned activities are very similar to those under the Terms of Reference[285] mentioned in *Lim.* Both EDCA and the Terms of Reference authorize the U.S. to perform the following: (a) participate in training exercises; (b) retain command over their forces; (c) establish temporary structures in the country; (d) share in the use of their respective resources, equipment and other assets; and (e) exercise their right to self-defense. We quote the relevant portion of the Terms and Conditions as follows:[286]

I. **POLICY LEVEL**

x x x x x x x x x

No permanent US basing and support facilities shall be established. **Temporary structures** such as those for **troop billeting, classroom instruction and messing may be set up for use by RP and US Forces during the Exercise**.

The Exercise shall be implemented jointly by RP and US Exercise Co-Directors under the authority of the Chief of

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[284] EDCA, Art. VII(2).

[285] According to the Agreed Minutes of the Discussion between the former Philippine Vice-President/Secretary of Foreign Affairs Teofisto T. Guingona, Jr. and U.S. Assistant Secretary of State for East Asian and Pacific Affairs James Kelly, both countries approved the Terms of Agreement of the Balikatan exercises. See: *rollo* (G.R. No. 151445), pp. 99-100.

[286] *Lim v. Executive Secretary, supra* note 69, at 565-566.

Staff, AFP. In no instance will US Forces operate independently during field training exercises (FTX). **AFP and US Unit Commanders will retain command over their respective forces under the overall authority of the Exercise Co-Directors.** RP and US participants shall comply with operational instructions of the AFP during the FTX.

The exercise shall be conducted and completed within a period of not more than six months, with the projected participation of 660 US personnel and 3,800 RP Forces. The Chief of Staff, AFP shall direct the Exercise Co-Directors to wind up and terminate the Exercise and other activities within the six month Exercise period.

The Exercise is a **mutual counter-terrorism advising, assisting and training Exercise** relative to Philippine efforts against the ASG, and will be conducted on the Island of Basilan. Further advising, assisting and training exercises shall be conducted in Malagutay and the Zamboanga area. Related activities in Cebu will be for support of the Exercise.

x x x x x x x x x

US exercise participants **shall not engage in combat, without prejudice to their right of self-defense**.

These terms of Reference are for purposes of this Exercise only and do not create additional legal obligations between the US Government and the Republic of the Philippines.

II. **EXERCISE LEVEL**

1. **TRAINING**

a. The Exercise shall involve the conduct of **mutual military assisting, advising and training** of RP and US Forces with the primary objective of **enhancing the operational capabilities** of both forces to combat terrorism.

b. **At no time shall US Forces operate independently within RP territory.**

c. Flight plans of all aircraft involved in the exercise will comply with the local air traffic regulations.

2. **ADMINISTRATION & LOGISTICS**

x x x x x x x x x

a. RP and US participating forces **may share**, in accordance with their respective laws and regulations, in the **use of their resources, equipment and other assets. They will use their respective logistics channels.** x x x. (Emphases Supplied)

After a thorough examination of the content, purpose, and framework of the MDT and the VFA, we find that EDCA has remained within the parameters set in these two treaties. Just like the Terms of Reference mentioned in *Lim,* mere adjustments in detail to implement the MDT and the VFA can be in the form of executive agreements.

Petitioners assert[287] that the duration of the activities mentioned in EDCA is no longer consistent with the temporary nature of the visits as contemplated in the VFA. They point out that Article XII(4) of EDCA has an initial term of 10 years, a term automatically renewed unless the Philippines or the U.S. terminates the agreement. According to petitioners, such length of time already has a badge of permanency.

In connection with this, Justice Teresita J. Leonardo-De Castro likewise argues in her Concurring and Dissenting Opinion that the VFA contemplated mere temporary visits from U.S. forces, whereas EDCA allows an unlimited period for U.S. forces to stay in the Philippines.[288]

However, the provisions of EDCA directly contradict this argument by limiting itself to 10 years of effectivity. Although this term is automatically renewed, the process for terminating the agreement is unilateral and the right to do so automatically accrues at the end of the 10 year period. Clearly, this method does not create a permanent obligation.

Drawing on the reasoning in *Lim,* we also believe that it could not have been by chance that the VFA does not include a maximum time limit with respect to the presence of U.S.

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[287] Memorandum of Saguisag, *et al.,* pp. 43-46, *rollo* (G.R. No. 212426, Vol. II), pp. 1013-1016.

[288] Concurring and Dissenting Opinion of Justice Teresita J. Leonardo-De Castro, p. 24.

personnel in the country. We construe this lack of specificity as a deliberate effort on the part of the Philippine and the U.S. governments to leave out this aspect and reserve it for the "adjustment in detail" stage of the implementation of the treaty. We interpret the subsequent, unconditional concurrence of the Senate in the entire text of the VFA as an implicit grant to the President of a margin of appreciation in determining the duration of the "temporary" presence of U.S. personnel in the country.

Justice Brion's dissent argues that the presence of U.S. forces under EDCA is "more permanent" in nature.[289] However, this argument has not taken root by virtue of a simple glance at its provisions on the effectivity period. EDCA does not grant permanent bases, but rather temporary rotational access to facilities for efficiency. As Professor Aileen S.P. Baviera notes:

> The new EDCA would grant American troops, ships and planes rotational access to facilities of the Armed Forces of the Philippines — but not permanent bases which are prohibited under the Philippine Constitution — with the result of reducing response time should an external threat from a common adversary crystallize.[290]

EDCA is far from being permanent in nature compared to the practice of states as shown in other defense cooperation agreements. For example, Article XIV(l) of the U.S.-Romania defense agreement provides the following:

> This Agreement is **concluded for an indefinite period** and shall enter into force in accordance with the internal laws of each Party x x x. (emphasis supplied)

Likewise, Article 36(2) of the *US-Poland Status of Forces Agreement* reads:

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[289] Dissenting Opinion of Justice Brion, pp. 48-51.

[290] Aileen S.P. Baviera, *Implications of the US-Philippines Enhanced Defense Cooperation Agreement,* ASIA PACIFIC BULLETIN No. 292, 9 May 2014.

This Agreement has been **concluded for an indefinite period of time**. It may be terminated by written notification by either Party and in that event it terminates 2 years after the receipt of the notification. (emphasis supplied)

Section VIII of *US.-Denmark Mutual Support Agreement* similarly provides:

8.1 This Agreement, which consists of a Preamble, SECTIONs I-VIII, and Annexes A and B, shall become effective on the date of the last signature affixed below and **shall remain in force until terminated by the Parties**, provided that it may be terminated by either Party upon 180 days written notice of its intention to do so to the other Party. (emphasis supplied)

On the other hand, Article XXI(3) of the *US.-Australia Force Posture Agreement* provides a longer initial term:

3. This Agreement shall have an **initial term of 25 years and thereafter shall continue in force**, but may be terminated by either Party at any time upon one year's written notice to the other Party through diplomatic channels. (emphasis supplied)

The phrasing in EDCA is similar to that in the U.S.-Australia treaty but with a term less than half of that is provided in the latter agreement. This means that EDCA merely follows the practice of other states in not specifying a non-extendible maximum term. This practice, however, does not automatically grant a badge of permanency to its terms. Article XII(4) of EDCA provides very clearly, in fact, that its effectivity is for an initial term of 10 years, which is far shorter than the terms of effectivity between the U.S. and other states. It is simply illogical to conclude that the initial, extendible term of 10 years somehow gives EDCA provisions a permanent character.

The reasoning behind this interpretation is rooted in the constitutional role of the President who, as Commander-in-Chief of our armed forces, is the principal strategist of the nation and, as such, duty-bound to defend our national sovereignty and territorial integrity;[291] who, as chief architect of our foreign

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[291] See CONSTITUTION, Art. VII, Sec. 18 in relation to Art. II, Sec. 3.

relations, is the head policymaker tasked to assess, ensure, and protect our national security and interests;[292] who holds the most comprehensive and most confidential information about foreign countries[293] that may affect how we conduct our external affairs; and who has unrestricted access to highly classified military intelligence data[294] that may threaten the life of the nation. Thus, if after a geopolitical prognosis of situations affecting the country, a belief is engendered that a much longer period of military training is needed, the President must be given ample discretion to adopt necessary measures including the flexibility to set an extended timetable.

Due to the sensitivity and often strict confidentiality of these concerns, we acknowledge that the President may not always be able to candidly and openly discuss the complete situation being faced by the nation. The Chief Executive's hands must not be unduly tied, especially if the situation calls for crafting programs and setting timelines for approved activities. These activities may be necessary for maintaining and developing our capacity to resist an armed attack, ensuring our national sovereignty and territorial integrity, and securing our national interests. If the Senate decides that the President is in the best position to define in operational terms the meaning of *temporary* in relation to the visits, considered individually or in their totality, the Court must respect that policy decision. If the Senate feels that there is no need to set a time limit to these visits, neither should we.

Evidently, the fact that the VFA does not provide specificity in regard to the extent of the "temporary" nature of the visits of U.S. personnel does not suggest that the duration to which

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[292] See Administrative Code of 1987, Book IV (Executive Branch), Title I (Foreign Affairs), Sec. 3(1) in relation to CONSTITUTION, Art. VII, Sec. 1 and Art. II, Sec. 3; *Akbayan Citizens Action Party v. Aquino, supra* note 15; *Pimentel v. Office of the Executive Secretary, supra* note 15; *Bayan v. Zamora, supra* note 23.

[293] *Vinuya v. Executive Secretary, supra* note 17.

[294] *Id*.

the President may agree is unlimited. Instead, the boundaries of the meaning of the term *temporary* in Article I of the treaty must be measured depending on the purpose of each visit or activity.[295] That purpose must be analyzed on a case-by-case basis depending on the factual circumstances surrounding the conclusion of the implementing agreement. While the validity of the President's actions will be judged under less stringent standards, the power of this Court to determine whether there was grave abuse of discretion remains unimpaired.

d. Authorized activities performed by US. contractors within Philippine territory — who were legitimately permitted to enter the country independent of EDCA — are subject to relevant Philippine statutes and regulations and must be consistent with the MDT and the VFA

Petitioners also raise[296] concerns about the U.S. government's purported practice of hiring private security contractors in other countries. They claim that these contractors — one of which has already been operating in Mindanao since 2004 — have been implicated in incidents or scandals in other parts of the globe involving rendition, torture and other human rights violations. They also assert that these contractors employ paramilitary forces in other countries where they are operating.

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[295] See generally Joint Report of the Committee on Foreign Relations and the Committee on National Defense and Security *reproduced in* SENATE OF THE PHILIPPINES, *supra* note 69, at 206. According to the report: "The Mutual Defense Board programs an average of 10 to 12 exercises annually. Participating U.S. personnel, numbering from 10 to more than 1,000, stay in Philippine territory from four days to four weeks, depending on the nature of the exercise."

[296] Memorandum of Bayan, pp. 47-51, *rollo* (G.R. No. 212444), pp. 611-615

Under Articles III and IV of EDCA, U.S. contractors are authorized to perform only the following activities:

1. Training; transit; support and related activities; refueling of aircraft; bunkering of vessels; temporary maintenance of vehicles, vessels, and aircraft; temporary accommodation of personnel; communications; prepositioning of equipment, supplies, and materiel; deployment of forces and materiel; and such other activities as the Parties may agree[297]
2. Prepositioning and storage of defense equipment, supplies, and materiel, including delivery, management, inspection, use, maintenance, and removal of such equipment, supplies and materiet[298]
3. Carrying out of matters in accordance with, and to the extent permissible under, U.S. laws, regulations, and policies[299]

EDCA requires that all activities within Philippine territory be in accordance with Philippine law. This means that certain privileges denied to aliens are likewise denied to foreign military contractors. Relevantly, providing security[300] and carrying, owning, and possessing firearms[301] are illegal for foreign civilians.

The laws in place already address issues regarding the regulation of contractors. In the 2015 Foreign Investment Negative list[302] the Executive Department has already identified corporations that have equity restrictions in Philippine jurisdiction. Of note is No. 5 on the list — private security agencies that cannot have any foreign equity by virtue of Section 4 of Republic

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[297] EDCA, Art. III (I).

[298] EDCA, Art. IV (4).

[299] EDCA, Art. IV (5).

[300] Commonwealth Act No. 541.

[301] Republic Act No. 10951.

[302] Executive Order No. 184 (2015).

Act No. 5487;[303] and No. 15, which regulates contracts for the construction of defense-related structures based on Commonwealth Act No. 541.

Hence, any other entity brought into the Philippines by virtue of EDCA must subscribe to corporate and civil requirements imposed by the law, depending on the entity's corporate structure and the nature of its business.

That Philippine laws extraneous to EDCA shall govern the regulation of the activities of U.S. contractors has been clear even to some of the present members of the Senate.

For instance, in 2012, a U.S. Navy contractor, the Glenn Marine, was accused of spilling fuel in the waters off Manila Bay.[304] The Senate Committee on Foreign Relations and the Senate Committee on Environment and Natural Resources chairperson claimed environmental and procedural violations by the contractor.[305] The U.S. Navy investigated the contractor and promised stricter guidelines to be imposed upon its contractors.[306] The statement attributed to Commander Ron

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[303] Republic Act No. 5487– *The Private Security Agency Law,* as amended by P.D. No. 11.

[304] *Glenn Defense: SBMA suspension doesn't cover all our functions,* RAPPLER, available at <http://www.rappler.corn/nation/16688-glenn-defense-sbma-suspension-does-not-cover-all-functions>(last visited 3 December 2015).

[305] *Glenn Defense: SBMA suspension doesn't cover all our functions,* RAPPLER, available at <http://www.rappler.com/nation/16688-glenn-defense-sbma-suspension-does-not-cover-all-functions>(last visited 3 December 2015); Norman Bordadora, *US Navy contractor liable for Subic waste dumping,* PHILIPPINE DAILY INQUIRER, available at <http://globalnation.inquirer.net/63765/us-navy-contractor- liable-for-subic-waste-dumping> (last visited 3 December 2015); Matikas Santos, *US navy contractor dumped millions of liters of wastes in Subic,* PHILIPPINE DAILY INQUIRER, available at <http://globalnation.inquirer.net/63649/us-navy-contractor-dumped-millions-of-liters-of-wastes-in-subic> (last visited 3 December 2015).

[306] Vincent Cabreza, *US Embassy says dumping of untreated waste in Subic not condoned,* PHILIPPINE DAILY INQUIRER, available at

Steiner of the public affairs office of the U.S. Navy's 7th Fleet — that U.S. Navy contractors are bound by Philippine laws — is of particular relevance. The statement acknowledges not just the presence of the contractors, but also the U.S. position that these contractors are bound by the local laws of their host state. This stance was echoed by other U.S. Navy representatives.[307]

This incident simply shows that the Senate was well aware of the presence of U.S. contractors for the purpose of fulfilling the terms of the VFA. That they are bound by Philippine law is clear to all, even to the U.S.

As applied to EDCA, even when U.S. contractors are granted access to the Agreed Locations, all their activities must be consistent with Philippine laws and regulations and pursuant to the MDT and the VFA.

While we recognize the concerns of petitioners, they do not give the Court enough justification to strike down EDCA. In *Lim v. Executive Secretary,* we have already explained that we cannot take judicial notice of claims aired in news reports, "not because of any issue as to their truth, accuracy, or impartiality, but for the simple reason that facts must be established in accordance with the rules of evidence."[308] What is more, we cannot move one step ahead and speculate that the alleged illegal activities of these contractors in other countries would take place in the Philippines with certainty. As can be seen from the above discussion, making sure that U.S. contractors comply with Philippine laws is a function of law enforcement. EDCA does not stand in the way of law enforcement.

<http://globalnation.inquirer.net/60255/us-embassy-says-dumping-of-untreated-waste-in-subic-not-condoned> (last visited 3 December 2015).

[307] Robert Gonzaga, *Contractor could face sanctions from US navy for violations*, PHILIPPINE DAILY INQUIRER, available at <http://globalnation.inquirer.net/56622/contractor-could-face-sanctions-from-us-navy-for-violations> (last visited 3 December 2015).

[308] *Lim v. Executive Secretary*, *supra* note 69, at 580.

Nevertheless, we emphasize that U.S. contractors are explicitly excluded from the coverage of the VFA. As visiting aliens, their entry, presence, and activities are subject to all laws and treaties applicable within the Philippine territory. They may be refused entry or expelled from the country if they engage in illegal or undesirable activities. There is nothing that prevents them from being detained in the country or being subject to the jurisdiction of our courts. Our penal laws,[309] labor

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[309] See R.A. No. 10591 or the Comprehensive Firearms and Ammunition Regulation Act. According to Section 4, Article II thereof: In order **to qualify and acquire a license to own and possess a firearm or firearms and ammunition,** the applicant, **must be a Filipino citizen**, at least twenty-one (21) years old and has gainful work, occupation or business or has filed an Income Tax Return (ITR) for the preceding year as proof of income, profession, business or occupation. In addition, the applicant should submit the following certification issued by appropriate authorities attesting the following: x x x." On the other hand, Section 5 states: "A **juridical person maintaining its own security force may be issued a regular license to own and possess firearms and ammunition** under the following conditions: (a) It must be **Filipino-owned and duly registered** with the Securities and Exchange Commission (SEC); (b) It is current, operational and a continuing concern; (c) It has completed and submitted all its reportorial requirements to the SEC; and (d) It has paid all its income taxes for the year, as duly certified by the Bureau of Internal Revenue. x x x. Security agencies and LGUs shall be included in this category of licensed holders but shall be subject to additional requirements as may be required by the Chief of the PNP. Finally, Section 22 expresses: "A **person arriving in the Philippines who is legally in possession of any firearm or ammunition in his/her country of origin** and who has declared the existence of the firearm upon embarkation and disembarkation but whose **firearm is not registered in the Philippines in accordance with this Act** shall **deposit the same upon written receipt with the Collector of Customs** for delivery to the FEO of the PNP for safekeeping, or for the issuance of a permit to transport if the person is a competitor in a sports shooting competition. **If the importation of the same is allowed and the party in question desires to obtain a domestic firearm license, the same should be undertaken in accordance with the provisions of this Act.** If no license is desired or leave to import is not granted, the firearm or ammunition in question shall remain in the custody of the FEO of the PNP until otherwise disposed of in accordance with law." (Emphasis supplied)

laws,[310] and immigrations laws[311] apply to them and therefore limit their activities here. Until and unless there is another law or treaty that specifically deals with their entry and activities, their presence in the country is subject to unqualified Philippine jurisdiction.

EDCA does not allow the presence of U.S.-owned or-controlled military facilities and bases in the Philippines

Petitioners Saguisag *et al.* claim that EDCA permits the establishment of U.S. military bases through the "euphemistically" termed "Agreed Locations."[312] Alluding to the definition of this term in Article II(4) of EDCA, they point out that these locations are actually military bases, as the definition refers to facilities and areas to which U.S. military forces have access for a variety of purposes. Petitioners claim that there are several badges of exclusivity in the use of the Agreed Locations by U.S. forces. *First,* Article V(2) of EDCA alludes to a "return" of these areas once they are no longer needed by U.S. forces, indicating that there would be some transfer of use. *Second,* Article IV(4) of EDCA talks about American forces' unimpeded access to the Agreed Locations for all matters relating to the prepositioning and storage of U.S. military equipment, supplies,

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[310] Article 40 of the Labor Code, as amended, provides: *"Employment permit of non-resident aliens.* Any **alien seeking admission to the Philippines for employment purposes** and any domestic or foreign employer who desires to engage an alien for employment in the Philippines **shall obtain an employment permit from the Department of Labor**. The employment permit may be issued to a non-resident alien or to the applicant employer **after a determination of the non-availability of a person in the Philippines who is competent, able and willing at the time of application to perform the services for which the alien is desired**. For an **enterprise registered in preferred areas of investments**, said employment permit **may be issued upon recommendation of the government agency** charged with the supervision of said registered enterprise." (Emphasis supplied)

[311] *Supra* notes 263 and 267.

[312] Memorandum of Saguisag, *et al.,* pp. 25-29, *rollo* (G.R. No. 212426, Vol. II), pp. 995-999.

and materiel. Third, Article VII of EDCA authorizes U.S. forces to use public utilities and to operate their own telecommunications system.

a. Preliminary point on badges of exclusivity

As a preliminary observation, petitioners have cherry-picked provisions of EDCA by presenting so-called "badges of exclusivity," despite the presence of contrary provisions within the text of the agreement itself.

First, they clarify the word "return" in Article V(2) of EDCA. However, the use of the word "return" is within the context of a lengthy provision. The provision as a whole reads as follows:

> The United States shall return to the Philippines any Agreed Locations, or any portion thereof, including non-relocatable structures and assemblies constructed, modified, or improved by the United States, once no longer required by United States forces for activities under this Agreement. The Parties or the Designated Authorities shall consult regarding the terms of return of any Agreed Locations, including possible compensation for improvements or construction.

The context of use is "required by United States forces for activities under this Agreement." Therefore, the return of an Agreed Location would be within the parameters of an activity that the Mutual Defense Board (MDB) and the Security Engagement Board (SEB) would authorize. Thus, possession by the U.S. prior to its return of the Agreed Location would be based on the authority given to it by a joint body co-chaired by the "AFP Chief of Staff and Commander, U.S. PACOM with representatives from the Philippines' Department of National Defense and Department of Foreign Affairs sitting as members."[313] The terms shall be negotiated by both the Philippines and the U.S., or through their Designated Authorities. This provision, seen as a whole, contradicts petitioners' interpretation

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[313] *PH-US MDB and SEE Convenes,* DEPARTMENT OF NATIONAL DEFENSE, available at <http://www.dndph.org/press-releases/ph-us-mdb-and-seb-convenes> (last visited 3 December 2015).

of the return as a "badge of exclusivity." In fact, it shows the cooperation and partnership aspect of EDCA in full bloom.

Second, the term "unimpeded access" must likewise be viewed from a contextual perspective. Article IV(4) states that U.S. forces and U.S. contractors shall have "unimpeded access to Agreed Locations for all matters relating to the prepositioning and storage of defense equipment, supplies, and materiel, including delivery, management, inspection, use, maintenance, and removal of such equipment, supplies and materiel."

At the beginning of Article IV, EDCA states that the Philippines gives the U.S. the authority to bring in these equipment, supplies, and materiel through the MDB and SEB security mechanism. These items are owned by the U.S.[314] are exclusively for the use of the U.S.[315] and, after going through the joint consent mechanisms of the MDB and the SEB, are within the control of the U.S.[316] More importantly, before these items are considered prepositioned, they must have gone through the process of prior authorization by the MDB and the SEB and given proper notification to the AFP.[317]

Therefore, this "unimpeded access" to the Agreed Locations is a necessary adjunct to the ownership, use, and control of the U.S. over its own equipment, supplies, and materiel and must have first been allowed by the joint mechanisms in play between the two states since the time of the MDT and the VFA. It is not the use of the Agreed Locations that is exclusive *per se;* it is mere access to items in order to exercise the rights of ownership granted by virtue of the Philippine Civil Code.[318]

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[314] EDCA, Art. IV(3).

[315] EDCA, Art. IV(3).

[316] EDCA, Art. IV(3).

[317] EDCA, Art. IV(I).

[318] Such rights gleaned from Title II, Chapter I of the Civil Code are *(Cojuangco v. Sandiganbayan,* 604 Phil. 670 [2009]): the right to possess, to use and enjoy, to abuse or consume, to accessories, to dispose or alienate, to recover or vindicate, and to the fruits.

As for the view that EDCA authorizes U.S. forces to use public utilities and to operate their own telecommunications system, it will be met and answered in part ***D****, infra.*

Petitioners also point out[319] that EDCA is strongly reminiscent of and in fact bears a one-to-one correspondence with the provisions of the 1947 MBA. They assert that both agreements (a) allow similar activities within the area; (b) provide for the same "species of ownership" over facilities; and (c) grant operational control over the entire area. Finally, they argue[320] that EDCA is in fact an implementation of the new defense policy of the U.S. According to them, this policy was not what was originally intended either by the MDT or by the VFA.

On these points, the Court is not persuaded.

The similar activities cited by petitioners[321] simply show that under the MBA, the U.S. had the right to construct, operate, maintain, utilize, occupy, garrison, and control the bases. The so-called parallel provisions of EDCA allow only operational control over the Agreed Locations specifically for construction activities. They do not allow the overarching power to operate, maintain, utilize, occupy, garrison, and control a base with full discretion. EDCA in fact limits the rights of the U.S. in respect of every activity, including construction, by giving the MDB and the SEB the power to determine the details of all activities such as, but not limited to, operation, maintenance, utility, occupancy, garrisoning, and control.[322]

The "species of ownership" on the other hand, is distinguished by the nature of the property. For immovable property constructed

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[319] Memorandum of Saguisag, *et al.,* pp. 29-33, *rollo* (G.R. No. 212426, Vol. II), pp. 999-1003; Memorandum of Bayan, *et al.,* pp. 41-71, *rollo* (G.R. No. 212444), pp. 605-635.

[320] Memorandum of Saguisag, *et al.,* pp. 33-35, *rollo* (G.R. No. 212426, Vol. II), pp. 1003-1005.

[321] *Id.*, pp. 1000-1001.

[322] *Id.*, p. 1000. EDCA, Arts. I (1)(b), I(2), I(3), & III(4).

or developed by the U.S., EDCA expresses that ownership will automatically be vested to the Philippines.[323] On the other hand, for movable properties brought into the Philippines by the U.S., EDCA provides that ownership is retained by the latter. In contrast, the MBA dictates that the U.S. retains ownership over immovable and movable properties.

To our mind, both EDCA and the MBA simply incorporate what is already the law of the land in the Philippines. The Civil Code's provisions on ownership, as applied, grant the owner of a movable property full rights over that property, even if located in another person's property.[324]

The parallelism, however, ends when the situation involves facilities that can be considered immovable. Under the MBA, the U.S. retains ownership if it paid for the facility.[325] Under EDCA, an immovable is owned by the Philippines, even if built completely on the back of U.S. funding.[326] This is consistent with the constitutional prohibition on foreign land ownership.[327]

Despite the apparent similarity, the ownership of property is but a part of a larger whole that must be considered before the constitutional restriction is violated. Thus, petitioners' points on operational control will be given more attention in the discussion below. The arguments on policy are, however, outside the scope of judicial review and will not be discussed

Moreover, a direct comparison of the MBA and EDCA will result in several important distinctions that would allay suspicion that EDCA is but a disguised version of the MBA.

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[323] *Id.*, p. 1002.

[324] *See generally* CIVIL CODE, Arts. 427-429.

[325] Memorandum of Saguisag, *et al.,* pp. 33-35, *rollo,* (G.R. No. 212426, Vol. II), pp. 1001-1002.

[326] Memorandum of Saguisag, *et al.,* pp. 33-35, *rollo,* (G.R. No. 212426, Vol. II), pp. 1001-1002.

[327] CONSTITUTION, Art. XII, Sec. 7.

b. There are substantial matters that the U.S. cannot do under EDCA, but which it was authorized to do under the 1947 MBA

The Philippine experience with U.S. military bases under the 1947 MBA is simply not possible under EDCA for a number of important reasons.

First, in the 1947 MBA, the U.S. retained all rights of jurisdiction in and over Philippine territory occupied by American bases. In contrast, the U.S. under EDCA does not enjoy any such right over any part of the Philippines in which its forces or equipment may be found. Below is a comparative table between the old treaty and EDCA:

1947 MBA/ 1946 Treaty of General Relations	**EDCA**
1947 MBA, Art. I(1): The Government of the Republic of the **Philippines** (hereinafter referred to as the Philippines) **grants to** the Government of the **United States** of America (hereinafter referred to as the United States) the **right to retain the use of the bases in the Philippines** listed in Annex A attached hereto. **1947 MBA, Art. XVII(2):** **All buildings and structures** which are **erected by the United States** in the bases shall be the **property of the United States** and **may be removed by it** before the expiration of this Agreement or the earlier relinquishment of the base on which the structures are situated. There shall be no obligation on the part	**EDCA, preamble:** Affirming that the Parties share an understanding for the United States **not to establish a permanent military presence or base in the territory of the Philippines;** x x x Recognizing that all **United States access** to and use of facilities and areas will be **at the invitation of the Philippines** and with **full respect for the Philippine Constitution and Philippine laws;** x x x **EDCA, Art. II(4):** **"Agreed Locations"** means **facilities and areas** that are

of the Philippines or of the United States to rebuild or repair any destruction or damage inflicted from any cause whatsoever on any of the said buildings or structures owned or used by the United States in the bases. x x x. **1946 Treaty of Gen. Relations, Art. I:** The **United States** of America **agrees to withdraw** and surrender, and does hereby withdraw and surrender, **all rights of possession, supervision, jurisdiction, control or sovereignty** existing and exercised by the United States of America **in and over the territory and the people of the Philippine Islands, except the use of such bases, necessary appurtenances to such bases, and the rights incident thereto,** as the United States of America, by agreement with the Republic of the Philippines may deem necessary to retain for the mutual protection of the Republic of the Philippines and of the United States of America. x x x.	**provided by the Government of the Philippines** through the AFP and that United States forces, United States contractors, and others as mutually agreed, shall have the right to access and use pursuant to this Agreement. Such Agreed Locations may be listed in an annex to be appended to this Agreement, and may be further described in implementing arrangements. **EDCA, Art. V:** 1. The **Philippines** shall **retain ownership of and title** to Agreed Locations. x x x 4. **All buildings, non-relocatable structures, and assemblies affixed to the land** in the Agreed Locations, **including ones altered or improved by** United States forces, **remain the property of the Philippines.** Permanent buildings constructed by United States forces become the property of the Philippines, once constructed, but shall be used by United States forces until no longer required by United States forces.

Second, in the bases agreement, the U.S. and the Philippines were visibly not on equal footing when it came to deciding whether to expand or to increase the number of bases, as the Philippines may be compelled to negotiate with the U.S. the moment the latter requested an expansion of the existing bases or to acquire additional bases. In EDCA, U.S. access is purely at the invitation of the Philippines.

1947 MBA/ 1946 Treaty of General Relations	EDCA
1947 MBA, Art. I (3): The **Philippines agree to enter into negotiations with the United States at the latter's request,** to permit the United States **to expand such bases,** to exchange such bases for other bases, **to acquire additional bases,** or relinquish rights to bases, as any of such exigencies may be required by military necessity. **1946 Treaty of Gen. Relations, Art. I:** The **United States** of America **agrees to withdraw** and surrender, and does hereby withdraw and surrender, **all rights of possession, supervision, jurisdiction, control or sovereignty** existing and exercised by the United States of America **in and over the territory and the people of the Philippine Islands, except the use of such bases**, necessary appurtenances to such bases, and the rights incident thereto, **as the United States of America, by agreement with the Republic of the Philippines may deem necessary to retain** for the mutual protection of the Republic of the Philippines and of the United States of America. x x x.	**EDCA, preamble:** Recognizing that all **United States access** to and use of facilities and areas will be **at the invitation of the Philippines** and with **full respect for the Philippine Constitution and Philippine laws**; x x x **EDCA, Art. 11(4):** **"Agreed Locations"** means **facilities and areas** that are **provided by the Government of the Philippines** through the AFP and that United States forces, United States contractors, and others **as mutually agreed**, shall have the right to access and use pursuant to this Agreement. Such Agreed Locations may be listed in an annex to be appended to this Agreement, and may be further described in implementing arrangements.

Third, in EDCA, the Philippines is guaranteed access over the entire area of the Agreed Locations. On the other hand, given that the U.S. had complete control over its military bases under the 1947 MBA, the treaty did not provide for any express

recognition of the right of access of Philippine authorities. Without that provision and in light of the retention of U.S. sovereignty over the old military bases, the U.S. could effectively prevent Philippine authorities from entering those bases.

1947 MBA	EDCA
No equivalent provision.	**EDCA, Art. III(5):** The **Philippine Designated Authority and its authorized representative** shall **have access to the entire area of the Agreed Locations.** Such access shall be provided promptly consistent with operational safety and security requirements in accordance with agreed procedures developed by the Parties.

Fourth, in the bases agreement, the U.S. retained the right, power, and authority over the establishment, use, operation, defense, and control of military bases, including the limits of territorial waters and air space adjacent to or in the vicinity of those bases. The only standard used in determining the extent of its control was military necessity. On the other hand, there is no such grant of power or authority under EDCA. It merely allows the U.S. to exercise operational control over the construction of Philippine-owned structures and facilities:

1947 MBA	EDCA
1947 MBA, Art. I(2): The Philippines agrees to **permit the United States**, upon notice to the Philippines, to **use such of those bases** listed in Annex B **as the United States determines to be required by military necessity**.	**EDCA, Art. III(4):** The Philippines hereby **grants to the United States, through bilateral security mechanisms**, such as the MDB and SEB, **operational control** of **Agreed Locations** for **construction**

1947 MBA, Art. III(1): It is mutually agreed that the **United States** shall have the **rights, power and authority within the bases** which are **necessary for the establishment, use, operation and defense thereof or appropriate for the control thereof** and all the rights, power and authority **within the limits of territorial waters and air space adjacent to, or in the vicinity of**, the bases which are **necessary to provide access to them**, or appropriate for their control.	**activities** and **authority** to **undertake such activities** on, and make **alterations and improvements** to, Agreed Locations. **United States forces shall consult** on **issues regarding such construction, alterations**, **and improvements** based on the Parties' shared intent that the technical requirements and construction standards of any such projects undertaken by or on behalf of United States forces should be consistent with the requirements and standards of both Parties.

Fifth, the U.S. under the bases agreement was given the authority to use Philippine territory for additional staging areas, bombing and gunnery ranges. No such right is given under EDCA, as seen below:

1947 MBA	EDCA
1947 MBA, Art. VI: The **United States** shall, subject to previous agreement with the Philippines, have the **right to use land and coastal sea areas** of appropriate size and location for periodic maneuvers, **for additional staging areas, bombing and gunnery ranges, and for such intermediate airfields** as may be required for safe and efficient air operations. Operations in such areas shall be carried on with due regard and safeguards for the public safety.	**EDCA, Art. III(1):** **With consideration** of the views of the **Parties**, the **Philippines** hereby **authorizes** and agrees that United States forces, United States contractors, and vehicles, vessels, and aircraft operated by or for United States forces may **conduct the following activities** with respect to Agreed Locations: training; transit; support and related activities; refueling of aircraft; bunkering of vessels; temporary maintenance of vehicles, vessels, and aircraft; temporary accommodation of personnel;

1947 MBA, Art.l(2): The Philippines agrees to **permit the United States**, upon notice to the Philippines, to **use such of those bases** listed in Annex B **as the United States determines to be required by military necessity**.	communications; prepositioning of equipment, supplies, and materiel; deploying forces and materiel; and such other activities as the Parties may agree.

Sixth, under the MBA, the U.S. was given the right, power, and authority to control and prohibit the movement and operation of all types of vehicles within the vicinity of the bases. The U.S. does not have any right, power, or authority to do so under EDCA.

1947 MBA	EDCA
1947 MBA, Art. III(2)(c) Such rights, power and authority shall include, *inter alia,* the **right, power and authority**: x x x **to control** (including the right **to prohibit**) in so far as may be required for the efficient operation and safety of the bases, and within the limits of military necessity, **anchorages, moorings, landings, takeoffs, movements and operation of ships and water-borne craft, aircraft and other vehicles on water, in the air or on land comprising**	No equivalent provision.

Seventh, under EDCA, the U.S. is merely given temporary access to land and facilities (including roads, ports, and airfields). On the other hand, the old treaty gave the U.S. the right to improve and deepen the harbors, channels, entrances, and anchorages; and to construct or maintain necessary roads and bridges that would afford it access to its military bases.

1947 MBA	EDCA
1947 MBA Art. III(2)(b): Such rights, power and authority shall include, *inter alia,* the **right, power and authority**: x x x **to improve and deepen the harbors, channels, entrances and anchorages**, and **to construct or maintain necessary roads** and bridges affording access to the bases.	**EDCA, Art. III(2):** When requested, the Designated Authority of the Philippines shall assist in **facilitating transit or temporary access** by United States forces to public land and facilities (including roads, ports, and airfields), including those owned or controlled by local governments, and to other land and facilities (including roads, ports, and airfields).

Eighth, in the 1947 MBA, the U.S. was granted the automatic right to use any and all public utilities, services and facilities, airfields, ports, harbors, roads, highways, railroads, bridges, viaducts, canals, lakes, rivers, and streams in the Philippines in the same manner that Philippine military forces enjoyed that right. No such arrangement appears in EDCA. In fact, it merely extends to U.S. forces temporary access to public land and facilities when requested:

1947 MBA	EDCA
1947 MBA, Art. VII: It is mutually agreed that the **United States may employ and use** for United States military forces **any and all public utilities, other services and facilities,** airfields, ports, harbors, roads, highways, railroads, bridges, viaducts, canals, lakes, rivers and streams in the Philippines **under conditions no less favorable than those** that may be **applicable** from time to time to the **military forces of the Philippines.**	**EDCA, Art. III(2):** **When requested**, the Designated Authority of the Philippines shall assist in **facilitating transit or temporary access** by United States forces to public land and facilities (including roads, ports, and airfields), including those owned or controlled by local governments, and to other land and facilities (including roads, ports, and airfields).

Ninth, under EDCA, the U.S. no longer has the right, power, and authority to construct, install, maintain, and employ *any* type of facility, weapon, substance, device, vessel or vehicle, or system unlike in the old treaty. EDCA merely grants the U.S., through bilateral security mechanisms, the authority to undertake construction, alteration, or improvements on the Philippine-owned Agreed Locations.

1947 MBA	EDCA
1947 MBA, Art. III(2)(e): Such rights, power and authority shall include, *inter alia,* the **right, power and authority**: x x x to **construct, install, maintain, and employ** on any base **any type** of **facilities, weapons, substance, device, vessel or vehicle** on or under the ground, in the air or on or under the water that may be requisite or appropriate, including meteorological systems, aerial and water navigation lights, radio and radar apparatus and electronic devices, of any desired power, type of emission and frequency.	**EDCA, Art. III(4):** The Philippines hereby grants to the **United States, through bilateral security mechanisms**, such as the MDB and SEB, operational control of Agreed Locations for construction activities and **authority to undertake such activities on, and make alterations and improvements to, Agreed Locations.** United States forces shall consult on Issues regarding such construction, alterations, and improvements based on the Parties' shared intent that the technical requirements and construction standards of any such projects undertaken by or on behalf of United States forces should be consistent with the requirements and standards of both Parties.

Tenth, EDCA does not allow the U.S. to acquire, by condemnation or expropriation proceedings, real property belonging to any private person. The old military bases agreement gave this right to the U.S. as seen below:

1947 MBA	EDCA
1947 MBA, Art. XXII(l): Whenever it is necessary to **acquire by condemnation or expropriation proceedings real property belonging to any private persons,** associations or corporations located in bases named in Annex A and Annex B in order to carry out the purposes of this Agreement, the Philippines will institute and prosecute such condemnation or expropriation proceedings in accordance with the laws of the Philippines. The United States agrees to reimburse the Philippines for all the reasonable expenses, damages and costs thereby incurred, including the value of the property as determined by the Court. In addition, subject to the mutual agreement of the two Governments, the United States will reimburse the Philippines for the reasonable costs of transportation and removal of any occupants displaced or ejected by reason of the condemnation or expropriation.	No equivalent provision.

Eleventh, EDCA does not allow the U.S. to unilaterally bring into the country non-Philippine nationals who are under its employ, together with their families, in connection with the construction, maintenance, or operation of the bases. EDCA strictly adheres to the limits under the VFA.

1947 MBA	EDCA
1947 MBA, Art. Xl(I): It is mutually agreed that the **United States shall have the right to bring into the Philippines** members of the United States military forces and the **United States nationals employed by or under a contract with the United States together with their families, and technical personnel of other nationalities** (not x x x being persons excluded by the laws of the Philippines) in connection with the construction, maintenance, or operation of the bases. The United States shall make suitable arrangements so that such persons may be readily identified and their status established when necessary by the Philippine authorities. Such persons, other than members of the United States armed forces in uniform, shall present their travel documents to the appropriate Philippine authorities for visas, it being understood that **no objection will be made to their travel to the Philippines as non-immigrants.**	**EDCA, Art. II:** 1. **"United States personnel"** means United States **military and civilian personnel** temporarily in the territory of the Philippines in connection with activities approved by the Philippines, **as those terms are defined in the VFA.** x x x x 3. **"United States contractors"** means companies and firms, and their employees, under contract or subcontract to or on behalf of the United States Department of Defense. United States contractors are **not included** as part of the **definition** of **United States personnel** in this Agreement, **including within the context of the VFA.**

Twelfth, EDCA does not allow the U.S. to exercise jurisdiction over any offense committed by any person within the Agreed Locations, unlike in the former military bases:

1947 MBA	EDCA
1947 MBA, Art. XIII(I)(a): The Philippines consents that the **United States** shall have the **right to exercise jurisdiction** over the following offenses:(a) **Any offense** committed by any person **within any base** except where the offender and offended parties are both Philippine citizens (not members of the armed forces of the United States on active duty) or the offense is against the security of the Philippines.	No equivalent provision.

Thirteenth, EDCA does not allow the U.S. to operate military post exchange (PX) facilities, which is free of customs duties and taxes, unlike what the expired MBA expressly allowed. Parenthetically, the PX store has become the cultural icon of U.S. military presence in the country.

1947 MBA	EDCA
1947 MBA, Art. XVIII(I): It is mutually agreed that the **United States** shall have the **right to establish on bases, free of all licenses; fees; sales, excise or other taxes, or imposts;** Government agencies, **including concessions,** such as **sales commissaries and post exchanges;** messes and social clubs, **for the exclusive use of the United States military forces and authorized civilian personnel and their families.** The merchandise or services sold	No equivalent provision.

or dispensed by such agencies shall be **free of all taxes, duties and inspection by the Philippine authorities.** Administrative measures shall be taken by the appropriate authorities of the United States to prevent the resale of goods which are sold under the provisions of this Article to persons not entitled to buy goods at such agencies and, generally, to prevent abuse of the privileges granted under this Article. There shall be cooperation between such authorities and the Philippines to this end.	

In sum, EDCA is a far cry from a basing agreement as was understood by the people at the time that the 1987 Constitution was adopted.

Nevertheless, a comprehensive review of what the Constitution means by "foreign military bases" and "facilities" is required before EDCA can be deemed to have passed judicial scrutiny.

c. The meaning of military facilities and bases

An appreciation of what a military base is, as understood by the Filipino people in 1987, would be vital in determining whether EDCA breached the constitutional restriction.

Prior to the drafting of the 1987 Constitution, the last definition of "military base" was provided under Presidential Decree No. (PD) 1227.[328] Unlawful entry into a military base is punishable under the decree as supported by Article 281 of the Revised Penal Code, which itself prohibits the act of trespass.

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[328] P.D. No. 1227– *Punishing Unlawful Entry into Any Military Base in the Philippines,* Sec. 2.

Section 2 of the law defines the term in this manner: "'[M]ilitary base' as used in this decree means any military, air, naval, or coast guard reservation, base, fort, camp, arsenal, yard, station, or installation in the Philippines."

Commissioner Tadeo, in presenting his objections to U.S. presence in the Philippines before the 1986 Constitutional Commission, listed the areas that he considered as military bases:

1,000 hectares Camp O'Donnel
20,000 hectares Crow Valley Weapon's Range
55,000 hectares Clark Air Base
150 hectares Wallace Air Station
400 hectares John Hay Air Station
15,000 hectares Subic Naval Base
1,000 hectares San Miguel Naval Communication
750 hectares Radio Transmitter in Capas, Tarlac
900 hectares Radio Bigot Annex at Bamban, Tarlac[329]

The Bases Conversion and Development Act of 1992 described its coverage in its Declaration of Policies:

> Sec. 2. Declaration of Policies.— It is hereby declared the policy of the Government to accelerate the sound and balanced conversion into alternative productive uses of the Clark and Subic military reservations and their extensions (John Hay Station, Wallace Air Station, O'Donnell Transmitter Station, San Miguel Naval Communications Station and Capas Relay Station), to raise funds by the sale of portions of Metro Manila military camps, and to apply said funds as provided herein for the development and conversion to productive civilian use of the lands covered under the 1947 Military Bases Agreement between the Philippines and the United States of America, as amended.[330]

The result of the debates and subsequent voting is Section 25, Article XVIII of the Constitution, which specifically restricts, among others, *foreign military facilities or bases.* At the time

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[329] IV RECORD, CONSTITUTIONAL COMMISSION 648 (15 September 1986).

[330] R.A. No. 7227.

of its crafting of the Constitution, the 1986 Constitutional Commission had a clear idea of what exactly it was restricting. While the term "facilities and bases" was left undefined, its point of reference was clearly those areas covered by the 1947 MBA as amended.

Notably, nearly 30 years have passed since then, and the ever- evolving world of military technology and geopolitics has surpassed the understanding of the Philippine people in 1986. The last direct military action of the U.S. in the region was the use of Subic base as the staging ground for Desert Shield and Desert Storm during the Gulf War.[331] In 1991, the Philippine Senate rejected the successor treaty of the 1947 MBA that would have allowed the continuation of U.S. bases in the Philippines.

Henceforth, any proposed entry of U.S. forces into the Philippines had to evolve likewise, taking into consideration the subsisting agreements between both parties, the rejection of the 1991 proposal, and a concrete understanding of what was constitutionally restricted. This trend birthed the VFA which, as discussed, has already been upheld by this Court.

The latest agreement is EDCA, which proposes a novel concept termed "Agreed Locations."

By definition, Agreed Locations are

> facilities and areas that are provided by the Government of the Philippines through the AFP and that United States forces, United States contractors, and others as mutually agreed, shall have the right to access and use pursuant to this Agreement. Such Agreed Locations may be listed in an annex to be appended to this Agreement, and may be further described in implementing arrangements.[332]

Preliminarily, respondent already claims that the proviso that the Philippines shall retain ownership of and title to the Agreed Locations means that EDCA is "consistent with Article II of

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[331] PADUA, *supra* note 64.

[332] EDCA, Art. II(4).

the VFA which recognizes Philippine sovereignty and jurisdiction over locations within Philippine territory."[333]

By this interpretation, respondent acknowledges that the contention of petitioners springs from an understanding that the Agreed Locations merely circumvent the constitutional restrictions. Framed differently, the bone of contention is whether the Agreed Locations are, from a legal perspective, foreign military facilities or bases. This legal framework triggers Section 25, Article XVIII, and makes Senate concurrence a *sine qua non.*

Article III of EDCA provides for Agreed Locations, in which the U.S. is authorized by the Philippines to "conduct the following activities: "training; transit; support and related activities; refueling of aircraft; bunkering of vessels; temporary maintenance of vehicles, vessels and aircraft; temporary accommodation of personnel; communications; prepositioning of equipment, supplies and materiel; deploying forces and materiel; and such other activities as the Parties may agree."

This creation of EDCA must then be tested against a proper interpretation of the Section 25 restriction.

d. Reasons for the constitutional requirements and legal standards for constitutionally compatible military bases and facilities

Section 25 does not define what is meant by a "foreign military facility or base." While it specifically alludes to U.S. military facilities and bases that existed during the framing of the Constitution, the provision was clearly meant to apply to those bases existing at the time and to any future facility or base. The basis for the restriction must first be deduced from the spirit of the law, in order to set a standard for the application

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[333] Memorandum of OSG, p. 23, *rollo* (G.R. No. 212426), p. 453.

of its text, given the particular historical events preceding the agreement.

Once more, we must look to the 1986 Constitutional Commissioners to glean, from their collective wisdom, the intent of Section 25. Their speeches are rich with history and wisdom and present a clear picture of what they considered in the crafting the provision.

SPEECH OF COMMISSIONER REGALADO[334]

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We have been regaled here by those who favor the adoption of the anti-bases provisions with what purports to be an objective presentation of the historical background of the military bases in the Philippines. Care appears, however, to have been taken to underscore the **inequity in their inception as well as their implementation**, as to seriously reflect on the supposed objectivity of the report. Pronouncements of military and civilian officials shortly after World War II are quoted in support of the proposition on **neutrality**; regrettably, the implication is that the same remains valid today, as if the world and international activity stood still for the last 40 years.

We have been given inspired lectures on the effect of the presence of the military bases on our sovereignty — whether in its legal or political sense is not clear — and the theory that any country with foreign bases in its territory cannot claim to be fully sovereign or completely independent. I was not aware that the concepts of sovereignty and independence have now assumed the totality principle, such that a willing assumption of some delimitations in the exercise of some aspects thereof would put that State in a lower bracket of nationhood.

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We have been receiving a continuous influx of materials on the pros and cons on the advisability of having military bases within our shores. Most of us who, only about three months ago, were just mulling the prospects of these varying contentions are now expected,

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[334] IV RECORD, CONSTITUTIONAL COMMISSION 628-630 (15 September 1986).

like armchair generals, to decide not only on the geopolitical aspects and contingent implications of the military bases but also on their political, social, economic and cultural impact on our national life. We are asked to answer a plethora of questions, such as: 1) whether the bases are magnets of nuclear attack or are deterrents to such attack; 2) whether an alliance or mutual defense treaty is a derogation of our national sovereignty; 3) whether criticism of us by Russia, Vietnam and North Korea is outweighed by the support for us of the ASEAN countries, the United States, South Korea, Taiwan, Australia and New Zealand; and 4) whether the social, moral and legal problems spawned by the military bases and their operations can be compensated by the economic benefits outlined in papers which have been furnished recently to all of us.[335]

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Of course, one side of persuasion has submitted categorical, unequivocal and forceful assertions of their positions. They are entitled to the luxury of the absolutes. **We are urged now to adopt the proposed declaration as a "golden," "unique" and "last" opportunity for Filipinos to assert their sovereign rights.** Unfortunately, I have never been enchanted by superlatives, much less for the applause of the moment or the ovation of the hour. Nor do I look forward to any glorious summer after a winter of political discontent. Hence, if I may join Commissioner Laurel, I also invoke a caveat not only against the tyranny of labels but also the tyranny of slogans.[336]

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SPEECH OF COMMISSIONER SUAREZ[337]

MR. SUAREZ: Thank you, Madam President.

I am quite satisfied that the crucial issues involved in the resolution of the problem of the removal of foreign bases from the Philippines have been adequately treated by previous speakers. Let me, therefore, just recapitulate the arguments adduced in favor of a foreign bases-free Philippines:

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[335] *Id*. at 628.

[336] *Id*. at 629.

[337] IV RECORD, CONSTITUTIONAL COMMISSION 630-631 (15 September 1986).

1. That every nation should be **free to shape its own destiny without outside interference;**

2. That no **lasting peace and no true sovereignty** would ever be achieved so long as there are foreign military forces in our country;

3. That the presence of foreign military **bases deprives us of the very substance of national sovereignty** and this is a constant source of national embarrassment and an insult to our national dignity and self-respect as a nation;

4. That these foreign military bases unnecessarily **expose our country to devastating nuclear attacks**;

5. That these foreign military bases create social problems and are designed to perpetuate the strangle-hold of United States interests in our national economy and development;

6. That **the extraterritorial rights** enjoyed by these foreign bases operate to **deprive our country of jurisdiction over civil and criminal offenses** committed within our own national territory and against Filipinos;

7. That the bases agreements are **colonial impositions** and dictations upon our helpless country; and

8. That on the legal viewpoint and in the ultimate analysis, all the bases agreements are null and void *ab initio,* especially because they did not count the sovereign consent and will of the Filipino people.[338]

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In the real sense, Madam President, if we in the Commission could accommodate the provisions I have cited, what is our objection to include in our Constitution a matter as priceless as the nationalist values we cherish? **A matter of the gravest concern for the safety and survival of this nation** indeed deserves a place in our Constitution.

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[338] *Id*. at 630.

x x x Why should we bargain away our **dignity and our self-respect** as a nation and the future of generations to come with thirty pieces of silver?[339]

SPEECH OF COMMISSIONER BENNAGEN[340]

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The underlying principle of **military bases** and nuclear weapons wherever they are found and whoever owns them is that **those are for killing people or for terrorizing humanity**. This objective by itself at any point in history is morally repugnant. This alone is reason enough for us to constitutionalize the ban on foreign military bases and on nuclear weapons.[341]

SPEECH OF COMMISSIONER BACANI[342]

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x x x Hence, the **remedy to prostitution does not seem to be primarily to remove the bases** because even if the bases are removed, the girls mired in poverty will look for their clientele elsewhere. The remedy to the problem of prostitution lies primarily elsewhere — in an alert and concerned citizenry, a healthy economy and a sound education in values.[343]

SPEECH OF COMMISSIONER JAMIR[344]

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One of the reasons advanced against the maintenance of foreign military bases here is that they impair portions of our

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[339] *Id*. at 631.

[340] IV RECORD, CONSTITUTIONAL COMMISSION 632-634 (15 September 1986).

[341] *Id*. at 632.

[342] IV RECORD, CONSTITUTIONAL COMMISSION 634-635 (15 September 1986).

[343] *Id*. at 634.

[344] IV RECORD, CONSTITUTIONAL COMMISSION 635-636 (15 September 1986).

sovereignty. While I agree that our country's sovereignty should not be impaired, I also hold the view that there are times when it is necessary to do so according to the imperatives of national interest. There are precedents to this effect. Thus, during World War II, England leased its bases in the West Indies and in Bermuda for 99 years to the United States for its use as naval and air bases. It was done in consideration of 50 overaged destroyers which the United States gave to England for its use in the Battle of the Atlantic.

A few years ago, England gave the Island of Diego Garcia to the United States for the latter's use as a naval base in the Indian Ocean. About the same time, the United States obtained bases in Spain, Egypt and Israel. In doing so, these countries, in effect, contributed to the launching of a preventive defense posture against possible trouble in the Middle East and in the Indian Ocean for their own protection.[345]

SPEECH OF COMMISSIONER TINGSON[346]

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In the case of the Philippines and the other Southeast Asian nations, the presence of American troops in the country is a projection of America's security interest. Enrile said that nonetheless, they also serve, although in an incidental and secondary way, the security interest of the Republic of the Philippines and the region. Yes, of course, Mr. Enrile also echoes the sentiments of most of us in this Commission, namely: **It is ideal for us as an independent and sovereign nation to ultimately abrogate the RP-US military treaty and, at the right time, build our own air and naval might.**[347]

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Allow me to say in summation that I am for the retention of American military bases in the Philippines provided that such an extension from one period to another shall be concluded upon

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[345] *Id*. at 636.

[346] IV RECORD, CONSTITUTIONAL COMMISSION 637-639 (15 September 1986).

[347] *Id*. at 638.

concurrence of the parties, and such extension shall be based on justice, the historical amity of the people of the Philippines and the United States and their common defense interest.[348]

SPEECH OF COMMISSIONER ALONTO[349]

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Madam President, sometime ago after this Commission started with this task of framing a constitution, I read a statement of President Aquino to the effect that she is for the removal of the U.S. military bases in this country but that the removal of the U.S. military bases should not be done just to give way to other foreign bases. Today, there are two world superpowers, both vying to control any and all countries which have importance to their strategy for world domination. The Philippines is one such country.

Madam President, **I submit that I am one of those ready to completely remove any vestiges of the days of enslavement**, but not prepared to erase them if to do so would merely leave a vacuum to be occupied by a far worse type.[350]

SPEECH OF COMMISSIONER GASCON[351]

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Let us consider the situation of peace in our world today. Consider our brethren in the Middle East, in Indo-China, Central America, in South Africa — there has been escalation of war in some of these areas because of foreign intervention which views these conflicts through the narrow prism of the East-West conflict. **The United States bases have been used as springboards for intervention in some of these conflicts. We should not allow ourselves to be party to the warlike mentality of these foreign interventionists.** We must always

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[348] *Id*. at 639.

[349] IV RECORD, CONSTITUTIONAL COMMISSION 640-641 (15 September 1986).

[350] *Id*. at 640.

[351] IV RECORD, CONSTITUTIONAL COMMISSION 641-645 (15 September 1986).

be on the side of peace — this means that we should not always rely on military solution.[352]

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x x x The United States bases, therefore, are **springboards for intervention in our own internal affairs and in the affairs of other nations in this region.**

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Thus, I firmly believe that a self-respecting nation should safeguard its fundamental freedoms which should logically be declared in black and white in our fundamental law of the land — the Constitution. **Let us express our desire for national sovereignty so we may be able to achieve national self-determination.** Let us express our desire for neutrality so that we may be able to follow active nonaligned independent foreign policies. Let us express our desire for peace and a nuclear-free zone so we may be able to pursue a healthy and tranquil existence, to have peace that is autonomous and not imposed.[353]

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SPEECH OF COMMISSIONER TADEO[354]

Para sa magbubukid, ano ba ang kahulugan ng* U.S. military bases?** *Para sa magbubukid,* ***ang kahulugan nito ay pagkaalipin. *Para sa magbubukid, ang pananatili ng* U.S. military bases *ay* ***tinik sa dibdib ng sambayanang Pilipinong patuloy na nakabaon****. Para sa sambayanang magbubukid, ang ibig sabihin ng* U.S. military bases *ay* ***batong pabigat na patuloy na pinapasan ng sambayanang Pilipino****. Para sa sambayanang magbubukid, ang pananatili ng* U.S. military bases *ay* ***isang nagdudumilat na katotohanan ng patuloy na paggahasa ng imperyalistang Estados Unidos sa ating — Inang Bayan* — economically, politically and culturally****. Para sa sambayanang magbubukid ang* U.S. military bases *ay* ***kasingkahulugan ng* nuclear weapon —** ***ang kahulugan ay magneto***

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[352] *Id*. at 643.

[353] *Id*. at 644.

[354] IV RECORD, CONSTITUTIONAL COMMISSION 645-649 (15 September 1986).

ng isang **nuclear war**. *Para sa sambayanang magbubukid,* ***ang kahulugan ng*** **U.S. military bases** ***ay isang salot***.[355]

SPEECH OF COMMISSIONER QUESADA[356]

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The drift in the voting on issues related to **freeing ourselves from the instruments of domination and subservience** has clearly been defined these past weeks.

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So for the record, Mr. Presiding Officer, I would like to declare my support for the committee's position to enshrine in the Constitution a fundamental principle forbidding foreign military bases, troops or facilities in any part of the Philippine territory as a **clear and concrete manifestation of our inherent right to national self-determination, independence and sovereignty.**

Mr. Presiding Officer, I would like to relate now these attributes of genuine nationhood to the social cost of allowing foreign countries to maintain military bases in our country. Previous speakers have dwelt on this subject, either to highlight its importance in relation to the other issues or to gloss over its significance and make this a part of future negotiations.[357]

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Mr. Presiding Officer, I feel that banning foreign military bases is one of the solutions and is the response of the Filipino people against this condition and other conditions that have already been clearly and emphatically discussed in past deliberations. The deletion, therefore, of Section 3 in the Constitution we are drafting will have the following implications:

First, the failure of the Constitutional Commission to decisively respond to the **continuing violation of our territorial integrity**

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[355] *Id*. at 645.

[356] IV RECORD, CONSTITUTIONAL COMMISSION 649-652 (15 September 1986).

[357] *Id*. at 650.

via the military bases agreement which permits the retention of U.S. facilities within the Philippine soil over which our authorities have no exclusive jurisdiction contrary to the accepted definition of the exercise of sovereignty.

Second, consent by this forum, this Constitutional Commission, to an **exception in the application of a provision in the Bill of Rights** that we have just drafted regarding equal application of the laws of the land to all inhabitants, permanent or otherwise, within its territorial boundaries.

Third, the **continued exercise by the United States of extraterritoriality** despite the condemnations of such practice by the world community of nations in the light of overwhelming international approval of eradicating all vestiges of colonialism.[358]

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Sixth, the deification of a new concept called **pragmatic sovereignty**, in the hope that such can be wielded to force the United States government to concede to better terms and conditions concerning the military bases agreement, including the **transfer of complete control to the Philippine government of the U.S. facilities**, while in the meantime we have to suffer all existing indignities and disrespect towards our rights as a sovereign nation.

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Eighth, **the utter failure of this forum to view the issue of foreign military bases as essentially a question of sovereignty** which does not require in-depth studies or analyses and which this forum has, as a constituent assembly drafting a constitution, the expertise and capacity to decide on except that it lacks the political will that brought it to existence and now engages in an elaborate scheme of buck-passing.

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Without any doubt we can establish a new social order in our country, if we reclaim, restore, uphold and defend our national sovereignty. **National sovereignty is what the military bases issue is all about.** It is only the sovereign people exercising their national

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[358] *Id*. at 651.

sovereignty who can design an independent course and take full control of their national destiny.[359]

SPEECH OF COMMISSIONER PADILLA[360]

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Mr. Presiding Officer, in advocating the majority committee report, specifically Sections 3 and 4 on neutrality, nuclear and bases-free country, some **views stress sovereignty of the Republic and even invoke survival of the Filipino nation and people.**[361]

REBUTTAL OF COMMISSIONER NOLLEDO[362]

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The anachronistic and ephemeral arguments against the provisions of the committee report to dismantle the American bases after 1991 only show the urgent need to **free our country from the entangling alliance** with any power bloc.[363]

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x x x Mr. Presiding Officer, it is not necessary for us to possess expertise to know that the so-called RP-US Bases Agreement will expire in 1991, that it **infringes on our sovereignty and jurisdiction as** well as national dignity and honor, that it goes against the UN policy of disarmament and that it constitutes **unjust intervention in our internal affairs**.[364] (Emphases Supplied)

The Constitutional Commission eventually agreed to allow foreign military bases, troops, or facilities, subject to the provisions of Section 25. It is thus important to read its discussions

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[359] *Id*. at 652.

[360] IV RECORD, CONSTITUTIONAL COMMISSION 652-653 (15 September 1986).

[361] *Id*.

[362] IV RECORD, CONSTITUTIONAL COMMISSION 653-654 (15 September 1986).

[363] *Id*. at 653.

[364] *Id*. at 654.

carefully. From these discussions, we can deduce three legal standards that were articulated by the Constitutional Commission Members. These are characteristics of any agreement that the country, and by extension this Court, must ensure are observed. We can thereby determine whether a military base or facility in the Philippines, which houses or is accessed by foreign military troops, is foreign or remains a Philippine military base or facility. The legal standards we find applicable are: independence from foreign control, sovereignty and applicable law, and national security and territorial integrity.

i. First standard: independence from foreign control

Very clearly, much of the opposition to the U.S. bases at the time of the Constitution's drafting was aimed at asserting Philippine independence from the U.S., as well as control over our country's territory and military.

Under the Civil Code, there are several aspects of control exercised over property.

Property is classified as private or public.[365] It is public if "intended for public use, such as roads, canals, rivers, torrents, ports and bridges constructed by the State, banks, shores, roadsteads, and others of similar character[,]" or "[t]hose which belong to the State, without being for public use, and are intended for some public service or for the development of the national wealth."[366]

Quite clearly, the Agreed Locations are contained within a property for public use, be it within a government military camp or property that belongs to the Philippines.

Once ownership is established, then the rights of ownership flow freely. Article 428 of the Civil Code provides that "[t]he owner has the right to enjoy and dispose of a thing, without

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[365] CIVIL CODE, Art. 419.

[366] CIVIL CODE, Art. 420.

other limitations than those established by law." Moreover, the owner "has also a right of action against the holder and possessor of the thing in order to recover it."

Philippine civil law therefore accords very strong rights to the owner of property, even against those who hold the property. Possession, after all, merely raises a disputable presumption of ownership, which can be contested through normal judicial processes.[367]

In this case, EDCA explicitly provides that ownership of the Agreed Locations remains with the Philippine government.[368] What U.S. personnel have a right to, pending mutual agreement, is access to and use of these locations.[369]

The right of the owner of the property to allow access and use is consistent with the Civil Code, since the owner may dispose of the property in whatever way deemed fit, subject to the limits of the law. So long as the right of ownership itself is not transferred, then whatever rights are transmitted by agreement does not completely divest the owner of the rights over the property, but may only limit them in accordance with law.

Hence, even control over the property is something that an owner may transmit freely. This act does not translate into the full transfer of ownership, but only of certain rights. In *Roman Catholic Apostolic Administrator of Davao, Inc. v. Land Registration Commission,* we stated that the constitutional proscription on property ownership is not violated despite the foreign national's control over the property.[370]

EDCA, in respect of its provisions on Agreed Locations, is essentially a contract of use and access. Under its pertinent provisions, it is the Designated Authority of the Philippines that

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[367] CIVIL CODE, Art. 433.

[368] EDCA, Art. V.

[369] EDCA, Art. II(4).

[370] *Roman Catholic Apostolic Administrator of Davao, Inc. v. Land Registration Commission,* 102 Phil. 596 (1957).

shall, when requested, assist in facilitating transit or access to public land and facilities.[371] The activities carried out within these locations are subject to agreement as authorized by the Philippine government.[372] Granting the U.S. operational control over these locations is likewise subject to EDCA's security mechanisms, which are bilateral procedures involving Philippine consent and cooperation.[373] Finally, the Philippine Designated Authority or a duly designated representative is given access to the Agreed Locations.[374]

To our mind, these provisions do not raise the spectre of U.S. control, which was so feared by the Constitutional Commission. In fact, they seem to have been the product of deliberate negotiation from the point of view of the Philippine government, which balanced constitutional restrictions on foreign military bases and facilities against the security needs of the country. In the 1947 MBA, the U.S. forces had "the right, power and authority x x x to construct (including dredging and filling), operate, maintain, utilize, occupy, garrison and control the bases."[375] No similarly explicit provision is present in EDCA.

Nevertheless, the threshold for allowing the presence of foreign military facilities and bases has been raised by the present Constitution. Section 25 is explicit that foreign military bases, troops, or facilities shall not be allowed in the Philippines, except under a treaty duly concurred in by the Senate. Merely stating that the Philippines would retain ownership would do violence to the constitutional requirement if the Agreed Locations were simply to become a less obvious manifestation of the U.S. bases that were rejected in 1991.

When debates took place over the military provisions of the Constitution, the committee rejected a specific provision proposed

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[371] EDCA, Art. III(2).

[372] EDCA, Art. III(1).

[373] EDCA, Art. III(4).

[374] EDCA, Art. III(5).

[375] 1947 MBA, III (2)(a).

by Commissioner Sarmiento. The discussion illuminates and provides context to the 1986 Constitutional Commission's vision of control and independence from the U.S., to wit:

> MR. SARMIENTO: Madam President, my proposed amendment reads as follows: "THE STATE SHALL ESTABLISH AND MAINTAIN AN INDEPENDENT AND SELF-RELIANT ARMED FORCES OF THE PHILIPPINES." Allow me to briefly explain, Madam President. The Armed Forces of the Philippines is a vital component of Philippine society depending upon its training, orientation and support. It will either be the people's protector or a staunch supporter of a usurper or tyrant, local and foreign interest. **The Armed Forces of the Philippines' past and recent experience shows it has never been independent and self-reliant.** Facts, data and statistics will show that it has been substantially dependent upon a foreign power. In March 1968, Congressman Barbero, himself a member of the Armed Forces of the Philippines, revealed top secret documents showing what he described as U.S. dictation over the affairs of the Armed Forces of the Philippines. **He showed that under existing arrangements, the United States unilaterally determines not only the types and quantity of arms and equipments that our armed forces would have, but also the time when these items are to be made available to us. It is clear, as he pointed out, that the composition, capability and schedule of development of the Armed Forces of the Philippines is under the effective control of the U.S. government.**[376] (Emphases supplied)

Commissioner Sarmiento proposed a motherhood statement in the 1987 Constitution that would assert "independent" and "self-reliant" armed forces. **This proposal was rejected by the committee, however. As Commissioner De Castro asserted, the involvement of the Philippine military with the U.S. did not, by itself, rob the Philippines of its real independence.** He made reference to the context of the times: that the limited resources of the Philippines and the current insurgency at that time necessitated a strong military relationship with the U.S. He said that the U.S. would not in any way control

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[376] V RECORD, CONSTITUTIONAL COMMISSION 240 (30 September 1986).

the Philippine military despite this relationship and the fact that the former would furnish military hardware or extend military assistance and training to our military. Rather, he claimed that the proposal was in compliance with the treaties between the two states.

MR. DE CASTRO: If the Commissioner will take note of my speech on U.S. military bases on 12 September 1986, I spoke on the self-reliance policy of the armed forces. However, due to very limited resources, the only thing we could do is manufacture small arms ammunition. We cannot blame the armed forces. We have to blame the whole Republic of the Philippines for failure to provide the necessary funds to make the Philippine Armed Forces self-reliant. Indeed that is a beautiful dream. And I would like it that way. But as of this time, fighting an insurgency case, a rebellion in our country — insurgency — and with very limited funds and very limited number of men, it will be quite impossible for the Philippines to appropriate the necessary funds therefor. **However, if we say that the U.S. government is furnishing us the military hardware, it is not control of our armed forces or of our government. It is in compliance with the Mutual Defense Treaty.** It is under the military assistance program that it becomes the responsibility of the United States to furnish us the necessary hardware in connection with the military bases agreement. Please be informed that there are three (3) treaties connected with the military bases agreement; namely: the RP-US Military Bases Agreement, the Mutual Defense Treaty and the Military Assistance Program.

My dear Commissioner, when we enter into a treaty and we are furnished the military hardware pursuant to that treaty, it is not in control of our armed forces nor control of our government. True indeed, we have military officers trained in the U.S. armed forces school. This is part of our Military Assistance Program, but it does not mean that the minds of our military officers are for the U.S. government, no. I am one of those who took four courses in the United States schools, but I assure you, my mind is for the Filipino people. Also, while we are sending military officers to train or to study in U.S. military schools, we are also sending our officers to study in other military schools such as in Australia, England and in Paris. So, it does not mean that when we send military officers to United States schools or to other military schools, we will be under the control of that country. We also have foreign officers in our schools, we in the Command and General Staff College in Fort

Bonifacio and in our National Defense College, also in Fort Bonifacio.[377] (Emphases supplied)

This logic was accepted in *Tañada v. Angara,* in which the Court ruled that independence does not mean the absence of foreign participation:

> Furthermore, the constitutional policy of a "self-reliant and independent national economy" **does not necessarily rule out the entry of foreign investments, goods and services.** It contemplates neither "economic seclusion" nor "mendicancy in the international community." As explained by Constitutional Commissioner Bernardo Villegas, sponsor of this constitutional policy:
>
> > Economic self reliance is a primary objective of a developing country that is keenly aware of overdependence on external assistance for even its most basic needs. It does not mean autarky or economic seclusion; rather, it means avoiding mendicancy in the international community. **Independence refers to the freedom from undue foreign control** of the national economy, especially in such strategic industries as in the development of natural resources and public utilities.[378] (Emphases supplied)

The heart of the constitutional restriction on foreign military facilities and bases is therefore the assertion of independence from the U.S. and other foreign powers, as independence is exhibited by the degree of foreign control exerted over these areas. The essence of that independence is self- governance and self-control.[379] Independence itself is "[t]he state or condition of being free from dependence, subjection, or control."[380]

Petitioners assert that EDCA provides the U.S. extensive control and authority over Philippine facilities and locations,

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[377] V RECORD, CONSTITUTIONAL COMMISSION 240-241 (30 September 1986).

[378] *Tañada v. Angara, supra* note 97.

[379] Tydings-McDuffie Act, Section 10 (a) Pub.L. 73-127, 48 Stat. 456 (enacted 24 March 1934).

[380] *BLACK'S LAW DICTIONARY* 770 (6th ed. 1990). *See also J.* Carpio's Dissenting Opinion in *Liban v. Gordon,* 654 Phil. 680 (2011).

such that the agreement effectively violates Section 25 of the 1987 Constitution.[381]

Under Article V1(3) of EDCA, U.S. forces are authorized to act as necessary for "operational control and defense." The term "operational control" has led petitioners to regard U.S. control over the Agreed Locations as unqualified and, therefore, total.[382] Petitioners contend that the word "their" refers to the subject "Agreed Locations."

This argument misreads the text, which is quoted below:

> United States forces are authorized to exercise all rights and authorities within Agreed Locations that are necessary for their operational control or defense, including taking appropriate measure to protect United States forces and United States contractors. The United States should coordinate such measures with appropriate authorities of the Philippines.

A basic textual construction would show that the word "their," as understood above, is a possessive pronoun for the subject "they," a third-person personal pronoun in plural form. Thus, "their" cannot be used for a non-personal subject such as "Agreed Locations." The simple grammatical conclusion is that "their" refers to the previous third-person plural noun, which is "United States forces." This conclusion is in line with the definition of operational control.

a. U.S. operational control as the exercise of authority over U.S. personnel, and not over the Agreed Locations

Operational control, as cited by both petitioner and respondents, is a military term referring to

> [t]he authority to perform those functions of command over subordinate forces involving organizing and employing commands and forces,

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[381] Memorandum of Saguisag, p. 56, *rollo,* (G.R. No. 212426), p. 594.

[382] *Id.* at 596.

assigning tasks, designating objective, and giving authoritative direction necessary to accomplish the mission.[383]

At times, though, operational control can mean something slightly different. In *JUSMAG Philippines v. National Labor Relations Commission,* the Memorandum of Agreement between the AFP and JUSMAG Philippines defined the term as follows:[384]

> The term "Operational Control" includes, but is not limited to, all personnel administrative actions, such as: hiring recommendations; firing recommendations; position classification; discipline; nomination and approval of incentive awards; and payroll computation.

Clearly, traditional standards define "operational control" as personnel control. Philippine law, for instance, deems operational control as one exercised by police officers and civilian authorities over their subordinates and is distinct from the administrative control that they also exercise over police subordinates.[385] Similarly, a municipal mayor exercises operational control over the police within the municipal government,[386] just as city mayor possesses the same power over the police within the city government.[387]

Thus, the legal concept of operational control involves authority over personnel in a commander-subordinate relationship and does not include control over the Agreed Locations in this particular case. Though not necessarily stated in EDCA provisions, this interpretation is readily implied by the reference to the taking of "appropriate measures to protect United States forces and United States contractors."

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[383] *Id*. at 460.

[384] G.R. No. 108813, 15 December 1994, 239 SCRA 224, 229.

[385] R.A. No. 6975– *Department of the Interior and Local Government Act of 1990,* Sec. 86; P.D. No. 531, Secs. 4, 5, and 6.

[386] Local Government Code of 1991, Sec. 444.

[387] Local Government Code of 1991, Sec. 455.

It is but logical, even necessary, for the U.S. to have operational control over its own forces, in much the same way that the Philippines exercises operational control over its own units.

For actual operations, EDCA is clear that any activity must be planned and pre-approved by the MDB-SEB.[388] This provision evinces the partnership aspect of EDCA, such that both stakeholders have a say on how its provisions should be put into effect.

b. Operational control vis-a-vis effective command and control

Petitioners assert that beyond the concept of operational control over personnel, qualifying access to the Agreed Locations by the Philippine Designated Authority with the phrase "consistent with operational safety and security requirements in accordance with agreed procedures developed by the Parties" leads to the conclusion that the U.S. exercises effective control over the Agreed Locations.[389] They claim that if the Philippines exercises possession of and control over a given area, its representative should not have to be authorized by a special provision.[390]

For these reasons, petitioners argue that the "operational control" in EDCA is the "effective command and control" in the 1947 MBA.[391] In their Memorandum, they distinguish effective command and control from operational control in U.S. parlance.[392] Citing the Doctrine for the Armed Forces of the United States, Joint Publication 1, "command and control (C2)" is defined as "the exercise of authority and direction by a properly designated commander over assigned and attached forces in the accomplishment of the mission x x x."[393] Operational control,

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[388] *Rollo,* (G.R. No. 212426), pp. 515-525.

[389] *Id.* at 597.

[390] *Id.*

[391] *Id.* at 598.

[392] *Id.* at 599.

[393] *Id.* at 599, FN 76.

on the other hand, refers to "[t]hose functions of command over assigned forces involving the composition of subordinate forces, the assignment of tasks, the designation of objectives, the overall control of assigned resources, and the full authoritative direction necessary to accomplish the mission."[394]

Two things demonstrate the errors in petitioners' line of argument.

Firstly, the phrase "consistent with operational safety and security requirements in accordance with agreed procedures developed by the Parties" does not add any qualification beyond that which is already imposed by existing treaties. To recall, EDCA is based upon prior treaties, namely the VFA and the MDT.[395] Treaties are in themselves contracts from which rights and obligations may be claimed or waived.[396] In this particular case, the Philippines has already agreed to abide by the security mechanisms that have long been in place between the U.S. and the Philippines based on the implementation of their treaty relations.[397]

Secondly, the full document cited by petitioners contradicts the equation of "operational control" with "effective command and control," since it defines the terms quite differently, *viz:*[398]

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[394] *Id.* at footnote 77.

[395] EDCA, preamble.

[396] See: *Bayan Muna v. Romulo, supra* note 114; *Bayan v. Zamora, supra* note 23; *USAFFE Veterans Ass'n., Inc. v. Treasurer of the Phil., supra* note 173; Vienna Convention on the Law of the Treaties, Art. 27 (on internal law and observance of treaties) in relation to Art. 46 (on provisions of internal law regarding competence to conclude treaties).

[397] "Under EDCA, before constructions and other activities can be undertaken, prior consent of the Philippines will have to be secured through the Mutual Defense Board (MDB) and Security Engagement Board (SEB) which were established under the MDT and the VFA." See *Q&A on the Enhanced Defense Cooperation Agreement,* OFFICIAL GAZETTE, available at <http://www.gov.ph/2014/04/28/qna-on-the- enhanced-defense-cooperation-agreement> (last accessed 3 December 2015).

[398] UNITED STATES DEPARTMENT OF DEFENSE, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES: JOINT PUBLICATION 1, Chap. 1-18 (2013).

Command and control encompasses the exercise of authority, responsibility, and direction by a commander over assigned and attached forces to accomplish the mission. Command at all levels is the art of motivating and directing people and organizations into action to accomplish missions. Control is inherent in command. To control is to manage and direct forces and functions consistent with a commander's command authority. Control of forces and functions helps commanders and staffs compute requirements, allocate means, and integrate efforts. Mission command is the preferred method of exercising C2. A complete discussion of tenets, organization, and processes for effective C2 is provided in Section B, "Command and Control of Joint Forces," of Chapter V "Joint Command and Control."

Operational control is defined thus:[399]

OPCON is able to be delegated from a lesser authority than COCOM. It is the authority to perform those functions of command over subordinate forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction over all aspects of military operations and joint training necessary to accomplish the mission. It should be delegated to and exercised by the commanders of subordinate organizations; normally, this authority is exercised through subordinate JFCs, Service, and/or functional component commanders. OPCON provides authority to organize and employ commands and forces as the commander considers necessary to accomplish assigned missions. It does not include authoritative direction for logistics or matters of administration, discipline, internal organization, or unit training. These elements of COCOM must be specifically delegated by the CCDR. OPCON does include the authority to delineate functional responsibilities and operational areas of subordinate JFCs.

Operational control is therefore the delegable aspect of combatant command, while command and control is the overall power and responsibility exercised by the commander with reference to a mission. Operational control is a narrower power and must be given, while command and control is plenary and vested in a commander. Operational control does not include the planning, programming, budgeting, and execution process

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[399] *Id*. at Chap. V-6.

input; the assignment of subordinate commanders; the building of relationships with Department of Defense agencies; or the directive authority for logistics, whereas these factors are included in the concept of command and control.[400]

This distinction, found in the same document cited by petitioners, destroys the very foundation of the arguments they have built: that EDCA is the same as the MBA.

c. Limited operational control over the Agreed Locations only for construction activitites

As petitioners assert, EDCA indeed contains a specific provision that gives to the U.S. operational control within the Agreed Locations during construction activities.[401] This exercise of operational control is premised upon the approval by the MDB and the SEB of the construction activity through consultation and mutual agreement on the requirements and standards of the construction, alteration, or improvement.[402]

Despite this grant of operational control to the U.S., it must be emphasized that the grant is only for construction activities. The narrow and limited instance wherein the U.S. is given operational control within an Agreed Location cannot be equated with foreign military control, which is so abhorred by the Constitution.

The clear import of the provision is that in the absence of construction activities, operational control over the Agreed Location is vested in the Philippine authorities. This meaning is implicit in the specific grant of operational control only during construction activities. The principle of constitutional construction, *"expressio unius est exclusio alterius,"* means the failure to mention the thing becomes the ground for inferring

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[400] *See id.*, at Chap. V-2.

[401] EDCA, Art. III (4).

[402] EDCA, Art. III (4).

that it was deliberately excluded.[403] Following this construction, since EDCA mentions the existence of U.S. operational control over the Agreed Locations for construction activities, then it is quite logical to conclude that it is not exercised over other activities.

Limited control does not violate the Constitution. The fear of the commissioners was total control, to the point that the foreign military forces might dictate the terms of their acts within the Philippines.[404] More important, limited control does not mean an abdication or derogation of Philippine sovereignty and legal jurisdiction over the Agreed Locations. It is more akin to the extension of diplomatic courtesies and rights to diplomatic agents,[405] which is a waiver of control on a limited scale and subject to the terms of the treaty.

This point leads us to the second standard envisioned by the framers of the Constitution: that the Philippines must retain sovereignty and jurisdiction over its territory.

ii. Second standard: Philippine sovereignty and applicable law

EDCA states in its Preamble the "understanding for the United States not to establish a permanent military presence or base in the territory of the Philippines." Further on, it likewise states the recognition that "all United States access to and use of facilities and areas will be at the invitation of the Philippines and with full respect for the Philippine Constitution and Philippine laws."

The sensitivity of EDCA provisions to the laws of the Philippines must be seen in light of Philippine sovereignty and jurisdiction over the Agreed Locations.

[403] *Sarmiento v. Mison, supra* note 177. The case also formulated this principle as follows: "an express enumeration of subjects excludes others not enumerated."

[404] Rebuttal of Commissioner Nolledo, *supra* note 362.

[405] Vienna Convention on Diplomatic Relations, Arts. 31-40, 500 U.N.T.S. 95 (1961).

Sovereignty is the possession of sovereign power,[406] while jurisdiction is the conferment by law of power and authority to apply the law.[407] Article I of the 1987 Constitution states:

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

From the text of EDCA itself, Agreed Locations are territories of the Philippines that the U.S. forces are allowed to access and use.[408] By withholding ownership of these areas and retaining unrestricted access to them, the government asserts sovereignty over its territory. That sovereignty exists so long as the Filipino people exist.[409]

Significantly, the Philippines retains primary responsibility for security with respect to the Agreed Locations.[410] Hence, Philippine law remains in force therein, and it cannot be said that jurisdiction has been transferred to the U.S. Even the previously discussed necessary measures for operational control and defense over U.S. forces must be coordinated with Philippine authorities.[411]

Jurisprudence bears out the fact that even under the former legal regime of the MBA, Philippine laws continue to be in force within the bases.[412] The difference between then and

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[406] See *BLACK'S LAW DICTIONARY* 1523 (9th ed. 2009).

[407] See *BLACK'S LAW DICTIONARY* 927 (9th ed. 2009).

[408] EDCA, Article I(1)(b).

[409] *Laurel v. Misa*, 77 Phil. 856 (1947).

[410] EDCA. Art. VI(2).

[411] EDCA, Art. VI(3).

[412] *Liwanag v. Hamill,* 98 Phil. 437 (1956).

now is that EDCA retains the primary jurisdiction of the Philippines over the security of the Agreed Locations, an important provision that gives it actual control over those locations. Previously, it was the provost marshal of the U.S. who kept the peace and enforced Philippine law in the bases. In this instance, Philippine forces act as peace officers, in stark contrast to the 1947 MBA provisions on jurisdiction.[413]

iii. Third standard: must respect national security and territorial integrity

The last standard this Court must set is that the EDCA provisions on the Agreed Locations must not impair or threaten the national security and territorial integrity of the Philippines.

This Court acknowledged in *Bayan v. Zamora* that the evolution of technology has essentially rendered the prior notion of permanent military bases obsolete.

> Moreover, military bases established within the territory of another state is no longer viable because of the alternatives offered by new means and weapons of warfare such as nuclear weapons, guided missiles as well as huge sea vessels that can stay afloat in the sea even for months and years without returning to their home country. These military warships are actually used as substitutes for a land-home base not only of military aircraft but also of military personnel and facilities. Besides, vessels are mobile as compared to a land-based military headquarters.[414]

The VFA serves as the basis for the entry of U.S. troops in a limited scope. It does not allow, for instance, the re-establishment of the Subic military base or the Clark Air Field as U.S. military reservations. In this context, therefore, this Court has interpreted the restrictions on foreign bases, troops, or facilities as three independent restrictions. In accord with this interpretation, each restriction must have its own qualification.

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[413] 1947 MBA, Art. XIII.

[414] *Bayan v. Zamora, supra* note 23.

Petitioners quote from the website http://en.wikipedia.org to define what a military base is.[415] While the source is not authoritative, petitioners make the point that the Agreed Locations, by granting access and use to U.S. forces and contractors, are U.S. bases under a different name.[416] More important, they claim that the Agreed Locations invite instances of attack on the Philippines from enemies of the U.S.[417]

We believe that the raised fear of an attack on the Philippines is not in the realm of law, but of politics and policy. At the very least, we can say that under international law, EDCA does not provide a legal basis for a justified attack on the Philippines.

In the first place, international law disallows any attack on the Agreed Locations simply because of the presence of U.S. personnel. Article 2(4) of the United Nations Charter states that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[418] Any unlawful attack on the Philippines breaches the treaty, and triggers Article 51 of the same charter, which guarantees the inherent right of individual or collective self-defence.

Moreover, even if the lawfulness of the attack were not in question, international humanitarian law standards prevent participants in an armed conflict from targeting non-participants. International humanitarian law, which is the branch of international law applicable to armed conflict, expressly limits allowable military conduct exhibited by forces of a participant in an armed conflict.[419] Under this legal regime, participants to

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[415] Memorandum of Saguisag, p. 72, *rollo* (G.R. No. 212426), p. 610.

[416] *Id*.

[417] *Id*.

[418] Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

[419] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3 (1977) [hereinafter Geneva

an armed conflict are held to specific standards of conduct that require them to distinguish between combatants and non-combatants,[420] as embodied by the Geneva Conventions and their Additional Protocols.[421]

Corollary to this point, Professor John Woodcliffe, professor of international law at the University of Leicester, noted that there is no legal consensus for what constitutes a base, as opposed to other terms such as "facilities" or "installation."[422] In strategic literature, "base" is defined as an installation "over which the user State has a right to exclusive control in an extraterritorial sense."[423] Since this definition would exclude most foreign military installations, a more important distinction must be made.

For Woodcliffe, a type of installation excluded from the definition of "base" is one that does not fulfill a combat role. He cites an example of the use of the territory of a state for training purposes, such as to obtain experience in local geography and climactic conditions or to carry out joint exercises.[424] Another example given is an advanced communications technology installation for purposes of information gathering and communication.[425] Unsurprisingly, he deems these non-combat

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Convention Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the potection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609 (1977).

[420] Articles 48, 51(2) and 52(2), Protocol I, *supra* note 419.

[421] 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31; 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85; 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287; *Id*.

[422] JOHN WOODCLIFFE, *THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER MODERN INTERNATIONAL LAW* 30 (1992).

[423] *Id*.

[424] *Id*. at 32.

[425] *Id*.

uses as borderline situations that would be excluded from the functional understanding of military bases and installations.[426]

By virtue of this ambiguity, the laws of war dictate that the status of a building or person is presumed to be protected, unless proven otherwise.[427] Moreover, the principle of distinction requires combatants in an armed conflict to distinguish between lawful targets[428] and protected targets.[429] In an actual armed conflict between the U.S. and a third state, the Agreed Locations cannot be considered U.S. territory, since ownership of territory even in times of armed conflict does not change.[430]

Hence, any armed attack by forces of a third state against an Agreed Location can only be legitimate under international humanitarian law if it is against a *bona fide* U.S. military base, facility, or installation that directly contributes to the military effort of the U.S. Moreover, the third state's forces must take all measures to ensure that they have complied with the principle of distinction (between combatants and non-combatants).

There is, then, ample legal protection for the Philippines under international law that would ensure its territorial integrity and national security in the event an Agreed Location is subjected to attack. As EDCA stands, it does not create the situation so feared by petitioners — one in which the Philippines, while not participating in an armed conflict, would be *legitimately targeted* by an enemy of the U.S.[431]

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[426] *Id*.

[427] JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*- VOLUME I: RULES 34-36 (2005)

[428] Art. 52, Protocol I, *supra* note 419.

[429] Art. 48, *Id*.

[430] Art. 4., *Id*.

[431] Memorandum of Saguisag, pp. 66-70, *rollo* (G.R. No. 212426), pp. 604-608.

In the second place, this is a policy question about the wisdom of allowing the presence of U.S. personnel within our territory and is therefore outside the scope of judicial review.

Evidently, the concept of giving foreign troops access to "agreed" locations, areas, or facilities within the military base of another sovereign state is nothing new on the international plane. In fact, this arrangement has been used as the framework for several defense cooperation agreements, such as in the following:

1. 2006 U.S.-Bulgaria Defense Cooperation Agreement[432]
2. 2009 U.S.-Colombia Defense Cooperation Agreement[433]
3. 2009 U.S.-Poland Status of Forces Agreement[434]
4. 2014 U.S.-Australia Force Posture Agreement[435]
5. 2014 U.S.-Afghanistan Security and Defense Cooperation Agreement[436]

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[432] Article II(6) thereof provides: **"Agreed facilities and areas"** means the **state owned facilities and areas** in the territory of the Republic of Bulgaria listed in Annex A, and **such other state owned facilities and areas**, as may be mutually agreed by the Parties.

[433] Article I(g) thereof provides: **"Agreed facilities and locations"** means those sites, installations, and infrastructure **to which the United States is authorized access** and use by Colombia **in connection with activities carried out within the framework of this Agreement**.

[434] Article 2(i) thereof provides: **"agreed facilities and areas"** shall mean areas, **facilities, buildings or structures** in the territory of the Republic of Poland, **owned by the Republic of Poland**, and used by United States forces with the consent of the Republic of Poland.

[435] Article 1 thereof provides: **"Agreed Facilities and Areas"** means the **facilities and areas in the territory of Australia** provided by Australia which may be listed in Annex A appended to this Agreement, **and such other facilities and areas** in the territory of Australia as may be provided by Australia in the future, **to which United States Forces, United States Contractors**, dependants, and other United States Government personnel as mutually agreed, shall have the **right to access and use pursuant to this Arreement**.

[436] Article I(7) thereof provides: **"Agreed facilities and areas"** means the **facilities and areas in the territory of Afghanistan provided by Afghanistan at the locations** listed in Annex A, **and such other facilities**

In all of these arrangements, the host state grants U.S. forces access to their military bases.[437] That access is without rental or similar costs to the U.S.[438] Further, U.S. forces are allowed to undertake construction activities in, and make alterations and improvements to, the agreed locations, facilities, or areas.[439] As in EDCA, the host states retain ownership and jurisdiction over the said bases.[440]

In fact, some of the host states in these agreements give specific military-related rights to the U.S. For example, under Article IV(l) of the *US.-Bulgaria Defense Cooperation Agreement,* "the United States forces x x x are authorized access to and may use agreed facilities and areas x x x for staging and deploying of forces and materiel, with the purpose of conducting x x x contingency operations and other missions, including those undertaken in the framework of the North Atlantic Treaty." In some of these agreements, host countries allow U.S. forces to construct facilities for the latter's exclusive use.[441]

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and areas in the territory of Afghanistan as may be provided by Afghanistan in the future, to which United States forces, United States contractors, United States contractor employees, and others as mutually agreed, shall have the **right to access and use pursuant to this Agreement**.

[437] US-Bulgaria Defense Cooperation Agreement, Arts. II(6) & IV(l); US-Colombia Defense Cooperation Agreement, Art. IV; US-Poland Status of Forces Agreement, Art. 3(2); US-Australia Force Posture Agreement, Arts. I, IV;

[438] US-Bulgaria Defense Cooperation Agreement, Art. IV(5); US-Colombia Defense Cooperation Agreement, Art. IV; US-Poland Status of Forces Agreement, Art. 3(1); US-Australia Force Posture Agreement, Art. IV(7).

[439] US-Bulgaria Defense Cooperation Agreement, Art. IV(7); US-Colombia Defense Cooperation Agreement, Arts. IV(7), XI; US-Poland Status of Forces Agreement, Art. 3(6); US-Australia Force Posture Agreement, Art. IV(8).

[440] US-Bulgaria Defense Cooperation Agreement, Arts. II(6), IV(1) & VI(l); US-Colombia Defense Cooperation Agreement, Art. IV(6); US-Poland Status of Forces Agreement, Art. 4(1); US-Australia Force Posture Agreement, Art. XIV(l).

[441] US-Bulgaria Defense Cooperation Agreement, Art. IV(8); US-Colombia Defense Cooperation Agreement, Art. IV(4); US-Poland Status

Troop billeting, including construction of temporary structures, is nothing new. In *Lim v. Executive Secretary,* the Court already upheld the Terms of Reference of *Balikatan 02-1,* which authorized U.S. forces to set up "[t]emporary structures such as those for troop billeting, classroom instruction and messing x x x during the Exercise." Similar provisions are also in the Mutual Logistics Support Agreement of 2002 and 2007, which are essentially executive agreements that implement the VFA, the MDT, and the 1953 Military Assistance Agreement. These executive agreements similarly tackle the "reciprocal provision of logistic support, supplies, and services,"[442] which include "[b]illeting, x x x operations support (and construction and use of temporary structures incident to operations support), training services, x x x storage services, x x x during an approved activity."[443] These logistic supplies, support, and services include temporary use of "nonlethal items of military equipment which are not designated as significant military equipment on the U.S. Munitions List, during an approved activity."[444] The first Mutual Logistics Support Agreement has lapsed, while the second one has been extended until 2017 without any formal objection before this Court from the Senate or any of its members.

The provisions in EDCA dealing with Agreed Locations are analogous to those in the aforementioned executive agreements. Instead of authorizing the building of temporary structures as previous agreements have done, EDCA authorizes the U.S. to build permanent structures or alter or improve existing ones for, and to be owned by, the Philippines.[445] EDCA is clear that the Philippines retains ownership of altered or improved facilities and newly constructed permanent or non-relocatable structures.[446]

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of Forces Agreement, Art. 3(10); US-Australia Force Posture Agreement, Art. X(2).

[442] 2002 MLSA, Art. Ill(2); 2007 MLSA, Art. III(2).

[443] 2002 MLSA, Art. IV(l)(a)(2); 2007 MLSA, Art. IV(l)(a)(2).

[444] 2002 MLSA, Art. IV(l)(a)(3); 2007 MLSA, Art. IV(1)(a)(3).

[445] EDCA, Art. V(l).

[446] EDCA, Art. V(2).

Under EDCA, U.S. forces will also be allowed to use facilities and areas for "training; x x x; support and related activities; x x x; temporary accommodation of personnel; communications" and agreed activities.[447]

Concerns on national security problems that arise from foreign military equipment being present in the Philippines must likewise be contextualized. Most significantly, **the VFA already authorizes the presence of U.S. military equipment in the country.** Article VII of the VFA already authorizes the U.S. to import into or acquire in the Philippines "equipment, materials, supplies, and other property" that will be used "in connection with activities" contemplated therein. The same section also recognizes that "[t]itle to such property shall remain" with the US and that they have the discretion to "remove such property from the Philippines at any time."

There is nothing novel, either, in the EDCA provision on the prepositioning and storing of "defense equipment, supplies, and materiel,"[448] since these are sanctioned in the VFA. In fact, the two countries have already entered into various implementing agreements in the past that are comparable to the present one. The *Balikatan 02-1* Terms of Reference mentioned in *Lim v. Executive Secretary* specifically recognizes that Philippine and U.S. forces "may share x x x in the use of their resources, equipment and other assets." Both the 2002 and 2007 Mutual Logistics Support Agreements speak of the provision of support and services, including the "construction and use of temporary structures incident to operations support" and "storage services" during approved activities.[449] These logistic supplies, support, and services include the "temporary use of x x x nonlethal items of military equipment which are not designated as significant military equipment on the U.S. Munitions List, during an approved activity."[450] Those activities include "combined

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[447] EDCA, Art. III(1).

[448] EDCA, Art. IV(1).

[449] 2002 MLSA, Art. IV(l)(a)(2); 2007 MLSA, Art. IV(I)(a)(2).

[450] 2002 MLSA, Art. IV(l)(a)(3); 2007 MLSA, Art. IV(I)(a)(3).

exercises and training, operations and other deployments" and "cooperative efforts, such as humanitarian assistance, disaster relief and rescue operations, and maritime anti-pollution operations" within or outside Philippine territory.[451] Under EDCA, the equipment, supplies, and materiel that will be prepositioned at Agreed Locations include "humanitarian assistance and disaster relief equipment, supplies, and materiel."[452] Nuclear weapons are specifically excluded from the materiel that will be prepositioned.

Therefore, there is no basis to invalidate EDCA on fears that it increases the threat to our national security. If anything, EDCA increases the likelihood that, in an event requiring a defensive response, the Philippines will be prepared alongside the U.S. to defend its islands and insure its territorial integrity pursuant to a relationship built on the MDT and VFA.

8. Others issues and concerns raised

A point was raised during the oral arguments that the language of the MDT only refers to mutual help and defense in the Pacific area.[453] We believe that any discussion of the activities to be undertaken under EDCA *vis-à-vis* the defense of areas beyond the Pacific is premature. We note that a proper petition on that issue must be filed before we rule thereon. We also note that none of the petitions or memoranda has attempted to discuss this issue, except only to theorize that the U.S. will not come to our aid in the event of an attack outside of the Pacific. This is a matter of policy and is beyond the scope of this judicial review.

In reference to the issue on telecommunications, suffice it to say that the initial impression of the facility adverted to does appear to be one of those that require a public franchise by

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[451] 2002 MLSA, Art. III(1); 2007 MLSA, Art. III(1).

[452] EDCA, Art. IV(l).

[453] MDT, Arts. III, IV, and V.

way of congressional action under Section 11, Article XII of the Constitution. As respondents submit, however, the system referred to in the agreement does not provide telecommunications services to the public for compensation.[454] It is clear from Article VII(2) of EDCA that the telecommunication system is solely for the use of the U.S. and not the public in general, and that this system will not interfere with that which local operators use. Consequently, a public franchise is no longer necessary.

Additionally, the charge that EDCA allows nuclear weapons within Philippine territory is entirely speculative. It is noteworthy that the agreement in fact specifies that the prepositioned materiel shall not include nuc1ear weapons.[455] Petitioners argue that only prepositioned nuclear weapons are prohibited by EDCA; and that, therefore, the U.S. would insidiously bring nuclear weapons to Philippine territory.[456] The general prohibition on nuclear weapons, whether prepositioned or not, is already expressed in the 1987 Constitution.[457] It would be unnecessary or superfluous to include all prohibitions already in the Constitution or in the law through a document like EDCA.

Finally, petitioners allege that EDCA creates a tax exemption, which under the law must originate from Congress. This allegation ignores jurisprudence on the government's assumption of tax liability. EDCA simply states that the taxes on the use of water, electricity, and public utilities are for the account of the Philippine Government.[458] This provision creates a situation in which a contracting party assumes the tax liability of the other.[459] In *National Power Corporation v. Province of Quezon,* we distinguished between enforceable and unenforceable stipulations

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[454] *Rollo,* p. 464.

[455] EDCA, Art. IV(6).

[456] *Rollo,* pp. 34-35.

[457] Article II, Sec. 8.

[458] EDCA. Art. VII(1).

[459] *National Power Corporation v. Province of Quezon,* 610 Phil. 456 (2009).

on the assumption of tax liability. Afterwards, we concluded that an enforceable assumption of tax liability requires the party assuming the liability to have actual interest in the property taxed.[460] This rule applies to EDCA, since the Philippine Government stands to benefit not only from the structures to be built thereon or improved, but also from the joint training with U.S. forces, disaster preparation, and the preferential use of Philippine suppliers.[461] Hence, the provision on the assumption of tax liability does not constitute a tax exemption as petitioners have posited.

Additional issues were raised by petitioners, all relating principally to provisions already sufficiently addressed above. This Court takes this occasion to emphasize that the agreement has been construed herein as to absolutely disauthorize the violation of the Constitution or any applicable statute. On the contrary, the applicability of Philippine law is explicit in EDCA.

EPILOGUE

The fear that EDCA is a reincarnation of the U.S. bases so zealously protested by noted personalities in Philippine history arises not so much from xenophobia, but from a genuine desire for self-determination, nationalism, and above all a commitment to ensure the independence of the Philippine Republic from any foreign domination.

Mere fears, however, cannot curtail the exercise by the President of the Philippines of his Constitutional prerogatives in respect of foreign affairs. They cannot cripple him when he deems that additional security measures are made necessary by the times. As it stands, the Philippines through the Department of Foreign Affairs has filed several diplomatic protests against the actions of the People's Republic of China in the West Philippine Sea;[462] initiated arbitration against that country under

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[460] *National Power Corporation v. Province of Quezon, supra.*

[461] EDCA, Art. III(6); Art. IV(2); Art. V(l, 4); Art. VIII(2).

[462] *Statement of Secretary Albert del Rosario before the Permanent Court of Arbitration, Peace Palace, The Hague, Netherlands,* 7 July 2015,

the United Nations Convention on the Law of the Sea;[463] is in the process of negotiations with the Moro Islamic Liberation Front for peace in Southern Philippines,[464] which is the subject of a current case before this Court; and faces increasing incidents of kidnappings of Filipinos and foreigners allegedly by the Abu Sayyaf or the New People's Army.[465] The Philippine military is conducting reforms that seek to ensure the security and safety of the nation in the years to come.[466] In the future, the Philippines must navigate a world in which armed forces fight with increasing sophistication in both strategy and technology, while employing asymmetric warfare and remote weapons.

Additionally, our country is fighting a most terrifying enemy: the backlash of Mother Nature. The Philippines is one of the countries most directly affected and damaged by climate change. It is no coincidence that the record-setting tropical cyclone

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OFFICIAL GAZETTE, available at <http//www.gov.ph/2015/07/07/ statement -of-secretary-albert -del-rosario-before-the-permanent -court-of-arbitration-peace-palace-the-hague-netherlands/> (last visited 3 December 2015); *Statement on Recent Incidents in the Philippines' Bajo de Masinloc,* 4 February 2015, DEPARTMENT OF FOREIGN AFFAIRS, available at <http://www.dfa.gov.ph/index.php/newsroom/dfa-releases/5337-statement-on-recent-incidents-in-the-philippines-bajo-de-masinloc> (last visited 21 October 2015).

[463] *The Republic of the Philippines v. The People's Republic of China,* Case No. 2013-19 (Perm Ct. Arb.) <http://www.pcacases.com/web/view/7>(last visited 13 October 2015).

[464] *Comprehensive Agreement on the Bangsamoro,* OFFICIAL GAZETTE, available at <http://www.gov.ph/2014/03/27/document-cab> (last visited 21 October 2015).

[465] Frinston Lim, *Authorities believe Abu Sayyaf behind abduction of Filipina, 3 foreigners,* 22 September 2015, PHILIPPINE DAILY INQUIRER, available at <http://globalnation.inquirer.net/128739/authorities-believe-npa-behind-abduction-of-filipina-foreigners (last visited 3 December 2015).

[466] Republic Act No. 10349 (2012); The Philippine Navy, *Picture of the Future: The Philippine Navy Briefer,* available at <http://www.navy.mil.ph/downloads/THE%20PHILIPPINE%20NAVY%20BRIEFER.pdf> (last visited 3 December 2015).

Yolanda (internationally named *Haiyan),* one of the most devastating forces of nature the world has ever seen hit the Philippines on 8 November 2013 and killed at least 6,000 people.[467] This necessitated a massive rehabilitation project.[468] In the aftermath, the U.S. military was among the first to extend help and support to the Philippines.

That calamity brought out the best in the Filipinos as thousands upon thousands volunteered their help, their wealth, and their prayers to those affected. It also brought to the fore the value of having friends in the international community.

In order to keep the peace in its archipelago in this region of the world, and to sustain itself at the same time against the destructive forces of nature, the Philippines will need friends. Who they are, and what form the friendships will take, are for the President to decide. The only restriction is what the Constitution itself expressly prohibits. It appears that this overarching concern for balancing constitutional requirements against the dictates of necessity was what led to EDCA.

As it is, EDCA is not constitutionally infirm. As an executive agreement, it remains consistent with existing laws and treaties that it purports to implement.

WHEREFORE, we hereby **DISMISS** the petitions.

SO ORDERED.

Velasco, Jr., del Castillo, Villarama, Jr., Perez, Mendoza, and *Reyes, JJ.,* concur.

Carpio, J., see separate concurring opinion.

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[467] Joel Locsin, *NDRRMC: Yolanda death toll hits 6,300 mark nearly 6 months after typhoon,* 17 April 2014, GMA NEWS ONLINE <http://www.gmanetwork.com/news/story/357322/news/nation/ndrrrmc-yolanda-death-toll-hits-6-300-mark-nearly-6-months-after-typhoon> (last accessed 3 December 2015).

[468] *Typhoon Yolanda,* OFFICIAL GAZETTE, available at <http://www.gov.ph/crisis-response/updates-typhoon-yolanda/> (last visited 3 December 2015).

Peralta and *Bersamin, JJ.,* join the separate concurring opinion of *J.* Carpio.

Leonardo de Castro, Brion, and *Leonen, JJ., s*ee dissenting opinion.

Perlas-Bernabe, J., joins the dissenting opinions.

Jardeleza, J., no part.

SEPARATE CONCURRING OPINION

CARPIO, *J.*:

The threshold issue in this case is whether the Enhanced Defense Cooperation Agreement (EDCA) merely implements the existing and ratified 1951 Mutual Defense Treaty[1] (MDT), or whether the EDCA is a new treaty requiring Senate ratification to take effect.

The answer to this question turns on whether, under present circumstances, the attainment of the purpose of the MDT requires the EDCA. The fundamental rule in treaty interpretation is that a treaty must be interpreted "in the light of its object and purpose."[2]

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[1] The Philippine Senate ratified the MDT on 12 May 1952 under Senate Resolution No. 84.

[2] Article 31 of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention) provides:

> Article 31
> General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and **in the light of its object and purpose**.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: x x x. (Emphasis supplied)

The Philippines acceded to the Vienna Convention on 15 November 1972.

As stated in the MDT, the purpose of the United States (U.S.) and the Philippines in forging the MDT is to "declare publicly and formally their sense of unity and their common determination to defend themselves against external armed attack." If the MDT cannot attain this purpose without the EDCA, then the EDCA merely implements the MDT and Executive action is sufficient to make the EDCA valid.

A ratified treaty like the MDT must be interpreted to allow the Executive to take all necessary measures to insure that the treaty's purpose is attained. A ratified treaty cannot be interpreted to require a second ratified treaty to implement the first ratified treaty, as a fundamental rule is that a treaty must be interpreted to avoid a "result which is manifestly absurd or unreasonable."[3] This is particularly true to a mutual defense treaty the purpose of which is mutual self-defense against sudden armed attack by a third state.

However, if the MDT can attain its purpose without the EDCA, then the EDCA is a separate treaty that requires Senate ratification. I shall discuss why, under present circumstances, the EDCA is absolutely necessary and essential to attain the purpose of the MDT.

With the departure in 1992 of U.S. military forces from Subic Naval Base and Clark Air Base in Luzon, a power vacuum resulted in the South China Sea. As in any power vacuum, the next power would rush in to fill the vacuum. Thus, China, the

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[3] Article 32 of the 1969 Vienna Convention on the Law of Treaties provides:

> Article 32
> Supplementary means of interpretation
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) **leads to a result which is manifestly absurd or unreasonable.** (Emphasis supplied)

next power after the U.S., filled the power vacuum in the South China Sea, which includes the West Philippine Sea.[4]

In early 1995, barely three years after the departure of U.S. military forces from the Philippines, China seized Mischief Reef from the Philippines. There was no power to deter China as the U.S. forces had left. The Philippines did not anticipate that China would rush in to fill the power vacuum, or if the Philippines anticipated this, it did not upgrade its military to deter any Chinese aggression. After China seized Mischief Reef in 1995, the Philippines still did not upgrade its military, particularly its navy.

In 2012, China seized Scarborough Shoal from the Philippines, which could offer no armed resistance to Chinese naval forces. The Scarborough Shoal seizure finally made the Philippine Government realize that there was an absolute need to deter China's creeping invasion of Philippine islands, rocks and reefs in the West Philippine Sea. Thus, the Philippines rushed the modernization of its navy and air force. The Philippines also agreed with the U.S. to use the MDT to preposition U.S. war materials in strategic locations in the Philippines, particularly in the islands of Palawan and Luzon facing the West Philippine Sea.

In modern warfare, the successful implementation of a mutual defense treaty requires the strategic prepositioning of war materials. Before the advent of guided missiles and drones, wars could take months or even years to prosecute. There was plenty of time to conscript and train soldiers, manufacture guns and artillery, and ship war materials to strategic locations even after the war had started. Today, wars could be won or lost in the first few weeks or even first few days after the initial outbreak of war.

In modern warfare, the prepositioning of war materials, like mobile anti- ship and anti-aircraft missiles, is absolutely necessary and essential to a successful defense against armed aggression,

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[4] *See* Administrative Order No. 29, 5 September 2012.

particularly for a coastal state like the Philippines. This is what the EDCA is all about — the prepositioning in strategic locations of war materials to successfully resist any armed aggression. Such prepositioning will also publicly telegraph to the enemy that any armed aggression would be repelled. The enemy must know that we possess the capability, that is, the war materials, to defend the country against armed aggression. Otherwise, without such capability, we telegraph to the enemy that further seizure of Philippine islands, rocks and reefs in the South China Sea would be a walk in the park, just like China's seizure of Mischief Reef and Scarborough Shoal. Without such capability, we would practically be inviting the enemy to seize whatever Philippine island, rock or reef it desires to seize in the West Philippine Sea.

Since 2014, China has started building artificial islands in the Spratlys out of submerged areas like Mischief Reef and Subi Reef, or out of rocks that barely protrude above water at high tide like Fiery Cross Reef. China has so far created a 590-hectare artificial island in Mischief Reef which is only 125 nautical miles (NM) from Palawan, well within the Philippines' Exclusive Economic Zone (EEZ). In comparison, San Juan City is 595 hectares in area. China has built a 390-hectare artificial island in Subi Reef, outside the Philippines' EEZ but within its Extended Continental Shelf (ECS). China has created a 265-hectare artificial island in Fiery Cross Reef, outside the Philippines' EEZ but within its ECS.

China claims that its island-building activities are for civilian purposes but the configuration of these artificial islands shows otherwise. The configuration of China's Mischief Reef island, which is China's largest artificial island in the Spratlys, is that of a combined air and naval base, with a 3,000- meter airstrip.[5] The configuration of China's Subi Reef island is that of a naval base with a 3,000-meter airstrip. The configuration of China's

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[5] A 3,000-meter airstrip is long enough for any military aircraft of China to land and take off. A Boeing 747 airliner, or a B52 bomber, can easily land and take off on a 3,000-meter airstrip.

Fiery Cross Reef island is that of an airbase with a 3,000-meter airstrip and a harbor for warships. These three air and naval bases form a triangle in the Spratlys, **surrounding** the islands occupied by the Philippines.

Mischief Reef, located mid-way between Palawan and Pagasa, is ideally situated to block Philippine ships re-supplying Pagasa, the largest Philippine-occupied island in the Spratlys. Mischief Reef is also close to the gas-rich Reed Bank, the gas field that should replace Malampaya once Malampaya runs out of gas in 10 to 12 years. Malampaya supplies 40% of the energy requirement of Luzon. The Reed Bank and Malampaya are well within the Philippines' EEZ. However, China's 9-dashed lines enclose entirely the Reed Bank and encroach partly on Malampaya.

It is obvious that China will use the three air and naval bases in its artificial islands to prevent Philippine ships and planes from re-supplying Philippine-occupied islands in the Spratlys, forcing the Philippines to abandon its occupied islands. Already, Chinese coast guard vessels are preventing medium-sized Philippine ships from re-supplying the BRP Sierra Madre, the dilapidated Philippine landing ship beached in Ayungin Shoal, just 20 NM from Mischief Reef. Only the Philippines' use of small watercrafts enables the re- supply to the BRP Sierra Madre, which is manned by about a dozen Philippine marine soldiers. The Philippines' small watercrafts can navigate the shallow waters of Ayungin Shoal while China's large coast guard vessels cannot.

With the anticipated installation by China of military facilities and war materials in its three air and naval bases in the Spratlys, expected to be completed before the end of 2016, China will begin to aggressively enforce its 9-dashed lines claim over the South China Sea. Under this claim, China asserts sovereignty not only to all the islands, rocks and reefs in the Spratlys, but also to 85.7% of the South China Sea, comprising all the waters, fisheries, mineral resources, seabed and submarine areas enclosed by the 9-dashed lines. Under this claim, the Philippines

will lose 381,000 square kilometers[6] of its EEZ in the West Philippine Sea, a maritime space larger than the total Philippine land area of 300,000 square kilometers. China's 9-dashed lines claim encroaches on all the traditional fishing grounds of Filipino fishermen in the South China Sea: Scarborough Shoal, Macclesfield Bank and the Spratlys.

The Philippines, acting by itself, cannot hope to deter militarily China from enforcing its 9-dashed lines claim in the West Philippine Sea. The Philippines cannot acquire war materials like anti-ship and anti-aircraft missiles off the shelf. The operation of anti-ship missiles requires communications with airborne radar or satellite guidance systems. With the completion of China's air and naval bases before the end of 2016, the Philippines has no time to acquire, install and operate an anti-ship missile system on its own. Military and security analysts are unanimous that there is only one power on earth that can deter militarily China from enforcing its 9-dashed lines claim, and that power is the United States. This is why the MDT is utterly crucial to the Philippines' defense of its EEZ in the West Philippine Sea.

Of course, the United States has repeatedly stated that the MDT does not cover the disputed islands, rocks and reefs in the South China Sea. We understand this because at the time the MDT was signed the Philippine territory recognized by the United States did not include the Kalayaan Island Group in the Spratlys. However, the MDT provides that an armed attack on "public vessels or aircraft" (military or coast guard ship or aircraft) of either the United States or the Philippines in the Pacific area is one of the grounds for a party to invoke mutual defense under the MDT.[7] The United States has officially clarified that the Pacific area includes the South China Sea.[8]

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[6] Final Transcript Day 1 – Merits Hearing, page 58, line 11, Philippines-China Arbitration, http://www.pcacases.com/web/sendAttach/15487.

[7] Article IV of the MDT provides: "Each Party recognizes that an armed attack in the Pacific area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes. x x x."

[8] Letter of U.S. Secretary of State Cyrus Vance to Philippine Secretary of Foreign Affairs Carlos P. Romulo dated 6 January 1979; Letter of U.S.

If China's navy ships attack a Philippine military ship re-supplying Philippine-occupied islands in the Spratlys, that will be covered by the MDT. However, unless the U.S. and the Philippines have prepositioned anti-ship missiles in Palawan, there will be no deterrence to China, and no swift response from U.S. and Philippine forces. The absence of any deterrence will likely invite Chinese harassment, or even armed attack, on Philippine re-supply ships. That will lead to the loss of all Philippine-occupied islands in the Spratlys, as well as the loss of the gas-rich Reed Bank.

The prepositioning of war materials is a necessary and essential element to achieve the purpose of the MDT. Article II of the MDT expressly provides:

> In order more effectively to achieve the objective of this Treaty, the Parties separately and jointly by self-help and mutual aid will **maintain and develop their individual and collective capacity to resist armed attack**. (Emphasis supplied)

The prepositioning of war materials is the very essence of the phrase to "**maintain and develop (the Parties') individual and collective capacity to resist armed attack**." Without the prepositioning of war materials, a Party to the MDT cannot maintain and develop the capacity to resist armed attack. Without the prepositioning of war materials, a Party is simply and totally unprepared for armed attack.

The 1987 Constitution defines the "national territory" to include not only islands or rocks above water at high tide but also the seabed, subsoil and other submarine areas "over which the Philippines has sovereignty **or jurisdiction**." Article 1 of the 1987 Constitution provides:

> The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all other territories over which the Philippines has **sovereignty or jurisdiction**, consisting of its terrestrial, fluvial, and aerial domains, including its territorial

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Ambassador to the Philippines Thomas C. Hubbard to Foreign Secretary Domingo L. Siazon dated 24 May 1999.

sea, the seabed, the subsoil, the insular shelves, and other submarine areas. The waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines. (Emphasis supplied)

Thus, the Philippine "national territory" refers to areas over which the Philippines has "sovereignty ***or*** jurisdiction." The Constitution mandates: "The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and **exclusive economic zone**, and reserve its use and enjoyment exclusively to Filipino citizens."[9]

Under both customary international law and the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the Philippines has "sovereign rights" and "**jurisdiction**"[10] to exploit exclusively all the living and non-living resources within its EEZ. Under the UNCLOS, the Philippines has the sovereign rights

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[9] Section 2, Article XII of the1987 Constitution. Emphasis supplied.

[10] Article 56 of UNCLOS provides:

Article 56

Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In the exclusive economic zone, the coastal State has:
   (a) **sovereign rights** for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
   (b) **jurisdiction** as provided for in the relevant provisions of this Convention with regard to:
      (i) the establishment and use of artificial islands, installations and structures;
      (ii) marine scientific research;
      (iii) the protection and preservation of the marine environment;
   (c) other rights and duties provided for in this Convention.
2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention. x x x (Emphasis supplied)

to exploit exclusively the mineral resources within its ECS.[11] Under the UNCLOS, the Philippines also has sole "**jurisdiction"** to create artificial islands or install structures within its EEZ[12] and ECS.[13]

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[11] Article 77 of the UNCLOS provides:

Article 77

Rights of the coastal State over the continental shelf

1. The coastal State exercises over the continental shelf **sovereign rights for the purpose of exploring it and exploiting its natural resources**.
2. The rights referred to in paragraph 1 are **exclusive** in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.
3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.
4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil. (Emphasis supplied)

[12] Article 60 of the UNCLOS provides:

Article 60

Artificial islands, installations and structures in the exclusive economic zone

1. In the exclusive economic zone, **the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:**

(a) artificial islands;

(b) installations and structures for the purposes provided for in Article 56 and other economic purposes;

(c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.

2. **The coastal State shall have exclusive jurisdiction over such artificial islands,** installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations. x x x (Emphasis supplied)

[13] Article 80 of the UNCLOS provides:

In short, under international law and in particular under the UNCLOS, the Philippines has **jurisdiction** over its EEZ and ECS. Thus, under domestic law, the Philippines' EEZ and ECS form part of Philippine "national territory" since the Constitution defines "national territory" to include areas over which the Philippines has "**jurisdiction**," a term which means less than sovereignty. However, under international law, the Philippine "national territory" refers to the areas over which the Philippines has **sovereignty**, referring to the Philippines' land territory, archipelagic waters and territorial sea, excluding areas over which the Philippines exercises only jurisdiction like its EEZ and ECS.

China has already invaded **repeatedly** Philippine "national territory" in two separate areas, one in the Kalayaan Island Group in the Spratlys and the other in Scarborough Shoal. When China seized in 1988 Subi Reef, a submerged area within the Philippines' ECS and beyond the territorial sea of any high tide feature,[14] China invaded Philippine national territory as defined in the Constitution. When China seized in 1995 Mischief Reef, a submerged area within the Philippines' EEZ and beyond the territorial sea of any high tide feature,[15] China invaded Philippine national territory as defined in the Constitution. When China seized in 2012 Scarborough Shoal, a rock above water at high tide and constituting land territory under international law, China invaded Philippine national territory as defined in the Constitution and as understood in international law. Republic Act No. 9522, amending the Philippine Baselines Law, expressly declares that Scarborough Shoal is part of Philippine territory

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Article 80

Artificial islands, installations and structures on the continental shelf

Article 60 applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf.

[14] Final Transcript Day 2 – Merits Hearing, page 23, lines 7, 8 and 9, Philippines-China Arbitration, http://www.pcacases.com/web/sendAttach/1548.

[15] *Id*.

over which the Philippines exercises "**sovereignty** and jurisdiction."[16]

After China's seizure of Scarborough Shoal in 2012, the Philippines finally woke up and summoned the political will to address the serial and creeping Chinese invasion of Philippine national territory. Thus, the EDCA was born, to give much needed teeth to the MDT as a deterrent to further Chinese aggression in the West Philippine Sea. Without the EDCA, the MDT remains a toothless paper tiger. With the EDCA, the MDT acquires a real and ready firepower to deter any armed aggression against Philippine public vessels or aircrafts operating in the West Philippine Sea.

With the EDCA, China will think twice before attacking Philippine military re-supply ships to Philippine-occupied islands in the Spratlys. With the EDCA, the Philippines will have a fighting chance to hold on to Philippine- occupied islands in the Spratlys. With the EDCA, China will think twice before attacking Philippine navy and coast guard vessels patrolling the West Philippine Sea. This will give the Philippines a fighting chance to ward off China's impending enforcement of its 9-dashed lines as China's "national boundaries" as shown in its 2013 official vertical map.[17]

The number and sites of the "agreed locations" to place the prepositioned war materials must necessarily remain numerous

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[16] Section 2 of RA No. 9522 provides: "The baseline in the following areas over which the Philippines likewise exercises sovereignty and jurisdiction shall be determined as "Regime of Islands" under the Republic of the Philippines consistent with Article 121 of the United Nations Convention on the Law of the Sea (UNCLOS):

a) The Kalayaan Island Group as constituted under Presidential Decree No. 1596; and
b) **Bajo de Masinloc, also known as Scarborough Shoal**." (Emphasis supplied)

[17] In its *Note Verbale* of 7 June 2013 to China, the Philippines stated it "**strongly objects to the indication that the nine-dash lines are China's national boundaries in the West Philippine Sea/South China Sea**." (Emphasis supplied)

and anonymous. The "agreed locations" must be numerous enough to survive repeated or surprise armed attacks. There must not only be redundant "agreed locations" but also dummy "agreed locations" to mislead the enemy. The sites of many of the "agreed locations" cannot be disclosed publicly because that will give the enemy the fixed coordinates of the "agreed locations," making them easy targets of long-range enemy cruise missiles. The number and sites of the "agreed locations" are matters best left to the sound discretion of the Executive, who is the implementing authority of the MDT for the Philippines.

The implementation of the MDT is a purely Executive function since the Senate has already ratified the MDT. The implementation of the MDT is also part of the purely Executive function of the President as Commander-in-Chief of the Armed Forces. As executor and "chief architect"[18] of the country's relations with foreign countries, including our treaty ally the United States, the President is constitutionally vested with ample discretion in the implementation of the MDT. EDCA, being essentially and entirely an implementation of the MDT, is within the sole authority of the President to enter into as an executive agreement with the U.S.

Article VIII of the MDT provides: "This Treaty shall remain in force indefinitely. Either party may terminate it one year after notice is given to the other Party." Neither the Philippines nor the United States has terminated the MDT. On the contrary, the 1998 Visiting Forces Agreement between the Philippines and the United States, which the Philippine Senate has ratified, expressly states that the parties are "[r]eaffirming their obligations under the Mutual Defense Treaty of August 30, 1951." Thus, the continued validity and relevance of the MDT cannot be denied.

Moreover, the Senate ratification of the MDT complies with the requirement of Section 25, Article XVIII[19] of the 1987

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[18] *Pimentel, Jr. v. Office of the Executive Secretary*, 501 Phil. 303 (2005).

[19] Section 25, Article XVIII of the 1987 Constitution provides: "After the expiration in 1991 of the Agreement between the Republic of the

Constitution that any agreement allowing foreign military facilities in the Philippines, like the prepositioning of U.S. war materials, must be embodied in a treaty and ratified by two-thirds vote[20] of the Senate. That treaty is the MDT which the Philippine Senate ratified by two-thirds vote on 12 May 1952[21] and which the U.S. Senate ratified on 20 March 1952.[22]

In summary, the EDCA is absolutely necessary and essential to implement the purpose of the MDT, which on the part of the Philippines, given the existing situation in the West Philippine Sea, is to deter or repel any armed attack on Philippine territory or on any Philippine public vessel or aircraft operating in the West Philippine Sea. To hold that the EDCA cannot take effect without Senate ratification is to render the MDT, our sole mutual self-defense treaty, totally inutile to meet the grave, even existentialist,[23] national security threat that the Philippines is now facing in the West Philippine Sea.

Philippines and the United States of America concerning Military Bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except **under a treaty duly concurred in by the Senate** and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State." (Emphasis supplied)

[20] Section 21, Article VII of the 1987 Constitution provides: "No treaty or international agreement shall be valid and effective unless **concurred in by at least two-thirds of all the Members of the Senate**." (Emphasis supplied)

[21] The 1935 Constitution, under which the MDT was ratified, also required ratification of treaties by two-thirds vote of the Senate. Section 10(7), Article VII of the 1935 Constitution provides: "The President shall have the power, **with the concurrence of two thirds of all the Members of the Senate**, to make treaties, and with the consent of the Commission on Appointments, he shall appoint ambassadors, other public ministers; and consuls. He shall receive ambassadors and other public ministers duly accredited to the Government of the Philippines." (Emphasis supplied)

[22] See footnote 7, *Nicolas v. Romulo*, 598 Phil. 262 (2009).

[23] China's successful control of the South China Sea will force the Philippines to share a 1,300-kilometer sea border with China, from Balabac Island in Palawan to Yamin Island in Batanes, very close to the Philippine coastline facing the South China Sea. This will bring the Philippines into

China has already invaded several geologic features comprising part of Philippine "national territory" as defined in the Constitution. The territorial integrity of the Philippines has been violated openly and repeatedly. The President, as Commander-in-Chief of the Armed Forces, "chief architect" of foreign policy and implementer of the MDT, has decided on the urgent need to fortify Philippine military defenses by prepositioning war materials of our treaty ally on Philippine soil. This Court should not erect roadblocks to the President's implementation of the MDT, particularly since time is of the essence and the President's act of entering into the EDCA on his own does not violate any provision of the Constitution.

A final word. The EDCA does not detract from the legal arbitration case that the Philippines has filed against China under UNCLOS. The EDCA brings into the Philippine strategy the element of credible self-defense. Having refused to participate in the legal arbitration despite being obligated to do so under UNCLOS, China is now using brute force to assert its claim to almost the entire South China Sea. Given this situation, the proper equation in defending the Philippines' maritime zones in the West Philippine Sea is "legal right plus credible self-defense equals might."

Accordingly, I vote to **DISMISS** the petitions on the ground that the EDCA merely implements, and in fact is absolutely necessary and essential to the implementation of, the MDT, an existing treaty that has been ratified by the Senate.

CONCURRING AND DISSENTING OPINION

LEONARDO-DE CASTRO, *J.*:

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external

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China's orbit, with the Philippines adhering to China's positions on matters involving foreign policy.

source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction." x x x.[1]

I concur with the disposition of the procedural issues but not with the arguments and conclusions reached as to the substantive issues.

The focus of the present controversy, as mentioned by the Honorable Chief Justice is the application of Section 25, Article XVIII of the Constitution which reads:

ARTICLE XVIII
TRANSITORY PROVISIONS

SEC. 25. After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State.

Section 25, Article XVIII bans foreign military bases, troops, or facilities in Philippine territory, unless the following requisites are complied with: (1) the presence of foreign military bases, troops, or facilities should be allowed by a **treaty;** (2) the treaty must be **duly concurred in by the Philippine Senate** and, when Congress so requires, such treaty should be ratified by a majority of the votes cast by the Filipino people in a national referendum held for that purpose; and (3) such treaty should be **recognized as a treaty by the other contracting party.**[2]

Couched in negative terms, Section 25, Article XVIII embodies a prohibition: "foreign military bases, troops, or facilities ***shall***

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[1] *The Schooner Exchange vs. McFaddon and Others*, 3 Law. ed., 287, 293; cited in *Dizon vs. The Commanding General of the Phil. Ryukus Command, U.S. Army,* 81 Phil. 286, 292 (1948).

[2] *BAYAN (Bagong Alyansang Makabayan) v. Zamora,* 396 Phil. 623, 654-655 (2000).

not be allowed in the Philippines," unless the requisites in the said section are met.

In *BAYAN v. Zamora,*[3] the Court held that Section 25, Article XVIII covers three different situations: a treaty allowing the presence within the Philippines of (a) foreign military bases, or (b) foreign military troops, or (c) foreign military facilities, such that a treaty that involves any of these three standing alone falls within the coverage of the said provision.

BAYAN v. Zamora likewise expounded on the coverage of the two provisions of the Constitution — Section 21, Article VII and Section 25, Article XVIII — which both require Senate concurrence in treaties and international agreements. The Court stated:

> Section 21, Article VII deals with treaties or international agreements in general, in which case, the concurrence of at least two-thirds (2/3) of all the Members of the Senate is required to make the subject treaty, or international agreement, valid and binding on the part of the Philippines. This provision lays down the general rule on treaties or international agreements and applies to any form of treaty with a wide variety of subject matter, such as, but not limited to, extradition or tax treaties or those economic in nature. All treaties or international agreements entered into by the Philippines, regardless of subject matter, coverage, or particular designation or appellation, requires the concurrence of the Senate to be valid and effective.
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> In contrast, Section 25, Article XVIII is a special provision that applies to treaties which involve the presence of foreign military bases, troops or facilities in the Philippines. Under this provision, the concurrence of the Senate is only one of the requisites to render compliance with the constitutional requirements and to consider the agreement binding on the Philippines. Section 25, Article XVIII further requires that "foreign military bases, troops, or facilities" may be allowed in the Philippines only by virtue of a treaty duly concurred in by the Senate, ratified by a majority of the votes cast in a national referendum held for that purpose if so required by Congress, and recognized as such by the other contracting state.

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[3] *Id*. at 653.

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Moreover, it is specious to argue that Section 25, Article XVIII is inapplicable to mere transient agreements for the reason that there is no permanent placing of structure for the establishment of a militar base. On this score, the Constitution makes no distinction between "transient" and "permanent." Certainly, we find nothing in Section 25, Article XVIII that requires *foreign troops or facilities* to be stationed or placed *permanently* in the Philippines.

It is a rudiment in legal hermeneutics that when no distinction is made by law the Court should not distinguish — *Ubi lex non distinguit nec nos distinguire debemos.*

In like manner, we do not subscribe to the argument that Section 25, Article XVIII is not controlling since no foreign military bases, but merely foreign troops and facilities, are involved in the VFA. Notably, a perusal of said constitutional provision reveals that the proscription covers *"foreign military bases, troops, or facilities."* Stated differently, this prohibition is not limited to the entry of troops and facilities without any foreign bases being established. The clause does not refer to *"foreign military bases, troops, or facilities"* collectively but treats them **as separate and independent subjects.** The use of comma and the disjunctive word "or" clearly signifies disassociation and independence of one thing from the others included in the enumeration, such that, the provision contemplates three different situations — a military treaty the subject of which could be either (a) foreign bases, (b) foreign troops, or (c) foreign facilities — any of the three standing alone places it under the coverage of Section 25, Article XVIII.

To this end, the intention of the framers of the Charter, as manifested during the deliberations of the 1986 Constitutional Commission, is consistent with this interpretation:

> MR. MAAMBONG. I just want to address a question or two to Commissioner Bernas. This formulation speaks of three things: foreign military bases, troops or facilities. My first question is: *If the country does enter into such kind of a treaty, must it cover the three-bases, troops or facilities or could the treaty entered into cover only one or two?*
>
> FR. BERNAS. *Definitely, it can cover only one. Whether it covers only one or it covers three, the requirement will be the same.*

> MR. MAAMBONG. *In other words, the Philippine government can enter into a treaty covering not bases but merely troops?*
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> FR. BERNAS. *Yes.*
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> MR. MAAMBONG. I cannot find any reason why the, government can enter into a treaty covering only troops.
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> FR. BERNAS. Why not? Probably if we stretch our imagination a little bit more, we will find some. We just want to cover everything.[4] (Citations omitted.)

Furthermore, the wording of Section 25, Article XVIII also provides an indubitable implication: **foreign military bases, troops and facilities have ceased to be allowed in the Philippines after the expiration in 1991 of the Military Bases Agreement; thereafter, the same can only be re-allowed upon the satisfaction of all the three requirements set forth in the Section 25, Article XVIII.**

The legal consequence of the above provision with respect to the Military Bases Agreement (March 14, 1947), the Mutual Defense Treaty (August 30, 1951), the Visiting Forces Agreement (February 10, 1998), and the Enhanced Defense Cooperation Agreement ([EDCA] April 28, 2014) can be appreciated by an examination of the respective rights and obligations of the parties in these agreements.

Effect of Section 25, Article XVIII of the Constitution on the Military Bases Agreement, the Mutual Defense Treaty, the Visiting Forces Agreement, and the Enhanced Defense Cooperation Agreement

On July 4, 1946, the United States recognized the independence of the Republic of the Philippines, thereby apparently relinquishing any claim of sovereignty thereto. However, on March 14, 1947, the Philippines and the United States entered into a **Military Bases Agreement** (MBA) which granted to

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[4] *Id*. at 650-654.

the United States government the right to *retain*[5] the use of the bases listed in the Annexes of said agreement.[6] Within said

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[5] The Court explained in *Nicolas v. Romulo* (598 Phil. 262, 279-280 [2009]) that:

"[U)nder the Philippine Bill of 1902, which laid the basis for the Philippine Commonwealth and, eventually, for the recognition of independence, the United States agreed to cede to the Philippines all the territory it acquired from Spain under the Treaty of Paris, plus a few islands later added to its realm, except certain naval ports and/or military bases and facilities, which the United States retained for itself.

This is noteworthy, because what this means is that Clark and Subic and the other places in the Philippines covered by the RP-US Military Bases Agreement of 1947 were not Philippine territory, as they were excluded from the cession and retained by the US.

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Subsequently, the United States agreed to tum over these bases to the Philippines; and with the expiration of the RP-US Military Bases Agreement in 1991, the territory covered by these bases were finally ceded to the Philippines."

[6] Military Bases Agreement (March 14, 1947), Article I, which provides:

Article I

GRANT OF BASES

1. The Government of the Republic of the Philippines (hereinafter referred to as the Philippines) grants to the Government of the United States of America (hereinafter referred to as the United States) the right to retain the use of the bases in the Philippines listed in Annex A attached hereto.

2. The Philippines agrees to permit the United States, upon notice to the Philippines, to use such of those bases listed in Annex B as the United States determines to be required by military necessity.

3. The Philippines agrees to enter into negotiations with the United States at the latter's request, to permit the United States to expand such bases, to exchange such bases for other bases, to acquire additional bases, or relinquish rights to bases, as any of such exigencies may be required by military necessity.

4. A narrative description of the boundaries of the bases to which this Agreement relates is given in Annex A and Annex B. An exact description of the bases listed in Annex A, with metes and bounds, in conformity with the narrative descriptions, will be agreed upon between the appropriate authorities of the two Governments as soon as possible. With respect to any of the bases listed in Annex B, an exact description with metes and bounds, in conformity with the narrative description of such bases, will be agreed upon if and when such bases are acquired by the United States.

bases, the United States was granted "the rights, power and authority within the bases which are necessary for the establishment, use, operation and defense thereof or appropriate for the control thereof and all the rights, power and authority within the limits of territorial waters and air space adjacent to, or in the vicinity of, the bases which are necessary to provide access to them, or appropriate for their control."[7] The term of the original agreement was "for a period of ninety-nine years subject to extension thereafter as agreed by the two Governments."[8] In 1966, the parties entered into the Ramos-Rusk Agreement, which reduced the term of the Military Bases Agreement to 25 years from 1966, or until 1991.

On August 30, 1951, the Philippines and the United States entered into the **Mutual Defense Treaty** (MDT), whereby the parties recognized that "an armed attack in the Pacific area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional process."[9] The treaty provided that it "shall remain in force indefinitely," although

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[7] *Id.*, Article III(l).

[8] *Id.*, Article XXIX.

[9] Articles IV and V of the Mutual Defense Treaty (August 30, 1951) provides:

ARTICLE IV

Each Party recognizes that an armed attack in the Pacific Area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional process.

Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

ARTICLE V

For the purpose of Article IV, an armed attack on either of the Parties is deemed to include an armed attack on the metropolitan territory of either of the Parties, or on the island territories under its jurisdiction in the Pacific or on its armed forces, public vessels or aircraft in the Pacific.

either party "may terminate it one year after notice has been given to the other Party."[10] It bears pointing out that there is no explicit provision in the MDT which authorized the presence in the Philippines of military bases, troops, or facilities of the United States.

In 1986, during the early stages of the deliberations of the Constitutional Commission, and in view of the impending expiration of the MBA in 1991, the members of the Commission expressed their concern that the continued presence of foreign military bases in the country would amount to a derogation of national sovereignty. The pertinent portion of the deliberations leading to the adoption of the present Section 25, Article XVIII is quoted as follows:

FR. BERNAS. My question is: Is it the position of the committee that the presence of foreign military bases in the country under any circumstances is a derogation of national sovereignty?

MR. AZCUNA. It is difficult to imagine a situation based on existing facts where it would not. However, in the abstract, it is possible that it would not be that much of a derogation. I have in mind, Madam President, the argument that has been presented. Is that the reason why there are U.S. bases in England, in Spain and in Turkey? And it is not being claimed that their sovereignty is being derogated. Our situation is different from theirs because we did not lease or rent these bases to the U.S. The U.S. retained them from us as a colonial power.

FR. BERNAS. So, the second sentence, Madam President, has specific reference to what obtains now.

MR. AZCUNA. Yes. It is really determined by the present situation.

FR. BERNAS. Does the first sentence tolerate a situation radically different from what obtains now? In other words, if we understand sovereignty as auto-limitation, as a people's power to give up certain goods in order to obtain something which may be more valuable, would it be possible under this first sentence for the nation to negotiate some kind of a treaty agreement that would not derogate against sovereignty?

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[10] Mutual Defense Treaty (August 30, 1951), Article VIII.

MR. AZCUNA. Yes. For example, Madam President, if it is negotiated on a basis of true sovereign equality, such as a mutual ASEAN defense agreement wherein an ASEAN force is created and this ASEAN force is a foreign military force and may have a basis in the member ASEAN countries, this kind of a situation, I think, would not derogate from sovereignty.

MR. NOLLEDO. Madam President, may I be permitted to make a comment on that beautiful question. I think there will be no derogation of sovereignty if the existence of the military bases as stated by Commissioner Azcuna is on the basis of a treaty which was not only ratified by the appropriate body, like the Congress, but also by the people.

I would like also to refer to the situation in Turkey where the Turkish government has control over the bases in Turkey, where the jurisdiction of Turkey is not impaired in anyway, and Turkey retains the right to terminate the treaty under circumstances determined by the host government. I think under such circumstances, the existence of the military bases may not be considered a derogation of sovereignty, Madam President.

FR. BERNAS. Let me be concrete, Madam President, in our circumstances. **Suppose they were to have this situation where our government were to negotiate a treaty with the United States, and then the two executive departments in the ordinary course of negotiation come to an agreement. As our Constitution is taking shape now, if this is to be a treaty at all, it will have to be submitted to our Senate for its ratification. Suppose, therefore, that what was agreed upon between the United States and the executive department of the Philippines is submitted and ratified by the Senate, then it is further submitted to the people for its ratification and subsequently, we ask the United States: "Complete the process by accepting it as a treaty through ratification by your Senate as the United States Constitution requires," would such an arrangement be in derogation of sovereignty?**

MR. NOLLEDO. **Under the circumstances the Commissioner just mentioned, Madam President, on the basis of the provision of Section 1 that "sovereignty resides in the Filipino people," then we would not consider that a derogation of our sovereignty on the**

basis and expectation that there was a plebiscite.[11] (Emphasis supplied.)

As a safeguard against the derogation of national sovereignty, the present form of Section 25, Article XVIII was finalized by the Commission and ratified by the Filipino people in 1987.

On September 16, 1991, the Senate rejected the proposed Treaty of Friendship, Cooperation and Security, which would have extended the presence of US military bases in the Philippines. Nevertheless, the defense and security relationship between the Philippines and the United States continued in accordance with the MDT.[12]

Upon the expiration of the MBA in 1991, Section 25, Article XVIII came into effect. The presence of foreign military bases, troops or facilities in the country can only be allowed upon the satisfaction of all three requirements set forth in Section 25, Article XVIII.

On February 10, 1998, the Philippines and the United States entered into the Visiting Forces Agreement (VFA), which required the Philippines to facilitate the admission of **United States personnel,**[13] a term defined in the same treaty as "United States military and civilian personnel **temporarily** in the Philippines **in connection with activities approved by the Philippine Government**."[14]

United States Government equipment, materials, supplies, and other property imported into the Philippines in connection with activities to which the VFA applies, while **not expressly stated** to be *allowed into the Philippines* by the provisions of the VFA, were nevertheless declared to be free from Philippine

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[11] IV RECORD OF THE CONSTITUTIONAL COMMISSION, pp. 661-662.

[12] *BAYAN v. Zamora, supra* note 2.

[13] Visiting Forces Agreement (February 10, 1998), Article III.

[14] *Id.*, Article I.

duties, taxes and similar charges. Title thereto was also declared to remain with the United States.[15]

The VFA expressly allowed the importation into the Philippines of reasonable quantities of personal baggage, personal effects, and other property for the personal use of United States personnel.[16] The VFA likewise expressly allowed the entry into the Philippines of (1) aircraft operated by or for the United States armed forces upon approval of the Government of the Philippines in accordance with procedures stipulated in implementing arrangements; and (2) vessels operated by or for the United States armed forces upon approval of the Government of the Philippines, in accordance with international custom and practice and such agreed implementing arrangements as necessary.[17]

The VFA also provided· for the jurisdiction over criminal and disciplinary cases over United States personnel with respect to offences committed within the Philippines.[18]

The VFA further stated that the same shall remain in force until the expiration of 180 days from the date on which either party gives the other party notice in writing that it desires to terminate the agreement.[19]

Subsequently, the constitutionality of the VFA was questioned before the Court in the aforementioned October 10, 2000 case of *BAYAN v. Zamora,*[20] and again in the February 11, 2009 case of *Nicolas v. Romulo.*[21] In both cases, the Court held that Section 25, Article XVIII of the Constitution is applicable,

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[15] *Id*., Article VII.

[16] *Id*., Article VII.

[17] *Id*., Article VIII.

[18] *Id*., Article V.

[19] *Id*., Article IX.

[20] *Supra* note 2.

[21] *Supra* note 5.

but the requirements thereof were nevertheless complied with. In *Nicolas,* however, the implementing *Romulo-Kenney Agreements* of December 19 and 22, 2006 concerning the custody of Lance Corporal Daniel J. Smith, who was charged with the crime of rape, were declared not in accordance with the VFA.

Thereafter, on April 28, 2014, the governments of the Philippines and the United States entered into the assailed EDCA.

The EDCA

Under the EDCA, the Philippines by mutual agreement with the United States, shall provide the United States forces the access and use of portions of Philippine territory. United States forces are "the entity comprising United States personnel and all property, equipment, and materiel of the United States Armed Forces present in the territory of the Philippines." These portions of Philippine territory that will be made available to the US are called "Agreed Locations," which is a new concept defined under Article II(4) of the EDCA as:

> 4. "Agreed Locations" means facilities and areas that are provided by the Government of the Philippines through the AFP and that the United States forces,[22] United States contractors, and others as mutually agreed, shall have the **right to access and use** pursuant to this Agreement. Such Agreed Locations may be listed in an annex to be appended to this Agreement, and may further be described in implementing arrangements. (Emphasis supplied.)

Aside from the right to access and to use the Agreed Locations, the United States may undertake the following types of activities within the Agreed Locations: security cooperation exercises; joint and combined training activities; humanitarian and disaster relief activities; and such other activities that as may be agreed

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[22] "United States forces" means the entity comprising United States personnel and all property, equipment and materiel of the United States Armed Forces present in the territory of the Philippines. [Enhanced Defense Cooperation Agreement, Article II(2).]

upon by the Parties."[23] Article III(l) of the EDCA further states in detail the activities that the United States may conduct inside the Agreed Locations:

> 1. With consideration of the views of the Parties, the Philippines hereby authorizes and agrees· that United States forces, United States contractors, and vehicles, vessels, and aircrafts operated by or for United States forces may conduct the following activities with respect to Agreed Locations: **training; transit; support and related activities; refueling of aircraft; bunkering of vessels; temporary maintenance of vehicles, vessels, and aircraft; temporary accommodation of personnel; communications; prepositioning of equipment, supplies, and materiel; deploying forces and materiel; and such other activities as the Parties may agree**. (Emphasis supplied.)

The United States may access and use the Agreed Locations without any obligation on its part to pay any rent or similar costs.[24]

In addition to the right to access and to use the Agreed Locations and to conduct various activities therein, the United States, upon request to the Philippines' Designated Authorities,[25] can further temporarily access public land and facilities (including roads, ports, and airfields), including those owned or controlled by local governments, and to other land and facilities (including roads, ports, and airfields).[26]

The United States is also granted operational control of Agreed Locations to do construction activities, make alterations or

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[23] Enhanced Defense Cooperation Agreement, Article I(3).

[24] *Id*., Article III(3).

[25] *Id*., Article II(5) states:

> 5. "Designated Authorities" means, respectively, the Philippine Department of National Defense, unless the Philippines otherwise provides written notice to the United States, and the United States Department of Defense, unless the United States otherwise provides written notice to the Philippines.

[26] *Id*., Article III(2).

improvements of the Agreed Locations.[27] All buildings, non-relocatable structures, and assemblies affixed to the land in the Agreed Locations, including [those] altered or improved by United States forces, remain the property of the Philippines. Permanent buildings constructed by the United States forces become the property of the Philippines, once constructed, but shall be used by the United States forces until no longer required.[28]

Incidental to the access and use of the Agreed Locations, the US is granted the use of water, electricity and other public utilities,[29] as well as the use of the radio spectrum in relation to the operation of its own telecommunications system.[30]

As to the management of the Agreed Locations, the United States forces are authorized to exercise an rights and authorities within the Agreed Locations that are necessary for their operational control or defense, including taking appropriate measures to protect United States forces and United States contractors. The United States should coordinate such measures with appropriate authorities of the Philippines.[31]

The United States is authorized to preposition and store defense equipment, supplies, and materiel ("prepositioned materiel"), including but not limited to, humanitarian assistance and disaster relief equipment, supplies and material, at Agreed Locations.[32] The prepositioned materiel of the United States forces shall be for the exclusive use. of United States forces, and full title to all such .equipment, supplies and materiel remains with the United States.[33] United States forces and United States

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[27] *Id*., Article III(4).

[28] *Id*., Article V(4).

[29] *Id*., Article VII(1).

[30] *Id*., Article VII(2).

[31] *ld*., Article VI(3).

[32] *Id*., Article IV(l).

[33] *Id*., Article IV(3).

contractors[34] shall have unimpeded access to Agreed Locations for all matters relating to the prepositioning and storage of defense equipment, supplies, and materiel, including delivery, management, inspection, use, maintenance, and removal of such equipment, supplies and materiel.[35] The United States forces and United States contractors shall retain title to all equipment, materiel, supplies, relocatable structures, and other movable property that have been imported into or acquired within the territory of the Philippines by or on behalf of United States forces.[36]

Considering the presence of US armed forces: military personnel, vehicles, vessels, and aircrafts and other defensive equipment, supplies, and materiel in the Philippines, for obvious military purposes and with the obvious intention of assigning or stationing them within the Agreed Locations, said Agreed Locations, for all intents and purposes, are considered military bases and fall squarely under the definition of a military base under Section 2, Presidential Decree No. 1227, otherwise known as *"Punishing Unlawful Entry into Any Military Base in the Philippines,"* which states:

> SECTION 2. The term "military base" as used in this decree means **any military, air, naval, or coast guard reservation, base, fort, camp, arsenal, yard, station, or installation in the Philippines.** (Emphasis supplied.)

In the same vein, Article XXVI of the 1947 RP-US Military Bases Agreement (MBA) defined a military base as "areas named in Annex A and Annex B and such additional areas as

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[34] *Id.*, Article II defines United States contractors as:

> 3. "United States contractors" means companies and firms, and their employees, under contract or subcontract to or on behalf of the United States Department of Defense. United States contractors are not included as part of the definition of United States personnel in this Agreement, including within the context of the VFA.

[35] *Id.*, Article IV(4).

[36] *Id.*, Article V(3).

may be acquired for military purposes pursuant to the terms of this Agreement."[37]

Considering further that the United States armed forces stationed in the Philippines, as well as their relocatable structures, equipment and materiel are owned, maintained, controlled, and operated by the United States within Philippine territory, these Agreed Locations are clearly overseas military bases of the US with RP as its host country.

The EDCA provided for an initial term of ten years, which thereafter shall continue in force automatically, unless terminated by either party by giving one year's written notice through diplomatic channels of its intention to terminate the agreement.[38]

Interestingly, the EDCA has similar provisions found in the 1947 MBA:

Military Bases Agreement (March 14, 1947)	**Enhanced Defense Cooperation Agreement (Apri1 28, 2014)**
Article III: DESCRIPTION OF RIGHTS 1. It is mutually agreed that the United States shall have the rights, power and authority within the bases which are necessary for the establishment, use, **operation and defense thereof or appropriate for the control** thereof and all the rights, power and authority within	Article III: AGREED LOCATIONS 4. The Philippines hereby grants the United States, through bilateral security mechanisms, such as the MDB and SEB, **operational control** of Agreed Locations for construction activities and authority to undertake such activities on, and **make alterations and improvements** to, Agreed Locations. x x x.

[37] Annexes A and B referred to under the MBA included the following military bases in the Philippines, namely: Clark Field Air Base, Pampanga; Mariveles Military Reservation, POL Terminal and Training Area, Bataan; Camp John Hay Leave and Recreation Center, Baguio; Subic Bay, Northwest Shore Naval Base, Zambales Province, and the existing Naval reservation at Olongapo and the existing Baguio Naval Reservation; Cañacao-Sangley Point Navy Base, Cavite Province; Mactan Island Army and Navy Air Base; Florida Blanca Air Base, Pampanga; Camp Wallace, San Fernando, La Union; and Aparri Naval Air Base, among others. (Military Bases Agreement [March 14, 1947).)

[38] Enhanced Defense Cooperation Agreement, Article XII(4).

the limits of territorial waters and air space adjacent to, or in the vicinity of, the bases which are necessary to provide access to them, or appropriate for their control.	Article VI: SECURITY 3. United States forces are authorized to exercise **all rights and authorities** within Agreed Locations that are **necessary for their operational control or defense** x x x.
Article III: DESCRIPTION OF RIGHTS 2. Such rights, power and authority shall include, *inter alia,* the right, power and authority: (a) to **construct** (including dredging and filling), operate, maintain, utilize, occupy, garrison and control the bases; (b) to **improve** and deepen the harbors, channels, entrances and anchorages, and to **construct or maintain** necessary roads and bridges affording access to the bases;	Article III: AGREED LOCATIONS 4. The Philippines hereby grants the United States, through bilateral security mechanisms, such as the MDB and SEB, **operational control** of Agreed Locations **for construction activities** and authority to undertake such activities on, and **make alterations and improvements** to, Agreed Locations. x x x.
Article III: DESCRIPTION OF RIGHTS 2. Such rights, power and authority shall include, *inter alia,* the right, power and authority: x x x (c) to **control (including the right to prohibit)** so far as may be required for the efficient operation and safety of the bases, and within the limits of military necessity, anchorages, moorings, landings, takeoffs, movements and operation of ships and waterborne craft, aircraft and other vehicles on water, in the air or on land comprising or in the vicinity of the bases;	Article III: AGREED LOCATIONS 5. The Philippine Designated Authority and its authorized representative shall have access to the entire area of the Agreed Locations. Such access shall be provided promptly **consistent with operational safety and security requirements in accordance with agreed procedures developed by the Parties.** Article IV: EQUIPMENT, SUPPLIES, AND MATERIEL 4. United States forces and United States contractors shall have **unimpeded access** to Agreed Locations for all matters relating to the **prepositioning and storage of defense equipment, supplies, and materiel, including delivery, management, inspection, use, maintenance, and removal** of such equipment, supplies and materiel.

Article III: DESCRIPTION OF RIGHTS 2. Such rights, power and authority shall include, *inter alia,* the right, power and authority: x x x (e) to construct, **install, maintain, and employ** on any base any type of **facilities, weapons, substance, device, vessel or vehicle** on or under the ground, in the air or on or under the water that may be requisite or appropriate, including meteorological systems, aerial and water navigation lights, radio and radar apparatus and electronic devices, of any desired power, type of emission and frequency.	Article III: AGREED LOCATIONS 1. With consideration of the views of the Parties, the Philippines hereby authorizes and agrees that United States forces, United States contractors, and vehicles, vessels, and aircraft operated by and for United States forces **may conduct the following activities with respect to Agreed Locations:** training; transit; support and related activities; **refueling of aircraft; bunkering of vessels;** temporary maintenance of vehicles, vessels, and aircraft; temporary accommodation of personnel; communications; **prepositioning of equipment, supplies, and materiel; deploying forces and materiel;** and such other activities as the Parties may agree. Article IV: EQUIPMENT, SUPPLIES, AND MATERIEL 1. The Philippines hereby authorizes the United States forces, x x x to **preposition and store defense equipment, supplies, and materiel ("prepositioned materiel")** x x x. x x x 3. **The prepositioned materiel of the United States forces shall be for the exclusive use of the United States forces,** and full title to all such equipment, supplies, and materiel remains with the United States. United States forces shall have **control over** the access to and disposition of **such prepositioned materiel** and shall have the unencumbered right to remove such prepositioned materiel at any time from the territory of the Philippines. (Emphases supplied.)

The EDCA is not a mere implementing agreement of the MDT or the VFA

As can be seen in the above table of comparison, **these EDCA provisions establishes military areas similar to that in the Military Bases Agreement,** and for that reason alone, the EDCA is far greater in scope than both the Mutual Defense Treaty and the Visiting Forces Agreement. The EDCA is not a mere implementing agreement of either the MDT or the VFA.

The EDCA is **an international agreement** that **allows the presence in the Philippines of foreign military bases, troops and facilities,** and thus requires that the three requisites under Section 25, Article XVIII be complied with. The EDCA must be submitted to the Senate for concurrence.

The majority opinion posits, *inter alia,* that the President may enter into an **executive agreement** on foreign military bases, troops, or facilities if: (a) it "is not the **principal agreement that first allowed their entry or presence in the Philippines,"** or (b) it merely aims to implement an existing law or treaty. Likewise, the President alone had the choice to enter into the EDCA by way of an executive agreement or a treaty. Also, the majority suggests that executive agreements may cover the matter of foreign military forces if it involves detail adjustments of previously existing international agreements.

The above arguments fail to consider that Section 25, Article XVIII of the Constitution covers three distinct and mutually independent situations: the presence of foreign military bases or troops or facilities. The grant of entry to foreign military troops does not necessarily allow the establishment of military bases or facilities.[39]

Generally, the parties to an international agreement are given the freedom to choose the form of their agreement.

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[39] *BAYAN v. Zamora, supra* note 2 at 653.

International agreements may be in the form of: (1) treaties, which require legislative concurrence after executive ratification; or (2) executive agreements, which are similar to treaties, except that they do not require legislative concurrence and are usually less formal and deal with a narrower range of subject matters than treaties. Under Article 2 of the Vienna Convention on the Law of Treaties, a treaty is defined as an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[40]

In the 1961 case of *Commissioner of Customs v. Eastern Sea Trading,*[41] the Court had occasion to state that "[i]nternational agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements."

In the more recent case of *Bayan Muna v. Romulo,*[42] the Court expounded on the above pronouncement in this wise:

> The categorization of subject matters that may be covered by international agreements mentioned in *Eastern Sea Trading* is not cast in stone. **There are no hard and fast rules on the propriety of entering, on a given subject, into a treaty or an executive agreement as an instrument of international relations. The primary consideration in the choice of the form of agreement is the parties' intent and desire to craft an international agreement in the form they so wish to further their respective interests.** Verily, the matter of form takes a back seat when it comes to effectiveness and binding effect of the enforcement of a treaty or an executive agreement, as the parties in either international agreement each labor under the *pacta sunt servanda* principle.

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[40] *Id*. at 657.

[41] 113 Phil. 333, 338 (1961).

[42] 656 Phil. 246, 271-272 (2011).

As may be noted, almost half a century has elapsed since the Court rendered its decision in *Eastern Sea Trading.* Since then, the conduct of foreign affairs has become more complex and the domain of international law wider, as to include such subjects as human rights, the environment, and the sea. x x x Surely, the enumeration in *Eastern Sea Trading* cannot circumscribe the option of each state on the matter of which the international agreement format would be convenient to serve its best interest. As Francis Sayre said in his work referred to earlier:

> x x x It would be useless to undertake to discuss here the large variety of executive agreements as such concluded from time to time. Hundreds of executive agreements, other than those entered into under the trade-agreement act, have been negotiated with foreign governments. x x x. They cover such subjects as the inspection of vessels, navigation dues, income tax on shipping profits, the admission of civil air craft, custom matters and commercial relations generally, international claims, postal matters, the registration of trademarks and copyrights, etc. x x x. (Citations omitted.)

However, it must be emphasized that while in the above case, the Court called attention to "one type of executive agreement which is a **treaty-authorized** or a **treaty-implementing** executive agreement, which necessarily would cover the same matter subject of the underlying treaty," still, the Court cited the special situation covered by Section 25, Article XVIII of the Constitution which explicitly prescribes the form of the international agreement. The Court stated:

> But over and above the foregoing considerations is the fact that — **save for the situation and matters contemplated in Sec. 25, Art. XVIII of the Constitution** — **when a treaty is required**, the Constitution does not classify any subject, like that involving political issues, to be in the form of, and ratified as, a treaty. What the Constitution merely prescribes is that treaties need the concurrence of the Senate by a vote defined therein to complete the ratification process.[43] (Emphasis supplied, citation omitted.)

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[43] *Id*. at 273.

Clearly, the Court had since ruled that when the situation and matters contemplated in Sec. 25, Article XVIII obtains, *i.e.,* when the subject matter of an international agreement involves the presence of foreign military bases, troops or facilities, a treaty is required and that the same must be submitted to the Senate for the latter's concurrence. In *BAYAN v. Zamora,*[44] the Court held that Section 25, Article XVIII, like Section 21, Article VII, embodies a phrase in the negative, *i.e.,* "shall not be allowed" and therefore, the concurrence of the Senate is indispensable to render the treaty or international agreement valid and effective.

What the majority did is to carve out exceptions to Section 25, Article XVIII when none is called for.

As previously discussed, the language of Section 25, Article XVIII is clear and unambiguous. The cardinal rule is that the plain, clear and unambiguous language of the Constitution should be construed as such and should not be given a construction that changes its meaning.[45] The Court also enunciated in *Chavez v. Judicial and Bar Council*[46] that:

> The Constitution evinces the direct action of the Filipino people by which the fundamental powers of government are established, limited and defined and by which those powers are distributed among the several departments for their safe and useful exercise for the benefit of the body politic. The Framers reposed their wisdom and vision on one *suprema lex* to be the ultimate expression of the principles and the framework upon which government and society were to operate. Thus, in the interpretation of the constitutional provisions, the Court firmly relies on the basic postulate that the Framers mean what they say. **The language used in the Constitution must be taken to have been deliberately chosen for a definite purpose. Every word employed in the Constitution must be interpreted to exude its deliberate intent which must be maintained inviolate against disobedience and defiance. What the Constitution clearly says,**

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[44] *Supra* note 2.

[45] *Soriano III v. Lista,* 447 Phil. 566, 570 (2003).

[46] G.R. No. 202242, April 16, 2013, 696 SCRA 496, 507-508.

according to its text, compels acceptance and bars modification even by the branch tasked to interpret it. (Emphasis supplied; citation omitted.)

The majority opinion posits that the EDCA is consistent with the content, purpose and framework of the MDT and the VFA. As such, the majority argues that the EDCA may be in the form of an executive agreement as it merely implements the provisions of the MDT and the VFA.

I disagree. Compared closely with the provisions of the MDT and the VFA, the EDCA transcends in scope and substance the subject matters covered by the aforementioned treaties. Otherwise stated, the EDCA is an entirely new agreement unto itself.

The MDT in relation to the EDCA

We noted in *Lim v. Executive Secretary*[47] that the MDT has been described as the "core" of the defense relationship between the Philippines and its traditional ally, the United States. The aim of the treaty is to enhance the strategic and technological capabilities of our armed forces through joint training with its American counterparts.

As explicitly pronounced in its declaration of policies, the MDT was entered into between the Philippines and the United States in order to actualize their desire "to declare publicly and formally their sense of unity and their common determination to **defend themselves against external armed attack**"[48] and "further to strengthen their present efforts to **collective defense** for the preservation of peace and security pending the development of a more comprehensive system of regional security in the Pacific area."[49]

Under Article II of the MDT, the parties undertook "separately and jointly by self-help and mutual aid" to "maintain and develop

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[47] 430 Phil. 555, 571-572 (2002).

[48] Mutual Defense Treaty, Preamble, paragraph 3.

[49] *Id*., Preamble, paragraph 4.

their individual and collective capacity to resist armed attack."[50] Article III thereof states that the parties to the treaty shall "consult together from time to time regarding the implementation of [the] Treaty and whenever in the opinion of either of them the territorial integrity, political independence or security of either of the Parties is threatened by external armed attack in the Pacific."[51]

Moreover, Article IV states that the individual parties to the treaty "recognizes that an armed attack in the Pacific area on either of the Parties would be dangerous to its own peace and safety and declares that **it would act to meet the common dangers in accordance with its constitutional process."**[52] This provision highlights the need for each party to follow their respective constitutional processes and, therefore, the MDT is not a self-executing agreement. It follows that if the Philippines aims to implement the MDT in the manner that the majority opinion suggests, such implementation must adhere to the mandate of Section 25, Article XVIII of the Constitution.

Also, under the above article, the parties are thereafter obligated to immediately report to the Security Council of the United Nations the occurrence of any such armed attack and all the measures taken as result thereof. Said measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.[53] Article V of the treaty explained that "an armed attack on either of the Parties is deemed to include an armed attack on the **metropolitan territory** of either of the Parties, or on the **island territories under its jurisdiction in the Pacific** or on **its armed forces, public vessels or aircraft** in the Pacific."[54]

Under Article VIII of the treaty, the parties agreed that the treaty shall remain in force indefinitely and that either party

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[50] *Id*., Article II.

[51] *Id*., Article III.

[52] *Id*., Article IV, first paragraph.

[53] *Id*., Article IV, second paragraph.

[54] *Id*., Article V.

may terminate it one year after notice has been given to the other party.[55]

Clear from the foregoing provisions is that the thrust of the MDT pertains to the furtherance of the avowed purpose of the parties thereto of maintaining and developing their individual and collective capacity to resist external armed attack **only** in the metropolitan territory of either party or in their island territories in the Pacific Ocean. **Accordingly, the territories of the parties other than those mentioned are not covered by the MDT.**

Conspicuously absent from the MDT are specific provisions regarding the presence in Philippine territory — whether permanent or temporary — of foreign military bases, troops, or facilities. The MDT did not contemplate the presence of foreign military bases, troops or facilities in our country in view of the fact that it was already expressly covered by the MBA that was earlier entered into by the Philippines and the United States in 1947. Moreover, the MDT contains no delegation of power to the President to enter into an agreement relative to the establishment of foreign military bases, troops, or facilities in our country. The MDT cannot also be treated as allowing an exception to the requirements of Section 25, Article XVIII of the Constitution, which took effect in 1987. As explained above, the reference to constitutional processes of either party in the MDT renders it obligatory that the Philippines follow Section 25, Article XVIII of the Constitution.

Indeed, the MDT covers defensive measures to counter an armed attack against either of the parties' territories or armed forces but there is nothing in the MDT that specifically authorizes the presence, whether temporary or permanent, of a party's bases, troops, or facilities in the other party's territory even during peace time or in mere anticipation of an armed attack.

On the other hand, the very clear-cut focal point of the EDCA is the authority granted to the United States forces and contractors

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[55] *Id*., Article VII.

to have unimpeded access to so-called Agreed Locations — which can be anywhere in the Philippines — and to build there military facilities and use the same to undertake various military activities. The very wording of the EDCA shows that it undoubtedly deals with the presence of foreign military bases, troops, and facilities in Philippine territory.

Thus, contrary to the posturing of the majority, the presence of foreign military bases, troops, or facilities provided under the EDCA cannot be traced to the MDT. Moreover, the general provisions of the MDT cannot prevail over the categorical and specific provision of Section 25, Article XVIII of the Constitution.

As will be further highlighted in the succeeding discussion, the EDCA creates new rights, privileges and obligations between the parties thereto.

The VFA in relation to the EDCA

With respect to the VFA, the EDCA likewise surpasses the provisions of the said former treaty.

The VFA primarily deals with the subject of allowing elements of the United States armed forces to **visit** the Philippines **from time to time** for the purpose of conducting activities, approved by the Philippine government, in line with the promotion and protection of the common security interests of both countries.

In the case of *BAYAN v. Zamora,*[56] the Court ruled that the VFA "defines the treatment of United States troops and personnel visiting the Philippines," "provides for the guidelines to govern such visits of military personnel," and "defines the rights of the United States and the Philippine government in the matter of criminal jurisdiction, movement of vessel and aircraft, importation and exportation of equipment, materials and supplies."

We likewise reiterated in *Lim v. Executive Secretary,*[57] that:

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[56] *Supra* note 2 at 652.

[57] *Supra* note 47 at 572.

The VFA provides the "regulatory mechanism" by which "United States military and civilian personnel **[may visit] temporarily** in the Philippines in connection with activities approved by the Philippine Government." It contains provisions relative to entry and departure of American personnel, driving and vehicle registration, criminal jurisdiction, claims, importation and exportation, movement of vessels and aircraft, as well as the duration of the agreement and its termination. It is the VFA which gives continued relevance to the MDT despite the passage of years. Its primary goal is to facilitate the promotion of optimal cooperation between American and Philippine military forces in the event of an attack by a common foe.

To a certain degree, the VFA is already an amplification of the MDT in that it allows the presence of **visiting** foreign troops for cooperative activities in peace time. Thus, in line with the mandate of Section 25, Article XVIII ofthe Constitution, the VFA is embodied in a treaty concurred in by the Senate.

In particular, the coverage of the VFA is as follows:

1) The admission of United States personnel and their departure from Philippines in connection with activities covered by the agreement, and the grant of exemption to United States personnel from passport and visa regulations upon entering and departing from the Philippines;[58]

2) The validity of the driver's license or permit issued by the United States, thus giving United States personnel the authority to operate military or official vehicles within the Philippines;[59]

3) The rights of the Philippines and the United States in mattersof criminal jurisdiction over United States personnel who commit offenses within the Philippine territory and punishable under Philippine laws;[60]

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[58] Visiting Forces Agreement, Article III.

[59] *Id*., Article IV.

[60] *Id*., Article V.

4) The importation and exportation of equipment, materials, supplies and other property, by United States personnel free from Philippine duties, taxes and similar charges;[61]

5) The movement of United States aircrafts, vessels and vehicles within Philippine territory;[62] and

6) The duration and termination of the agreement.[63]

In contrast, the EDCA specifically deals with the following matters:

1) The authority of the United States forces to access facilities and areas, termed as "Agreed Locations," and the activities that may be allowed therein;[64]

2) The grant to the United States of operational control of Agreed Locations to do construction activities and make alterations or improvements thereon;[65]

3) The conditional access to the Agreed Locations of the Philippine Designated Authority and its authorized representative;[66]

4) The storage and prepositioning of defense equipment, supplies and materiel, as well as the unimpeded access granted to the United States contractors to the Agreed Locations in matters regarding the prepositioning, storage, delivery, management, inspection, use, maintenance and removal of the defense equipment, supplies, and materiel; and the prohibition that the preposition materiel shall not include nuclear weapons;[67]

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[61] *Id*., Article VII.

[62] *Id*., Article VIII.

[63] *Id*., Article IX.

[64] Enhanced Defense Cooperation Agreement, Article II.

[65] *Id*., Article III(4).

[66] *Id*., Article III(5).

[67] *Id*., Article IV.

5) a) The ownership of the Agreed Locations by the Philippines, b) the ownership of the equipment, materiel, supplies, relocatable structures and other moveable property imported or acquired by the United States, c) the ownership and use of the buildings, non-relocatable structures, and assemblies affixed to the land inside the Agreed Locations;[68]

6) The cooperation between the parties in taking measures to ensure protection, safety and security of United States forces, contractors and information in Philippine territory; the primary responsibility of the Philippines to secure the Agreed Locations, and the right of the United States to exercise all rights and authorities within the Agreed Locations that are necessary for their operational control or defense;[69]

7) The use of water, electricity and other public utilities;[70]

8) The use of the radio spectrum in connection with the operation of a telecommunications system by the United States·[71]

9) The authority granted to the of the United States to contract for any materiel, supplies, equipment, and services (including construction) to be furnished or undertaken inside Philippine territory;[72]

10) The protection of the environment and human health and safety, and the observance of Philippine laws on environment and health, and the prohibition against the intentional release of hazardous waste by the United States and the containment of thereof in case a spill occurs;[73]

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[68] *Id*., Article V.

[69] *Id*., Article VI.

[70] *Id*., Article VII(I).

[71] *Id*., Article VII(2).

[72] *Id*., Article VIII.

[73] *Id*., Article IX.

11) The need to execute implementing arrangements to address details concerning the presence of United States forces at the Agreed Locations and the functional relations between the United States forces and the AFP with respect to the Agreed Locations;[74] and

12) The resolution of disputes arising from the EDCA through consultation between the parties.[75]

Initially, what is abundantly clear with the foregoing enumeration is that the EDCA is an entirely new creation. The provisions of the EDCA are not found in or have no corresponding provisions in the VFA. They cover entirely different subject matters ·and they create new and distinct rights and obligations on the part of the Philippines and the United States.

Furthermore, as to the nature of the presence of foreign military troops in this country, the VFA is explicit in its characterization that it is an agreement between the governments of the Philippines and the United States regarding the treatment of United States Armed Forces **visiting** the Philippines. The Preamble of the VFA likewise expressly provides that, "noting that **from time to time** elements of the United States armed forces may **visit** the Republic of the Philippines"[76] and "recognizing the desirability of defining the treatment of United States personnel **visiting** the Republic of the Philippines"[77] the parties to the VFA agreed to enter into the said treaty. The use of the word visit is very telling. In its ordinary usage, to visit is to "stay temporarily with (someone) or at (a place) as a guest or tourist" or to "go to see (someone or something) for a specific purpose."[78] Thus, the word visit implies the temporariness or impermanence of the presence at a specific location.

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[74] *Id*., Article X.

[75] *Id*., Article XI.

[76] Visiting Forces Agreement, Preamble, third paragraph.

[77] *Id*., fifth paragraph.

[78] http://www.oxforddictionaries.com/us/definition/american_english/visit. Accessed on December 14, 2015, 5:30 P.M.

On the other hand, under the EDCA, United States forces and United States contractors are permitted to stay in the Agreed Locations to undertake military activities therein **without any clear limitation as to the duration of their stay.** Moreover, they are given unimpeded access to Agreed Locations to conduct different activities that definitely were not contemplated under the VFA.

The Court's ruling in *Lim v. Executive Secretary*[79] provides some insights as to the scope of activities germane to the intention of the VFA. Thus:

> The first question that should be addressed is whether "Balikatan 02-1" is covered by the Visiting Forces Agreement. To resolve this, it is necessary to refer to the VFA itself. Not much help can be had therefrom, unfortunately, since the terminology employed is itself the source of the problem. The VFA permits United States personnel to engage, on an impermanent basis, in **"activities,"** the exact meaning of which was left undefined. The expression is ambiguous, permitting a wide scope of undertakings subject only to the approval of the Philippine government. The sole encumbrance placed on its definition is couched in the negative, in that United States personnel must "abstain from any activity *inconsistent with the spirit of this agreement, and in particular, from any political activity."* All other activities, in other words, are fair game.
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> After studied reflection, it appeared farfetched that the ambiguity surrounding the meaning of the word "**activities**" arose from accident. In our view, it was deliberately made that way to give both parties a certain leeway in negotiation. In this manner, visiting US forces may sojourn in Philippine territory for purposes other than military. As conceived, the joint exercises may include training on new techniques of patrol and surveillance to protect the nation's marine resources, sea search-and- rescue operations to assist vessels in distress, disaster relief operations, civic action projects such as the building of school houses, medical and humanitarian missions, and the like.
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> Under these auspices, the VFA gives legitimacy to the current Balikatan exercises. It is only logical to assume that "Balikatan 02-

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[79] *Supra* note 47 at 572-575.

1," a "mutual anti-terrorism advising, assisting and training exercise," falls under the umbrella of sanctioned or allowable activities in the context of the agreement. **Both the history and intent of the Mutual Defense Treaty and the VFA support the conclusion that *combat-related* activities — as opposed to *combat* itself — such as the one subject of the instant petition, are indeed authorized.** (Emphases supplied, citations omitted.)

The above discussion clearly shows that the VFA was intended for non-combat activities only.

In the instant case, the OSG averred that the entry of the United States forces into the Agreed Location is borne out of "military necessity."[80] Military necessity means the necessity attending belligerent military operations that is held to justify all measures necessary to bring an enemy to complete submission excluding those (as cruelty, torture, poison, perfidy, wanton destruction) that are forbidden by modem laws and customs of war.[81]

In the instant case, some of the activities that the United States forces will undertake within the Agreed Locations such as prepositioning of defense equipment, supplies and materiel, and deploying of forces and materiel are actual- military measures supposedly put into place in anticipation of battle. To preposition means "to place military units, equipment, or supplies at or near the point of planned use or at a designated location to reduce reaction time, and to ensure timely support of a specific force during initial phases of an operation."[82] On the other hand, materiel is defined as "all items necessary to equip, operate, maintain, and support military activities without distinction as to its application for administrative or combat purposes."[83] Also,

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[80] *Rollo* (G.R. No. 212444), p. 481.

[81] *Webster's Third New International Dictionary* [1993].

[82] http://www.dtic.mil/doctrine/new_pubs/jp4_0.pdf. Accessed on December 11, 2015, 11:48 A.M.

[83] http://www.dtic.mil/doctrine/new_pubs/jp4_0.pdf. Accessed on December 11, 2015, 11:48 A.M.

to deploy means "to place or arrange (armed forces) in battle disposition or formation or in locations appropriate for their future employment."[84] Deployment also means "the rotation of forces into and out of an operational area."[85]

The EDCA likewise allows the construction of permanent buildings, which the United States forces can utilize until such time that they no longer need the use thereof. The construction of permanent buildings, including the alteration or improvement by the United States of existing buildings, structures and assemblies affixed to the land, are certainly necessary not only for the accommodation of its troops, bunkering of vessels, maintenance of its vehicles, but also the creation of the proper facilities for the storage and prepositioning of its defense materiel. This grant of authority to construct new buildings and the improvement of existing buildings inside the Agreed Locations — which buildings are to be used indefinitely — further evinces the permanent nature of the stay of United States forces and contractors in this country under the EDCA. This is a far cry from the temporary visits of United States armed forces contemplated in the VFA.

Moreover, aside from agreements that the Philippines and the United States may subsequently enter into with respect to the access of the United States forces in the Agreed Locations on a "rotational basis,"[86] and other activities that the United States may conduct therein,[87] the EDCA also contains provisions requiring the execution of further "implementing arrangements" with regard to description of the Agreed Locations,[88] "[funding] for construction, development, operation and maintenance costs at the Agreed Locations,"[89] and "additional details concerning

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[84] *Webster's Third New International Dictionary* [1993].

[85] http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf. Accessed on December 11, 2015, 12:36 P.M.

[86] Enhanced Defense Cooperation Agreement, Article I(1)(b).

[87] *Id*., Article III(l).

[88] *Id*., Article II(4).

[89] *Id*., Article III(6).

the presence of the United States forces at the Agreed Locations and the functional relations between the United States forces and the AFP with respect to Agreed Locations."[90]

Article II(4) of the EDCA states that the Agreed Locations shall be provided by the Philippine Government **through the AFP.** What is readily apparent from said article is that the AFP is given a broad discretion to enter into agreements with the United States with respect to the Agreed Locations. The grant of such discretion to the AFP is without any guideline, limitation, or standard as to the size, area, location, boundaries and even the number of Agreed Locations to be provided to the United States forces. As there is no sufficient standard in the EDCA itself, and no means to determine the limits of authority granted, the AFP can exercise unfettered power that may have grave implications on national security. The intervention of the Senate through the constitutionally ordained treaty-making process in defining the new national policy concerning United States access to Agreed Locations enunciated in the EDCA, which has never been before expressly or impliedly authorized, is **imperative** and **indispensible** for the validity and effectivity of the EDCA.

The above distinctions between the EDCA and the VFA, therefore, negate the OSG's argument that the EDCA merely involves "adjustments in detail" of the VFA. To my mind, the EDCA is the general framework for the access and use of the Agreed Locations by the United States forces and contractors rather than an implementing instrument of both the MDT and the VFA.

As stated above, Section 25, Article XVIII contemplates three different situations: a treaty concerning the allowance within the Philippines of (a) foreign military bases, (b) foreign military troops, or (c) foreign military facilities, such that a treaty that involves any of these three standing alone would fall within the coverage of the said provision. The VFA clearly contemplates *only* visits of foreign military troops.

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[90] *Id*., Article X(3).

The VFA, which allows the presence of the units of the United States military troops, cannot by any stretch of the imagination include any arrangement that practically allows the establishment of United States military *bases* or *facilities* in the so-called Agreed Locations under the EDCA. Thus, the EDCA goes far-beyond the arrangement contemplated by the VFA and therefore it necessarily requires Senate concurrence as mandated by Section 25, Article XVIII of the Constitution. In the same vein, the initial entry of United States *troops* under the VFA cannot, as postulated by the ponencia, justify a "treaty-authorized" presence under the EDCA, since the presence contemplated in the EDCA also pertains to the establishment of foreign military *bases* or *facilities,* and not merely visiting troops.

The argument that the entry of the United States bases, troops and facilities under the EDCA is already allowed in view of the "initial entry" of United States troops under the VFA glaringly ignores that the entry of visiting foreign military troops is distinct and separate from the presence or establishment of foreign military bases or facilities in the country under Section 25, Article XVIII of the Constitution.

To reiterate, the EDCA is entirely a new treaty, separate and distinct from the VFA and the MDT. Hence, it must satisfy the requirements under Section 25, Article XVIII of the Constitution. The Senate itself issued Resolution No. 105 on November 10, 2015, whereby it expressed its "definite stand on the non-negotiable power of the Senate to decide whether a treaty will be valid and effective depending on the Senate concurrence" and resolved "that the RP-US EDCA [is a] treaty [that] requires Senate concurrence in order to be valid and effective."

Incidentally, with respect to the VFA, there is a difference of opinion whether or not the same is an implementing agreement of the MDT, as the latter does not confer authority upon the United States President (or the Philippine President) to enter into an executive agreement to implement said treaties. Still,

in *Nicolas v. Romulo,*[91] the Court noted that even if the VFA was treated as an implementing agreement of the MDT, the VFA was submitted to the Senate for concurrence.

By no means should this opinion be construed as one questioning the President's intention and effort to protect our national territory and security. However, in the case of *Tawang Multi-purpose Cooperative v. La Trinidad Water District,*[92] the Court said:

> There is no "reasonable and legitimate" ground to violate the Constitution. The Constitution should never be violated by anyone. Right or wrong, the President, Congress, the Court, x x x have no choice but to follow the Constitution. **Any act, however noble its intentions, is void if it violates the Constitution.** This rule is basic.
>
> In *Social Justice Society,* the Court held that, "In the discharge of their defined functions, the three departments of government have no choice but to yield obedience to the commands of the Constitution. Whatever limits it imposes must be observed." In *Sabio,* the Court held that, "the Constitution is the highest law of the land. It is 'the basic and paramount law to which x x x all persons, including the highest officials of the land, must defer. No act shall be valid, however noble its intentions, if it conflicts with the Constitution.'" In *Bengzon v. Drilon,* the Court held that, "the three branches of government must discharge their respective functions within the limits of authority conferred by the Constitution." In *Mutuc v. Commission on Elections,* the Court held that, "**The three departments of government in the discharge of the functions with which it is [sic] entrusted have no choice but to yield obedience to [the Constitution's] commands. Whatever limits it imposes must be observed.**" (Emphases supplied, citations omitted.)

A final word. While it is true that the Philippines cannot stand alone and will need friends within and beyond this region of the world, still we cannot offend our Constitution and bargain away our sovereignty.

Accordingly, I vote to grant the consolidated petitions.

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[91] Chief Justice Reynato S. Puno and Justice Carpio submitted stirring dissenting opinions which assail the constitutionality of the VFA on its being unenforceable due to the absence of ratification by the US Senate.

[92] 661 Phil. 390, 406 (2011).

DISSENTING OPINION

BRION, *J.*:

Before this Court is the constitutionality of the Enhanced Defense Cooperation Agreement *(EDCA),* an executive agreement with the United States of America *(U.S.)* that the Executive Department entered into and ratified on June 6, 2014.[1]

This case is not an easy one to resolve for many reasons — the stakes involved in light of contemporary history, the limited reach of judicial inquiry, the limits of the Court's own legal competence in fully acting on petitions before it, and the plain and clear terms of our Constitution. While the petitions, the comments, and the *ponencia* all extensively dwell on constitutional, statutory, and international law, the constitutional challenge cannot be resolved based solely on our consideration of the Constitution nor through the prism of Philippine national interest considerations, both expressed and those left unspoken in these cases. In our globalized world where Philippine interests have long been intersecting with those of others in the world, the country's externalities — the international and regional situations and conditions — must as well be considered as operating background from where the Philippines must determine where its national interests lie.

From the practical point of view of these externalities and the violation of Philippine territorial sovereignty that some of us have expressed, a quick decision may immediately suggest itself — ***let us do away with all stops and do what we must to protect our sovereignty and national integrity.***

What renders this kind of resolution difficult to undertake is the violation of our own Constitution — the express manifestation of the collective will of the Filipino people — that may transpire if we simply embrace the proffered easy solutions. Our history

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[1] Instrument of Ratification, Annex A of the Memorandum of OSG, *rollo,* p. 476. [per p. 14 of *ponencia,* to verify from *rollo*]

tells us that we cannot simply turn a blind eye to our Constitution without compromising the very same interests that we as a nation want to protect through a decision that looks only at the immediate practical view. To lightly regard our Constitution now as we did in the past, is to open the way to future weightier transgressions that may ultimately be at the expense of the Filipino people.

It is with these thoughts that this Opinion has been written: I hope to consider all the interests involved and thereby achieve a result that balances the immediate with the long view of the concerns besetting the nation.

I am mindful, of course, that the required actions that would actively serve our national interests depend, to a large extent, on the political departments of government — the Executive and, to some extent, the Legislature.[2] The Judiciary has only one assigned role — to ensure that the Constitution is followed and, in this manner, ensure that the Filipino people's larger interests, as expressed in the Constitution, are protected.[3] *Small though this contribution may be, let those of us from the Judiciary do our part and be counted.*

I. THE CASE

I.A. The Petitions

The challenges to the EDCA come from several petitions that uniformly question — based on Article XVIII, Section 25 of the 1987 Constitution — **the use of an executive agreement as the medium for the agreement with the U.S.** The petitioners posit that the EDCA involves foreign military bases, troops, and facilities whose entry into the country should be **covered by a treaty concurred in by the Senate**.

They question substantive EDCA provisions as well, particularly the grant of telecommunication and tax privileges

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[2] Constitution, Article VII, Section 21; Article XVIII, Section 25.

[3] Derived from the Supreme Court's powers under Article VIII, Section 5(2)(a) of the Constitution.

to the U.S. armed forces and its personnel;[4] the constitutional ban against the presence and storage of nuclear weapons within the Philippines;[5] the violation of the constitutional mandate to protect the environment;[6] the deprivation by the EDCA of the exercise by the Supreme Court of its power of judicial review;[7] the violation of the constitutional policy on the preferential use of Filipino labor and materials;[8] the violation of the constitutional command to pursue an independent foreign policy; [9] the violation of the constitutional provision on the autonomy of local government units[10] and of National Building Code;[11] and, last but not the least, they question the EDCA for being a one-sided agreement in favor of the Americans.[12]

I.B. <u>The Respondents' Positions</u>

The respondents, through the Office of the Solicitor General (*OSG),* respond by questioning the petitioners on the threshold issues of justiciability, prematurity and standing, and by invoking the application of the political question doctrine.[13]

The OSG claims as well that the EDCA is properly embodied in an executive agreement as it is an exercise of the President's power and duty to serve and protect the people, and of his commander-in-chief powers;[14] that the practical considerations

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[4] *Bayan Muna, et al.* Petition (G.R. No. 212444), pp. 46-47, 79-81.

[5] *Id.* at 52-57; *Saguisag, et al.* Petition (G.R. No. 212444), pp. 32-34.

[6] *Bayan Muna, et al.* Petition (G.R. No. 212444), pp. 84-87.

[7] *Id.* at 40-43; *Saguisag, et al.* Petition (G.R. No. 212444), pp. 34-36

[8] *Bayan Muna, et al.* Petition (G.R. No. 212444), pp. 82-84.

[9] *Id.* at 23-27; *Saguisag, et al.* Petition (G.R. No. 212444), pp. 36-38.

[10] *Bayan Muna, et al.* Petition (G.R. No. 212444), pp. 87-89.

[11] *Id.* at 90-91.

[12] *Id* at 44-45, 58-59; *Saguisag, et al.* Petition (G.R. No. 212426), pp. 39-49.

[13] OSG Consolidated Comment, pp. 3-8.

[14] *Id.* at 10-13.

of the case requires a deferential review of executive decisions over national security;[15] that the EDCA is merely in implementation of two previous treaties — the Mutual Defense Treaty of 1951 *(1951 MDT)* and the Visiting Forces Agreement of 1998 *(1998 VFA);*[16] that the President may choose the form of the agreement, provided that the agreement dealing with foreign military bases, troops, or facilities is not the principal agreement that first allowed their entry or presence in the Philippines.

I.C. The *Ponencia*

The *ponencia* exhaustively discusses many aspects of the challenges in its support of the OSG positions. It holds that the President is the chief implementor of the law and has the duty to defend the State, and for these purposes, he may use these powers in the conduct of foreign relations;[17] even if these powers are not expressly granted by the law in this regard, he is justified by necessity and is limited only by the law since he must take the necessary and proper steps to carry the law into execution.

The *ponencia* further asserts that the President may enter into an executive agreement on foreign military bases, troops, or facilities, if:

(a) it is not the instrument that allows the presence of foreign military bases, troops, or facilities; or

(b) it merely aims to implement an existing law or treaty.[18]

It adds that the 1951 MDT is not an obsolete treaty;[19] that the 1998 VFA has already allowed the entry of U.S. troops and civilian personnel and is the treaty being implemented by the

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[15] *Id.* at 13-14.

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

[17] *Ponencia,* pp. 3-7, 25-27.

[18] *Id.* at 29-43.

[19] *Id.* at 31.

EDCA;[20] that the President may generally enter into executive agreements subject to the limitations defined by the Constitution, in furtherance of a treaty already concurred in by the Senate;[21] that the President can choose to agree to the EDCA either by way of an executive agreement or by treaty.[22] While it compares the EDCA with the 1951 MDT and the 1998 VFA, it claims at the same time it merely implements these treaties.[23]

On the exercise of its power of judicial review, the *ponencia* posits that the Court does not look into whether an international agreement should be in the form of a treaty or an executive agreement, save in the cases in which the Constitution or a statute requires otherwise;[24] that the task of the Court is to determine whether the international agreement is consistent with applicable limitations;[25] and that executive agreements may cover the matter of foreign military forces if these merely involve adjustments of details.[26]

I.D. The Dissent

I dissent, as I disagree that an executive agreement is the proper medium for the matters covered by the EDCA. The EDCA is an agreement that, on deeper examination, violates the letter and spirit of Article XVIII, Section 25 and Article VII, Section 21, both of the Constitution.

The EDCA should be in the form of a treaty as it brings back to the Philippines

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[20] *Id.* at 48-52.

[21] *Id.* at 34-43.

[22] *Id.* at 43-46.

[23] *Id.* at 48-72.

[24] *Id.* at 46.

[25] *Id.*

[26] *Id.* at 46-48.

- **the modern equivalent of the foreign military bases whose term expired in 1991 and which Article XVIII, Section 25 of the Constitution directly addresses;**
- **foreign troops under arrangements outside of the contemplation of the visiting forces that the 1998 VFA allows; and**
- **military facilities that, under modern military strategy, likewise can be brought in only through a treaty.**

As the *ponencia* does, I shall discuss the background facts and the threshold issues that will enable *the Court and the reading public* to fully appreciate the constitutional issues before us, as well as my reasons for the conclusion that the EDCA, as an executive agreement, is constitutionally deficient.

I purposely confine myself to the term "constitutionally deficient" (instead of saying "unconstitutional") in light of my view that the procedural deficiency that plagues the EDCA as an executive agreement is remediable and can still be addressed. Also on purpose, I refrain from commenting on the substantive objections on the contents of the EDCA for the reasons explained below.

II. THE THRESHOLD ISSUES

The petitioners bring their challenges before this Court on the basis of their standing as citizens, taxpayers, and former legislators. The respondents, on the other hand, question the justiciability of the issues raised and invoke as well the *political question doctrine* to secure the prompt dismissal of the petitions. I shall deal with these preliminary issues below, singly and in relation with one another, in light of the commonality that these threshold issues carry.

The petitioners posit that the use of an executive agreement as the medium to carry EDCA into effect, violates Article XVIII, Section 25 of the 1987 Constitution and is an issue of transcendental importance that they, as citizens, can raise before

the Supreme Court.[27] *(Significantly, the incumbent Senators are not direct participants in this case and only belatedly reflected their institutional sentiments through a Resolution.)*[28] The petitioners in G.R. No. 212444 also claim that the constitutionality of the EDCA involves the assertion and *protection of a public right,* in which they have a personal interest as affected members of the general public.[29]

The petitioners likewise claim that the EDCA requires the disbursement of public funds and the waiver of the payment of taxes, fees and rentals; thus, the petitioners have the standing to sue as taxpayers.[30]

They lastly claim that the exchange of notes between the Philippines' Department of National Defense Secretary Voltaire Gazmin and U.S. Ambassador Philip Goldberg[31] — the final step towards the implementation of the EDCA — rendered the presented issues ripe for adjudication.

The respondents, in response, assert that the petitioners lack standing,[32] and that the petitions raise political questions that are outside the Court's jurisdiction to resolve.[33]

They also argue that the issues the petitions raise are premature.[34] The EDCA requires the creation of separate agreements to carry out separate activities such as joint exercises, the prepositioning of materiel, or construction activities. At present, these separate agreements do not exist. Thus, the

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[27] *Saguisag, et al.* Petition (G.R. No. 212426), pp. 19-22; *Bayan Muna, et al.* Petition (G.R. No. 212444), p. 6.

[28] Senate Resolution No. 105 dated November 10, 2015.

[29] *Bayan Muna, et al.* Petition (G.R. No. 212444), pp. 9-10.

[30] *Saguisag, et al.* Petition (G.R. No. 212426), pp. 19-22.

[31] *Id.* at 19.

[32] OSG Consolidated Comment, pp. 3-5.

[33] *Id.* at 5-7.

[34] *Id.* at 7-8.

respondents state that the petitioners are only speculating that the agreements to be forged under the EDCA would violate our laws. These speculations cannot be the basis for a constitutional challenge.

II. A. *Locus Standi*

The *ponencia* holds that the petitioners do not have the requisite standing to question the constitutionality of the EDCA, but chooses to give due course to the petitions because of the transcendental importance of the issues these petitions raise.[35] In effect, the *ponencia* takes a liberal approach in appreciating the threshold issue of *locus standi.*

I agree with the *ponencia's* ultimate conclusions on the threshold issues raised. I agree as well that a justiciable issue exists that the Court can pass upon, although on both counts I differ from the *ponencia*'s line of reasoning. Let me point out at the outset, too, that judicial review is only an exercise of the wider judicial power that Article VIII, Section 1 of the Constitution grants and defines. One should not be confused with the other.

Judicial review is part of the exercise of judicial power under Article VIII, Section 1 of the Constitution, particularly when it is exercised under the judiciary's expanded power *(i.e.,* when courts pass upon the actions of other agencies of government for the grave abuse of discretion they committed), or when the Supreme Court reviews, on appeal or *certiorari,* the constitutionality or validity of any law or other governmental instruments under Section 5(2)(a) and (b) of Article VIII of the Constitution.

A basic requirement is the existence of an *actual case or controversy* that, viewed correctly, is a limit on the exercise of judicial power or the more specific power of judicial review.[36]

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[35] *Ponencia,* pp. 19-25.

[36] *Imbong v. Ochoa, Jr.,* G.R. No. 204819, April 8, 2014, 721 SCRA 146, 278-279.

Whether such case or controversy exists depends on the existence of a *legal right* and the *violation of this right,* giving rise to a dispute between or among adverse parties.[37] Under the expanded power of judicial review, the actual case or controversy arises when an official or agency of government is alleged to have committed grave abuse of discretion in the exercise of its functions.[38]

Locus standi is a requirement for the exercise of judicial review[39] and is in fact an aspect of the actual case or controversy requirement viewed *from the prism of the complaining party whose right has been violated.*[40]

When a violation of a *private right* is asserted, the *locus standi* requirement is sharp and narrow because the claim of violation accrues only to the complainant or the petitioner whose right is alleged to have been violated.[41]

On the other hand, when a violation of a *public right* is asserted — *i.e.,* a right that belongs to the public in general and whose violation ultimately affects every member of the public — the *locus standi* requirement cannot be sharp or narrow; it must correspond in width to the right violated. Thus, the standing of even a plain citizen sufficiently able to bring

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[37] *Id* at 279-280.

[38] See Separate Opinion of *J.* Brion in *Imbong v. Ochoa, Jr., supra* note 36, at 489-491.

[39] *Galicto v. Aquino,* 683 Phil. 141, 170 (2012).

[40] *Ibid.*

[41] See *David v. Macapagal Arroyo,* 552 Phil. 705 (2006), where the Court held that in private suits, standing is governed by the "real-parties-in-interest" rule as contained in Section 2, Rule 3 of the 1997 Rules of Civil Procedure, as amended. It provides that "every action must be prosecuted or defended in the name of the real party in interest." Accordingly, the "real-party-in-interest" is "the party who stands to be benefited or injured by the judgment in the suit or the party entitled to the avails of the suit." Succinctly put, the plaintiffs standing is based on his own right to the relief sought.

and support a suit, should be recognized as he or she can then be deemed to be acting in representation of the general public.[42]

Transcendental importance is a concept (a much abused one) that has been applied in considering the requirements for the exercise of judicial power.[43] To be sure, it may find application when a public right is involved because a right that belongs to the general public cannot but be important.[44] Whether the importance rises to the level of being transcendental is a subjective element that depends on the user's appreciation of the descriptive word "transcendental" or on his or her calibration of the disputed issues' level of importance.

In either case, the use of transcendental importance as a justification is replete with risks of abuse as subjective evaluation is involved.[45] To be sure, this level of importance can be used as justification in considering *locus standi* with liberality,[46] but

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[42] *De Castro v. Judicial and Bar Council,* 629 Phil. 629, 680 (2010).

[43] See *Integrated Bar of the Philippines v. Zamora,* 392 Phil. 618, 634 (2000), citing *Tatad v. Secretary of the Department of Energy,* G.R. No. 124360, December 3, 1997, 281 SCRA 330, 349, citing *Garcia v. Executive Secretary,* G.R. No. 101273, July 3, 1992, 211 SCRA 219; *Osmeña v. COMELEC,* G.R. No. 100318, July 30, 1991, 199 SCRA 750; *Basco v. Pagcor,* G.R. No. 91649, May 14, 1991, 197 SCRA 52; and *Araneta v. Dinglasan,* 84 Phil. 368 (1949).

[44] *Initiatives for Dialogue and Empowerment through Alternative Legal Services, Inc. (IDEALS, INC.) v. Power Sector Assets and Liabilities Management Corporation (PSALM),* G.R. No. 192088, October 9, 2012, 682 SCRA 602, 633-634.

[45] See Separate Opinion of *J. Brion* in *Cawad v. Abad,* G.R. No. 207145, July 28, 2015, citing *Quinto v. COMELEC,* G.R. No. 189698, December 1, 2009, 606 SCRA 258, 276 and *GMA Network v. COMELEC,* G.R. No. 205357, September 2, 2014, 734 SCRA 88, 125-126.

[46] See *CREBA v. ERC,* 638 Phil. 542, 556-557 (2010), where the Court provided "instructive guides" as determinants in determining whether a matter is of transcendental importance, namely: (1) the character of the funds or other assets involved in the case; (2) the presence of a clear case of disregard of a constitutional or statutory prohibition by the public respondent agency or instrumentality of the government; and (3) the lack of any other party with a more direct and specific interest in the questions being raised.

it can never be an excuse to find an actual controversy when there is none. To hold otherwise is to give the courts an unlimited opportunity for the exercise of judicial power — a situation that is outside the Constitution's intent in the grant of judicial power.

In the present cases, a violation of the Constitution, no less, is alleged by the petitioners through the commission of grave abuse of discretion. The violation potentially affects our national sovereignty, security, and defense, and the integrity of the Constitution — concerns that touch on the lives of the citizens as well as on the integrity and survival of the nation. In particular, they involve the nation's capability for self-defense; the potential hazards the nation may face because of our officials' decisions on defense and national security matters; and our sovereignty as a nation as well as the integrity of the Constitution that all citizens, including the highest officials, must protect.

In these lights, I believe that the issues involved in the present case are so important that a plain citizen *sufficiently knowledgeable of the outstanding issues,* should be allowed to sue. The petitioners — *some of whom are recognized legal luminaries or are noted for their activism on constitutional matters* — should thus be recognized as parties with proper standing to file and pursue their petitions before this Court.

II.B. Ripeness of the Issues Raised for Adjudication

I agree with the *ponencia's* conclusion that the cases before this Court, *to the extent they are anchored on the need for Senate concurrence,* are ripe for adjudication. My own reasons for this conclusion are outlined below.

Like *locus standi,* ripeness for adjudication is an aspect of the actual case or controversy requirement in the exercise of judicial power.[47] The two concepts differ because ripeness is considered from the *prism, not of the party whose right has been violated, but from the prism of the actual violation itself.*

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[47] *Imbong v. Ochoa, Jr., supra* note 36, at 280.

Of the two basic components of actual case or controversy, namely, the *existence of a right* and the *violation of that right,* ripeness essentially addresses the latter component.[48] That a right exists is not sufficient to support the existence of an actual case or controversy; the right must be alleged to have been violated to give rise to a justiciable dispute. In other words, it is the *fact of violation* that renders a case ripe,[49] assuming of course the undisputed existence of the right violated.

In the present cases, Article XVIII, Section 25 of the Constitution lays down in no uncertain terms the conditions under which foreign military bases, troops, and facilities may be allowed into the country: there should at least be the concurrence of the Senate.

Under these terms, the refusal to allow entry of foreign military bases, troops, and facilities into the country without the required Senate concurrence is a prerogative that the people of this country adopted for themselves under their Constitution: they want participation in this decision, however indirect this participation might be. This prerogative is exercised through the Senate; thus, a violation of this constitutional prerogative is not only a transgression against the Senate but one against the people who the Senate represents.

The violation in this case occurred when the President ratified the EDCA as an executive agreement and certified to the other contracting party (the U.S.) that all the internal processes have been complied with, leading the latter to believe that the agreement is already valid and enforceable. Upon such violation, the dispute between the President and the Filipino people ripened.

The same conclusion obtains even under the respondents' argument that the constitutionality of the EDCA is not yet ripe for adjudication, since it requires the creation of separate agreements to carry out separate activities such as joint exercises,

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[48] *Id.*

[49] *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain,* 589 Phil. 387, 481 (2008).

the prepositioning of materiel, or construction activities. To the respondents, the petitioners are merely speculating on their claim of unconstitutionality since these separate agreements do not yet exist.

Indeed, issues relating to agreements yet to be made are not, and cannot be, ripe for adjudication for the obvious reason that they do not yet exist. The question of the EDCA's constitutionality, however, does not depend solely on the separate agreements that will implement it. The fact that an executive agreement had been entered into, not a treaty as required by Article XVIII, Section 25 of the Constitution, rendered the agreement's constitutional status questionable. Thus, when the exchange of notes that signaled the implementation of the EDCA took place, the issue of its compliance with the constitutional requirements became ripe for judicial intervention under our expanded jurisdiction.

II.C. The Political Question Doctrine

Another threshold issue that this Court must settle at the outset, relates to the political question doctrine that, as a rule, bars any judicial inquiry on any matter that the Constitution and the laws have left to the discretion of a coordinate branch of government for action or determination.[50]

The respondents raise the political question issue as part of their defense, arguing that the issues the petitioners raise are policy matters that lie outside the Court's competence or are matters where the Court should defer to the Executive.[51]

The political question bar essentially rests on the separation of powers doctrine that underlies the Constitution.[52] The courts cannot interfere with questions that involve policy determination exclusively assigned to the political departments of the

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[50] *Bondoc v. Pineda,* 278 Phil. 784 (1991).

[51] *Javellana v. Executive Secretary,* 151-A Phil. 36, 131 (1973), citing *In Re McConaughy,* 119 N.W. 408, 417.

[52] See *Garcia v. Executive Secretary,* 602 Phil. 64, 73-77 (2009).

government.[53] The American case of *Baker v. Carr*[54] best describes the standards that must be observed in determining whether an issue involves a political question, as follows:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[55]

From among these tests, the presence or absence of constitutional standards is the most relevant under the circumstances of the present consolidated cases.

After analyzing the issues raised, I find the respondents' position ***partly erroneous and partly premature for a political question doctrine ruling.***

This conclusion proceeds from my recognition that a distinction should be drawn in recognizing the constitutional issues before us, some of which are procedural in character while others are substantive ones that require the application of different constitutional provisions.

The petitioners primarily question the constitutional validity of the EDCA for violation of Article XVIII, Section 25 of the 1987 Constitution. They challenge, as well, substantive provisions of the EDCA, among them, those relating to the grant of telecommunication privileges and tax exemptions to American visiting forces, and the EDCA provisions that would allegedly allow the entry of nuclear weapons into the country.

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[53] *Ibid.*

[54] 369 U.S. 186 (1962).

[55] *Id.* at 217.

That the EDCA is an agreement that requires concurrence by the Senate before it can be considered valid and enforceable, is an issue that is essentially procedural as it requires that ***steps be taken*** before an international agreement can be considered fully valid and enforceable. It is ***an issue extrinsic to the terms of the EDCA*** and is properly a threshold issue that must be resolved before the substantive challenges to the EDCA' s validity can be addressed.

Aside from being procedural, the issue relates as well to the standard set by the Constitution that delineates when an international agreement should be a treaty subject to Senate concurrence. The presence of this standard renders the determination of the medium to be used in forging an international agreement — whether as a treaty or as an executive agreement — an issue within the competence and authority of the courts to resolve in their role as guardians of the Constitution.[56]

Thus, the main issue the petitioners pose — the constitutional status of the EDCA as an executive agreement in light of the mandate of Article XVIII, Section 25 of the Constitution — is not a political question outside the judiciary's competence and authority to resolve. The respondents' argument on this point is therefore erroneous.

If indeed a referral to the Senate is required and no referral has been made, then the EDCA is ***constitutionally deficient*** so that its terms cannot be enforced. This finding renders further proceedings on the merits of the substantive issues raised, pointless and unwarranted. There is likewise no point in determining whether the substantive issues raised call for the application of the political question doctrine.[57]

On the other hand, the examination of the EDCA' s substantive contents may be ripe and proper for resolution if indeed the

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[56] *Dueas v. House of Representatives Electoral Tribunal,* 610 Phil. 730, 742 (2009); *Lambino v. Commission on Elections,* 536 Phil. 1, 111 (2006).

[57] See Constitution, Article VII, Section 21.

EDCA can properly be the subject of an executive agreement. It is at that point when the respondents may claim that the substantive contents of the EDCA involve policy matters that are solely for the President to determine and that the courts may not inquire into under the separation of powers principle.[58] It is only at that point when the application of the political question doctrine is called for.

In these lights (particularly, my position on the merits of the procedural issue raised), I find a ruling on the application of the political question doctrine to the substantive issues raised premature and unripe for adjudication; any ruling or discussion I may make may only confuse the issues when a proper petition on the constitutionality of the substantive contents of EDCA is filed.

III. THE FACTS

III. A. Historical, International and Regional Contexts

III.A(1) *The Early Years of Philippines-U.S. Relationship*

Active Philippine-American relations started in 1898, more than a century ago, when Commodore George Dewey and his armada of warships defeated the Spanish navy in the Philippines in the Battle of Manila Bay.[59] The sea battle was complemented

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[58] *Bondoc v. Pineda, supra* note 50, at 784.

[59] On order of then U.S. Secretary of the Navy, Theodore Roosevelt, Commodore Dewey attacked the Spanish fleet in the Philippines. At noon of May 1, 1898, Commodore Dewey's ships had destroyed the Spanish fleet at the Battle of Manila Bay. See *Bayan Muna, et al.* Petition (G.R. No. 212444), p. 11, citing http://www.history.com/this-day-in-history/battle-of-manila-bay.

See Zbigniew Brzesinski, *The Grand Chessboard — American Primacy and its Geostrategic Imperatives* (1997).

See also Fraser Weir. *A Centennial History of Philippine Independence, 1898-1998: Spanish- American War - War of Philippine Independence 1898-1901.* University of Alberta, available at https://www.ualberta.ca/~vmitchel/fw4.html; *The Spanish-American War, 1898.* United States Department of State, available at https://history.state.gov/milestones/ 1866-1898/spanish-

by land assaults by Philippine forces who were then in open rebellion against Spain under the leadership of General Emilio Aguinaldo.[60]

The complementary effort started a relationship that, from the Philippine end, was characterized by hope of collaboration and assistance in the then colony's quest for independence from Spain.[61] But the fulfillment of this hope did not come to pass and was in fact shattered when America, with its own geopolitical interests in mind, decided to fight the Philippine forces and to keep the Philippines for itself as a colony. The American objective was fully realized under the Treaty of Paris between Spain and the U.S., when the Philippines was handed by Spain to the U.S. as a colony.[62]

The result, of course, was inevitable as the Philippine forces were not then fighting for a change of masters but for independence. The Philippine forces fought the Americans in the Philippine-American war, and lost.[63]

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american-war; and, *The Spanish-American War in the Philippines (1989).* American Experience, available at http://www.pbs.org/wgbh/annex/macarthur/peopleevents/pandeAMEX87.html.

[60] In the early part of 1898, the relations between the U.S. and Spain deteriorated. As the war became imminent, Commodore George Dewey, the commander of the U.S. Asiatic Squadron, had discussion with Emilio Aguinaldo's government in exile in Singapore and Hong Kong. See Weir, *supra* note 59.

[61] In the early part of 1898, the relations between the U.S. and Spain deteriorated. As the war became imminent, Commodore George Dewey, the commander of the U.S. Asiatic Squadron, had discussion with Emilio Aguinaldo's government in exile in Singapore and Hong Kong. See Weir, *supra* note 59.

[62] Treaty of Peace Between the United States and Spain (December 10, 1898), Article III: "Spain cedes to the United States the archipelago known as the Philippine Islands x x x"

See Yale Law School The Avalon Project. *Treaty of Peace between the United States and Spain.* Available at http://avalon.law.yale.edu/ 19th century/sp 1898.asp.

[63] Renato Constantino. *The Philippines: A Past Revisited* (1975), pp. 228-229.

Thus, a new colonizer took Spain's place. Unlike the Spanish colonial rule, however, one redeeming feature of the American colonial rule was the introduction of the concepts of democracy and governance.

As a colony, the Philippines, played a distinct role as the American outpost in the Far East as the American geopolitical interests slowly grew from the First World War years. By the end of the Second World War, the U.S.' international primacy was confirmed as the leader of the victor-nations. This international leadership role became sole leadership when the Soviet Union collapsed in the late 1980s. Thus, the U.S. now stands as the only global superpower whose military, economic, cultural, and technological reach and influence extend over all continents.[64]

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[64] See Brzesinski, *supra* note 59, at 3-29.

According to Brzesinski, America stands supreme in the four decisive domains of global power: (l) ***militarily,*** it has an unmatched global reach; (2) ***economically,*** it remains the main locomotive of global growth; (3) ***technologically,*** it retains the overall lead in the cutting-edge areas of innovation; and (4) ***culturally,*** despite some crassness, it enjoys an appeal that is unrivaled. ***The combination of all four makes America the only comprehensive superpower.***

Brzesinski traced the trajectory of the US's rise to global supremacy beginning from World War I *(WWI)* to the end of the Cold War, noting that the U.S.'s participation in WWI introduced it as a new major player in the international arena. While WWI was predominantly a European war, not a global one, its self- destructive power marked the beginning of the end of Europe's political, economic and cultural preponderance over the rest of the world. The European era in world politics ended in the course of World War II *(WWII),* the first truly global war. Since the European (*i.e.*, Germany) and the Asian (*i.e.*, Japan) were defeated, the US and the Soviet Union, two extra-European victors, became the successors to Europe's unfulfilled quest for global supremacy.

The contest between the Soviet Union and the US for global supremacy dominated the next fifty years following WWII. The outcome of this contest, the author believes, was eventually decided by non- military means: *political vitality, ideological flexibility, economic dynamism, and cultural appeal.* The protracted competition, in the end, eventually tip the scales in America's favor simply because it was much richer, technologically much more advanced, militarily more resilient and innovative, socially more creative and appealing.

III. A(2) ***The Post-W.W. II Years***

It was soon after Philippine independence, as the U.S. superpower status was rising, that the U.S. and the Philippines forged the **Military Bases Agreement of 1947** *(1947 MBA)* and the 1951 MDT. The 1947 MBA was the agreement specific to the U.S. bases, troops, and facilities in the Philippines,[65] while the 1951 MDT was the overarching document, entered into and ratified by the two countries as a treaty, to define the Philippine- American defense relationship in case of an armed

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[65] See *Bayan Muna, et al.* Petition, GR No. 212444, pp. 13-14; and *Kilusang Mayo Uno, et al.* petition-in-intervention, p. 7.

See also Stephen Shalom. *Securing the U.S-Philippine Military Bases Agreement of 1947,* William Paterson University, available at http://www.wpunj.edu/dotAsset/209673.pdf; Robert Paterno. *American Military Bases in the Philippines: The Brownell Opinion,* available at http://philippinestudies.net/ojs/index.php/ps/article/viewFile/2602/5224; James Gregor. *The Key Role of U.S. Bases in the Philippines.* The Heritage Foundation, available at http://www.heritage.org/research/reports/ 1984/01/the-key-role-of-us-bases-in-the-philippines; Maria Teresa Lim. "Removal Provisions of the Philippine-United States Military Bases Agreement: Can the United States Take it All" 20 *Loyola of Los Angeles Law Review* 421, 421-422. See Fred Greene. *The Philippine Bases: Negotiating For the Future* (1988), p. 4.

The 1947 Military Bases Agreement was signed by the Philippines and the U.S. on March 14, 1947; it entered into force on March 26, 1947 and was ratified by the Philippine President on January 21, 1948. See Charles Bevans. *Treaties and Other International Agreements of the United States of America (1776-1949),* Available at United States Department of State,*https://books.google.com.ph/books?id=MUU6AQAAIAAJ&pg=PA55&lpg=PA55&dg=17+UST+1212;+TIAS+6084&source=bl&ots=VBt1V34ntR&sig=X2yYCbWVfJqF_o69-CcyiP88zw0&hl=en&sa=X&ved=0ahUKEwiKg-jXq8LJAhXRBY4KHSicDeAQ6AEIGzAA#v=onepage&q=17%20UST%201212%3B%20TIAS%206084&f=false.*

The Philippine government also agreed to enter-into negotiations with the U.S., on the latter's request, to: expand or reduce such bases, exchange those bases for others, or acquire additional base areas. The agreement allowed the U.S. full discretionary use of the bases' facilities; gave criminal jurisdiction over U.S. base personnel and their dependents to the U.S. authorities irrespective of whether the alleged offenses were committed on or off the base areas. See Gregor, *supra.*

attack by a third country on either of them.[66] As its title directly suggests, it is a defense agreement.

The solidity of the R.P.-U.S. relationship that started in the colonizer — colony mode, shifted to defense/military alliance (through the MBA, MDT, and their supplementary agreements) after Philippine independence, and began to progressively loosen as the Philippines tracked its own independent path as a nation. Through various agreements,[67] the American hold and the length of stay of American military bases in the Philippines progressively shrunk.

The death knell for the U.S. military bases started sounding when a new Philippine Constitution was ratified in 1987. The new Constitution provides that ***after the expiration of the agreement on military bases, no foreign military bases, troops or facilities shall be allowed except through a treaty concurred***

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[66] The Philippines and the U.S. signed the MDT on August 30, 1951. It came into force on August 27, 1952 by the exchange of instruments of ratification between the parties. See Mutual Defense Treaty, U.S.-Philippines, August 30, 1951, 177 U.N.T.S. 134. Available at https://treaties.un.org/doc/Publication/UNTS/Volume%20177/volume-177-1-2315-English.pdf; See also *Bayan v. Gazmin* petition, G.R. No. 212444, at 14; *Saguisag v. Executive Secretary Ochoa* petition, G.R. No. 212426, p. 8; and *Kilusang Mayo Uno, et. al.* petition-in-intervention, p. 7.

It was concurred in by the Philippine Senate on May 12, 1952; and was advised and consented to by the U.S. Senate on March 20, 1952, as reflected in the U.S. Congressional Record, 82nd Congress, Second Session, Vol. 98–Part 2, pp. 2594-2595. See *Nicolas v. Romulo,* 598 Phil. 262 (2009).

[67] *1956*: The Garcia-Bendetsen conference resolved the issue of jurisdiction in the American bases. The US began to recognize sovereignty of the Philippine government over the base lands. See *Exchange of Notes,* U.S.-Philippines, December 6, 1956, available at http://elibrary.judiciary.gov.ph/thebookshelf/docmonth/Dec/1965/35.

1959: Olongapo, which was then an American territory, was officially turned over by the US to the Philippines. Over the years, 17 of the 23 military installations were also turned over to the Philippines. See *Memorandum of Agreement,* U.S.-Philippines, October 12, 1959, available at http://elibrary.judiciary.gov.ph/thebookshelf/showdocs/35/11192.

1965: An agreement was signed revising Article XIII of the treaty wherein the US will renounce exclusive jurisdiction over the on-base offenses and

***in by the Senate or with the direct consent of the** Filipino people if Congress would require this mode of approval*.[68]

The actual end of the military bases came in 1991 when the 1947 MBA expired with no replacement formal arrangement in place except the 1951 MDT.[69] For some years, R.P.-U.S. relationship on defense/military matters practically froze. The thaw only came when the 1998 VFA was negotiated and agreed upon as a treaty that the Philippine Senate concurred in.

III.A(3) ***The U.S.'s "Pivot to Asia" Strategy***

During the latter part of the first term of the Obama Administration, the U.S. announced a shift in its global strategy in favor of a military and diplomatic "pivot" or "rebalance" toward Asia.[70] The strategy involved a shift of the U.S.'s diplomatic, economic, and defense resources to Asia, made urgent by "the rise of Chinese regional power and influence,

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the creation of a joint criminal jurisdiction committee. See *Exchange of Notes,* U.S.-Philippines, August 10, 1965, available at http:/elibrary.judiciary.gov.ph/thebookshelf/showdocs/35/10934.

1966: The Ramos-Rusk Agreement reduced the term of the MBA to 25 years starting from that year. See Exchange of Notes, U.S.-Philippines, September 16, 1966, available at http:/elibrary.judiciary.gov.ph/thebookshelf/showdocs/35/10859.

1979: The US reaffirmed Philippine sovereignty over the basis and placed each base under command of a Philippine base commander. See Office of the President of the Philippines. (1979). Oftlcial Week in Review. *Official Gazette of the Republic of the Philippines. 75(1).* iii-iv, available at http://www.gov.ph/1979/01/08/official-week-in-review-january-1-january-7-1979/

[68] Constitution, Article XVIII, Section 25.

[69] On September 16, 1991, the Philippine Senate voted to reject a new treaty that would have extended the presence of U.S. military bases in the Philippines. See *Bayan v. Zamora,* 396 Phil. 623, 632 (2002), citing the Joint Report of the Senate Committee on Foreign Relation and the Committee on National Defense and Security on the Visiting Forces Agreement.

[70] United States Department of Defense. *Sustaining U.S. Global Leadership: Priorities for 21st Century Defense* (January 2012), p. 2, available at http://archive.defense.gov/news/Defense_Strategic Guidance.pdf.

and China's apparent inclination to exercise its burgeoning military power in territorial disputes with its neighbors."[71] These disputes affected sea lanes that are vital to the U.S. and its allies; hence, the U.S. was particularly concerned with their peaceful resolution.[72] Critical to the strategy is the projection of American power and influence worldwide.

The key to the new strategy in the military-political area is ***"presence:*** *forward deployment of U.S. military forces; a significant tempo of regional diplomatic activity (including helping Asian countries resolve disputes that they cannot resolve themselves); and promoting an agenda of political reform where it is appropriate."*[73] This meant, among others, the strengthening of American military alliance with Asian countries, including the Philippines.

The "pivot" has a direct relevance to Philippine concerns since it was prompted, among others, by "China's growing military capabilities and its increasing assertiveness of claims to disputed maritime territory, with implications for freedom of navigation and the United States' ability to project power in the region."[74] The opening of new areas for military cooperation with the Philippines is among the announced features of the "pivot."[75]

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[71] John Hemmings. *Understanding the U.S. Pivot: Past, Present, and Future*. 34(6) *Royal United Services Institute Newsbrief* (November 26, 2014), available at https://hemmingsjohn.wordpress.com/2014/11/27/understanding-the-us-pivot-past-present-and- future/.

[72] *Ibid*

[73] Richard Bush, *No rebalance necessary: The essential continuity of U.S. policy in the Asia-Pacific.* Brookings Institution (March 18, 2015), available at *http://www.brookings.edu/blogs/order-from-*chaos/posts/2015/03/18-value-of-*continuity*-us-policy-in-asia-pacific.

[74] US Congressional Research Service, *Pivot to the Pacific? The Obama Administration's "Rebalancing" Toward Asia,* March 28, 2012, p. 2. Available at http://www.fas.org/sgp/crs/natsec/R42448.pdf.

[75] United States Department of Defense. *The Asia-Pacific Maritime Security Strategy: Achieving U.S. National Security Objectives in*

III. A (4) *The EDCA*

It was soon after the launch of the "pivot" strategy that the initiatives for the EDCA came. The EDCA, of course, did not introduce troops into the country for the first time, as the 1998 VFA already ushered in the presence of U.S. military troops on a *rotational but temporary* basis.

What the EDCA brought with it was the concept of "agreed locations" to which the U.S. has "unimpeded access" for the refueling of aircraft; bunkering of ships; pre-positioning and storage of equipment, supplies and materials; the introduction of military contractors into the agreed locations; and the stationing and deployment point for troops.[76]

In these lights, the confirmed and valid adoption of the EDCA would make the Philippines ***an active ally*** *participating either as a forward operating site* (FOS) *or Cooperative Security Location* (CSL) ***in the American "pivot" strategy*** or, in blunter terms, in the projection and protection of American worldwide power. *FOS and CSL shall be explained under the proper topic below.*

All these facts are recited to place our reading of the EDCA in proper context — historically, geopolitically, and with a proper appreciation of the interests involved, both for the Philippines and the U.S.

The U.S. is in Asia because of the geopolitical interests and the world dominance that it seeks to maintain and preserve.[77] Asia is one region that has been in a flux because of the sense of nationalism that had lain dormant among its peoples, the economic progress that many of its countries are experiencing

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a Changing Environment, (2015), p. 23. Available at http://www.defense.gov/Portals/l/Documents/pubs/NDAA%20A-P_Maritime Security_Strategy-08142015-1300-FlNALFORMAT.PDF.

[76] EDCA, Article III.

[77] David Vine, *Base Nation: How U.S. Military Bases Abroad Harm America and the World* (2015), pp. 300-301.

as the economic winds shift to the East, and the emergence of China that — at the very least — is now gradually being recognized as a regional power with the potential for superpower status.[78] The Philippines itself is encountering territorial problems with China because of the latter's claims in the West Philippine Sea; the Philippines has chosen the path of peace in the dispute through international arbitration.[79]

EDCA and Article XVIII, Section 25 of the Constitution, in their larger regional signification, mean that the Philippines would thereafter, not only be bound as an American ally under the 1951 MDT, but as an active participant as "pivot" and projection points in the grand American strategy in Asia.

How the Philippines will react to all these developments is largely for the Executive and the people (through the Legislature) to determine. In making its decisions, they must — at the very least — show one and all that our country is entitled to respect as an independent and sovereign nation. ***This respect must come primarily from within the Philipines and the Filipinos themselves, from the nation's own sense of self-respect: in negative terms, the Filipino nation cannot attain self-respect unless it shows its respect for its own Constitution — the only instrument that binds the whole nation.***

IV. THE PRESIDENT'S ROLE IN GOVERNANCE AND ITS LIMITS

This discussion is made necessary by the *ponencia's* patent misconceptions regarding the role the President plays in governance as chief executive and implementor of policies and the laws.

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[78] Brzesinski, *supra* note 59, at 151-193.

[79] The arbitration case was filed before the Permanent Court of Arbitration on January 22, 2013. See *Republic of the Philippines v. The People's Republic of China,* Permanent Court of Arbitration, available at http://www.pca-cpa.org/showpage65f2.html?pag id=1529.

IV.A. The *Ponencia* and My Objections

In upholding the constitutionality of the EDCA, the *ponencia* holds that the President's power and duty to ensure the faithful execution of our laws include the defense of our country as the commander-in-chief of the country's armed forces.[80] It contends that these powers, combined with the President's capacity as the country's sole organ in foreign affairs, empower the President to enter into international agreements with other countries and give him the *discretion* to determine whether an international agreement should be in the form of a treaty or executive agreement.

The patent misconception begins when the *ponencia* asserts that the President cannot function with crippled hands: *"the manner of the President's execution of the law, even if not expressly granted by the law, is justified by necessity and limited only by law since he must 'take necessary and proper steps to carry into execution the law.'"*[81] It further adds that it is the President's prerogative to do whatever is legal and necessary for the Philippines' defense interests.[82]

While acknowledging the Constitution's command that the entry of foreign military bases, troops, and facilities must be in a treaty, the *ponencia* asserts that *the EDCA should be examined in relation with this requirement alone, as the President's wide authority in external affairs should be subject only to the limited amount of checks and restrictions under the Constitution.*[83]

It is within this framework that the *ponencia* concludes that *the requirement under Article XVIII, Section 25 of the Constitution is limited to the* ***initial entry*** *of foreign military bases, troops, and facilities.* Thus, once a treaty has allowed the entry of foreign military bases, troops, and facilities into

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[80] *Ponencia,* pp. 25-28.

[81] *Id.* at 27.

[82] *Id.* at 28.

[83] *Id.* at 28-46.

the Philippines, the *ponencia* posits that the President may enter into subsequent executive agreements that involve "detail adjustments" of existing treaties.[84]

I cannot fully agree with the *ponencia's* approach and with its conclusions.

First and foremost, the *ponencia* overlooks that as Chief Executive, the President's role is not simply to execute the laws. This important function is preceded by ***the President's foremost duty to preserve and defend the Constitution***, the highest law of the land. The President's oath, quoted by the *ponencia* itself, in fact, states:

> I do solemnly swear (or affirm) that **I will faithfully and conscientiously fulfill my duties as President** (or Vice-President or Acting President) of the Philippines, **preserve and defend its Constitution**, execute its laws, do justice to every man, and consecrate myself to the service of the Nation. So help me God.[85] [Emphasis supplied]

The supremacy of the Constitution means that in the performance of his duties, the President should always be guided and kept in check by the safeguards that were crafted by the framers of the Constitution and ratified by the people. The Constitution prescribes the limitations to the otherwise awesome powers of the Executive who wields the power of the sword and shares in the power of the purse.

I also do not agree that constitutional limitations, such as the need for Senate concurrence in treaties, can be disregarded if they unduly "tie the hands" of the President.[86] These limitations

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[84] *Id.* at 28-34, 46-95.

[85] Constitution, Article VII, Section 5.

[86] Although the *ponencia* recognized constitutional provisions that restrict or limit the President's prerogative in concluding international agreements (see *ponencia*, pp. 34-43), it contradictorily asserts that "[n]o court can tell the President to desist from choosing an executive agreement over a treaty to embody an international agreement, unless the case falls squarely within Article VIII, Sec. 25" and that "[t]he President had the choice to

are democratic safeguards that place the responsibility over national policy beyond the hands of a single official. Their existence is the hallmark of a strong and healthy democracy. In treaty-making, this is how the people participate — through their duly elected Senate — or directly when the Congress so requires. *When the Constitution so dictates, the President must act through the medium of a treaty and is left with no discretion on the matter.* This is the situation under Article XVIII, Section 25 of the Constitution, whose application is currently in dispute.

Let it be noted that noble objectives do not authorize the President to bypass constitutional safeguards and limits to his powers. To emphasize this point, we only need to refer to Article VI, Section 23(2) of the Constitution:

> (2) In times of **war or other national emergency,** the **Congress may by law authorize the President,** for a limited period and subject to such restrictions as it may prescribe, **to exercise powers necessary and proper to carry out a declared national policy**. Unless sooner withdrawn by resolution of the Congress, such power shall cease upon the next adjournment thereof. [Emphasis supplied]

Thus, the President cannot, by himself, usurp the prerogatives of a co- equal branch to carry out what he believes is necessary for the country's defense interests. His position as the Commander-in-Chief of the Armed Forces of the Philippines *(AFP)* does not give him the sole discretion to increase our military's defensive capabilities; his role as commander-in- chief only gives him control of the military's chain of command. It grants him the power to call out the armed forces to prevent/ suppress lawless violence, invasion, insurrection, or rebellion.[87]

The modernization of the military, in particular, is a joint responsibility of the political branches of the State because the

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enter into the EDCA by way of an executive agreement or a treaty." See *ponencia,* p. 43.

[87] Constitution, Article VII, Section 18.

Congress is responsible for crafting relevant laws[88] and for allocating funds for the AFP through the General Appropriations Act.[89] The increase or decrease of funds and the extent of defense initiatives to be undertaken are national policy matters that the President cannot undertake alone.

IV.B. The President's Foreign Relations Power should be Interpreted in the Context of the Separation of Powers Doctrine

We cannot also interpret a provision in the Constitution *in isolation* and *separately from the rest of the Constitution.* Similarly, we cannot determine whether the Executive's acts had been committed with grave abuse of discretion without considering his authority in the context of the powers of the other branches of government.

While the President's role as the country's lead official in the conduct of foreign affairs is beyond question, his authority is not without limit. When examined within the larger context of how our tripartite system of government works (where each branch of government is supreme within its sphere but coordinate with the others), we can see that the conduct of foreign affairs, particularly when it comes to international agreements, is a *shared function* among all three branches of government.

The President is undeniably the chief architect of foreign policy and is the country's representative in international affairs.[90] He is vested with the authority to preside over the nation's foreign relations which involve, among others, dealing with foreign states and governments, extending or withholding recognition, maintaining diplomatic relations, and entering into treaties.[91] In

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[88] The Constitution vests legislative power upon the Congress of the Philippines. Thus, the Congress has the power to determine the subject matters it can legislate upon. See Constitution, Article VI, Section 1.

[89] Constitution, Article Vl, Section 25.

[90] *Pimentel v. Executive Secretary,* 501 Phil. 303, 317-318 (2005).

[91] *Ibid.*

the realm of treaty-making, the President has the sole authority to negotiate with other States.[92]

IV.B (1) ***Separation of Powers and the Treaty-Making Process***

This wide grant of authority, however, does not give him the license to conduct foreign affairs to the point of disregarding or bypassing the separation of powers that underlies our established constitutional system.

Thus, while the President has the sole authority to negotiate and enter into treaties, Article VII, Section 21 of the 1987 Constitution at the same time provides the limitation that two-thirds of the members of the Senate should give their concurrence for the treaty to be valid and effective.

Notably, this limitation is a not a new rule; the legislative branch of government has been participating in the treaty-making process by giving (or withholding) its consent to treaties since the 1935 Constitution. Section 10 (7), Article VII of the 1935 Constitution provides:

> Sec. 10. (7) The President shall have the power, with the concurrence of two-thirds of all the Members of the Senate, to make treaties x x x.

This tradition of legislative participation continued despite our presidential-parliamentary form of government under the 1973 Constitution, that is markedly different from the tripartite form of government that traditionally prevailed in the country. Section 14(1) Article VIII of the 1973 Constitution stated:

> Sec. 14. (1) Except as otherwise provided in this Constitution, no treaty shall be valid and effective unless concurred in by a majority of all the Members of the Batasang Pambansa.

That we have consistently included the participation of the legislative branch in the treaty-making process is not without an important reason: it provides a check on the Executive in

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[92] *Ibid.*

the field of foreign relations. By requiring the concurrence of the Legislature in the treaties entered into by the President, the Constitution ensures a healthy system of checks and balances necessary in the nation's pursuit of political maturity and growth.

Under this system, the functions of government are divided among three branches of government, each one supreme within its own sphere: the executive administers and enforces laws; the legislature formulates and enacts laws; and the judiciary settles cases arising out of the enforcement of these laws[93] The requirement of Senate concurrence to the executive's treaty-making powers is a check on the prerogative of the Executive, in the same manner that the Executive's veto on laws passed by Congress[94] is a check on the latter's legislative powers.

Even the **executive agreements** that the President enters into without Senate concurrence has legislative participation — they are implementations of existing laws Congress has passed or of treaties that the Senate had assented to.[95] The President's authority to negotiate and ratify these executive agreements springs from his power to ensure that these laws and treaties are executed.[96]

The judicial branch of government's participation in international agreements is largely passive, and is only triggered when cases reach the courts. The courts, in the exercise of their judicial power, have the duty to ensure that the Executive and Legislature stay within their spheres of competence;[97] they ensure as well that constitutional standards and limitations set by the Constitution for the Executive and the Congress to follow are not violated.

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[93] *Angara v. Electoral Commission,* 63 Phil. 139 (1936).

[94] Constitution, Article VI, Section 27(2).

[95] *Commissioner of Customs v. Eastern Sea Trading,* 113 Phil. 333, 338-340 (1961).

[96] Constitution, Article VII, Sections 5 and 17.

[97] *Angara v. Electoral Commission, supra* note 93, at 157-159.

Article VIII, Section 5 of the Constitution is even more explicit, as it gives the Supreme Court the jurisdiction "to review by appeal or *certiorari* all cases in which the constitutionality or validity of any treaty, international or executive agreement, law x x x is in question."

Thus, entry into international agreements is a *shared function* among the three branches of government. In this light and in the context that the President's actions should be viewed under our tripartite system of government, **I cannot agree with the *ponencia's* assertion that the case should be examined solely and strictly through the constitutional limitation found in Article XVIII, Section 25 of the Constitution.**

IV. B(2) *Standards in Examining the President's Treaty-Making Powers*

Because the Executive's foreign relations power operates within the larger constitutional framework of separation of powers, I find the examination of the President's actions through this larger framework to be the better approach in the present cases. This analytical framework, incidentally, is not the result of my original and independent thought; it was devised by U.S. Supreme Court Associate Justice Robert Jackson in his Concurring Opinion in *Youngstown Sheet & Tube Co. v. Sawyer.*[98]

Justice Jackson's framework for evaluating executive action categorizes the President's actions into three: *first*, when the President acts ***with authority from the Congress,*** his authority is at its maximum, as it includes all the powers he possesses in his own right and everything that Congress can delegate.[99]

Second, "when the President acts ***in the absence of either Congressional grant or denial of authority***, he can only rely on his own independent powers, but there is a [twilight zone where] he and Congress may have concurrent authority, or

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[98] 343 U.S. 579 (1952).

[99] *Id.* at 635.

where its distribution is uncertain."[100] In this situation, presidential authority can derive support from "congressional inertia, indifference or quiescence."[101]

Third, "when the President takes ***measures incompatible with the expressed or implied will of Congress***, his power is at its lowest ebb,"[102] and the Court can sustain his actions "only by disabling the Congress from acting upon the subject."[103]

This framework has been recently adopted by the U.S. Supreme Court in *Medellin v. Texas,*[104] a case involving the President's foreign affairs powers and one that can be directly instructive in deciding the present case.

In examining the validity of an executive act, the Court takes into consideration the varying degrees of authority that the President possesses. Acts of the President with the authorization of Congress should have the "widest latitude of judicial interpretation"[105] and should be "supported by the strongest of presumptions."[106] For the judiciary to overrule the executive action, it must decide that the government itself lacks the power. In contrast, ***executive acts that are without congressional imprimatur would have to be very carefully examined***.

IV. B(3) *The Senate Objection to EDCA as an Executive Agreement*

In the present cases, ***the President's act of treating the EDCA as an executive agreement has been disputed by the Senate,*** although the Senate is *not* an active party in the present cases.

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[100] *Id.* at 637.

[101] *Ibid.*

[102] *Ibid.*

[103] *Youngstown Sheet v. Sawyer, supra* note 98, at 637-638.

[104] 552 U.S. 491 (2008).

[105] *Id., supra* note 98, at 637.

[106] *Ibid.*

On November 10, 2015, the Senate sent the Supreme Court a copy of Senate Resolution No. 1414[107] expressing its sentiment that the EDCA should have been entered into in the form of a treaty. Furthermore, and as will be explained in the succeeding portions of this Dissenting Opinion, the EDCA's provisions are not all within the terms of the two treaties properly ratified by the Senate — the 1951 MDT and 1998 VFA; hence, the President could not have drawn his authority from these agreements.

Thus, contrary to the *ponencia's* assertion that the President's act of treating the EDCA as an executive agreement should be subject to the "least amount of checks and restrictions under the Constitution,"[108] this presidential action *should actually be very carefully examined,* in light of the Senate's own expressed sentiments on the matter.

The mandatory character of the executive-legislative power sharing should be particularly true with respect to the EDCA, as its adoption signifies ***Philippine participation in America's pivot strategy by making our country one of the "pivot" or projection points that would enforce America's military strategy.*** In taking this kind of step, the Senate must simply be there to give its consent, as the Constitution envisions in situations involving the entry of foreign military bases, troops, and facilities into the country.

In these lights, I propose that we examine the President's act of treating the EDCA not simply by the standard of whether it complies with the limitation under Article XVIII, Section 25

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[107] Senate Resolution No. 1414 was entitled as the "Resolution expressing the strong sense of the Senate that any treaty ratified by the President of the Philippines should be concurred in by the Senate, otherwise the treaty becomes invalid and ineffective." It was signed by thirteen Senators: Senators Defensor-Santiago, Angara, Cayetano, P., Ejercito, Estrada, Guingona III, Lapid, Marcos, Jr., Osmeña III, Pimentel Ill, Recto, Revilla, Jr., and Villar. Available at https://www.senate.gov.ph/lisdata/21750184781!.pdf.

[108] *Ponencia,* pp. 45-46.

of the Constitution, but in the context of how our government functions, and of other relevant provisions in the Constitution.

IV.C. Constitutional Standards in Allowing the Entry of Foreign Military Bases, Troops, and Facilities in the Philippines

IV.C(1) *Article VII, Section 21 of the Constitution and Treaty-Making*

In general, the President's foreign affairs power must be exercised in compliance with Article VII, Section 21 of the Constitution, which requires the submission of treaties the President ratified, to the Senate for its concurrence. The Senate may either concur in, or withhold consent to, the submitted treaties.

Significantly, not all the international agreements that the President enters into are required to be sent to the Senate for concurrence. Jurisprudence recognizes that the President may enter into executive agreements with other countries,[109] and these agreements — under the proper conditions — do not require Senate concurrence to be valid and enforceable in the Philippines.[110]

IV.C(2) *Treaties and Executive Agreements under Article VII, Section 21*

Where lies the difference, it may well be asked, since both a treaty and an executive agreement fall under the general title of international agreement?

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[109] See *Land Bank of the Philippines v. Atlanta Industries, Inc.,* G.R. No. 193796, July 2, 2014, 729 SCRA 12, 30-31, citing *Bayan Muna v. Romulo,* 656 Phil. 246, 269-274 (2011); *Neri v. Senate Committee on Accountability of Public Officers and Investigations,* 586 Phil. 135, 168 (2008), citing *Usaffe Veterans Association, Inc. v. Treasurer of the Philippines.* 105 Phil 1030, 1038 (1959); *Commissioner of Customs v. Eastern Sea Trading, supra* note 95.

[110] *Ibid*

An **executive agreement** emanates from the President's duty to execute the laws faithfully.[111] They trace their validity from existing laws or from treaties that have been authorized by the legislative branch of government.[112] In short, they implement laws and treaties.

In contrast, **treaties** are international agreements that do not originate solely from the President's duty as the executor of the country's laws, but from the shared function that the Constitution mandates between the President and the Senate.[113] They therefore need concurrence from the Senate after presidential ratification, in order to fulfill the constitutional shared function requirement.[114]

Jurisprudential definitions of treaties and executive agreements are conceptually drawn from these distinctions although in *Bayan Muna v. Romulo,*[115] we simply differentiated treaties from executive agreements in this wise:

> Article 2 of the Vienna Convention on the Law of Treaties: An international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. International agreements may be in the form of **(1) treaties that require legislative concurrence after executive ratification; or (2) executive agreements that are similar to treaties, except that they do not require legislative concurrence** and are usually less formal and deal with a narrower range of subject matters than treaties.[116] [Emphases supplied]

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[111] Constitution, Article VII, Sections 5 and 17.

[112] *Commissioner of Customs v. Eastern Sea Trading, supra* note 95.

[113] Constitution, Article VII, Section 21. See also *Bayan Muna v. Romulo, supra* note 109, at 269-270.

[114] *Ibid*.

[115] *Supra* note 109.

[116] *Id.* at 269.

Bayan Muna likewise did not distinguish between treaties and executive agreements in terms of their binding effects on the contracting States concerned.[117] But neither one can contravene the Constitution.

This ambiguity perhaps might have been the root of the general statement that the Executive generally has the discretion to determine whether an international obligation should be in the form of a treaty or an executive agreement. This general statement, however, is far from complete and should be qualified because the *Executive's exercise of discretion* is affected and should be dictated by the demands of the enforceability of the obligations the international agreement creates in the domestic sphere.

Between a treaty and an executive agreement, a treaty exists on a higher plane as it carries the authority of the President and the Senate.[118] Treaties have the status, effect, and impact of statutory law in the Philippines; they can amend or prevail over prior statutory enactments.[119]

Executive agreements — which exist at the level of implementing rules and regulations or administrative orders in the domestic sphere — carry no such effect.[120] They cannot contravene statutory enactments and treaties and would be invalid if they do so.[121]

Again, this difference in impact is traceable to the source of their authority; since a treaty has the approval of both the President and the Senate, it has the same impact as a statute. In contrast, since an executive agreement springs from the

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[117] *Ibid.*

[118] *Bayan Muna v. Romulo, supra* note 109, at 270, citing Henkin, *Foreign Affairs and the United States Constitution* 224 (2nd ed., 1996), and Edwin Borchard, *Treaties and Executive Agreements – Reply,* Yale Law Journal, June 1945.

[119] *Ibid.*

[120] *Gonzales v. Hechanova,* 118 Phil. 1065, 1079 (1963).

[121] *Adolfo v. CFI of Zambales,* 145 Phil. 264, 266-268 (1970).

President's power to execute laws, it cannot amend or violate existing treaties, and must be in accord with and be made pursuant to existing laws and treaties.[122]

Accordingly, the terms and objectives of the presidential entry into an international agreement dictates the form the agreement must take. When an international agreement is made ***merely to implement an existing law or treaty***, then it can properly take the form of an executive agreement.[123]

In contrast, when an international agreement involves the introduction of a ***new subject matter*** or ***the amendment of existing agreements or laws*** and has not passed the required executive and legislative processes, then it should properly be in the form of a treaty.[124]

To reiterate, the consequence of the violation of this norm impacts on the enforceability of the international agreement in the domestic sphere; should an executive agreement amend or contravene statutory enactments and treaties, then it is void and cannot be enforced in the Philippines for lack of the proper authority on the part of the issuer.

In judicial terms, the distinctions and their consequences mean that **an executive agreement that creates new obligations or amends existing ones, has been issued with grave abuse of discretion amounting to a lack of or in excess of jurisdiction, and can be judicially nullified under the courts' power of judicial review.**

IV. C(3) *Joint Reading of Article VII, Section 21 and Article XVIII, Section 25*

The dynamics that Article VII, Section 21 embody, should be read into Article XVIII, Section 25 of the 1987 Constitution, which specifically covers and applies to the entry of foreign military bases, troops, or facilities into the country.

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[122] *Bayan Muna v. Romulo, supra* note 109 at 1079-1080.

[123] *Ibid.*

[124] *Ibid.*

It is on the basis of this joint reading that the ***ponencia's conclusion —*** that Article XVIII, Section 25 applies only to the **initial** entry of foreign military bases, troops, and facilities in the country — is ***essentially incorrect.***

Article XVIII, Section 25 does not provide for any such limitation in its applicability. Neither is there anything in the language of the provision that remotely implies this consequence. What it simply states is that foreign military bases, troops, and facilities may only be present in Philippine soil *in accordance with a treaty* concurred in by the Senate.

When the terms of Article XVIII, Section 25 treaty does not provide for situations or arrangements subsequent to the initial entry of foreign military bases, troops, or facilities in the country and the subsequent arrangements are still attributed to the same treaty made pursuant to Section 25, the combined reading of Article VII, Section 21 and Article XVIII, Section 25 must now come into play.

This combined reading simply means that after the initial entry of foreign military bases, troops, or facilities in the Philippines under a duly ratified treaty, subsequent arrangements relating to foreign military bases, troops or facilities that are claimed to be based on the same treaty, should be examined based on the treaty–executive agreement distinctions recognized by jurisprudence under Article VII, Section 21 of the Constitution.

In other words, any subsequent international agreement referring to military bases, troops or facilities should be ***examined based on whether it creates a new obligation or implements an existing one.*** The determination of this question rests with the Executive but the treaty-executive agreement distinctions should limit the Executive's discretion when the new international agreement relates to a *new obligation* (or a change in an existing obligation) as the presence of foreign military bases, troops, or facilities in the Philippines should then be effected through another treaty.

To put it more bluntly, Article XVIII, Section 25 effectively removes the Executive's discretion in deciding the form of an

international agreement because of this provision's explicit directive to use a treaty as the medium for new obligations created.

In *Bayan v. Zamora,*[125] our conclusion supported this position. We explained that Article XVIII, Section 25 makes no distinction as to whether the presence of foreign military bases, troops, or facilities may be transient or permanent.[126] By concluding that the permanence of foreign military bases, troops, or facilities is immaterial to the application of Article XVIII, Section 25, we effectively acknowledged that subsequent agreements that amend or introduce new obligations to existing treaties that previously allowed the entry of foreign military bases, troops or facilities, should be the subject of another treaty as they may enter the country on varying grounds, lengths or periods of time – all of which can change the nature of the obligations under existing treaties.

IV.C(4) ***The Dissent's Analytical Approach***

Given these parameters, I propose that we examine the constitutionality of the Executive's act of entering into the obligations found in the EDCA in the form of an executive agreement with these two questions:

(1) Does the EDCA involve the introduction into the Philippines of foreign military bases, troops, or facilities that call for its examination under Article XVIII, Section 25?

(2) **Does the EDCA impose new obligations, or amend or go beyond existing ones, regarding the presence of foreign military bases, troops, or facilities in the Philippines?**

If the EDCA introduces foreign military bases, troops, or facilities in the Philippines within the contemplation of Article XVIII, Section 25 of the 1987 Constitution, and if these obligations

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[125] *Supra* note 69.

[126] *Id.* at 653.

are different from those found in our existing treaty obligations with the U.S., then the EDCA cannot be enforced in the Philippines without the Senate's concurrence. **The *ponencia* is then incorrect and the Dissent must prevail.**

Conversely, if the EDCA merely implements present treaty obligations — particularly those under the 1951 MDT and the 1998 VFA — then the President was well within his powers in the execution of our present treaty obligations. **The *ponencia* is correct and the Dissent therefore fails.**

V. THE APPLICATION OF ARTICLE XVIII, SECTION 25 TO THE EDCA

V.A. The Article XVII, Section 25 Dispute

When the subject of an international agreement falls under Article XVIII, Section 25 of the Constitution, the President — *by constitutional command* — must enter into a treaty subject to the concurrence of the Senate and, when Congress so desires of the people through a national referendum.

This rule opens the door for Court intervention pursuant to its duty to uphold the Constitution and its further duty (under its power of judicial review) to pass upon any grave abuse of discretion committed by any official or agency of government. It is under this constitutionally-mandated terms that this Court invokes its power to review the constitutionality of the President's actions in handling the EDCA.

Within this framework, the issue these cases present is clear. The bottom line question is ***whether the President gravely abused his discretion in executing the EDCA as an executive agreement***; the alleged existence of grave abuse of discretion constitutes the *actual case or controversy* that allows the exercise of judicial power. ***Whether grave abuse exists, in turn, depends on the determination of whether the terms of the EDCA imposed new or amended existing obligations involving foreign military bases, troops, and facilities in the Philippines.***

If the EDCA does, then it should have been in the form of a treaty submitted to the Senate for its concurrence. In resolving

this question, I am guided ***first,*** by the text of the Constitution itself and the meaning of its operative words in both their original and contemporaneous senses; ***second,*** by the spirit that motivated the framing of Article XVIII, Section 25; and ***third,*** by jurisprudence interpreting this provision.

The *ponencia* lays the premise that the President may enter into an executive agreement on foreign military bases, troops, or facilities if:

(a) it is not the instrument that allows the presence of foreign military bases, troops, or facilities; or

(b) it merely aims to implement an existing law or treaty.[127]

The *ponencia* follows this premise with the position that Article XVIII, Section 25 refers only to the initial entry of bases, troops, or facilities, and not to the activities done after the entry.[128]

In construing Article XVIII, Section 25, the *ponencia* invokes the rule of *verba legis,* a cardinal rule of construction stating that when the law is clear and free from any doubt or ambiguity, then there is no room for construction or interpretation, only application.[129] The law must be given its literal meaning and applied without attempted interpretation.[130] The *ponencia* asserts that the plain meaning of "allowed in" refers solely to the initial entry.[131] Thus, after entry, any subsequent acts involving foreign military troops, bases, or facilities no longer fall under the coverage of Article XVIII, Section 25.[132]

I believe that the ponencia's approach and interpretation are incorrect because they are overly simplistic. The proper

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[127] *Ponencia,* p. 29.

[128] *Id.* at 33.

[129] *Bolos v. Bolos,* G.R. No. 186400, 20 October 2010, 634 SCRA 429, 437.

[130] *Ponencia,* p. 32.

[131] *Id.* at 33.

[132] *Ibid.*

understanding of Article XVIII, Section 25 must take into account the many considerations that bear upon its plain terms, among them, the treaty — executive agreement distinctions under Article VII, Section 21 that I discussed above; the history of Article XVIII, Section 25; the motivations that drove the framers to adopt the provision; and the current and contemporaneous developments and usages that give full and effective meaning to the provision.

Separately from textual interpretation considerations and as part of the history of Article XVIII, Section 25, the basic concept of sovereignty that underlies it should not be forgotten.[133] Sovereignty means the full right and power of the nation to govern itself, its people, and its territory without any interference from outside sources or entities.[134] Within its territory, a nation

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[133] IV Record, Constitutional Commission 84, 659 and 661 (September 16, 1986), which reads:

MR. AZCUNA: After the agreement expires in 1991, the question, therefore, is: Should we extend a new treaty for these bases to stay put in 1991 in our territory? The position of the committee is that it should not, because the presence of such bases is a derogation of Philippine sovereignty.

It is said that we should leave those matters to be decided by the executive, since the President conducts foreign relations and this is a question of foreign policy. I disagree, Madam President. This is not simply a question of foreign policy; this is a question of national sovereignty. x x x

FR. BERNAS: My question is: is it the position of the committee that the presence of foreign military bases in the country under any circumstances is a derogation of national sovereignty?

MR. AZCUNA: It is difficult to imagine a situation based on existing facts where it would not. x x x

[134] IV Record, Constitutional Commission 84, 659 and 661 (September 16, 1986), which reads:

MR. AZCUNA: After the agreement expires in 1991, the question, therefore, is: Should we extend a new treaty for these bases to stay put in 1991 in our territory? The position of the committee is that it should not, because the presence of such bases is a derogation of Philippine sovereignty.

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reigns supreme. If it will allow interference at all, such interference should be under the terms the nation allows and has accepted;[135] beyond those terms, the primacy of sovereignty is the rule.[136]

Thus, if interference were to be allowed at all, or if exceptions to full sovereignty within a territory would be allowed, or if there would be any ambiguity in the extent of an exception granted, the interference, exception or ambiguity must be resolved in favor of the fullest exercise of sovereignty under the obtaining circumstances. Conversely, if any ambiguity exists at all in the terms of the exception or in the terms of the resulting treaty, then such terms should be interpreted restrictively in favor of the widest application of the restrictions embodied in the Constitution and the laws.

The *ponencia* cannot be incorrect in stating the rule that when terms are clear and categorical, no need for any forced constitutional construction exists;[137] we need not divine any further meaning but must only apply terms in the sense that they are ordinarily understood.

A flaw, however, exists in the *ponencia's* application of *verba legis* as Article XVIII, Section 25 is ***neither plain nor that simple***.

FR. BERNAS: My question is: Is it the position of the committee that the presence of foreign military bases in the country under any circumstances is a derogation of national sovereignty?

MR. AZCUNA: It is difficult to imagine a situation based on existing facts where it would not. x x x

[135] See *Tañada v. Angara,* 338 Phil. 546, 593 (1997), citing *Reagan v. Commissioner of Internal Revenue,* 141 Phil. 621, 625 (1969), where the Court discussed the concept of auto-limitation, *viz.:* "It is to be admitted that any State may by its consent, express or implied, submit to a restriction of its sovereignty rights. That is the concept of sovereignty and auto-limitation which, in the succinct language of Jellinek, 'is the property of a state-force due to which has the exclusive capacity of legal-self determination and self-restriction.' A State then, if it chooses to may refrain from the exercise of what otherwise is illimitable competence."

[136] *Ibid.*

[137] *Ponencia,* p. 32.

As pointed out above, it must be read together with Article VII, Section 21 for the general rules on the treaty — making process. It also expressly refers to a historical incident — the then coming expiration of the 1947 MBA. From these take-off points, the Article XVIII, Section 25 proceeds to a list of the matters it specifically addresses — *foreign military bases, troops, or facilities.*

All these bring up the question that has so far been left undiscussed — **what are the circumstances that led to the expiration of the 1947 MBA and what are the foreign military bases, troops, and facilities that Article XVIII, Section 25 refers to?**

V.B. The History and Intent of Article XVIII, Section 25

The history of Article XVIII, Section 25 of the Constitution is practically summed up in the introductory phrase of the provision — *"After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases x x x."*

Purely and simply, the framers of the Constitution in 1986 then looked forward to the expiration of the U.S. bases coming in 1991 and wanted the terms of any future foreign military presence governed by the Constitution itself. Behind this intent is the deeper policy expressed under Article II, Section 7 of the Constitution —

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

During the constitutional deliberation on Article XVIII, Section 25, two views were espoused on the presence of military bases in the Philippines. One view was that espoused by the anti-bases group; the other group supported the view that this should be left to the policy makers.

Commissioner Adolfo Azcuna expressed the sentiment of the first group when he stated in his privilege speech on 16 September 1986 that:

After the agreement expires in 1991, the question therefore, is: Should we extend a new treaty for these bases to stay put in 1991 in our territory? The position of the committee is that it should not, because *the presence of such bases is a derogation of Philippine sovereignty.*

It is said that we should leave these matters to be decided by the executive, since the President conducts foreign relations and this is a question of foreign policy. I disagree, Madam President. *This is not simple a question of foreign policy;this is a question of national sovereignty.* And the Constitution is anything at all, it is a definition of the parameters of the sovereignty of the people.[138]

On the other hand, the second group posited that the decision to allow foreign bases into the country should be left to the policy makers. Commissioner Jose Bengzon expressed the position of this group that:

x x x this is neither the time nor the forum to insist on our views for we know not what lies in the future. lt would be foolhardy to second-guess the events that will shape the world, our region and our country by 1991. It would be sheer irresponsibility and a disservice to the highest calibre to our own country if we were to tie down the hands of our future governments and future generations.[139]

Despite his view that the presence of foreign military bases in the Philippines would lead to a derogation of national security, Commissioner Azcuna conceded that this would not be the case if the agreement would allow the foreign military bases, troops, and facilities to be embodied in a treaty.[140]

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[138] III Record, Constitutional Commission 86 (16 September 1986), p. 659.

[139] IV Record, Constitutional Commission 82 (13 September 1986), pp. 617-618.

[140] IV Record, Constitutional Commission 84 (16 September 1986), pp. 661-662, which reads:

FR. BERNAS. My question is: ls it the position of the committee that the presence of foreign military bases in the country under any circumstances is a derogation of national sovereignty?

MR. AZCUNA: It is difficult to imagine a situation based on existing facts where it would not. However, in the abstract, it is possible that it

After a series of debates, Commissioner Ricardo Romulo proposed an alternative formulation that is now the current Article XVIII, Section 25.[141] He explained that this is an explicit ban on all foreign military bases other than those of the U.S.[142] Based on the discussions, the spirit of the basing provisions of the Constitution is primarily a ***balance of the preservation of***

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would not be that much of a derogation. I have in mind, Madam President, the argument that has been presented. Is that the reason why there are U.S. bases in England, in Spain and in Turkey? And it is not being claimed that their sovereignty is being derogated. Our situation is different from theirs because we did not lease or rent these bases to the U.S. The US. retained them from us as a colonial power.

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FR. BERNAS: Does the first sentence tolerate a situation radically different from what obtains now? In other words, if we understand sovereignty as autolimitation, as a people's power to give up certain goods in order to obtain something which may be more valuable, would it be possible under this first sentence for the nation to negotiate some kind of a treaty agreement that would not derogate against sovereignty?

MR. AZCUNA: Yes. For example, Madam President, if it is negotiated on a basis of true sovereign equality, such as a mutual ASEAN defense agreement wherein an ASEAN force is created and this ASEAN force is a foreign a military force and may have a basis in the member ASEAN countries, this kind of a situation, I think would not derogate from sovereignty.

[141] IV Record, Constitutional Commission 86 (18 September 1986), p. 787, which reads:

MR. ROMULO: Madam President, may I propose my amendment to the Bernas amendment: "AFTER THE EXPIRATION OF THE RP-US AGREEMENT IN 1991, FOREIGN MILITARY BASES, TROOPS OR FACILITIES SHALL NOT BE ALLOWED IN THE PHILIPPINE TERRITORY EXCEPT UNDER THE TERMS OF A TREATY DULY CONCURRED IN BY THE SENATE, AND WHEN CONGRESS SO REQUIRES RATIFIED BY A MAJORITY OF THE VOTES CAST BY THE PEOPLE IN A REFERENDUM HELD FOR THAT PURPOSE AND RECOGNIZED AS A TREATY BY THE OTHER CONTRACTING STATE."

[142] IV Record, Constitutional Commission 86 (18 September 1986), p. 780; which reads:

FR. BERNAS: On the other hand, Madam President, if we place it in the Transitory Provisions and mention only the American State, the conclusion might be drawn that this applies only to foreign military bases of the United

the national sovereignty **and** ***openness to the establishment of foreign bases, troops, or facilities in the country***.

Article XVIII, Section 25 imposed three requirements that must be complied with for an agreement to be considered valid insofar as the Philippines is concerned. These three requirements are: (1) the agreement must be embodied in a treaty; (2) the treaty must be duly concurred in by 2/3 votes of all the members of the Senate;[143] and (3) the agreement must be recognized as a treaty by the other State.

On the second requirement, the two-thirds concurrence of all the members of the Senate, the people's representative,[144] may be viewed as the people's "voluntary submission" of their sovereignty so they can reap the greater benefits of the agreement that the President, as policymaker, entered into.

States. The conclusion might be drawn that the principle does not apply to other states.

MR. ROMULO: That is certainly not our meaning. We do not wish any other foreign military base here and I think the phrase which says: "NO FOREIGN MILITARY BASES, TROOPS OR FACILITIES ..." makes that very clear even if it is in the Transitory Provisions.

[143] *Bayan v. Zamora, supra* note 69, at 652, stating that:

Undoubtedly, Section 25, Article XVIII, which specifically deals with treaties involving foreign military bases, troops, or facilities, should apply in the instant case. To a certain extent and in a limited sense, however, the provisions of Section 21, Article VII will find applicability with regard to the issue and for the sole purpose of determining the number of votes required to obtain the valid concurrence of the Senate, as will be further discussed hereunder.

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As noted, the "concurrence requirement" under Section 25, Article XVIII must be construed in relation to the provisions of Section 21, Article VII. In a more particular language, the concurrence of the Senate contemplated under Section 25, Article XVIII means that at least two-thirds of all the members of the Senate favorably vote to concur with the treaty, the VFA in the instant case.

[144] Constitution, Article VII, Section 21. See also Joaquin Bernas, *The 1987 Constitution of the Republic of the Philippines: A Commentary* (1995), pp. 487-488.

When the Congress so requires, the agreement should be ratified by a majority of the votes cast by the people in a national referendum held for that purpose.[145] This additional requirement evinces the framers' intent to emphasize the people's direct participation in treaty-making.

In *Bayan v. Zamora,*[146] the Court relaxed the third requirement when it ruled that it is sufficient that "the other contracting party accepts or acknowledges the agreement as a treaty." In that case, since the U.S. had already declared its full commitment to the 1998 VFA,[147] we declared that it was unnecessary for the U.S. to further submit the agreement to the U.S. Senate.[148]

This history highlights the importance of the issue now before us, and stresses as well how seriously the Constitution regards the Senate concurrence requirement. Thus, the issue can neither be simply glossed over nor disregarded on the basis of *stretched legal technicalities.* In case of doubt, as above discussed, such doubt should be resolved strictly in favor of what the Constitution requires in its widest sense.

V.C. Historical Roots of the U.S. Bases in the Philippines

As a U.S. colony after the Treaty of Paris of 1898, the whole Philippines could be equated to one big American base: the U.S. had sovereignty and had a free hand on how to deal with defense matters and its military forces in the Philippines.

The ***Tydings-McDuffie Act of 1934*** provided for the Philippines' self-government and specified a procedural framework for the drafting of a constitution for the government of the Commonwealth of the Philippines[149] within two years

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[145] Constitution, Article XVIII, Section 25.

[146] *Supra* note 69.

[147] *Id.* at 659.

[148] *Id.* at 656-659.

[149] The Tydings-McDuffie Act, also known as the Philippine Independence Act, was entitled "An Act to Provide for the Complete

from the Act's enactment.[150] The Act, more importantly, mandated the recognition by the U.S. of the independence of the Philippine Islands as a separate and self-governing nation after a ten-year transition period.[151]

Prior to independence, the Act allowed the U.S. to maintain military forces in the Philippines and to call all military forces of the Philippine government into U.S. military service.[152] **The Act empowered the U.S. President, within two years following independence, to negotiate for the establishment of U.S. naval reservations and fueling stations in the Philippine Islands**.[153]

The negotiations for American bases that took place after independence resulted in the 1947 MBA.

V.C(1) *The 1947 Military Bases Agreement*

The 1947 MBA between the Philippines and the U.S. was signed on March 16, 1947. The agreement officially allowed the U.S. to establish, maintain, and operate air and naval bases in the Country.[154] It provided for about 23 listed bases and

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Independence of the Philippine Islands, to provide for the Adoption of a Constitution and a Form of Government for the Philippine Islands, and for other purposes." It was signed into law by President Franklin D. Roosevelt on March 24, 1934 and was approved by the Philippine Senate on May 1, 1934. See Encyclopedia Britannica, *Tydings-McDuffie Act.* available at http://www. britannica.com/topic/Tydings-McDuffie Act and http://www.philippine-history.org/tydings-mcduffie-law.htm.

[150] Tydings-McDuffie Act, Section 3.

[151] *Id.,* Section 10.

[152] *Id.,* Section 2 (12). *See also* Ordinance appended to 1935 Constitution, Section 1 (12).

[153] *Id.,* Section 10 (b).

[154] The 1947 MBA Whereas Clause, par. 7, states:

THEREFORE, the Governments of the Republic of the Philippines and of the United States of America agree upon the following terms for the delimitation, establishment, maintenance, and operation of military bases in the Philippines.

facilities for use by Americans for a period of 99 years.[155] The most important of these bases were the 180,000-acre Clark Air Base in Pampanga, then the biggest American airbase outside of the continental U.S.A., and the Subic Naval Base in Zambales.

The bases covered by the 1947 MBA were ***fixed bases*** where American ***structures and facilities*** had been built and ***arms, weapons, and equipment were deployed and stored***, and where ***troops and civilian personnel were stationed***, together with their families.

Other provisions of the 29-article 1947 MBA were the following:

- The bases were properties over which the U.S. originally exercised sovereignty but this was subsequently transferred to the Philippines pursuant to the *Romulo-Murphy Agreement of 1979.* After the transfer, the U.S. and its armed forces and personnel were granted rent-free access up to the expiration of the Agreement.[156]
- The bases were for the mutual protection and cooperation of the two countries and for this purpose were for their use as U.S. and Philippine military installations.[157]
- The U.S. had the right, power and authority necessary for the establishment, operation, and defense of the bases and their control,[158] specifically:

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[155] 1947 MBA, Article XXIX; see Annexes A and B of the 1947 MBA.

[156] The 1947 MBA Whereas clause states:

Whereas, the Governments of the Republic of the Philippines and of the United States of America are desirous of cooperating in the common defense of their two countries through arrangements consonant with the procedures and objectives of the United Nations, and particularly through a grant to the United States of America by the Republic of the Philippines in the exercise of its title and sovereignty, of the use, free of rent, in furtherance of the mutual interest of both countries, of certain lands of the public domain; x x x (Emphases supplied)

[157] 1947 MBA, Whereas Clause, Articles II and III.

[158] *Id.,* Articles II, III, IV, VI, and VII.

- To operate, maintain, utilize, occupy, garrison, and control the bases;
- To improve and deepen the harbors, channels and entrances and anchorage, and to construct and maintain necessary roads and bridges accessing the bases;
- To control the operation and safety of the bases and all the structures and facilities in them;
- To acquire right-of-way by agreement and to construct telecommunication and other facilities;
- To construct, install, maintain and employ on any base any type of facilities, weapons, substance, device, or vessel as may be necessary;
- To bring into the Philippines members of the U.S. military forces and U.S. nationals employed under contract by the U.S. with the families, as well as technical personnel of other nationalities not otherwise excluded from the Philippines.

- The Philippine government was prohibited from granting any bases to other nations without U.S. consent.[159]
- The U.S. was permitted to recruit Filipino citizens, on voluntary basis, for service in the American military.[160]
- The U.S. base commanders had the right to tax, distribute utilities, hand out licenses, search without warrants, and deport undesirables.[161]

Complementing the signing of the 1947 MBA was the signing of the *Military Assistance Agreement 1947* and the *1951 MDT.*

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[159] *Id.,* Article XXV (1).

[160] *Id.*. Article XXVII.

[161] *Id.,* Articles XI, XII. XIII, XIV, and XV.

Over the years, various provisions of the 1947 MBA were amended, gradually delimiting U.S. control over the bases.[162] On September 16, 1966, the *Ramos-Rusk Agreement* reduced its term to 25 years starting from that year.

A review of the 1947 MBA in 1979 led to the formal transfer of control of Clark and Subic bases to the Philippines.[163] Thus, ***these bases became Philippine military installations containing U.S. military facilities***. The review also provided that each base would be ***under a Filipino base commander***; the ***Philippine flag was to fly singly in the bases***; the ***Philippine government was to provide security along the bases' perimeters;*** and the review of the agreements would take place every five years starting in 1979.[164]

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[162] *The Ramos-Rusk Agreement of 1966* reduced the term of the 1947 Bases Treaty to a total of 44 years or until 1991.

The Bohlen-Serrano Memorandum of Agreement provided for the return to the Philippines of 17 U.S. military bases.

The Romulo-Murphy exchange of Notes of 1979 recognized Philippine sovereignty over the Clark and Subic Bases, reduced the area that could be used by the U.S. military, and provided for the mandatory review of the 1947 Bases Treaty every five years.

The Romualdez-Armacost Agreement of 1983 revised the 1947 Bases Treaty, particularly pertaining to the operational use of military bases by the U.S. government within the context of Philippine sovereignty, including the need for prior consultation with the Philippine government on the former's use of the bases for military combat operations or the establishment of long-range missiles.

The 1947 Military Assistance Agreement (1947 MAA) entered into by the President with the U.S. pursuant to the authority granted under Republic Act No. 9. The Agreement established the conditions under which the U.S. military assistance would be granted to the Philippines, particularly the provision of military arms, ammunitions, supplies, equipment. vessels, services, and training for the latter's defense forces.

The 1953 Exchange of Notes Constituting an Agreement Extending the Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America on Military Assistance to the Philippines (1953 Agreement) clarified that the 1947 Agreement would remain in force until terminated by any of the parties.

[163] See *Romulo-Murphy Exchange of Notes of 1979.*

[164] See Official Gazette, *Report of President Marcos to the Batasang Pambansa,* January 15, 1979.

On September 16, 1991, the Philippine Senate rejected the proposed RP-US Treaty of Friendship, Cooperation and Security that would have extended the life of the bases for 10 more years.[165] The 1947 MBA was terminated on December 21, 1992 when the 25-year tenure lapsed. This prompted the U.S. to vacate its bases effective at the end of December 1992.[166] The departure of the U.S. warship *Bellau Wood* marked the closure of American military bases in the country.[167]

With the expiration of the 1947 MBA, the detailed arrangements for the presence of U.S. military forces and facilities in the Philippines, particularly those listed above, similarly ended, leaving only the general arrangements under the 1951 Mutual MDT.

V.C(2) ***The 1951 Mutual Defense Treaty***

The 1951 MDT was signed on August 30, 1951, while the U.S. was establishing a number of bilateral defense alliances

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[165] *Bayan v. Zamora, supra* note 69, at 632, which states:

In view of the impending expiration of the RP-U.S. Military Bases Agreement in 1991, the Philippines and the U.S. negotiated for a possible extension of the military bases agreement. On September 16, 1991, the Philippine Senate rejected the proposed RP-U.S. Treaty of Friendship, Cooperation and Security which, in effect, would have extended the presence of U.S. military bases in the Philippines.

[166] *Philippine Communications Satellite Corporation v. Globe Telecom, Inc.,* 473 Phil. 116, 122 (2004), which states:

On 31 December 1991, the Philippine Government sent a *Note Verbale* to the U.S. Government through the U.S. Embassy, notifying it of the Philippines' termination of the RP-US Military Bases Agreement. The *Note Verbale* stated that since the RP-US Military Bases Agreement, as amended, shall terminate on 31 December 1992, the withdrawal of all U.S. military forces from Subic Naval Base should be completed by said date.

[167] Gerald Anderson. *Subic Bay From Magellan to Pinatubo: The History of the US Naval Station, Subic Bay* (2006), p. 181. Available at https://books.google.com.ph/books?id=OfPs0NH5EuAC&printsec=frontcover&dq=subic+bay+from+magellan+to+pinatubo&hl=en&sa=X&ved=0ahUKEwjvitrLrNjJAhUBJ5QKHcBICAUQ6AEIJDAA#v=onepage&q=subic%20bay%20from%20magellan%20to%20pinatubo &f=false.

with key Asian States as it positioned itself to contain communist expansion in Asia in the period following World War II and the Korean War. Despite periods of drift, its relationship with its Asian allies provided the U.S. support and assistance throughout the Cold War and during the Vietnam war.[168]

The 1951 MDT provided the general terms of the defense alliance between the U.S. and the Philippines; the more detailed terms were reflected in the earlier 1947 MBA that expired and was not renewed in 1991.

The 1947 MBA and the 1951 MDT were the counterparts of U.S. agreements with the North Atlantic Treaty Organization *(NATO)* countries. One of those agreements was the NATO Status of Forces Agreement *(NATO-SOFA),* a multilateral agreement that applies to all the NATO-member countries.[169]

After the World War II, the U.S. maintained various European bases.[170] Despite the presence of these bases, the U.S. entered into the NATO-SOFA on June 19, 1951, to define the terms for the deployment *and status* of its military forces in these countries.[171] Most of the other NATO states, however,

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[168] Bruce Vaughn. "U.S. Strategic and Defense Relationships in the Asia-Pacific Region" *U.S. Congressional Research Service Report for Congress* (January 22, 2007). Available at https://www.fas.org/crs/row/RL33821.pdf.

[169] R. Chuck Mason. "Status of Forces Agreement (SOFA): What is it, how is it utilized?" *U.S. Congressional Research Service Report for Congress* (March 15, 2012). Available at https://www.fas.org/sgp/crs/natsec/RL34531.pdf.

[170] For an illustrated depiction of the increase of U.S. military bases around the world before (1939) and after (1945) World War III, see David Vine. *supra* note 77, at 32-36.

[171] See Mason, *supra* note 169, stating that the U.S. and Germany entered into a supplemental agreement to the NATO SOFA (as provided in 14 U.S.T. 531; T.I.A.S. 5351. Signed at Bonn, August 3, 1959. Entered into force July 1, 1963) and additional exchange of notes related to specific issues (14 U.S.T. 689; T.l.A.S. 5352; 490 U.N.T.S. 30. Signed at Bonn, August 3, 1959. Entered into force July 1, 1963).

Also, the Manila Pact entered into on September 8, 1954 by the U.S., the Philippines, Australia, France, New Zealand, Pakistan, and Thailand,

required ratification and implementing legislation, with additional agreements to implement the NATO-SOFA.[172]

The 1951 MDT provides for an alliance — that both nations would support one another if either the Philippines or the U.S. would be attacked by an external party.[173] It states that each party shall either, separately or jointly, through mutual aid, acquire, develop and maintain their capacity to resist armed attack.[174] It provides tor a mode of consultations to determine the 1951 MDT's appropriate implementation measures and when either of the parties determines that their territorial integrity, political independence, or national security is threatened by *armed attack in the Pacific.*[175] An attack on either party will be acted upon in accordance with their constitutional processes and any armed attack on either party will be brought to the attention of the United Nations for immediate action.[176]

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whereby the parties agreed, among others, to: settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations; and separately and jointly, by means of continuous and effective self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack and to prevent and counter subversive activities directed from without against their territorial integrity and political stability. See Southeast Asia Collective Defense Treaty (September 8, 1954). 209 U.N.T.S. 28-30. Available at https://www.treaties.un.org/doc/Publication/UNTS/Volume%20209/v209.pdf.

[172] For example, the U.S. entered into supplementary agreement with the Federal Republic of Germany (which acceded to the NATO-SOFA in 1963) with respect to allied forces stationed permanently in Germany, see Dieter Fleck, *The Handbook of the Law on Visiting Forces* (2001), p. 353.

[173] The 1951 MDT states the Parties' Objective "[d]esiring to declare publicly and formally their sense of unity and their common determination to defend themselves against external armed attack, so that no potential aggressor could be under the illusion that either of them stands alone in the Pacific Area."

[174] 1951 MDT, Article II.

[175] *Id,* Article III.

[176] *Id.,* Article IV.

The accord defines the meaning of an armed attack as including armed attacks by a hostile power on a metropolitan area of either party, on the island territories under their jurisdiction in the Pacific, or on their armed forces, public vessels, or aircrafts in the Pacific.[177] The U.S. government guaranteed to defend the security of the Philippines against external aggression but not necessarily against internal subversion. The treaty expressly stipulates that its terms are indefinite and would last until one or both parties terminate the agreement by a one-year advance notice.[178] The treaty subsequently became the basis for an annual joint exercise, known as *Balikatan,* between the Philippines and the U.S.[179]

On the whole, the 1951 MDT embodied an alliance and defense agreement, focused as it is *on joint action and defenses against armed external attacks.* It made no provision for bases, troops, or facilities which the 1947 MBA contained and which lapsed when the MBA's term expired.

V.C(3) ***The 1998 Visiting Forces Agreement***

The 1998 VFA came after the expiration of the 1947 MBA in 1991 and opened a limited window for the ***presence of American troops*** in the Philippines. It was entered into during the era when the U.S. was envisioning "access" as a new approach in maintaining its presence in Southeast Asia. Instead of permanent bases, the approach sought bilateral arrangements — like those with Singapore — for ***training, exercises, and interoperability*** to allow for uninterrupted forward deployment

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[177] *Id.,* Article V.

[178] *Id.,* Article VIII.

[179] *Lim v. Executive Secretary,* 430 Phil. 555, 562 (2002), which states: These so-called "Balikatan" exercises are the largest combined training operations involving Filipino and American troops. In theory, they are a simulation of joint military maneuvers pursuant to the Mutual Defense Treaty, a bilateral defense agreement entered into by the Philippines and the United States in 1951.

in the Asian region; their continued presence in the region assures faster response to developments in flash points in the eastern hemisphere.[180]

In line with the American approach, the 1998 VFA allows the rotational presence of U.S. military forces and their operations anywhere in the Philippines for a *temporary but undefined length of time* to train and inter-operate with the Philippine armed forces and to use their facilities. The Philippines retains jurisdiction over criminal cases, including capital offenses, involving U.S. troops.[181]

In *Bayan v. Zamora,*[182] the Court held that although the agreement did not entail the permanent basing of a foreign military force, it required a treaty because Article XVIII, Section 25 of the Constitution covers not only the presence of bases but also the presence of "troops."[183] As a treaty, the 1998 VFA required the concurrence of the Senate pursuant to Article VII, Section 21 of the Constitution.

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[180] See H. Marcos Moderno, "A Decade of US Troops in Mindanao: Revisiting the Visiting Forces Agreement (2)" *MindaNews,* April 24, 2012, available at http://www.mindanews.com/special-reports/2012/04/24/a-decade-of-us-troops-in-mindanao-revisiting-the-visiting-forces-agreement-2/.

[181] 1998 VFA, Article V.

[182] *Supra* note 69.

[183] *Id.* at 652, which states:

> On the whole, the VFA is an agreement which defines the treatment of United States troops and personnel visiting the Philippines. It provides for the guidelines to govern such visits of military personnel, and further defines the rights of the United States and the Philippine government in the matter of criminal jurisdiction. movement of vessel and aircraft, importation and exportation of equipment, materials and supplies.
>
> Undoubtedly, Section 25, Article XVIII, which specifically deals with treaties involving foreign military bases, troops, or facilities, should apply in the instant case. To a certain extent and in a limited sense, however, the provisions of Section 21, Article VII will find applicability with regard to the issue and for the sole purpose of determining the number of votes required to obtain the valid concurrence of the Senate, as will be further discussed hereunder.

The Court also held that the Philippines is bound to accept an official declaration by the U.S. to satisfy the requirement that the other contracting party must recognize the agreement as a treaty.[184] It noted that the Vienna Convention on the Law of Treaties leaves each state free to choose its form of giving consent to a treaty.[185]

V.D. The EDCA

As heretofore outlined, the U.S. adopted the "Pivot to Asia" strategy beginning 2009 under the administration of President Barack Obama. In the article *Explaining the U.S. Pivot to Asia,* Kurt Campbell and Brian Andrews enumerated six key efforts under the U.S.'s "Pivot to Asia" policy, namely: alliances; improving relationships with emerging powers; economic statecraft; engaging with multi-lateral institutions; support for universal values; and increasing military presence.[186]

On military presence, the operative word is **"presence"**: the forward deployment of U.S. military forces in Asia.[187] **The EDCA perfectly fits the American strategy as it allows the *prepositioning of equipment and supplies* in *agreed locations* to enhance the U.S.'s "development of a geographically dispersed, politically sustainable *force posture* in the region."**[188]

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[184] *Id.* at 657, which states:

This Court is of the firm view that the phrase ***recognized as a treaty*** means that the other contracting party ***accepts or acknowledges*** the agreement as a treaty. To require the other contracting state, the United States of America in this case, to submit the VFA to the United States Senate for concurrence pursuant to its Constitution, is to accord strict meaning to the phrase.

[185] Joaquin Bernas, *supra* note 144, at 1400-401.

[186] See Kurt Campbell & Brian Andrews. *Explaining the US 'Pivot' to Asia,* August 2013, Chatham House, pp. 3-8. Available at https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Americas/0813pp_pivottoasia.pdf.

[187] *Id.* at 8.

[188] *Ibid.*

The EDCA was signed on April 28, 2014, in Manila, by Philippine Defense Secretary Voltaire Gazmin, and U.S. Ambassador to the Philippines Philip Goldberg, in time for the official state visit by U.S. President Barack Obama. The 10-year accord is the second military agreement between the U.S. and the Philippines (the first being the 1998 VFA) since American troops withdrew from its Philippines naval base in 1992.

The agreement allows the U.S. to station troops and operations on Philippine territory without establishing a permanent base[189] and with the stipulation that the U.S. is not allowed to store or position any nuclear weapons on Philippine territory.[190]

The EDCA was entered into for the following purposes:

l. This Agreement deepens defense cooperation between the Parties and maintains and develops their individual and collective capacities, in furtherance of Article II of the MDT, which states that "the Parties separately and jointly by self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack," and within the context of the VFA. This includes:

(a) Supporting the Parties' shared goal of improving interoperability of the Parties' forces and for the Armed Forces of the Philippines ("AFP"), addressing short-term capabilities gaps; promoting long-term modernization, and helping maintain and develop additional maritime security, maritime domain awareness, and humanitarian assistance and disaster relief capabilities; and

(b) Authorizing access to Agreed Location in the territory of the Philippines by United States forces on a rotational basis as mutually determined by the Parties.

2. In furtherance of the MDT, the Parties mutually agree that this Agreement provides the principal provisions and necessary authorizations with respect to Agreed Locations.

3. The Parties agree that the United States may undertake the following types of activities in the territory of the Philippines in relation to its access to and use of Agreed Locations: security cooperation

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[189] EDCA, Preamble, par. 5.

[190] *Id.,* Article IV, par. 6.

exercises; joint and combined training activities; humanitarian assistance and disaster relief activities; and such other activities as may be agreed upon by the Parties.[191]

To summarize, the **EDCA has two main purposes:**

First, it is intended as a framework for activities for defense cooperation in accordance with the 1951 MDT and the 1998 VFA.

Second, it grants to the U.S. military the right to use certain identified portions of the Philippine territory referred to in the EDCA as Agreed Locations. *This right is fleshed out in the EDCA when the agreement identifies the privileges granted to the U.S. in bringing in troops and facilities, in constructing structures, and in conducting activities.*[192]

The EDCA is effective for 10 years, unless both the U.S. and the Philippines formally agree to alter it.[193] The U.S. is bound to hand over any and all facilities in the "Agreed Locations" to the Philippine government upon the termination of the Agreement.

In terms of contents, EDCA may be divided into two:

First, it reiterates the purposes of the 1951 MDT and the 1998 VFA in that it affirms the continued conduct of joint activities between the U.S. and the Philippines in pursuit of defense cooperation.

Second, it contains ***an entirely new agreement*** pertaining to Agreed Locations, the right of the U.S. military to stay in these areas and conduct activities which may not be imbued with mutuality of interests since they do not involve defense cooperation.

The latter provides support for two interrelated arguments that I will forward in this Opinion. ***First***, the EDCA refers to

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[191] *Id.,* Article I.

[192] *Id.,* Article III.

[193] *Id.,* Article XII (4).

the presence of foreign military bases, troops, and facilities in this jurisdiction. ***Second***, the EDCA is not a mere implementation of, but goes beyond, the 1951 MDT and the 1998 VFA. It is an agreement that introduces new terms and obligations not found in the 1951 MDT and the 1998 VFA, and thus requires the concurrence of the Senate.

V.D(1) ***Does the EDCA involve the entry of military bases to the Philippines as envisioned under Article XVIII, Section 25?***

V.D(1) (i) ***The Concept of a Foreign Military Base***

A reading of the EDCA will reveal that it pertains to the presence in this country of a foreign military base or the modern equivalent of one. While Article XVIII, Section 25 mentions no definition of what a foreign military base, troops, or facility is, these terms, at the time the 1987 Constitution was drafted, carried a special meaning. In fact, this meaning was the compelling force that convinced the framers to include Article XVIII, Section 25 in the 1987 Constitution.

More specifically, when the framers of the 1987 Constitution referred to foreign military bases, they had in mind the then existing 1947 MBA.[194] This is apparent from the text of the provision itself which makes direct reference to the treaty, as well as from the exchanges of the framers of the 1987 Constitution prior to their vote on the proposed provision.[195]

In construing the meaning of statutes and of the Constitution, one aim is to discover the meaning that the framers attached to

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[194] V Records, Constitutional Commission 105. (October 11, 1986), which reads:

Mr. Bennagen: Point of information. I have with me a book of Patricia M. Paez, *The Bases Factor,* the authority on US relations. And reference to the agreement reads this way: Agreement between the Republic of the Philippines and the United States of America concerning military bases.

Mr. Azcuna: That is the official title. Why do we not use that? After the expiration of the agreement x x x.

[195] *Ibid.*

the particular word or phrase employed.[196] The pertinent statute or provision of the Constitution must then be "construed as it was intended to be understood when it was passed."[197]

Thus, a proper interpretation of the meaning of foreign military bases must take into account how it was understood by the framers in accordance with how the 1947 MBA established U.S. military bases in the Philippines. It is in this technical and precise meaning that the term military base was used. It is this kind of military bases that Article XVIII, Section 25 intends to cover, *subject to specific qualifications.*

Hence, the concept of military bases as illustrated in the 1947 MBA should be taken into account in ascertaining whether the EDCA contemplates the establishment of foreign military bases. This reality renders a comparison of the 1947 MBA and the EDCA appropriate.

To clarify this position, it is *not that the framers of the 1987 Constitution had in mind the specific existing foreign military bases under the 1947 MBA when they drafted Article XVIII, Section 25.* Such a position unjustifiably assumes that the framers lacked foresight and merely allowed themselves to be solely limited by the existing facts.

Rather, my position is that it is ***the concept of a foreign military base under the 1947 MBA***, and not the specific military bases listed in its Annexes, that should be determinative of what the Constitution intends to cover. ***The foreign military base concept should necessarily be adjusted, too, to take into account the developments under the new U.S. "Pivot to Asia" strategy.***

V.D(l)(ii) *EDCA and the 1947 MBA Compared*

A first materialyt point to note is that ***the obligations under the EDCA are similar to the obligations found in the 1947***

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[196] Samson Alcantara. *Statutes* (1997 ed.) at 58; See also Ruben Agpalo, *Statutory Construction* (6th ed) at 282.

[197] *Ernesto v. Court of Appeals,* 216 Phil. 319, 327-328 (1984).

MBA. To support this view, I present below a side by side comparison of the relevant provisions of the EDCA and the 1947 MBA.

EDCA	**1947 MBA**
Article III, Section 1 With the consideration of the views of the Parties, the Philippines hereby authorizes and agrees that United States forces, United States contractors, and vehicles, vessels, and aircraft operated by or for United States forces may conduct the following activities with respect to Agreed Locations: training, transit, support and related activities, refueling of aircraft; bunkering of vessels; temporary maintenance of vehicles, vessels, and aircraft; temporary accommodation of personnel; communications; prepositioning of equipment, supplies, and materiel; deploying forces and materiel and such other activities as the Parties may agree. **Article VI, Section 3** United States forces are authorized to exercise all rights and authorities within the Agreed Locations that are necessary for their operational control or defense, including undertaking appropriate	**Article III, par. I** It is mutually agreed that the United States shall have the rights, power, and authority within the bases which are necessary for the establishment, use, operation and defense thereof or appropriate for the control thereof and all the rights, power and authority within the limits of territorial waters and air space adjacent to, or in the vicinity of, the bases which are necessary to provide access to them, or appropriate for their control.

measures to protect United States forces and United States contractors. The United States should coordinate such measures with appropriate authorities of the Philippines.	
Article III, Section 4 The Philippines hereby grants to the United States, through bilateral security mechanisms, such as the MDB and SEB, operational control of agreed Locations for construction activities and authority to undertake activities on, and make alterations and improvements to, Agreed Locations. x x x	**Article III, par. 2 (a) and (b)** x x x 2. Such rights, power, and authority shall include, inter alia, the right, power and authority: (a) to construct (including dredging and filling), operate, maintain, utilize, occupy, garrison and control the bases; (b) to improve and deepen the harbors, channels, entrances and anchorages, and to construct or maintain necessary roads and bridges affording access to the bases; x x x
Article VII, Section 1. The Philippines hereby grants to United States forces and United States contractors the use of water, electricity, and other public utilities on terms and conditions, including rates of charges, no less favorable than those available to the AFP or the Government of the Philippines. x x x	**Article III, par 2 (d)** x x x the right to acquire, as may be agreed between the two Governments, such rights of way, and to construct thereon, as may be required for military purposes, wire and radio communications facilities, including submarine and subterranean cables, pipe lines

Article VII, Section 2 The Parties recognize that it may be necessary for United States forces to use the radio spectrum. The Philippines authorizes the United States to operate its own telecommunications systems (as telecommunication is defined in the1992 Constitution and Convention of the International Telecommunication Union "ITU"). This shall include the right to utilize such means and services required to ensure the full ability to operate telecommunications systems and the right to use all necessary radio spectrum allocated for this purpose. xxx	and spur tracks from railroads to bases, and the right, as may be agreed upon between the two Governments to construct the necessary facilities; x x x
Article IV, Section 1 The Philippines hereby authorizes United States forces, through bilateral mechanisms, such as the MDB and SEB, to preposition and store defense equipment, supplies and materiel ("prepositioned materiel"), including, but not limited to, humanitarian assistance and disaster relief equipment, supplies, and materiel, at Agreed Locations. United States forces x x x	**Article III, par (2) (e)** x x x to construct, install, maintain, and employ on any base any type of facilities, weapons, substance, device, vessel or vehicle on or under the ground, in the air or on or under the water that may be requisite or appropriate, including meteorological systems, aerial and water navigation lights, radio and radar apparatus and electronic devices, of any desired power, type of emission and frequency.

Article IV, Section 3 The prepositioned materiel of the United States shall be for the exclusive use of United States forces, and full title to all such equipment, supplies, and materiel remains with the United States. United States forces shall have control over the access and disposition of such prepositioned materiel and shall have the unencumbered right to remove such prepositioned materiel at any time from the territory of the Philippines.	
Article IV, Section 4 United States forces and United States contractors shall have unimpeded access to Agreed Locations for all matters relating to the prepositioning and storage of defense equipment, supplies, and materiel including delivery, management, inspection, use, maintenance, and removal of such equipment, supplies and materiel.	
Article III, Section 2 When requested, the Designated Authority of the Philippines shall assist in facilitating transit or temporary access by United States forces to public land and facilities	**Article VII** It is mutually agreed that the United States may employ and use for United States military forces any and all public utilities, other services and facilities, airfields, ports,

(including loads, ports, an airfield) including those owned or controlled by local governments, and to other land and facilities (including roads, ports and airfields).	harbors, roads, highways, railroads, bridges, viaducts, canals, lakes, rivers and streams in the Philippines under conditions no less favorable than those that may be applicable from time to time to the military forces of the Philippines.

While the 1947 MBA grants broader powers to the U.S., due perhaps to the geopolitical context under which the agreement was forged (the 1947 MBA had an international, in contrast with EDCA's Asian, focus), the EDCA and the 1947 MBA essentially pursue the same purpose — ***the identification of portions of Philippine territory over which the U.S. is granted certain rights for its military activities.***

These rights may be categorized into four:

(1) the right to construct structures and other facilities for the proper functioning of the bases;

(2) the right to perform activities for the defense or security of the bases or Agreed Locations;

(3) the right to preposition defense equipment, supplies and materiel; and,

(4) other related rights such as the use of public utilities and public services.

Only those who refuse to see cannot discern these undeniable parallelisms.

Further, even independently of the concept of military bases under the 1947 MBA, the provisions of the EDCA itself provide a compelling argument that it seeks to allow in this country what Article XVIII, Section 25 intends to regulate.

There exists no rigid definition of a military base. However, it is a term used in the field of military operations and thus has

a *generally accepted connotation.* The U.S. Department of Defense *(DoD)* Dictionary of Military and Associated Terms defines a base as *"an area or locality containing installations which provide logistic or other support"; home airfield, or home carrier.*[198]

Under our laws, we find the definition of a military base in Presidential Decree No. 1227 which states that a military base is "any military, air, naval, coast guard reservation, base, fort, camp, arsenal, yard, station, or installation in the Philippines."[199] A military base connotes the presence, in a relatively permanent degree, of troops and facilities in a particular area.[200]

In 2004, the U.S. DoD released *Strengthening U.S. Global Defense Posture,* a report to U.S. Congress about the renewed U.S. global position.[201] The U.S. DoD redefined and reclassified their military bases in three categories:

Main Operating Base (MOB)

Main operating bases, with permanently stationed combat forces and robust infrastructure, will be characterized by command and control structures, family support facilities, and strengthened force protection measures. Examples include Ramstein Air Base (Germany), Kadena Air Base (Okinawa, Japan), and Camp Humphreys (Korea).

Forward Operating Site *(FOS)*

Forward operating site will be an *expandable* "warm facilities" maintained with a *limited U.S. military support presence* and possibly

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[198] US Department of Defense, Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms, at 21 (2015), available at <http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf>.

[199] Presidential Decree No. 1227, Section 2.

[200] IV Records, Constitutional Commission 86 (September 18, 1986):

Fr. Bernas: By the term 'bases,' were we thinking of permanent bases?

Mr. Maambong: Yes.

[201] US DoD, *Strengthening U.S. Global Defense Posture: Report to Congress, U.S. Department of Defense,* (2004), pp. 10-11. Available at http://www.dmzhawaii.org/wp-content/uploads/2008/l2/global posture.pdf.

prepositioned equipment. FOSs will support *rotational* rather than permanently stationed forces and be a focus for bilateral and regional training. Examples include the Sembawang port facility in Singapore and Soto Cano Air Base in Honduras.

The following are the key characteristics of an FOS:

First, an FOS is an expandable/scalable facility. Andrew Krepinevich and Robert Work noted that an FOS can support both small and large forces, and can be readily expanded to serve as expeditionary or campaign bases should a crisis erupt nearby.[202]

Second, the facility is maintained or "kept warm" by limited U.S. military support personnel or U.S. military contractors. It hosts *rotational* rather than permanently stationed forces. An FOS may also house prepositioned equipment.

Finally, an FOS facility does not need to be owned by the U.S. *(i.e.,* the Sembawang Port Facility and the Paya Lebar Airfield in Singapore). FOSs are generally bases that support *forward-deployed* rather than *forward-based* forces.[203]

The third classification of military bases is a ***Cooperative Security Location***, described as follows:

Cooperative Security Location *(CSL)*

Cooperative security locations will be *facilities* with little or no permanent U.S. presence. Instead they will be *maintained with periodic service, contractor, or host-nation support.* CSLs will provide *contingency* access and be a focal point for security *cooperation* activities. A current example of a CSL is in Dakar, Senegal, where the U.S. Air Force has negotiated contingency landing, logistics, and fuel contracting arrangements, and which served as a staging area for the 2003 peace support operation in Liberia.[204]

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[202] Andrew Krepinevich and Robert Work. *A New Global Defense Posture for the Second Transoceanic Era* (2007), p. 19.

[203] Krepinevich and Work, *supra* note 201, at 18.

[204] US DoD, *supra* note 201, at 10-11.

The GDPR emphasized that the U.S.'s plan is **to *establish a network of FOSs and CSLs in Asia-Pacific* to support the global war on terrorism and to provide multiple avenues of access for contingency operations.** These facilities serve to expand training opportunities for the U.S. and the host-country. FOSs and CSLs allow U.S. forces to use these areas in times of crisis while *avoiding the impression of establishing a permanent presence.*[205] Notably, these access agreements are less expensive to operate and maintain than MOBs.[206] Moreover, FOSs and CSLs allow overseas military presence with a lighter footprint.[207]

To go back to the EDCA, it notably allows the U.S. to use the Agreed Locations for the following activities: *"training, transit, support and related activities, refueling of aircraft; bunkering of vessels; temporary maintenance of vehicles, vessels, and aircraft; temporary accommodation of personnel; communications; prepositioning of equipment, supplies, and materiel; deploying forces and materiel and such other activities as the Parties may agree."*[208]

In order to carry out these activities, the EDCA allows U.S. military personnel *to enter and remain in Philippine territory.* It grants the U.S. the right *to construct structures and assemblies.*[209] It also allows the U.S. to *preposition defense equipment, supplies and materiel.*[210] The U.S. personnel may also use the Agreed Locations *to refuel aircraft and bunker vessels.*[211]

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[205] Bruno Charbonneau and Wayne Cox. *Locating Global Order: American Power and Canadian Security after 9/11* (2010), p. 65.

[206] Stacie Pettyjohn. *"Minimalist International Interventions: For the Future US Overseas Presence, Access Agreement Are Key"* Summer 2013, RAND Corporation, *available at* http://www.rand.org/pubs/periodicals/rand-review/issues/2013/summer/for-the-future-us-overseas- presence.html.

[207] *Id.* at 2.

[208] EDCA, Article III Sec. 1.

[209] *Id.,* Article V, Section 2.

[210] *Id.,* Article IV, Sec. 1.

[211] *Id.*

Stockpiling of military materiel in the Philippines is explicitly permitted under the following EDCA provisions: ·

1. Article III, par. 1: The activities allowed on the agreed locations include: (i) the **prepositioning** of equipment, supplies, and materiel; (ii) deploying forces and materiel; and (iii) such other activities as the Parties may agree.
2. Article IV, par. 1: U.S. forces are allowed **to preposition and store defense equipment, supplies, material ("prepositioned materiel")**, *including, but not limited to,* humanitarian assistance and disaster relief equipment, supplies, and materiel, at agreed locations.
3. Article IV, par. 3: The **prepositioned materiel is for the exclusive use of U.S. forces** and full title shall belong to the U.S.
4. Article IV, par. 4: The U.S. forces and U.S. contractors shall have **unimpeded access** to the agreed locations **for all matters relating to the *prepositioning and storage* of defense equipment, supplies, and materiel, including delivery, management, inspection, use, maintenance, and removal of such equipment, supplies and materiel.**

Notably, **neither the 1951 MDT nor the 1998 VFA authorized stockpiling**. The 1951 MDT focused on developing the Philippines and the U.S.'s capacity to resist an armed attack while 1998 VFA focused on the entry and exit of US troops in the country. No provision in either treaty specifically allows stockpiling of military materiel.

In sum, the Agreed Locations mentioned in the EDCA are areas where the U.S. can perform military activities in structures built by its personnel. The extent of the U.S.' right to use of the Agreed Locations is broad enough to include even the *stockpiling of weapons* and the *shelter and repair of vessels* over which the U.S. personnel has exclusive control. Clearly, this is a military base as this term is ordinarily understood.

Further, as we held in *Bayan Muna,* Article XVIII, Section 25 refers to three different situations: the presence of foreign military

bases, troops, or facilities.[212] ***Even assuming that the EDCA is not a basing agreement, it nevertheless involves the deployment of troops and facilities in Philippine soil.*** As I have already stated, the EDCA allows U.S. forces to enter and remain in the Philippines. It defines U.S. forces to include U.S. military and civilian personnel and U.S. Armed Forces property, equipment, and materiel.[213] The EDCA itself provides that the U.S. can deploy forces and materiel in the Agreed Locations.[214]

That the EDCA allows this arrangement for an initial period of 10 years, to continue automatically unless terminated[215] is further proof that it pertains to the presence in Philippine soil of foreign military bases, troops, and facilities *on a more or less permanent basis.*

Note, at this point, that the Senators, during the ratification of the 1998 VFA, observed that it only covers *temporary* visits of U.S. troops and personnel in the country. ***These Senators gave their consent to the 1998 VFA on the knowledge that the U.S. forces' stay in the country may last only up to three weeks to six months per batch***.[216]

This temporary stay of U.S. forces in the Philippines under the 1998 VFA means that it *does not cover, or approve of, a more permanent stay of U.S.forces and their equipment in the Philippines. Significantly, this is the key characteristic*

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[212] *Supra* note 109, at 653.

In like manner x x x such that, the provision contemplates three different situations – a military treaty the subject of which could be either (a) foreign bases, (b) foreign troops, or (c) foreign facilities – any of the three standing alone places it under the coverage of Section 25, Article XVIII.

[213] EDCA, Article II, Section 2.

[214] *Id.,* Article III, Section 1.

[215] *Id.,* Article XII, Section 4.

[216] The senators argued the precise length of time but agreed that it would not exceed six months. See Senate deliberations on P.S. Res. No. 443 – Visiting Forces Agreement, May 17, 1999, Records and Archives Service, Vol. 133, pp. 23-25.

of the Agreed Locations in the EDCA. For, if the EDCA had not envisioned the stay of U.S. forces and equipment in the Agreed Locations in the Philippines for a period longer than envisioned in the 1998 VFA, it would not have added obligations regarding the ***storage*** of their equipment and materiel. The more permanent nature of the EDCA, in contrast to the 1998 VFA, indicates a change in the tenor of the agreement in the EDCA, one that does not merely implement the 1998 VFA.

V.D(2) ***Does the EDCA Merelv Implement the 1951 MDT?***

This question responds to the *ponencia'* s argument that the EDCA can be embodied in an executive agreement because it merely provides implementing details for the 1951 MDT.[217]

V.D(2)(i) ***The Effects of the Expiration of the 1947 MBA and of the Adoption of the 1987 Constitution***

The sequence of events relating to American bases, troops, and facilities in the Philippines that took place since Philippine independence, is critical in responding to the question in caption. It should be remembered that as a condition under the Tydings-McDuffie Act for the grant of Philippine independence, the Philippines was bound to negotiate with the U.S. for bases in the Philippines, resulting in the 1947 MBA.

This agreement contained the detailed terms relating to the existence and operation of American bases and the presence of American forces and facilities in the Philippines. As its title denotes, the 1951 MDT is the treaty providing for alliance and mutual defense against armed attack on either country; ***it only generally contained the defense and alliance relationship between the Philippines and the U.S.***

In 1987, the Philippines adopted a new Constitution. This Charter directly looked forward to the expiration of the 1947 MBA and provided for the terms under which foreign military bases, troops, and facilities would thereafter be allowed into

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[217] *Ponencia,* pp. 48-66.

the Philippines. The 1947 MBA expired in 1991 and no replacement treaty took its place; thus, ***all the detailed arrangements provided under the 1947 MBA for the presence of U.S. bases. troops and facilities also ended***, leaving only the 1951 MDT and its general terms in place.

Under this situation, the detailed arrangements that expired with the 1947 MBA were not carried over to the 1951 MDT as this treaty only generally provided for the defense and alliance relationship between the U.S. and the Philippines. Thus, there were no specific policies on military bases, troops, and facilities that could be implemented and operationalized by subsequent executive agreements on the basis of the MDT.

In particular, the terms of the 1947 MBA that had expired and had not been renewed cannot be deemed carried over to the 1951 MDT. If any such future agreements would be made after the effectivity of the 1987 Constitution, then such agreements would be governed by Article XVIII, Section 25 of the new Constitution.

Significantly, when the 1987 Constitution and its Article XVIII, Section 25 took effect, no absolute prohibition against the introduction of new U.S. bases, troops, and facilities was put in place. In fact the 1951 MDT then still existed as a general defense alliance of the Philippines and the U.S. against armed attack by third parties. But the introduction of military bases or their equivalent, of troops, and of military facilities into the Philippines can now only take place by way of a treaty concurred in by the Senate.

V.D(2)(ii) ***The 1951 MDT examined in light of the EDCA***

That the EDCA is purely an implementation of the 1951 MDT and does not need to be in the form of a treaty, is not tenable for two reasons.

First, The EDCA grants rights and privileges to the U.S. that go well beyond what is contemplated in the 1951 MDT and the 1998 VFA.

Second, even the assumptions that the EDCA is indeed a mere implementation of both the earlier 1951 MDT and the 1998 VFA, this assumption by no means provides an argument in favor of treating the EDCA as an executive agreement. Notably, *the 1998 VFA is also recognized as an implementation of the 1951 MDT yet the Government deemed it necessary to have it embodied in a separate treaty concurred in by the Senate.*

On the first argument, an analysis of the 1951 MDT, the 1998 VFA, and the EDCA reveals that the ***EDCA is a stand-alone agreement.***

The 1951 MDT is a treaty intended for the collective defense of its signatory countries *(i.e.,* the U.S. and the Philippines) against external armed attack. This is apparent from its declaration of policies which states, among others, that the U.S. and the Philippines have agreed to the MDT in pursuit of their desire to —

> x x x declare publicly and formally their sense of unity and their common determination to **defend themselves against external armed attack**, so that no potential aggressor could he under the illusion that either of them stands alone in the Pacific area.[218]

The rest of the text of the 1951 MDT consistently highlights this goal. Its **Article II** states that the parties shall "separately and jointly by self-help and mutual aid maintain and develop their individual and collective capacity to resist armed attack." **Article III** provides that the parties shall "consult together" regarding the implementation of the MDT whenever in their opinion the "territorial integrity, political independence or security of either of the parties is threatened by external armed attack in the Pacific." **Article IV** declares that an armed attack in the Pacific area on either of the parties would be dangerous to each other's peace and safety and thus they would act to meet the common danger. **Article V** then proceeds to define an armed attack as to include an armed attack on "the metropolitan territory of either parties or on the island territories under its jurisdiction

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[218] 1951 MDT, Preamble, par. 3.

in the Pacific Ocean, its armed forces, public vessels and aircrafts in the Pacific."

This Court has had occasion to explain the nature of the 1951 MDT. In *Lim v. Executive Secretary*,[219] we said —

> x x x The MDT has been described as the core of the defense relationship between the Philippines and its traditional ally, the United States. Its aim is to enhance the strategic and technological capabilities of our armed forces **through joint training** with its American counterparts x x x. [Emphasis supplied]

Thus, the essence of the 1951 MDT is the conduct of joint activities by the U.S. and the Philippines in accordance with the dictates of *collective defense against an attack in the Pacific.* ***This is a focus that the EDCA lacks.***

V.D (2)(iii) *The 1951 MDT Compared with Other Defense Alliance Agreements*

Our military obligations to the U.S. under the 1951 MDT are (1) to maintain and develop our military capacity to resist armed attack, and (2) to recognize that an armed attack against the U.S. in the Pacific is an attack on the Philippines and to meet the common danger *in accordance with our constitutional process.* The relevant provisions read:

> **Article II.** In order more effectively to achieve the objective of this Treaty, the Parties separately and jointly by self-help and mutual aid will **maintain and develop their individual and collective capacity to resist armed attack**.
>
> **Article IV.** Each Party **recognizes** that an **armed attack** in the Pacific area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to **meet the common dangers** in **accordance with its constitutional processes**.
>
> Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations. Such measures shall be terminated when the Security Council

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[219] *Supra* note 179, at 571-572.

has taken the measures necessary to restore and maintain international peace and security.

Article V. For purposes of ARTICLE IV, an armed attack on either of the Parties is deemed to include an armed attack on the metropolitan territory of either of the Parties, or on the island territories under its jurisdiction in the Pacific Ocean, its armed forces, public vessels or aircraft in the Pacific.

(Fortunately, the limits of the 1951 MDT have not been tested in actual operation since neither the Philippines nor the U.S. has as yet been the subject of an *armed* attack in the Pacific region.)

In relating the 1951 MDT to the EDCA, I glean from the *ponencia* the intent to seize the term "mutual aid" in developing the contracting parties' collective capacity to resist an armed attack, as basis for the US to establish a military base or a military facility or station military troops in the Philippines.[220] This reading, however, would be a novel one in the context of American agreements with other Asian countries with their own alliance and MOTs with the U.S.

Note that Article II of the RP-U.S. 1951 MDT is similar to the following provisions in other MDTs:

(1) The 1953 US-South Korean MDT

Article II

The Parties will consult together whenever, in the opinion of either of them, the political independence or security of either of the Parties is threatened by external armed attack, Separately and jointly, by self-help and ***mutual aid,*** the Parties will ***maintain and develop appropriate means to deter armed attack*** and will take suitable measures in consultation and agreement to implement this Treaty and to further its purposes.[221]

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[220] *Ponencia,* pp. 54-63.

[221] Mutual Defense Treaty, U.S.-South Korea, October l, 1953, 238 U.N.T.S. 202, 204. Available at https://treaties.un.org/doc/Publication/UNTS/Volunte%20238/v238.pdf.

(2) The 1954 US-Taiwan (Republic of China) MDT

Article II

In order more effectively to achieve the objective of this Treaty, the Parties separately and jointly by self-help and ***mutual aid*** will maintain and develop their ***individual and collective capacity to resist armed attack*** and communist subversive activities directed from without against their territorial integrity and political stability.[222]

(3) the 1960 US-Japan Treaty of Mutual Co-operation and Security

Article III

The Parties, individually and in cooperation with each other, by means of continuous and effective self-help and ***mutual aid*** will ***maintain and develop***, subject to their constitutional provisions, ***their capacities to resist armed attack***.[223]

With little variance,[224] these articles are essentially identical to Article II of the RP-U.S. 1951 MDT.

But notably, despite the existence of the above-mentioned provisions, all three treaties also saw the need to include a *separate* provision explicitly granting the U.S. the right to access and use of areas and facilities of the other contracting party. Thus:

Article IV (US-Korea)

The Republic of Korea grants, and the United States of America accepts, **the right to dispose United States land, air and sea forces**

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[222] Mutual Defense Treaty, U.S.-Taiwan, December 10, 1954, 248 U.N.T.S. 214. Available at https://treaties.un.org/doc/Publication/UNTS/Volume%20248/v248.pdf.

[223] Treaty of Mutual Co-operation and Security, U.S.-Japan, January 19, 1960, 373 U.N.T.S. 188. Available at https://treaties.un.org/doc/Publication/UNTS/Volume%20373/v373.pdf.

[224] The US-Taiwan MDT states that self-help and mutual aid will be utilized by the Parties to resist not only an armed attack but also "communist subversive activities directed against Taiwan's territorial integrity and political stability." Moreover, the US-Korean Treaty adds the phrase

in and about the territory of the Republic of Korea as determined by mutual agreement.[225]

Article VII
(US-Taiwan)

The Government of the Republic of China (Taiwan) grants, and the Government of the United States of America accepts, **the right to dispose such United States land, air and sea forces in and about Taiwan and the Pescadores** as may be required for their defense, as determined by mutual agreement.[226]

Article VI
(US-Japan)

For the purpose of contributing to the security of Japan and the maintenance of international peace and security in the Far East, **the United States of America is granted the use by its land, air and naval forces of facilities and areas in Japan**.

The use of these facilities and areas as well as the status of United States armed forces in Japan shall be governed by a separate agreement, replacing the Administrative Agreement under Article III of the Security Treaty between Japan and the United States of America, signed at Tokyo on February 28, 1952, as amended, and by such other arrangements as may be agreed upon.[227]

These three articles do not have any counterpart in the RP-US 1951 MDT. Understandably perhaps, counterpart provisions are not in the 1951 MDT as our commitment to grant the U.S. use and access to areas and facilities in the Philippine territory was embodied in an earlier agreement, the 1947 MBA (which, however, expired, thus ending the use and access grants to the U.S. and its armed forces).

"whenever, in the opinion of either of them, the political independence or security of either of the Parties is threatened by external armed attack" and uses the phrase "means to ***deter*** [an] armed attack") instead of "maintain and develop x x x their capacities to ***resist*** armed attack:'

[225] Mutual Defense Treaty, U.S.-South Korea, *supra* note 221.

[226] Mutual Defense Treaty, U.S.-Taiwan, *supra* note 222.

[227] Treaty of Mutual Co-operation and Security, U.S.-Japan, *supra* note 223.

In my view, the implication of the above-quoted provisions in the US-South Korea, US-Taiwan, and US-Japan treaties (on "mutual aid") is clear: **the obligation to provide mutual aid under Article II of the RP-US 1951 MDT (and its counterpart provisions) does *not* include the obligation to allow the entry and the stationing of U.S. troops or the establishment of military bases or facilities.**

In light particularly of the constitutional developments in 1987, the 1951 MDT cannot be invoked as an umbrella agreement that would legally justify the grant to the U.S. of entry, access, and use of Philippine-owned areas or facilities without Senate concurrence. These activities, which the EDCA seeks to do allegedly pursuant to the 1951 MDT, do not fall within the purview of our commitments under the earlier treaty.

V.D(3) *Does the EDCA Merely Implement the 1998 VFA?*

Is the EDCA merely an agreement implementing the 1998 VFA which already allows the limited entry of U.S. military troops and the construction of facilities?

The quick and short answer to the above question is — No, the EDCA does not implement the 1998 VFA as the EDCA in fact provides a wider arrangement than the 1998 VFA with respect to the entry of military bases, troops, and facilities into the Philippines. A naughty view is that the 1998 VFA should form part of the EDCA and not the other way around. Another reality, based on the treaty-executive agreement distinctions discussed above, is that ***the EDCA introduces new arrangements and obligations to those existing under the 1998 VFA***; hence, the EDCA should be in the form of a treaty.

V.D(3)(i) *The 1998 Visiting Forces Agreement*

The Philippines' primary obligation under the 1998 VFA, is to facilitate the entry and departure of U.S. personnel in relation with "covered activities;"[228] it merely defines the treatment of

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[228] 1998 VFA, Article III(1).

U.S. personnel visiting the Philippines; hence, its name.[229] It is in fact a counterpart of the NATO- SOFA that the U.S. forged in Europe.

The Preamble of the VFA defines its objectives — to govern the terms of visits of "elements of the United States Armed Forces" to the Philippines, while the body of the agreement contains the agreed conditions. To quote from the relevant provisions of the 1998 VFA:

VISITING FORCES AGREEMENT

Preamble

The Government of the Republic of the Philippines and the Government of the United States of America,

Reaffirming their faith in the purposes and principles of the Charter of the United Nations and their desire to strengthen international and regional security in the Pacific area;

Reaffirming their obligations under the Mutual Defense Treaty of August 30, 1951;

Noting that **from time to time elements of the United States armed forces may visit the Republic of the Philippines**;

Considering that cooperation between the Republic of the Philippines and the United States promotes their common security interests;

Recognizing the desirability of defining the treatment of United States personnel **visiting** the Republic of the Philippines;

Have agreed as follows:

Article 1: *Definitions*

As used in this Agreement, "United States personnel" means United States military and civilian personnel temporarily in the Philippines

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[229] *Bayan v. Zamora, supra* note 69. On the whole, the VFA is an agreement which defines the treatment of United States troops and personnel visiting the Philippines. It provides for the guidelines to govern such visits of military personnel, and further defines the rights of the United States and the Philippine government in the matter of criminal jurisdiction, movement of vessel and aircraft, importation and exportation of equipment, materials and supplies.

in connection with activities approved by the Philippine Government. x x x

x x x x x x x x x

Article III: *Entry and Departure*

1. The Government of the Philippines **shall facilitate the admission** of United States personnel and their departure from the Philippines **in connection with activities covered by this Agreement**. x x x

As the *ponencia* correctly observed, the 1998 VFA itself does not specify what "activities" would allow the entry of U.S. troops into the Philippines. The parties left this open and recognized that the activities that shall require the entry of U.S. troops are subject to future agreements and the approval by the Philippine Government.

How this approval, however, will be secured is far from certain. What is certain is that beyond the restrictive "visits" that the 1998 VFA mentions, nothing else is said under the express terms of the Agreement.

Harking back to the 1947 MBA and its clear and certain terms, what comes out boldly is that the 1998 ***VFA is not an agreement that covers "activities" in the way that the 1947 MBA did; it is simply an agreement regulating the status of and the treatment to be accorded to U.S. armed forces personnel and their aircraft and vehicles while visiting the Philippines.*** The agreement itself does not authorize U.S. troops to permanently stay in the Philippines, nor authorize any activity related to the establishment and the operation of bases, as these activities had been defined under the 1947 MBA.

As discussed under the treaty-executive agreement distinctions above, if indeed the activities would be in line with the original intent of the 1998 VFA, then an executive agreement would suffice as an implementing agreement. On the other hand, if the activity would be a modification of the 1998 VFA or would be beyond its terms and would entail the establishment of a military base or facility or their equivalent, and the introduction

of troops, then, a treaty duly concurred in by the Senate would be the appropriate medium of the U.S.-Philippines agreement.

This Court has had the opportunity to examine the 1998 VFA in *Bayan Muna*[230] and described the agreement in this wise —

> On the whole, the VFA is an agreement which defines the treatment of United States troops and personnel visiting the Philippines. It provides for the guidelines to govern such visits of military personnel, and further defines the rights of the United States and the Philippine government in the matter of criminal jurisdiction, movement of vessel and aircraft, importation and exportation of equipment, materials and supplies.

In *Lim v. Executive Secretary,*[231] this Court further explained:

> The VFA provides the "**regulatory mechanism" by which "United States military and civilian personnel [may visit] temporarily in the Philippines in connection with activities approved by the Philippine Government.**" It contains provisions relative to entry and departure of American personnel, driving and vehicle registration, criminal jurisdiction, claims, importation and exportation, movement of vessels and aircraft, as well as the duration of the agreement and its termination. [Emphasis supplied]

The 1998 VFA allows the entry of U.S. military personnel to Philippine territory and grants the U.S. specific rights; it is essentially an agreement governing the rules for the visit of "US armed forces in the Philippines *from time to time"*[232] in pursuit of cooperation to promote "common security interests"; it is essentially a treaty governing the sojourn of US forces in this country for joint exercises.[233]

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[230] *Ibid.*

[231] *Supra* note 179, at 572.

[232] 1998 VFA, Preamble, par. 4.

[233] *Lim v. Executive Secretary, supra* note 179, at 575. In this manner, visiting US forces may sojourn in Philippine territory for purposes other than military. As conceived, the joint exercises may include training on new techniques of patrol and surveillance to protect the nations marine resources, sea search-and-rescue operations to assist vessels in distress,

Significantly, the 1951 MDT and the 1998 VFA contain a similar feature — joint activities in pursuit of common security interests. *The EDCA, on the other hand, goes beyond the terms of the 1951 MDT and the 1998 VFA.*

As explained above, the EDCA has two purposes. First, it is an agreement for the conduct of joint activities in accordance with the 1951 MDT and the 1998 VFA. This, however, is not the centerpiece of the EDCA. ***Its centerpiece is the introduction of Agreed Locations which are portions of the Philippine territory whose use is granted to the U.S.***[234] ***The EDCA then proceeds to list the rights that the U.S. has over the Agreed Locations.***[235]

A reading of the EDCA's provisions shows that the rights and *privileges granted to the U.S. do not always carry a concomitant right on the part of the Philippines nor do they involve joint exercises.* While the EDCA mentions that the Agreed Locations may be used for "security cooperation exercises"[236] and "joint and combined training activities,"[237] the provisions of the EDCA also provide for *the conduct of other activities beyond the 1951 MDT and the 1998 VFA.*

Within the Agreed Locations, the U.S. may conduct trainings for its troops, transit, support and related activities.[238] *The EDCA also allows the U.S. to use the Agreed Locations to refuel aircraft, bunker vessels, temporarily maintain vehicles, vessels and aircraft.*[239] Significantly, it *does not provide for*

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disaster relief operations, civic action projects such as the building of school houses, medical and humanitarian missions, and the like.

[234] EDCA, Article II(4).

[235] *Id.,* Article III(1).

[236] *Id.,* Article I(3).

[237] *Ibid.*

[238] *Id.,* Article III(1).

[239] *Ibid.*

any qualification on the purpose for the entry of these vessels, vehicles, and aircraft into Philippine jurisdiction.

The EDCA also permits the temporary accommodation of personnel,[240] *again without any qualification as to the purpose of their visit.* The U.S. forces may also engage in communications activities including the use of its own radio spectrum,[241] *similarly without any limitation as to the purpose by which such communications shall be carried out.*

Further, within the Agreed Locations, the U.S. can also preposition defense equipment, supplies, and materiel over which the U.S. forces shall have exclusive use and control.[242] *Clearly, the right to deploy weapons can be undertaken even if it is not in the pursuit of joint activities for common security interests.*

These rights, granted to the U.S. under the EDCA, ***do not contain an element of mutuality*** in the sense that mutuality is reflected in the 1951 MDT and the 1998 VFA. As these rights go beyond the earlier treaties and are, in fact, independent sources of rights and obligations between the U.S. and the Philippines, they cannot be mere details of implementation of both the 1951 MDT and the 1998 VFA.

And, as pointed out earlier, the Agreed Locations under the EDCA are akin to the military bases contemplated under the 1947 MBA. Thus, by its own terms, the EDCA is not only a military base agreement outside the provisions of the 1951 MDT and the 1998 VFA, but a piecemeal introduction of military bases in the Philippines.

Note that, at this point, there exists no agreement on the establishment of U.S. military bases in the Philippines; **the EDCA re-introduces a modernized version of the fixed military base concept contemplated and operationalized under the 1947 MBA.**

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[240] *Ibid.*

[241] *Id.,* Article VII(2).

[242] *Id.*. Article IV(1), (3).

V.D(4) ***The 1951 MDT and 1998 VFA in conjunction with the EDCA***

An additional dimension that the EDCA introduces — ***the treatment of U.S. forces and U.S. contractors*** — reveals that it does not merely implement the 1951 MDT and the 1998 VFA, but adds to the obligations in these agreements.

To support its conclusion that the EDCA implements the provisions in the 1951 MDT and the 1998 VFA, the *ponencia* points out that the EDCA references 1951 MDT and the 1998 VFA in allowing the entry of U.S. personnel and U.S. forces in the Philippines, and that the entry of U.S. contractors (who had not been mentioned in the 1998 VFA) do not contradict the obligations found in the 1998 VFA.

The *ponencia* further notes that the U.S. contractors had been expressly excluded from the definition of U.S. personnel and U.S. forces, in line with their definitions in the 1998 VFA.[243] They are not entitled to the same privileges that U.S. Personnel and U.S. forces enjoy under the 1998 VFA, but would have to comply with Philippine law to enter the Philippines.

The *ponencia* proceeds to argue that the lack of dissimilarities between the 1998 VFA and the EDCA point to the conclusion that the EDCA implements the 1998 VFA. By limiting the entry of persons under the EDCA to the categories under the 1998 VFA, the EDCA merely implements what had already been agreed upon under the 1998 VFA. The U.S. forces's authorization to perform activities under the EDCA does not change the nature of the EDCA as the 1998 VFA's implementing agreement, as the term "joint exercises" under the 1998 VFA denotes a wide range of activities that include the additional activities under the EDCA.

That the 1998 VFA and the EDCA are not dissimilar in terms of their treatment of U.S. forces and U.S. personnel, does not automatically mean that the EDCA simply implements the 1998

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[243] *Ponencia,* pp. 50-51.

VFA, given the additional obligations that the EDCA introduces for the Philippine government.

As earlier discussed, the EDCA introduces military bases in the Philippines within the concept of the 1987 Constitution, and ***it is in light of these additional obligations that the EDCA's affirmation of the 1998 VFA should be viewed: the EDCA adds new dimensions to the treatment of U.S. Personnel and U.S. forces provided in the 1998 VFA, and these dimensions cannot be ignored in determining whether the EDCA merely implements the 1998 VFA.***

Thus, while the EDCA affirms the treatment of U.S. personnel and U.S. forces in the Philippines, it at the same time ***introduces the Philippines' obligation to recognize the authority of U.S. Forces in the "Agreed Locations***." Under the EDCA, U.S. forces can now ***preposition and store*** defense equipment, supplies, and materiel at Agreed Locations. They shall have ***unimpeded access*** to Agreed Locations for all matters relating to the prepositioning and storage of defense equipment, supplies, and materiel. Lastly, the EDCA ***authorizes the U.S. forces to exercise all rights and authorities within the Agreed Locations*** that are necessary for their operational control or defense. In contrast, the 1998 VFA only refers to the tax and duty-free entry of U.S. Government equipment in connection with the activities during their visit.

In the same manner, and despite being in a different class as U.S. personnel and U.S. forces, ***U.S. contractors are also allowed "unimpeded access" to the Agreed Locations*** when it comes to all matters relating to the ***prepositioning and storage of defense equipment, supplies and materiel***.

Thus, these groups of people (U.S. personnel, U.S. forces and U.S. contractors) have been referred to in the EDCA not merely to implement the 1998 VFA, but to further their roles in the Agreed Locations that the EDCA authorizes.

From these perspectives, the EDCA cannot be considered to be a simple implementation of the 1998 VFA. Rather, it is a continuation of the 1998 VFA under new dimensions. These

dimensions should not and cannot be hidden behind reaffirmations of existing 1998 VFA obligations. These added dimensions reinforce the idea of military bases, as it allows them access to the Agreed Locations that, as I had earlier mentioned, is the cornerstone of the EDCA. From the legal end, ***the obligations under the EDCA, not its policy declarations and characterization,*** should be decisive in determining whether Section 25, Article XVIII applies.

Lastly, even assuming that the EDCA is an implementation of the 1951 MDT and the 1998 VFA, the practice of the Government reveals that even when an agreement is considered as an implementation of a prior treaty, the concurrence of the Senate must still be sought.

Early in the Senate deliberations on the 1998 VFA, the senator-sponsors characterized it merely as a **subsidiary or implementing agreement** to the 1951 MDT.[244] Nevertheless, Senator Tatad, one of the 1998 VFA's co-sponsors, recognized that Article XVIII, Section 25 of the Constitution prohibits the l998 DFA from being executed as a mere executive agreement,[245] for which reason it was sent to the Senate for concurrence.

The senators agreed during the deliberations that an agreement implementing the 1951 MDT requires Senate concurrence.[246] This is because the agreement, despite implementing or affirming the 1951 MDT, allows the entry of U.S. troops in the

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[244] *Ibid.*

[245] *Senate deliberations,* May 25, 1999, A.M., p. 17, which reads:

Senator Tatad. x x x Mr. President, distinguished colleagues, the Visiting Forces Agreement does not create a new policy or a new relationship. It simply seeks to implement and reinforce what already exists.

For that purpose, **an executive agreement might have sufficed, were there no constitutional constraints. But the Constitution requires the Senate to concur in all international agreements**. So the Senate must concur in the Visiting Forces Agreement, even if the U.S. Constitution does not require the U.S. Senate to give its advice and consent.

[246] Senate Resolution No. 1414, *supra* note 107.

Philippines, a matter covered by Article XVIII, Section 25 of the Constitution.

Indeed, the 1998 VFA has been consistently treated as an implementation of the 1951 MDT. Nevertheless, the Government correctly chose to enter into the international agreement in the form of a treaty duly concurred in by the Senate, because it involves the entry of foreign military troops *independent of, and in addition to,* the general agreements in the 1951 MDT.

In the same manner, the EDCA, which purportedly implements and complements both the 1951 MDT and the 1998 VFA, should have likewise been submitted to the Senate for its concurrence because of the new obligations it introduces.

To reiterate, the EDCA allows for a more permanent presence of U.S. troops and military equipment in the Philippines (akin to establishing a base), which was not contemplated under the 1998 VFA. Thus, despite having been treated as an implementation of the 1951 MDT and the 1998 VFA, the new obligations under the EDCA calls for the application of Article XVIII, Section 25 of the Constitution and its submission to the Senate for concurrence.

V.E. <u>The EDCA: the Actual and Operational View</u>

As my last point, let me just say that ***the ponencia can engage in a lot of rationalizations and technical distinctions*** on why the EDCA provisions do not amount to or equate with the operation of military bases and the introduction of troops and facilities into the Philippines. The *ponencia* cannot escape the conclusion that translated to ***actual operational*** reality:

1. The activities described in the EDCA are no different from the ***operation*** of a military base in the 1947 sense, except that under the current U.S. strategy, a fixed base in the 1947 sense is hardly ever established because the expenses and administrative problems accompanying a fixed base can now be avoided. A military "facility" can very well serve the same purposes as a fixed military

base under current technological advances in weaponry, transportation, and communications.[247] The U.S. can achieve the same results at less expense and with lesser problems if it would have guaranteed access to and control of specified areas such as the Agreed Locations that the EDCA conveniently provides.

FOSs or CSLs, as defined above, are *expandable* "warm facilities" maintained with *limited U.S. military support presence* and possibly *prepositioned* equipment.[248] FOSs will support *rotational* rather than permanently stationed forces, and will be a focus for bilateral and regional training and for *the deployment of troops and stored and prepositioned equipment, supplies, and materiel*.[249]

As has already been mentioned, examples include the Sembawang port facility in Singapore and Soto Cano Air Base in Honduras. *The Philippines will soon follow without the consent of the Filipino people and against the constitutional standards they set, if EDCA would be enforced without the benefit of Senate concurrence.*

2. Under the "pivot to Asia strategy," the operative word is **"presence"** which means ready access to equipment, supplies, and materiel by troops who can be ferried from safer locations and immediately be brought to the

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[247] During the latter part of the Cold War, the term "facilities" was frequently substituted for the word "bases" to *soften* the negative political overtones normally associated with the basing of foreign troops in a sovereign country. In line with this thinking, the Stockholm International Peace Research Institute uses the term foreign military presence (FMP) to describe bases/facilities that house foreign troops in a sovereign state. See Krepinevich and Work, *supra* note 202.

[248] *Strengthening U.S. Global Defense Posture*: *Report to Congress, supra* note 201.

[249] *Ibid.*

scene of action from the Agreed Locations. The EDCA provides such presence through the Agreed Locations; the access to these secured locations; the prepositioning and storage of defense (read as "military") equipment, supplies, and materiel; and the forward jump-off point for the deployment of troops to whatever scene of action there may be that Philippine locations may serve best.

3. From the point of view of "troops" that Article XVIII, Section 25 likewise regulates through Senate concurrence, note that in the EDCA, **contractual employees** are mentioned together or side-by-side with the military. This is a relatively recent development where contractual employees are used to provide the same services and serve hand in hand or as replacement or to augment regular military forces. The U.S. has put these contractual employees to good use in various local theaters of conflict, notably in Iraq, Afghanistan and Syria.[250] The U.S. has reportedly resorted to the use, not only of regular military forces, but of contractual employees who may provide the same services as military forces and who can increase their numbers without alerting the U.S. public to the actual number of troops maintained.

VI. CONCLUSION AND THE QUESTION OF REMEDY

Based on all the above considerations, I conclude that the EDCA, instead of being in implementation of the 1951 MDT and the 1998 VFA, is significantly broader in scope than these two treaties, and effectively added to what the 1951 MDT and the 1998 VFA provide.

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[250] See Jose Gomez del Prado. Privatization of War: Mercenaries, Private Military and Security Companies, *Global Research,* November 3, 2010. Available at http://www.globalresearch.ca/the-privatization-of-war-mercenaries-private-military-and-security-companies-pmsc/21826.

The EDCA is thus a new agreement that touches on military bases, troops, and facilities beyond the scope of the 1951 MDT and the 1998 VFA, and should be covered by a treaty pursuant to Article XVIII, Section 25 and Article VII, Section 21, both of the 1987 Constitution. Without the referral and concurrence by the Senate, the EDCA is *constitutionally deficient* and, hence, cannot be enforced in our country.

To remedy the deficiency, the best recourse RECOMMENDED TO THE COURT under the circumstances is for the Court to **suspend the operations of its rules** on the finality of its rulings and for the Court to **give the President ninety (90) days from the service of its Decision, whether or not a motion for reconsideration is filed, the OPTION to refer the EDCA to the Senate for its consideration and concurrence.**

The referral to the Senate shall serve as a main or supplemental motion for reconsideration that addresses the deficiency, rendering the effects of the Court's Decision moot and academic. Otherwise, the conclusion that the President committed grave abuse of discretion by entering into an executive agreement instead of a treaty, and by certifying to the completeness of Philippine internal process, shall be fully effective.

As my last point, we must not forget that the disputed executive agreement that the President entered into is with the Americans from whom we trace the roots of our present Constitution. The Americans are a people who place the highest value in their respect for their Constitution. This should be no less than the spirit that should move us in adhering to our own Constitution. To accord a lesser respect for our own Constitution is to invite America's disrespect for the Philippines as a co-equal sovereign and independent nation.

DISSENTING OPINION

"Para kayong mga birhen na naniniwala sa pag-ibig ng isang puta!"[1]
- Heneral Luna kina Pedro Paterno, Felix Buencamino, at Emilio Aguinaldo noong sinabi nila na nangako ang mga Amerikano na kikilalanin nila ang kasarinlan ng mga Pilipino

LEONEN, *J.*:

1987 Constitution, Article XVIII, Section 25:

> *After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State.*

In a disturbing turn of events, the majority of this court just succeeded in amending this constitutional provision. At the very least, it emasculated its text and weakened its spirit.

An agreement signed by our Secretary of Defense and the Ambassador of the United States that grants United States military personnel and their contractors operational control over unspecified locations within Philippine territory in order to pre-position military equipment as well as to use as launching pads for operations in various parts of the globe is not binding until it is concurred in by the Senate. This is in accordance with Article XVIII, Section 25 and Article VII, Section 21 of the Constitution.

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[1] *Heneral Luna,* Dir. Jerrold Tarog Artikulo Uno Productions (2015). The inclusion of this quote is to emphasize its metaphor and not meant in any way to denigrate the human dignity of commercial sex workers.

Furthermore, the Enhanced Defense Cooperation Agreement (EDCA) does not simply implement the Agreement Between the Government of the United States of America and the Government of the Republic of the Philippines Regarding the Treatment of United States Armed Forces Visiting the Philippines (Visiting Forces Agreement or VFA). The EDCA substantially modifies or amends the VFA. An executive agreement cannot amend a treaty. Nor can any executive agreement amend any statute, most especially a constitutional provision.

The EDCA substantially modifies or amends the VFA in the following aspects:

First, the EDCA does not only regulate the "visits" of foreign troops. It also allows the temporary stationing on a rotational basis of US military personnel and their contractors in physical locations with permanent facilities and pre-positioned military materiel.

Second, unlike the VFA, the EDCA allows pre-positioning of military materiel, which can include various types of warships, fighter planes, bombers, and vessels, as well as land and amphibious vehicles and their corresponding ammunition.

Third, the VFA contemplates the entry of troops for various training exercises. The EDCA allows our territory to be used by the United States to launch military and paramilitary operations to be conducted within our territory or against targets in other states.

Fourth, the EDCA introduces the following concepts not contemplated in the VFA or in the 1951 Mutual Defense Treaty, namely: (a) agreed locations; (b) contractors; (c) pre-positioning of military materiel; and (d) operational control.

Lastly, the VFA does not have provisions that may be construed as a restriction or modification of obligations found in existing statutes. The EDCA contains provisions that may affect various statutes, including (a) the jurisdiction of courts, (b) local autonomy, and (c) taxation.

There is no showing that the new matters covered in the EDCA were contemplated by the Senate when it approved the VFA. Senate Resolution No. 105, Series of 2015, which expresses the sentiment of that legislative chamber, is a definite and unequivocal articulation of the Senate: the VFA was not intended to cover the matters now included in the EDCA. In the view of the Senate reading the same provisions of the Constitution as we do, the EDCA should be in treaty form.

The EDCA, in its current form, is only an official and formal memorial of agreed provisions resulting from the negotiations with the United States. The President has the discretion to submit the agreement to the Senate for concurrence. The EDCA is a treaty and requires Senate concurrence.

I

The EDCA should comply with Article XVIII, Section 25 of the Constitution.

Bayan v. Zamora[2] interpreted the scope of this provision when it discussed the constitutionality of the VFA. Similar to the EDCA, the VFA was a product of negotiations between the two governments relating to mutual security interests. Unlike the EDCA, however, the VFA was submitted to the Senate for concurrence, thus:

> On July 18, 1997, the United States panel, headed by US Defense Deputy Assistant Secretary for Asia Pacific Kurt Campbell, met with the Philippine panel, headed by Foreign Affairs Undersecretary Rodolfo Severino, Jr., to exchange notes on "the complementing strategic interests of the United States and the Philippines in the Asia-Pacific region." Both sides discussed, among other things, the possible elements of the Visiting Forces Agreement (VFA for brevity). Negotiations by both panels on the VFA led to a consolidated draft text, which in turn resulted [in] a final series of conferences and negotiations that culminated in Manila on January 12 and 13, 1998. Thereafter, then President Fidel V. Ramos approved the VFA, which was respectively signed by public respondent Secretary Siazon and United States Ambassador Thomas Hubbard on February 10, 1998.

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[2] *Bayan v. Zamora,* 396 Phil. 623 (2000) [Per *J.* Buena, *En Banc*].

On October 5, 1998, President Joseph E. Estrada, through respondent Secretary of Foreign Affairs, ratified the VFA.

On October 6, 1998, the President, acting through respondent Executive Secretary Ronaldo Zamora, officially transmitted to the Senate of the Philippines, the Instrument of Ratification, the letter of the President and the VFA, for concurrence pursuant to Section 21, Article VII of the 1987 Constitution. The Senate, in turn, referred the VFA to its Committee on Foreign Relations, chaired by Senator Blas F. Ople, and its Committee on National Defense and Security, chaired by Senator Rodolfo G. Biazon, for their joint consideration and recommendation. Thereafter, joint public hearings were held by the two Committees.

On May 3, 1999, the Committees submitted Proposed Senate Resolution No. 443 recommending the concurrence of the Senate to the VFA and the creation of a Legislative Oversight Committee to oversee its implementation. Debates then ensued.

On May 27, 1999, Proposed Senate Resolution No. 443 was approved by the Senate, by a two-thirds (2/3) vote of its members. Senate Resolution No. 443 was then re-numbered as Senate Resolution No. 18.

On June 1, 1999, the VFA officially entered into force after an Exchange of Notes between respondent Secretary Siazon and United States Ambassador Hubbard.[3] (Citations omitted)

Bayan held that Article XVIII, Section 25 of the Constitution applies to the VFA:

Section 25, Article XVIII disallows foreign military bases, troops, or facilities in the country, unless the following conditions are sufficiently met, *viz:* (a) it must be under a treaty; (b) the treaty must be duly concurred in by the Senate and, when so required by Congress, ratified by a majority of the votes cast by the people in a national referendum; and (c) recognized as a treaty by the other contracting state.

There is no dispute as to the presence of the first two requisites in the case of the VFA. The concurrence handed by the Senate through Resolution No. 18 is in accordance with the provisions of the Constitution, whether under the general requirement in Section 21, Article VII, or the s pecific mandate mentioned in Section 25,

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[3] *Id*. at 632-637.

Article XVIII, the provision in the latter article requiring ratification by a majority of the votes cast in a national referendum being unnecessary since Congress has not required it.

As to the matter of voting, Section 21, Article VII particularly requires that a treaty or international agreement, to be valid and effective, must be concurred in by at least two-thirds of all the members of the Senate. On the other hand, Section 25, Article XVIII simply provides that the treaty be "duly concurred in by the Senate."

Applying the foregoing constitutional provisions, a two-thirds vote of all the members of the Senate is clearly required so that the concurrence contemplated by law may be validly obtained and deemed present. While it is true that Section 25, Article XVIII requires, among other things, that the treaty — the VFA, in the instant case — be "duly concurred in by the Senate," it is very true however that said provision must be related and viewed in light of the clear mandate embodied in Section 21, Article VII, which in more specific terms, requires that the concurrence of a treaty, or international agreement, be made by a two-thirds vote of all the members of the Senate. Indeed, Section 25, Article XVIII must not be treated in isolation to Section 21, Article VII.

As noted, the "concurrence requirement" under Section 25, Article XVIII must be construed in relation to the provisions of Section 21, Article VII. In a more particular language, the concurrence of the Senate contemplated under Section 25, Article XVIII means that at least two-thirds of all the members of the Senate favorably vote to concur with the treaty — the VFA in the instant case.

. . . . . .

Having resolved that the first two requisites prescribed in Section 25, Article XVIII are present, we shall now pass upon and delve on the requirement that the VFA should be recognized as a treaty by the United States of America.

. . . . . .

This Court is of the firm view that the phrase "recognized as a treaty" means that the other contracting party accepts or acknowledges the agreement as a treaty. To require the other contracting state, the United States of America in this case, to submit the VFA to the United States Senate for concurrence pursuant to its Constitution, is to accord strict meaning to the phrase.[4]

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[4] *Id*. at 654-657.

Lim v. Executive Secretary[5] further explored the scope of the VFA as it dealt with the constitutionality of the Terms of Reference of the "Balikatan 02-1" joint military exercises between the Philippines and the United States:

> The Terms of Reference rightly fall within the context of the VFA.
>
> After studied reflection, it appeared farfetched that the ambiguity surrounding the meaning of the word "activities" arose from accident. In our view, it was deliberately made that way to give both parties a certain leeway in negotiation. In this manner, visiting US forces may sojourn in Philippine territory for purposes other than military. As conceived, the joint exercises may include training on new techniques of patrol and surveillance to protect the nation's marine resources, sea search-and-rescue operations to assist vessels in distress, disaster relief operations, civic action projects such as the building of school houses, medical and humanitarian missions, and the like.
>
> Under these auspices, the VFA gives legitimacy to the current Balikatan exercises. It is only logical to assume that "Balikatan 02-1," a "mutual anti-terrorism advising, assisting and training exercise," falls under the umbrella of sanctioned or allowable activities in the context of the agreement. Both the history and intent of the Mutual Defense Treaty and the VFA support the conclusion that combat-related — activities as opposed to combat itself — such as the one subject of the instant petition, are indeed authorized.
>
> That is not the end of the matter, though. Granted that "Balikatan 02-1" is permitted under the terms of the VFA, what may US forces legitimately do in furtherance of their aim to provide advice, assistance and training in the global effort against terrorism? Differently phrased, may American troops actually engage in combat in Philippine territory? The Terms of Reference are explicit enough. Paragraph 8 of Section I stipulates that US exercise participants may not engage in combat "except in self-defense." We wryly note that this sentiment is admirable in the abstract but difficult in implementation. The target of "Balikatan 02-1," the Abu Sayyaf, cannot reasonably be expected to sit idly while the battle is brought to their very doorstep. They cannot be expected to pick and choose their targets for they will not have the luxury of doing so. We state this point if only to signify our awareness that the parties straddle

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[5] 430 Phil. 555 (2002) [Per *J.* De Leon, Jr., *En Banc*].

a fine line, observing the honored legal maxim *"Nemo potest facere per alium quod non potest facere per directum."* The indirect violation is actually petitioners' worry, that in reality, "Balikatan 02-1" is actually a war principally conducted by the United States government, and that the provision on self-defense serves only as camouflage to conceal the true nature of the exercise. A clear pronouncement on this matter thereby becomes crucial.

In our considered opinion, neither the MDT nor the VFA allow foreign troops to engage in an offensive war on Philippine territory.[6] (Emphasis supplied)

Nicolas v. Romulo[7] involved the grant of custody of Lance Corporal Daniel Smith to the United States pursuant to the VFA and reiterated the ruling in *Bayan:*

[A]s an implementing agreement of the RP-US Mutual Defense Treaty, it was not necessary to submit the VFA to the US Senate for advice and consent, but merely to the US Congress under the Case–Zablocki Act within 60 days of its ratification. It is for this reason that the US has certified that it recognizes the VFA as a binding international agreement, i.e., a treaty, and this substantially complies with the requirements of Art. XVIII, Sec. 25 of our Constitution.[8]

The controversy now before us involves more than the VFA. Reading the entirety of the Constitution is necessary to fully appreciate the context of the interpretation of Article XVIII, Section 25.

II

Foreign policy indeed includes security alliances and defense cooperation among states. In the conduct of negotiations and in the implementation of any valid and binding international agreement, Article II of the Constitution requires:

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[6] *Id*. at 575-576. *"Nemo potest facere per alium quod non potest facere per directum"* translates to "No one is allowed to do indirectly what he is prohibited to do directly."

[7] 598 Phil. 262 (2009) [Per *J*. Azcuna, *En Banc*].

[8] *Id*. at 284-285.

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

. . . . . .

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

Article 2(4) of the Charter of the United Nations similarly provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[9]

Our use of force is not completely proscribed as the Charter of the United Nations provides for the inherent right of individual or collective self-defense:

CHAPTER VII: ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

. . . . . .

Article 51. Nothing in the present Charter shall impair the inherent right of individual or collective self-defen[s]e if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defen[s]e shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[10]

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[9] Charter of United Nations, Chapter I, Art. 2(4) <http://www.un.org/en/documents/charter/chapterl.shtml> (visited January 11, 2016).

[10] Charter of United Nations, Chapter VII, Art. 51 <http://www.un.org/en/documents/charter/chapter7.shtml>(visited January 11, 2016). See

Furthermore, falling within the penumbra on the use of force are pre-emptive self-defense,[11] self-help, and humanitarian interventions.[12]

Another exception would be the collective security system set up under the Charter of the United Nations, with the Security Council acting in accordance with Chapter VII of the Charter. Under Article 42:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action

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Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), I.C.J. 1984 I.C.J.39

[11] *See* Anthony Clark Arend, *International Law and the Preemptive Use of Military Force,* THE WASHINGTON QUARTERLY 26:2, 89-103 (2003). *See* ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 242-243 (1994), citing US Secretary of State Webster in his diplomatic note in the 1842 *Caroline Case.* According to Professor Higgins, under customary international law, pre-emptive self-defense may be resorted to when the necessity is "instant, overwhelming, and leav[es] no choice of means, and no moment for deliberation."

[12] *See* ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 245-248 (1994). *See* Keynote address by Jacques Forster, Vice President of the International Committee of the Red Cross, presented at the Ninth Annual Seminar on International Humanitarian Law for Diplomats accredited to the United Nations, Geneva, 8-9 March 2000 <https://www.icrc.org/eng/resources/documents/misc/57jqjk.htm> (visited January 11, 2016): "The use of force by the international community should come within the scope of the United Nations Charter. International humanitarian law cannot be invoked to justify armed intervention because it has nothing to do with the right of States to use force. Its role is strictly limited to setting limits to armed force irrespective of the legitimacy of its use." *See also* United Nations Security Council Resolution 1674 (2006) on the concept of Responsibility to Protect <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1674(2006)> (visited January 11, 2016).

may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.[13]

We fall within this exception when we participate in the enforcement of the resolutions of the Security Council.[14]

Generally, the President's discretion is plenary in matters falling within executive functions. He is the chief executive,[15] having the power of control over all executive departments, bureaus, and offices.[16] Further, "by constitutional fiat and by the intrinsic nature of his office, the President, as head of State, is the sole organ and authority in the external affairs of the country [and] [i]n many ways, the President is the chief architect of the nation's foreign policy."[17]

The President is also the Commander-in-Chief of all armed forces of the Philippines.[18] He has the power to "call out such armed forces to prevent or suppress lawless violence, invasion or rebellion ... suspend the privilege of the writ of habeas corpus or place the Philippines or any part thereof under martial law"[19] subject to the conditions and requisites under the provision.

However, the President's discretion to allow our participation in the use of force—whether by committing our own military assets and personnel or by allowing our territory to be used as waypoints, refueling or staging areas — is also constrained by

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[13] Charter of United Nations, Chapter VII, Art. 42 <http://www. un.org/en/sections/charter/chapter7.shtml> (visited January 11, 2016).

[14] *See* Charter of United Nations, Chapter VII, Art. 44 <http://www.un.org/en/documents/charter/chapter7.shtml> (visited January 11, 2016). *See also* Enforcement action through regional arrangements under Articles 52 (l) and 53 (1) of the United Nations Charter. <http://www.un.org/en/sections/un-charter/chapter-viii/index.html> (visited January 11, 2016).

[15] CONST., Art. VII, Sec. 1.

[16] CONST., Art. VII, Sec. 17.

[17] *Bayan v. Zamora,* 396 Phil. 623, 663 (2000) [Per *J.* Buena, *En Banc*].

[18] CONST., Art. VII, Sec. 18.

[19] CONST., Art. VII, Sec. l8.

the Constitution. In this sense, the power of the President as Commander-in-Chief and head of state is limited by the sovereign through judicially determinable constitutional parameters.

III

With respect to the use of or threat to use force, we can discern a gradation of interrelations of the legislative and executive powers to ensure that we pursue "an independent foreign policy" in the context of our history.

Article VI, Section 23 of the Constitution covers declarations of a state of war. It is vested solely in Congress, thus:

> Section 23. (1) The Congress, by a vote of two-thirds of both Houses in joint session assembled, voting separately, shall have the sole power to declare the existence of a state of war.
>
> (2) In times of war or other national emergency, the Congress may, by law, authorize the President, for a limited period and subject to such restrictions as it may prescribe, to exercise powers necessary and proper to carry out a declared national policy. Unless sooner withdrawn by resolution of the Congress, such powers shall cease upon the next adjournment thereof.

Informed by our history and to ensure that the independence of our foreign policy is not compromised by the presence of foreign bases, troops, or facilities, the Constitution now provides for treaty recognition, Senate concurrence, and public ratification when required by Congress through Article XVIII, Section 25, thus:

> Section 25. After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State.

The prohibition in Article XVIII, Section 25 relates only to international agreements involving foreign military bases, troops, or facilities. It does not prohibit the President from entering into other types of agreements that relate to other aspects of his powers as Commander-in- Chief.

In Bayan:

Section 25, Article XVIII is a ***special provision that applies to treaties which involve the presence of foreign military bases, troops or facilities in the Philippines***. Under this provision, the concurrence of the Senate is only one of the requisites to render compliance with the constitutional requirements and to consider the agreement binding on the Philippines. Section 25, Article XVIII ***further requires that "foreign military bases, troops, or facilities" may be allowed in the Philippines only by virtue of a treaty duly concurred in by the Senate, ratified by a majority of the votes cast in a national referendum held for that purpose if so required by Congress, and recognized as such by the other contracting state***.

. . . . . .

Section 25, Article XVIII disallows foreign military bases, troops, or facilities in the country, unless the following conditions are sufficiently met, *viz:* (a) it must be under ***a treaty;*** (b) the treaty must be ***duly concurred in by the Senate and, when so required by Congress, ratified by a majority of the votes cast by the people in a national referendum;*** and (c) ***recognized as a treaty by the other contracting state***.[20] (Emphasis supplied)

"Foreign military bases, troops, and facilities" should not be read together but separately. Again, in *Bayan*:

Moreover, it is specious to argue that Section 25, Article XVIII is inapplicable to mere transient agreements for the reason that there is no permanent placing of structure for the establishment of a military base. On this score, the Constitution makes no distinction between "transient" and "permanent." Certainly, we find nothing in Section 25, Article XVIII that requires foreign troops or facilities to be stationed or placed permanently in the Philippines.

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[20] *Bayan v. Zamora,* 396 Phil. 623, 651-655 (2000) [Per *J.* Buena, *En Banc*].

It is a rudiment in legal hermeneutics that when no distinction is made by law, the Court should not distinguish-*Ubi lex non distinguit nec nos distinguire debemos.*

In like manner, we do not subscribe to the argument that Section 25, Article XVIII is not controlling since no foreign military bases, but merely foreign troops and facilities, are involved in the VFA. Notably, a perusal of said constitutional provision reveals that the proscription covers "foreign military bases, troops, or facilities." Stated differently, this prohibition is not limited to the entry of troops or facilities without any foreign bases being established. The clause does not refer to "foreign military bases, troops, or facilities" collectively but treats them as separate and independent subjects. The use of comma and the disjunctive word "or" clearly signifies disassociation and independence of one thing from the others included in the enumeration, such that, the provision contemplates three different situations — a military treaty the subject of which could be either (a) foreign bases, (b) foreign troops, or (c) foreign facilities — any of the three standing alone places it under the coverage of Section 25, Article XVIII.

To this end, the intention of the framers of the Charter, as manifested during the deliberations of the 1986 Constitutional Commission, is consistent with this interpretation:

> "MR. MAAMBONG. I just want to address a question or two to Commissioner Bernas.
>
> This formulation speaks of three things: foreign military bases, troops or facilities. My first question is: If the country does enter into such kind of a treaty, must it cover the three-bases, troops or facilities — or could the treaty entered into cover only one or two?
>
> FR. BERNAS. Definitely, it can cover only one. Whether it covers only one or it covers three, the requirements will be the same.
>
> MR. MAAMBONG. In other words, the Philippine government can enter into a treaty covering not bases but merely troops?
>
> FR. BERNAS. Yes.
>
> MR. MAAMBONG. I cannot find any reason why the government can enter into a treaty covering only troops.

> FR. BERNAS. Why not? Probably if we stretch our imagination a little bit more, we will find some. We just want to cover everything."

Moreover, military bases established within the territory of another state is no longer viable because of the alternatives offered by new means and weapons of warfare such as nuclear weapons, guided missiles as well as huge sea vessels that can stay afloat in the sea even for months and years without returning to their home country. These military warships are actually used as substitutes for a land-home base not only of military aircraft but also of military personnel and facilities. Besides, vessels are mobile as compared to a land-based military headquarters.

At this juncture, we shall then resolve the issue of whether or not the requirements of Section 25 were complied with when the Senate gave its concurrence to the VFA.

Section 25, Article XVIII disallows foreign military bases, troops, or facilities in the country, unless the following conditions are sufficiently met, *viz:* (a) it must be under a treaty; (b) the treaty must be duly concurred in by the Senate and, when so required by congress, ratified by a majority of the votes cast by the people in a national referendum; and (c) recognized as a treaty by the other contracting state.[21] (Citations omitted)

The ponencia, among others, interprets "shall not be allowed" as being limited to the "initial entry" of bases, troops, or facilities.[22] Subsequent acts are treated as no longer being subject to Article XVIII, Section 25 and are, therefore, only limited by other constitutional provisions and relevant laws.[23]

This interpretation is specious and ahistorical.

There is nothing in Article XVIII, Section 25 that defines the extent and scope of the presence of foreign military bases, troops, or facilities, thereby justifying a distinction between their initial entry and subsequent activities. Its very structure shows

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[21] *Id*. at 653-655.

[22] *Ponencia*, pp. 26-27.

[23] *Id*. at 28.

that Article XVIII, Section 25 is not a mere gateway for the entry of foreign troops or facilities into the Philippines for them to carry out any activity later on.

The provision contains measures designed to protect our country in the broader scheme of international relations. Military presence shapes both foreign policy and political relations. War—or the threat thereof through the position of troops, basing, and provision of military facilities—is an extension of politic, thus:

> The use of military force is a means to a higher end—the political object. War is a tool that policy uses to achieve its objectives and, as such, has a measure of rational utility. So, the purpose for which the use of force is intended will be the major determinant of the course and character of a war. As Clausewitz explains, war "is controlled by its political object," which "will set its course, prescribe the scale of means and effort which is required, and makes its influence felt throughout down to the smallest operational detail.[24]

With respect to the entry and presence of foreign military bases, troops, and facilities, Article XVIII, Section 25 of the 1987 Constitution enables government to politically negotiate with other states from a position of equality. The authority is not exclusively granted to the President. It is shared with the Congress. The Senate participates because no foreign base, troop, or facility may enter unless it is authorized by a treaty.

There is more evidence in the text of the provision of a sovereign intent to require conscious, deliberate, and public discussion regarding these issues.

The provision gives Congress, consisting of the Senate and the House of Representatives, the option to require that the treaty become effective only when approved by a majority of the people in a referendum. Furthermore, there is the additional

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[24] Thomas Waldman, *Politics and War: Clausewitz's Paradoxical Equation,* AUTUMN 2 (2010) <http://strategicstudiesinstitute.army.mil/pubs/parameters/Articles/2010autumn/Waldman.pdf> (visited January 11, 2016).

requirement that the authority will be absent if the other state does not treat the same instrument that allows their bases, troops, and facilities to enter our territory as a treaty.

The provision ensures equality by requiring a higher level of public scrutiny. Unlike in the past when we bargained with the United States from a position of weakness, the Constitution opens the legislative forum so that we use the freedoms that we have won since 1946 to ensure a fair agreement. Legislative hearings make the agreements more publicly legible. They allow more criticism to be addressed. Public forums clarify to the United States and other foreign military powers interested in the Philippines the full extent of interest and the various standpoints of our different constituents. As a mechanism of public participation, it also assures our treaty partners of the durability of the various obligations in these types of security arrangements.

The EDCA was negotiated in private between representatives of the President and the United States. The complete text of the negotiations was presented to the public in time for the visit of the President of the United States. During its presentation, the President's representatives took the position that no further public discussion would be held that might affect the terms of the EDCA. The President presented the EDCA as a final product withdrawn from Senate or Congressional input. The President curtailed even the possibility of full public participation through a Congressional Resolution calling for a referendum on this matter.

The Separate Opinion of former Chief Justice Puno in *Bayan* provides a picture of how the Constitutional Commission recognized the lopsided relationship of the United States and the Philippines despite the 1951 Mutual Defense Treaty and the 1947 Agreement Between the United States of America and the Republic of the Philippines Concerning Military Bases (1947 Military Bases Agreement):

To determine compliance of the VFA with the requirements of Sec. 25, Art. XVIII of the Constitution, ***it is necessary to ascertain the intent of the framers of the Constitution as well***

as the will of the Filipino people who ratified the fundamental law. This exercise would inevitably take us back to the period in our history when U.S. military presence was entrenched in Philippine territory with the establishment and operation of U.S. Military Bases in several parts of the archipelago under the 1947 R.P.-U.S. Military Bases Agreement. As articulated by Constitutional Commissioner Blas F. Ople in the 1986 Constitutional Commission deliberations on this provision, ***the 1947 RP-US Military Bases Agreement was ratified by the Philippine Senate, but not by the United States Senate. In the eyes of Philippine law, therefore, the Military Bases Agreement was a treaty, but by the laws of the United States, it was a mere executive agreement. This asymmetry in the legal treatment of the Military Bases Agreement by the two countries was believed to be a slur to our sovereignty.*** Thus, in the debate among the Constitutional Commissioners, the unmistakable intention of the commission emerged that this *anomalous asymmetry must never be repeated.* ***To correct this historical aberration, Sec. 25, Art. XVIII of the Constitution requires that the treaty allowing the presence of foreign military bases, troops, and facilities should also be "recognized as a treaty by the other contacting party."*** In plain language, *recognition of the United States as the other contracting party of the VFA should be by the U.S. President with the advice and consent of the U.S. Senate.*

The following exchanges manifest this intention:

> "MR. OPLE. Will either of the two gentlemen yield to just one question for clarification? Is there anything in this formulation, whether that of Commissioner Bernas or of Commissioner Romulo, that will prevent the Philippine government from abrogating the existing bases agreement?
>
> FR. BERNAS. To my understanding, none.
>
> MR. ROMULO. I concur with Commissioner Bernas.
>
> MR. OPLE. I was very keen to put this question because I had taken the position from the beginning — and this is embodied in a resolution filed by Commissioners Natividad, Maambong and Regalado — that it is very important that the government of the Republic of the Philippines be in a position to terminate or abrogate the bases agreement as one of the options . . . . we have acknowledged starting at the committee

level that *the bases agreement was ratified by our Senate; it is a treaty under Philippine law. But as far as the Americans are concerned, the Senate never took cognizance of this and therefore, it is an executive agreement.* That creates a wholly unacceptable asymmetry between the two countries. Therefore, in my opinion, the right step to take, if the government of our country will deem it in the national interest to terminate this agreement or even to renegotiate it, is that we must begin with a clean slate; *we should not be burdened by the flaws of the 1947 Military Bases Agreement . . .*

MR. ROMULO. Madam President, I think the two phrases in the Bernas formulation take care of Commissioner Ople's concerns.

The first says "EXCEPT UNDER THE TERMS OF A TREATY." That means that if it is to be renegotiated, it must be under the terms of a new treaty. The second is the concluding phrase which says: "AND RECOGNIZED AS A TREATY BY THE OTHER CONTRACTING STATE."

. . . . . .

MR. SUAREZ. Is the proposal prospective and not retroactive in character?

FR. BERNAS. Yes, it is prospective because it does not touch the validity of the present agreement. However, if a decision should be arrived at that the present agreement is invalid, then even prior to 1991, this becomes operative right away.

MR. SUAREZ. In other words, we do not impress the previous agreements with a valid character, neither do we say that they are null and void *ab initio* as claimed by many of us here.

FR. BERNAS. The position I hold is that it is not the function of this Commission to pass judgment on the validity or invalidity of the subsisting agreement.

MR. SUAREZ . . . the proposal requires recognition of this treaty by the other contracting nation. How would that recognition be expressed by that other contracting nation? That is in *accordance with their constitutional or legislative process, I assume.*

> FR. BERNAS. As Commissioner Romulo indicated, since this certainly would refer only to the United States, because it is only the United States that would have the possibility of being allowed to have treaties here, then *we would have to require that the Senate of the United States concur in the treaty because under American constitutional law, there must be concurrence on the part of the Senate of the United States to conclude treaties.*
>
> . . . . . .
>
> FR. BERNAS. When I say that the other contracting state must recognize it as a treaty, by that I mean *it must perform all the acts required for the agreement to reach the status of a treaty under their jurisdiction.*"[25] (Emphasis supplied)

By allowing the entry of United States military personnel, their deployment into undefined missions here and abroad, and their use of military assets staged from our territory against their present and future enemies based on a general provision in the VFA, the majority now undermines the measures built into our present Constitution to allow the Senate, Congress and our People to participate in the shaping of foreign policy. The EDCA may be an agreement that "deepens defense cooperation"[26] between the Philippines and the United States. However, like the 1947 Military Bases Agreement, it is the agreement more than any other that will extensively shape our foreign policy.

IV

Article VII, Section 21 of the Constitution complements Article XVIII, Section 25 as it provides for the requisite Senate concurrence, thus:

> Section 21. No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.

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[25] *J.* Puno, Dissenting Opinion in *Bayan v. Zamora,* 396 Phil. 623, 672-675 (2000) [Per *J.* Buena, *En Banc*].

[26] Agreement between the Government of the Philippines and the Government of the United States of America on Enhanced Defense Cooperation (2014), Art. I, Sec. 1.

The provision covers both *"treaty and international agreement."* Treaties are traditionally understood as international agreements entered into between states or by states with international organizations with international legal personalities.[27] The deliberate inclusion of the term "international agreement" is the subject of a number of academic discussions pertaining to foreign relations and international law. Its addition cannot be mere surplus. Certainly, Senate concurrence should cover more than treaties.

That the President may enter into international agreements as chief architect of the Philippines' foreign policy has long been acknowledged.[28] However, whether an international agreement is to be regarded as a treaty or as an executive agreement depends on the subject matter covered by and the temporal nature of the agreement.[29] *Commissioner of Customs v. Eastern Sea Trading*[30] differentiated international agreements that require Senate concurrence from those that do not:

> International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying *adjustments of detail* carrying out well-established national policies and traditions and those involving arrangements of a more or less *temporary* nature usually take the form of executive agreements.[31] (Emphasis in the original)

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[27] *See* Vienna Convention on the Law of Treaties (1969), Art. 2(l)(a) and Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Art. 2(1)(a) (1986).

[28] See *Bayan v. Zamora,* 396 Phil. 623 (2000) [Per *J*. Buena, *En Banc*]; and *Pimentel, Jr. v. Office of the Executive Secretary,* 501 Phil. 303 (2005) [Per *J*. Puno, *En Banc*]. *See also* Exec. Order No. 292 (1987), Book IV, Title I, Secs. 3(1) and 20.

[29] *Commissioner of Customs v. Eastern Sea Trading,* 113 Phil. 333 (1961) [Per *J*. Concepcion, *En Banc*].

[30] *Id*.

[31] *Id*. at 338.

Indeed, the distinction made in *Commissioner of Customs* in terms of international agreements must be clarified depending on whether it is viewed from an international law or domestic law perspective. Dean Merlin M. Magallona summarizes the differences between the two perspectives:

From the standpoint of Philippine constitutional law, a treaty is to be distinguished from an executive agreement, as the Supreme Court has done in *Commissioner of Customs v. Eastern Sea Trading* where it declares that "the concurrence of [the Senate] is required by our fundamental law in the making of 'treaties' . . . which are, however, distinct and different from 'executive agreements,' which may be validly entered into without such concurrence."

Thus, the distinction rests on the application of Senate concurrence as a constitutional requirement.

However, from the standpoint of international law, no such distinction is drawn. Note that for purposes of the Vienna Convention on the Law of Treaties, in Article 2(1)(a) the term "treaty" is understood as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." ... The Philippines is a party to the Convention which is already in force. In the use of the term "treaty," Article 2(l)(a) of the Vienna Convention on the Law of Treaties between States and International Organizations, which is not yet in force, the designation or appellation of the agreement also carries no legal significance. Provided the instruments possess the elements of an agreement under international law, they are to be taken equally as "treaty" without regard to the descriptive names by which they are designated, such as "protocol," "charter," "covenant," "exchange of notes," "modus vivendi," "convention," or "executive agreement."[32] (Emphasis supplied, citations omitted)

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[32] *MERLIN M. MAGALLONA, A PRIMER IN INTERNATIONAL LAW* 62-64 (1997).

Under Article 2(2)[33] of the Vienna Convention on the Law of Treaties, in relation to Article 2(1)(a),[34] the designation and treatment given to an international agreement is subject to the treatment given by the internal law of the state party.[35] Paragraph 2 of Article 2 specifically safeguards the states' usage of the terms "treaty" and "international agreement" under their internal laws.[36]

Within the context of our Constitution, the requirement for Senate concurrence in Article VII, Section 21 of the Constitution connotes a special field of state policies, interests, and issues relating to foreign relations that the Executive cannot validly cover in an executive agreement:

> As stated above, an executive agreement is outside the coverage of Article VII, Section 21 of the Constitution and hence not subject to Senate concurrence. However, the demarcation line between a treaty and an executive agreement as to the subject-matter or content of their coverage is ill-defined. The courts have not provided reliable guidelines as to the scope of executive-agreement authority in relation to treaty-making power.

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[33] Article 2. USE OF TERMS

. . . . . .

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

[34] 1. For the purposes of the present Convention:

(a) "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

[35] *See* Merlin M. Magallona, *The Supreme Court and International Law: Problems and Approaches in Philippine Practice,* in INTERNATIONAL RELATIONS PAMPHLET SERIES NO. 12, 16-17 (2010).

[36] *See* 1 OLIVIER CORTIEN AND PIERRE KLEIN, THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 34 and 55 (2011).

If executive-agreement authority is un-contained, and if what may be the proper subject-matter of a treaty may also be included within the scope of executive-agreement power, the constitutional requirement of Senate concurrence could be rendered meaningless. The requirement could be circumvented by an expedient resort to executive agreement.

The definite provision for Senate concurrence in the Constitution indomitably signifies that there must be a regime of national interests, policies and problems which the Executive branch of the government cannot deal with in terms of foreign relations except through treaties concurred in by the Senate under Article VII, Section 21 of the Constitution. The problem is how to define that regime, i.e., that which is outside the scope of executive-agreement power of the President and which exclusively belongs to treaty-making as subject to Senate concurrence.[37] (Emphasis supplied)

Thus, Article VII, Section 21 may cover some but not all types of executive agreements. Definitely, the determination of its coverage does not depend on the nomenclature assigned by the President.

Executive agreements are international agreements that pertain to mere adjustments of detail that carry out well-entrenched national policies and traditions in line with the functions of the Executive. It includes enforcement of existing and valid treaties where the provisions are clear. It involves arrangements that are of a temporary nature. More importantly, it does not amend existing treaties, statutes, or the Constitution.

In contrast, international agreements that are considered ***treaties*** under our Constitution involve key political issues or changes of national policy. These agreements are of a permanent character. It requires concurrence by at least two-thirds of all the members of the Senate.

Even if we assume that the EDCA's nomenclature as an "executive agreement" is correct, it is still the type of international agreement that needs to be submitted to the Senate for

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[37] *MERLIN M. MAGALLONA, A PRIMER IN INTERNATIONAL LAW* 66-67 (1997).

concurrence. It involves a key political issue that substantially alters or reshapes our national and foreign policy.

Fundamentally however, the President's classification of the EDCA as a mere "executive agreement" is invalid. Article XVIII Section 25 requires that the presence of foreign troops, bases, and facilities must be covered by an internationally binding agreement in the form of a treaty concurred in by the Senate.

V

The Solicitor General, on behalf of government, proposes that we should view the EDCA merely as an implementation of both the Mutual Defense Treaty and the VFA. In his view, since both the Mutual Defense Treaty and the VFA have been submitted to the Senate and concurred in validly under the governing constitutional provisions at that time, there is no longer any need to have an implementing agreement similarly submitted for Senate concurrence.

The Chief Justice, writing for the majority of this court, agrees with the position of the Solicitor General.

I disagree.

The proposal of the Solicitor General cannot be accepted for the following reasons: (1) the Mutual Defense Treaty, entered into in 1951 and ratified in 1952, cannot trump the constitutional provision Article XVIII, Section 25; (2) even the VFA, which could have been also argued as implementing the Mutual Defense Treaty, was presented to the Senate for ratification; (3) the EDCA contains significant and material obligations not contemplated by the VFA; and (4) assuming *arguendo* that the EDCA only provides the details for the full implementation of the VFA, Article XVIII, Section 25 still requires that it at least be submitted to the Senate for concurrence, given the history and context of the constitutional provision.

VI

The 1951 Mutual Defense Treaty cannot be the treaty contemplated in Article XVIII, Section 25. Its implementation

through an executive agreement, which allows foreign military bases, troops, and facilities, is not enough. If the Mutual Defense Treaty is the basis for the EDCA as a mere executive agreement, Article XVIII, Section 25 of the Constitution will make no sense. An absurd interpretation of the Constitution is no valid interpretation.

The Mutual Defense Treaty was entered into by representatives of the Philippines and the United States on August 30, 1951 and concurred in by the Philippine Senate on May 12, 1952. The treaty acknowledges that this is in the context of our obligations under the Charter of the United Nations. Thus, Article I of the Mutual Defense Treaty provides:

> The Parties undertake, as set forth in the Charter of the United Nations, to settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations.

Further, the treaty expresses the desire of the parties to "maintain and develop their individual and collective capacity to resist armed attack." Thus, in Article III of the Treaty:

> In order more effectively to achieve the objective of this Treaty, the Parties separately and jointly by self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack.

While these provisions in the 1951 Mutual Defense Treaty could reasonably be interpreted to include activities done jointly by the Philippines and the United States, nothing in International Law nor in the Constitution can be reasonably read as referring to this treaty for the authorization for "foreign military bases, troops, or facilities" after the ratification of the 1987 Constitution.

Again, the constitutional provision reads:

> Section 25. ***After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases,*** foreign military bases, troops or facilities

shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State. (Emphasis supplied)

There is a time stamp to the obligation under this provision. The prohibition against "foreign military bases, troops, or facilities," unless covered by treaty or allowed through a referendum, becomes effective '"after the expiration in 1991 of the Agreement ... concerning Military Bases." The treaty about to expire refers to the 1947 Military Bases Agreement as amended. This was still in effect at the time of the drafting, submission, and ratification of the 1987 Constitution.

The constitutional timeline is unequivocal.

The 1951 Mutual Defense Treaty was in effect at the time of the ratification of the Constitution in 1987. It was also in effect even after the expiration of the Military Bases Agreement in 1991. We could reasonably assume that those who drafted and ratified the 1987 Constitution were aware of this legal situation and of the broad terms of the 1951 treaty yet did not expressly mention the 1951 Mutual Defense Treaty in Article XVIII, Section 25. We can conclude, with sturdy and unassailable logic, that the 1951 treaty is not the treaty contemplated in Article XVIII, Section 25.

Besides, the Executive also viewed the VFA as an implementation of the 1951 Mutual Defense Treaty. Yet, it was still submitted to the Senate for concurrence.

Parenthetically, Article 62 of the Vienna Convention on the Law of Treaties[38] provides for the principle of "*rebus sic*

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[38] Article 62. Fundamental Change of Circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

a. The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

stantibus, "in that a fundamental change of circumstances may be a ground to terminate or withdraw from a treaty.[39] Dean Merlin M. Magallona is of the view that there has been a fundamental change in circumstances that allows the Philippines to terminate the 1951 Mutual Defense Treaty.[40] Although we should acknowledge this suggestion during the oral arguments by petitioners, we do not need to go into such an issue and at this time to be able to resolve the controversies in this case. We await a case that will provide a clearer factual backdrop properly pleaded by the parties.

In addition, the Mutual Defense Treaty is not the treaty contemplated by Article XVIII, Section 25 on account of its subject matter. In Paragraph 5 of its Preamble, the Mutual Defense Treaty articulates the parties' desire "to strengthen their present efforts to collective defense for the preservation of peace and security pending the development of a more comprehensive system of regional security in the Pacific Area." Article II further clarifies the treaty's purpose:

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b. The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty;

a. If the treaty establishes a boundary; or

b. If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Vienna Convention of the Law of Treaties (1969) <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> (visited January 11, 2016).

[39] Vienna Convention of the Law of Treaties, Art. 62 (1969) <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> (visited January 11, 2016).

[40] Merlin M. Magallona, *A Critical Review of the EDCA* 29 (2014) (Unpublished), annexed to petitioners' Memorandum.

Article II

In order more effectively to achieve the objective of this Treaty, the Parties separately and jointly by self-help and mutual aid will maintain and develop their ***individual and collective capacity to resist armed attack.*** (Emphasis supplied)

Clearly, none of its provisions provide specifically for the presence of a base, troops, or facilities that will put it within the ambit of Article XVIII, Section 25. Its main aim is to provide support against state enemies effectively and efficiently. Thus, for instance, foreign military bases were covered in the 1947 Military Bases Agreement.

The VFA cannot also be said to be the treaty required in Article XVIII, Section 25. This is because the United States, as the other contracting party, has never treated it as such under its own domestic laws. The VFA has the same status as that of the 1947 Military Bases Agreement in that it is merely an executive agreement on the part of United States:

As articulated by Constitutional Commissioner Blas F. Ople in the 1986 Constitutional Commission deliberations on this provision, ***the 1947 RP-US Military Bases Agreement was ratified by the Philippine Senate, but not by the United States Senate. In the eyes of Philippine law, therefore, the Military Bases Agreement was a treaty, but by the laws of the United States, it was a mere executive agreement. This asymmetry in the legal treatment of the Military Bases Agreement by the two countries was believed to be a slur to our sovereignty.***[41] (Emphasis supplied)

In *Nicolas,* Associate Justice Antonio T. Carpio himself underscored the non-treaty status of the Visiting Forces Agreement in light of *Medellin v. Texas*[42] in his Separate Opinion, thus:

Under *Medellin,* the VFA is indisputably not enforceable as domestic federal law in the United States. On the other hand, since

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[41] *J.* Puno, Dissenting Opinion in *Bayan v. Zamora,* 396 Phil. 623, 672-673 (2000) [Per *J.* Buena, *En Banc*].

[42] 128 S.Ct. 1346; 170 L.Ed.2d 190.

the Philippine Senate ratified the VFA, the VFA constitutes domestic law in the Philippines. This unequal legal status of the VFA violates Section 25, Article XVIII of the Philippine Constitution, which specifically requires that a treaty involving the presence of foreign troops in the Philippines must be equally binding on the Philippines and on the other contracting State.

In short, the Philippine Constitution bars the efficacy of such a treaty that is enforceable as domestic law only in the Philippines but unenforceable as domestic law in the other contracting State. The Philippines is a sovereign and independent State. It is no longer a colony of the United States. This Court should not countenance an unequal treaty that is not only contrary to the express mandate of the Philippine Constitution, but also an affront to the sovereignty, dignity and independence of the Philippine State.

There is no dispute that Section 25, Article XVIII of the Philippine Constitution governs the constitutionality of the VFA. Section 25 states:

> Section 25. After the expiration in 1991 of the Agreement between the Republic ofthe Philippines and the United States of America concerning Military Bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and **recognized as a treaty by the other contracting State.**

The clear intent of the phrase **"recognized as a treaty by the other contracting State"** is to insure that the treaty has the same legal effect on the Philippines as on the other contracting State. This requirement is unique to agreements involving the presence of foreign troops in the Philippines, along with the requirement, if Congress is so minded, to hold a national referendum for the ratification of such a treaty.

The deliberations of the Constitutional Commission reveal the sensitivity of the framers to the "unacceptable asymmetry" of the then existing military bases agreement between the Philippines and the United States. The Philippine Senate had ratified the military bases agreement but the United States Government refused to submit the same to the U.S. Senate for ratification. Commissioner Blas Ople explained this "unacceptable asymmetry" in this manner:

> . . . But I think we have acknowledged starting at the committee level that the bases agreement was ratified by our Senate; **it is a treaty under Philippine law. But as far as the Americans are concerned, the Senate never took cognizance of this and, therefore, it is an executive agreement. That creates a wholly unacceptable asymmetry between the two countries**. Therefore, in my opinion, the right step to take, if the government of our country will deem it in the national interest to terminate this agreement or even to renegotiate it, is that we must begin with a clean slate; we should not be burdened by the flaws of the 1947 Military Bases Agreement. I think that is a very important point. I am glad to be reassured by the two Gentlemen that there is nothing in these proposals that will bar the Philippine government at the proper time from exercising the option of abrogation or termination.

Eventually, the Constitutional Commission required that any agreement involving the presence of foreign troops in the Philippines must be "**recognized as a treaty by the other contracting State**." This means that the other contracting State must recognize the agreement as a treaty, as distinguished from any other agreement, and if its constitutional processes require, submit the agreement to its proper legislative body for ratification as a treaty. As explained by Commissioner Father Joaquin Bernas, S.J., during the deliberations of the Constitutional Commission:

> Third, on the last phrase "AND RECOGNIZED AS A TREATY BY THE OTHER CONTRACTING NATION," **we enter into a treaty and we want the other contracting party to respect that document as a document possessing force in the same way that we respect it**. The present situation we have is that the bases agreement is a treaty as far as we are concerned, but it is only an executive agreement as far as the United States is concerned, because the treaty process was never completed in the United States because the agreement was not ratified by the Senate.
>
> So, for these reasons, I oppose the deletion of this section because, first of all, as I said, it does not prevent renegotiation. Second, it respects the sovereignty of our people and the people will be in a better position to judge whether to accept the treaty or not, because then they will be voting not just on an abstraction

> but they will be voting after examination of the terms of the treaty negotiated by our government. And third, **the requirement that it be recognized as a treaty by the other contracting nation places us on the same level as any other contracting party**.

The following exchanges in the Constitutional Commission explain further the meaning of the phrase "**recognized as a treaty by the other contracting State**":

> FR. BERNAS: Let me be concrete, Madam President, in our circumstances. Suppose they were to have this situation where our government were to negotiate a treaty with the United States, and then the two executive departments in the ordinary course of negotiation come to an agreement. As our Constitution is taking shape now, if this is to be a treaty at all, it will have to be submitted to our Senate for its ratification. Suppose, therefore, that what was agreed upon between the United States and the executive department of the Philippines is submitted and ratified by the Senate, then it is further submitted to the people for its ratification and subsequently, we ask the United States: "**Complete the process by accepting it as a treaty through ratification by your Senate as the United States Constitution requires," would such an arrangement be in derogation of sovereignty?**
>
> MR. NOLLEDO: Under the circumstances the Commissioner just mentioned, Madam President, on the basis of the provision of Section 1 that "sovereignty resides in the Filipino people," then we would not consider that a derogation of our sovereignty on the basis and expectation that there was a plebiscite.
>
> x x x x x x x x x
>
> FR. BERNAS: As Commissioner Romulo indicated, since this certainly would refer only to the United States, because it is only the United States that would have the possibility of being allowed to have treaties here, then we would have to require that the Senate of the United States concur in the treaty because under American constitutional law, there must be concurrence on the part of the Senate of the United States to conclude treaties.
>
> MR. SUAREZ: Thank you for the clarification.

> Under the 1935 Constitution, if I recall it correctly, treaties and agreements entered into require an exchange of ratification. I remember that is how it was worded. We do not have in mind here an exchange of ratification by the Senate of the United States and by the Senate of the Philippines, for instance, but only an approval or a recognition by the Senate of the United States of that treaty.
>
> FR. BERNAS: **When I say that the other contracting state must recognize it as a treaty, by that I mean it must perform all the acts required for that agreement to reach the status of a treaty under their jurisdiction.**

Thus, Section 25, Article XVIII of the Philippine Constitution requires that any agreement involving the presence of foreign troops in the Philippines must be **equally legally binding both on the Philippines and on the other contracting State**. This means the treaty must be enforceable under Philippine domestic law as well as under the domestic law of the other contracting State. Even Justice Adolfo S. Azcuna, the *ponente* of the majority opinion, and who was himself a member of the Constitutional Commission, **expressly admits** this when he states in his *ponencia:*

> The provision is thus designed to ensure that any agreement allowing the presence of foreign military bases, troops or facilities in Philippine territory shall be **equally binding on the Philippines and the foreign sovereign State involved. The idea is to prevent a recurrence of the situation where the terms and conditions governing the presence of foreign armed forces in our territory were binding on us but not upon the foreign State**.

An **"equally binding"** treaty means exactly what it says — the treaty is enforceable as domestic law in the Philippines and likewise enforceable as domestic law in the other contracting State.[43] (Emphasis in the original, citations omitted)

Surprisingly, through his Concurring Opinion in this case, Associate Justice Carpio has now abandoned his earlier views.

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[43] *J.* Carpio, Dissenting Opinion in *Nicolas v. Romulo,* 598 Phil. 262, 308-312 (2009) [Per *J.* Azcuna, *En Banc*].

This court's interpretation of a treaty under Article XVIII, Section 25 in *Bayan,* which did away with the requirement that the agreement be recognized as a treaty by the other contracting party, has resulted in an absurd situation of political asymmetry between the United States and the Philippines. A relationship where both parties are on equal footing must be demanded, and from one state to another. The Philippine government must be firm in requiring that the United States establish stability in its international commitment, both by legislation and jurisprudence.

The doctrine laid down in *Bayan,* insofar as the VFA is concerned, should now be revisited in light of new circumstances and challenges in foreign policy and international relations.

VII

Even if we assume that the Mutual Defense Treaty and the VFA are the treaties contemplated by Article XVIII, Section 25 of the Constitution, this court must determine whether the EDCA is a valid executive agreement as argued by respondents.

It is not. The EDCA modifies these two agreements.

Respondents claim that the EDCA is an executive agreement and merely implements the Mutual Defense Treaty and VFA.[44] In arguing that the EDCA implements the Mutual Defense Treaty, respondents state that the latter has two operative principles: (1) the Principle of Defensive Reaction under Article IV;[45] and (2) the Principle of Defensive Preparation under Article II.[46]

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[44] Respondents' Memorandum, pp. 15-16.

[45] ARTICLE IV. Each Party recognizes that an armed attack in the Pacific area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes.

Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

[46] ARTICLE II. In order more effectively to achieve the objective of this Treaty, the Parties separately and jointly by self-help and mutual aid

According to respondents, "[t]he primary concern of the EDCA is the Principle of Defensive Preparation in order to enhance both parties' abilities, if required, to operationalize the Principle of Defensive Reaction."[47] The specific goals enumerated in the EDCA demonstrate this:

> 56. The specific purposes of the EDCA-to "[s]upport the Parties' shared goal of improving interoperability of the Parties' forces, and for the Armed Forces of the Philippines ("AFP"), [to address its] short-term capabilities gaps, promoting long-term modernization, and helping maintain and develop additional maritime security, maritime domain awareness, and humanitarian assistance and disaster relief capabilities" properly fall within the MDT's objective of developing the defense capabilities of the Philippines and the US. The EDCA implements the MDT by providing for a mechanism that promotes optimal cooperation between the US and the Philippines.[48]

Similarly, respondents allege that the EDCA implements the VFA in relation to the entry of United States troops and personnel, importation and exportation of equipment, materials, supplies, and other property, and movement of vessels and aircraft in the Philippines.[49] Respondents rely on this court's pronouncement in *Lim* that combat-related activities are allowed under the VFA:

> 61. Article I of the EDCA provides that its purposes are to support "the Parties' shared goal of improving interoperability of the Parties' forces, and for the Armed Forces of the Philippines ("AFP"), [to address its] short-term capabilities gaps, promoting long-term modernization, and helping maintain and develop additional maritime security, maritime domain awareness, and humanitarian assistance and disaster relief capabilities."

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will maintain and develop their individual and collective capacity to resist armed attack.

[47] Respondents' Memorandum, p. 15.

[48] *Id*. at 16.

[49] *Id*., *citing* Agreement between the Government of the Republic of the Philippines and the Government of the United States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines (1998), Art. I, VII, and VIII.

62. The Honorable Court in *Lim* ruled that these activities are already covered by the VFA. Under *Lim,* "maritime security, maritime domain awareness, and humanitarian assistance and disaster relief capabilities" are activities that are authorized to be undertaken in the Philippines under the VFA.

63. Article II of the EDCA reiterates the definition of "United States personnel" in the VFA which means "United States military and civilian personnel temporarily in the Philippines in connection with activities approved by the Philippines."

64. Article III of the EDCA provides for the "Agreed Locations" where the Philippines authorizes US to "conduct the following activities": "training; transit; support and related activities; refueling of aircraft; bunkering of vessels; temporary maintenance of vehicles, vessels and aircraft; temporary accommodation of personnel; communications; prepositioning of equipment, supplies and materiel; deploying forces and materiel; and such other activities as the Parties may agree."

65. Article IV of the EDCA authorizes the prepositioning and storing of defense equipment, supplies and materiel. Under Article IV in relation to Article III of the EDCA, the "prepositioning of equipment, supplies and materiel" is an "activity" to be approved by the Philippine Government "through bilateral security mechanisms, such as the MDB and SEB."

66. In sum, what the EDCA does is to enhance the existing contractual security apparatus between the Philippines and the US, set up through the MDT and the VFA. It is the duty of the Honorable Court to allow this security apparatus enough breathing space to respond to perceived, anticipated, and actual exigencies.

As discussed earlier, an executive agreement merely provides for the detailed adjustments of national policies or principles already existing in other treaties, statutes, or the Constitution. It involves only the enforcement of clear and specific provisions of the Constitution, law, or treaty. It cannot amend nor invalidate an existing statute, treaty, or provision in the Constitution. It includes agreements that are of a temporary nature.

This is not the case with the EDCA.

The EDCA contains significant and material obligations not contemplated by the VFA. As an executive agreement, it cannot

be given any legal effect. The EDCA substantially modifies and amends the VFA in at least the following aspects:

First, the EDCA does not only regulate the "visits" of foreign troops. It allows the temporary stationing on a rotational basis of United States military personnel and their contractors on physical locations with permanent facilities and pre-positioned military materiel.

Second, unlike the VFA, the EDCA allows the pre-positioning of military materiel, which can include various types of warships, fighter planes, bombers, land and amphibious vehicles, and their corresponding ammunition.

Third, the VFA contemplates the entry of troops for various training exercises. The EDCA allows our territory to be used by the United States to launch military and paramilitary operations conducted in other states.

Fourth, the EDCA introduces new concepts not contemplated in the VFA, namely: (a) agreed locations; (b) contractors; (c) pre-positioning of military materiel; and (d) operational control.

Lastly, the VFA did not have provisions that may have been construed as a restriction or modification of obligations found in existing statutes. The EDCA contains provisions that may affect various statutes including, among others, (a) the jurisdiction of courts, (b) local autonomy, and (c) taxation.

VIII

Article I(1)(b) of the EDCA authorizes United States forces access to "Agreed Locations" in the Philippines on a rotational basis.[50] Even while the concept of "rotation" may refer to incidental and transient presence of foreign troops and contractors, the nature of the "Agreed Locations" is eerily similar to and, therefore, amounts to basing agreements.

"Agreed Locations" has been defined by the EDCA in Article II(4) as:

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[50] (b) Authorizing access to Agreed Locations in the territory of the Philippines by United States forces on a rotational basis, as mutually determined by the Parties.

Facilities and areas that are ***provided*** by the Government of the Philippines through the AFP and ***that United states forces, United States contractors, and others as mutually agreed, shall have the right to access and use*** pursuant to this Agreement. Such agreed Locations may be listed in an annex to be appended to this Agreement, and may be further described in implementing agreements. (Emphasis supplied)

As treaties, the 1947 Military Bases Agreement and its various amendments specified the actual location of the physical locations of United States troops and facilities. The EDCA, however, now delegates the identification of the location not to a select Senate Committee or a public body but simply to our military representatives in the Mutual Defense Board and the Security Enhancement Board.

More importantly, the extent of access and use allowed to United States forces and contractors under the EDCA is broad. It is set out in Article III:

Article III

Agreed Locations

1. With consideration of the views of the Parties, the Philippines hereby authorizes and agrees that *United States forces, United States contractors, and vehicles, vessels, and aircraft operated by or for United States forces may conduct the following activities with respect to Agreed Locations: training; transit; support and related activities; refueling of aircraft; bunkering of vessels; temporary maintenance of vehicles, vessels, arid aircraft; temporary accommodation of personnel; communications; prepositioning of equipment, supplies, and materiel; deploying forces and materiel;* and such other activities as the Parties may agree.

2. *When requested, the Designated Authority of the Philippines shall assist in facilitating transit or temporary access by United States forces to public land and facilities* (including roads, ports, and airfields), including those owned or controlled by local governments, and to other land and facilities (including roads, ports, and airfields).

3. Given the mutuality of benefits, the Parties agree that the *Philippines shall make Agreed Locations available to United States forces without rental or similar costs.* United States forces shall cover their necessary operation expenses with respect to their activities at the Agreed Locations.

4. The *Philippines hereby grants to the United States, through bilateral security mechanisms, such as the MDB and SEB, operational control of Agreed Locations for construction activities and authority to undertake such activities on, and make alterations and improvements to, Agreed Locations.* United States forces shall consult on issues regarding such construction; alterations, and improvements on the Parties' shared intent that the technical requirements and construction standards of any such projects undertaken by or on behalf of United States forces should be consistent with the requirements and standards of both Parties.

. . . . . .

6. *United States forces shall be responsible on the basis of proportionate use for construction, development, operation, and maintenance costs at Agreed Locations.* Specific funding arrangements may be fined in Implementing arrangements. (Emphasis supplied)

Parsing the provisions carefully, we find that the Agreed Locations may be used for:

(1) training;

(2) transit;

(3) support and related activities;

(4) refueling of aircraft;

(5) bunkering of vessels;

(6) temporary maintenance of vehicles, vessels, and aircraft;

(7) temporary accommodation of personnel;

(8) communications;

(9) pre-positioning of equipment, supplies, and materiel;

(10) deploying forces and materiel; and

(11) other activities as the parties may agree.

There is no hierarchy among these activities. In other words, functions (2) to (11) need not be supportive only of training or transit. Function (10), which pertains to deployment of United States forces and materiel, can be done independently of whether there are training exercises or whether the troops are only in transit.

The permission to do all these activities is explicit in the EDCA. Government has already authorized and agreed that "United States forces, United States contractors, and vehicles, vessels, and aircraft operated by or for United States forces" may conduct all these activities. Carefully breaking down this clause in Article III(1) of the EDCA, the authorization is already granted to:

(a) "United States forces";

(b) "United States contractors"; and

(c) "vehicles, vessels, and aircraft operated by or for United States forces."

United States military forces will not only be allowed to "visit" Philippine territory to do a transient military training exercise with their Philippine counterparts. They are also allowed to execute, among others, the following scenarios:

One: Parts of Philippine territory may be used as staging areas for special or regular United States military personnel for intervention in conflict areas in the Southeast Asian region. This can be in the form of landing rights given to their fighter jets and stealth bombers or way stations for SEALS or other special units entering foreign territory in states not officially at war with the Philippines.

Two: Parts of Philippine territory may be used to supplement overt communication systems of the United States forces. For instance, cyberwarfare targeting a state hostile to the United States can be launched from any of the Agreed Locations to

pursue their interests even if this will not augur well to Philippine foreign policy.

Three: Parts of Philippine territory may be used to plan, deploy, and supply covert operations done by United States contractors such as Blackwater and other mercenary groups that have been used by the United States in other parts of the world. The EDCA covers these types of operations within and outside Philippine territory. Again, the consequences to Philippine foreign policy in cases where targets are found in neighboring countries would be immeasurable.

The Visiting Forces Agreement does not cover these sample activities. Nor does it cover United States contractors.

IX

Blanket authority over Agreed Locations is granted under Article VI, Section 3 of the EDCA. The United States forces are given a broad range of powers with regard to the Agreed Locations that are "necessary for their operational control or defense."[51] This authority extends to the protection of United States forces and contractors. In addition, the United States is merely obligated to coordinate with Philippine authorities the measures they will take in case they deem it necessary to take action.

In contrast, the Mutual Defense Treaty is different. It is specific to the maintenance and development of the Philippines and the United States' individual and collective capacity to resist armed attack. The parties' goal under the Mutual Defense Treaty

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[51] Agreement between the Government of the Philippines and the Government of the United States of America on Enhanced Defense Cooperation (2014), Art. VI(3). United States forces are authorized to exercise all rights and authorities within Agreed Locations that are necessary for their operational control or defense, including taking appropriate measures to protect United States forces and United States contractors. The United States should coordinate such measures with appropriate authorities of the Philippines.

is to enhance collective defense mechanisms for the preservation of peace and security in the Pacific area.[52]

While certain activities such as "joint RP-US military exercises for the purpose of developing the capability to resist an armed attack fall ...under the provisions of the RP-US Mutual Defense Treaty,"[53] the alleged principles of Defensive Reaction and Defensive Preparation do not license the ceding of authority and control over specific portions of the Philippines to foreign military forces without compliance with the Constitutional requirements.[54] Such grant of authority and control over Agreed Locations to foreign military forces involves a drastic change in national policy and cannot be done in a mere executive agreement.

Moreover, nothing in the VFA provides for the use of Agreed Locations to United States forces or personnel, considering that the VFA focuses on the visitation of United States armed forces to the Philippines in relation to joint military exercises:

Preamble

The Government of the United States of America and the Government of the Republic of the Philippines,

Reaffirming their faith in the purposes and principles of the Charter of the United Nations and their desire to strengthen international and regional security in the Pacific area;

Reaffirming their obligations under the Mutual Defense Treaty of August 30, 1951;

Noting that from time to time elements of the United States armed forces may visit the Republic of the Philippines;

Considering that cooperation between the United States and the Republic of the Philippines promotes their common security interests;

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[52] Mutual Defense Treaty between the Republic of the Philippines and the United States of America (1951), Preamble, par. 4.

[53] *Nicolas v. Romulo,* 598 Phil. 262, 284 (2009) (Per *J.* Azcuna, *En Banc*].

[54] *See* CONST., Art. XVIII, Sec. 25.

Recognizing the desirability of defining the treatment of United States personnel visiting the Republic of the Philippines[.]

(Emphasis supplied)

In *Lim,* the Terms of Reference[55] of the "Balikatan 02-1" joint military exercises is covered by the VFA. Hence, under the VFA, activities such as joint exercises, which "include training on new techniques of patrol and surveillance to protect

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[55] The Terms of Reference provides:

I. POLICY LEVEL

1. The Exercise shall be Consistent with the Philippine Constitution and all its activities shall be in consonance with the laws of the land and the provisions of the RP-US Visiting Forces Agreement (VFA).
2. The conduct of this training Exercise is in accordance with pertinent United Nations resolutions against global terrorism as understood by the respective parties.
3. No permanent US basing and support facilities shall be established. Temporary structures such as those for troop billeting, classroom instruction and messing may be set up for use by RP and US Forces during the Exercise.
4. The Exercise shall be implemented jointly by RP and US Exercise Co-Directors under the authority of the Chief of Staff, AFP. In no instance will US Forces operate independently during field training exercises (FTX). AFP and US Unit Commanders will retain command over their respective forces under the overall authority of the Exercise Co-Directors. RP and US participants shall comply with operational instructions of the AFP during the FTX.
5. The exercise shall be conducted and completed within a period of not more than six months, with the projected participation of 660 US personnel and 3,800 RP Forces. The Chief of Staff, AFP shall direct the Exercise Co-Directors to wind up and terminate the Exercise and other activities within the six month Exercise period.
6. The Exercise is a mutual counter-terrorism advising, assisting and training Exercise relative to Philippine efforts against the ASG, and will be conducted on the Island of Basilan. Further advising, assisting and training exercises shall be conducted in Malagutay and the Zamboanga area. Related activities in Cebu will be for support of the Exercise.

the nation's marine resources, sea search-and-rescue operations to assist vessels in distress, disaster relief operations, civic action

7. Only 160 US Forces organized in 12-man Special Forces Teams shall be deployed with AFP field commanders. The US teams shall remain at the Battalion Headquarters and, when approved, Company Tactical headquarters where they can observe and assess the performance of the AFP Forces.

8. US exercise participants shall not engage in combat, without prejudice to their right of self-defense.

9. These tenns of Reference are for purposes of this Exercise only and do not create additional legal obligations between the US Government and the Republic of the Philippines.

II. *EXERCISE LEVEL*

1. *TRAINING*

a. The Exercise shall involve the conduct of mutual military assisting, advising and training of RP and US Forces with the primary objective of enhancing the operational capabilities of both forces to combat terrorism.

b. At no time shall US Forces operate independently within RP territory.

c. Flight plans of all aircraft involved in the exercise will comply with the local air traffic regulations.

2. *ADMINISTRATION & LOGISTICS*

a. RP and US participants shall be given a country and area briefing at the start of the Exercise. This briefing shall acquaint US Forces on the culture and sensitivities of the Filipinos and the provisions of the VFA. The briefing shall also promote the full cooperation on the part of the RP and US participants for the successful conduct of the Exercise.

b. RP and US participating forces may share, in accordance with their respective laws and regulations, in the use of their resources, equipment and other assets. They will use their respective logistics channels.

c. Medical evaluation shall be jointly planned and executed utilizing RP and US assets and resources.

d. Legal liaison officers from each respective party shall be appointed by the Exercise Directors.

3. *PUBLIC AFFAIRS*

a. Combined RP-US Information Bureaus shall be established at the Exercise Directorate in Zamboanga City and at GHQ, AFP in Camp Aguinaldo, Quezon City.

projects such as the building of school houses, medical and humanitarian missions, and the like,"[56] are authorized. However, *Lim* specifically provided for the context of the conduct of the *combat-related activities* under the VFA: President George W. Bush's international anti- terrorism campaign as a result of the events on September 11, 2001.[57]

Meanwhile, the EDCA unduly expands the scope of authorized activities to Agreed Locations with only a vague reference to the VFA:

Article I
Purpose and Scope

1. This Agreement deepens defense cooperation between the Parties and maintains and develops their individual and collective capacities, in furtherance of Article II of the MDT, which states that "the Parties separately and jointly by self-help and mutual aid will maintain and develop their individual capacity to resist armed attack, and *within the context of VFA.* This includes:

(a) Supporting the Parties' shared goal of improving interoperability of the Parties' forces, and for the Armed Forces of the Philippines ("AFP"), addressing short-term capabilities gaps, promoting long-term modernization, and helping maintain and develop additional maritime security, maritime domain awareness, and humanitarian assistance and disaster relief capabilities; and

(b) Authorizing access to Agreed Locations in the territory of the Philippines by United States forces on a rotational basis, as mutually determined by the Parties.

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b. Local media relations will be the concern of the AFP and all public affairs guidelines shall be jointly developed by RP and US Forces.

c. Socio-Economic Assistance Projects shall be planned and executed jointly by RP and US Forces in accordance with their respective laws and regulations, and in consultation with community and local government officials.

[56] *Lim v. Executive Secretary,* 430 Phil. 555 (2002) [Per *J*. De Leon, Jr., *En Banc*].

[57] *Id*. at 564.

2. In furtherance of the MDT, the Parties mutually agree that this Agreement provides the principal provisions and necessary authorizations with respect to Agreed Locations.

3. The Parties agree that the United States may undertake the following types of activities in the territory of the Philippines in relation to its access to and use of Agreed Locations: security cooperation exercises; joint and combined training activities; humanitarian assistance and disaster relief activities; and such other activities as may be agreed upon by the Parties. (Emphasis supplied)

The VFA was ratified in 1998. However, in 2011, the Obama Administration announced its plan of intensifying its presence in the Asia-Pacific region.[58] The United States hinges this pivot on maritime peace and security in the region in relation to a stable international economic order.[59] Hence, their Department of Defense enumerates three maritime objectives: "to safeguard the freedom of the seas; deter conflict and coercion; and promote adherence to international law and standards."[60]

To achieve these objectives, the United States conducts operations, exercises, and training with several countries it considers allies in the region.[61] Nevertheless, key to the United States' military strategy is the enhancement of its forward presence in the Asia-Pacific:

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[58] Manyin, Mark E., *Pivot to the Pacific? The Obama Administration's "Rebalancing" Toward Asia* (2012) <https://www.fas.org/sgp/crs/natsec/R42448.pdf> (visited January 11, 2016). *See* Jonathan G. Odom, *What Does a "Pivot" or "Rebalance" Look Like? Elements of the US. Strategic Turn Towards Security in the Asia-Pacific Region and Its Waters,* 14 APLPJ 2-8 (2013); Ronald O'Rourke, *Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress,* (2015) <https://www.fas.org/sgp/crs/row/R42784.pdf> (visited January 11, 2016).

[59] United States Department of Defense, *The Asia-Pacific Maritime Security Strategy: Achieving U.S. National Security Objectives in a Changing Environment,* (1-2) <http://www.defense.gov/Portals/1/Documents/pubs/NDAA%20A-P_Maritime_SecuritY_Strategy-08142015-1300-FINALFORMAT.PDF (visited January 11, 2016).

[60] *Id*. at 1.

[61] *Id*. at 23-24.

Force Posture

One of the most important efforts the Department of Defense has underway is *to enhance our forward presence by bringing our finest capabilities, assets, and people to the Asia-Pacific region.* The U.S. military presence has underwritten security and stability in the Asia-Pacific region for more than 60 years. Our forward presence not only serves to deter regional conflict and coercion, it also allows us to respond rapidly to maritime crises. Working in concert with regional allies and partners enables us to respond more effectively to these crises.

The United States maintains 368,000 military personnel in the Asia-Pacific region, of which approximately 97,000 are west of the International Date Line. *Over the next five years, the U.S. Navy will increase the number of ships assigned to Pacific Fleet outside of U.S. territory by approximately 30 percent, greatly improving our ability to maintain a more regular and persistent maritime presence in the Pacific. And by 2020, 60 percent of naval and overseas air assets will be home-ported in the Pacific region. The Department will also enhance Marine Corps presence by developing a more distributed and sustainable laydown model.*

Enhancing our forward presence also involves using existing assets in new ways, across the entire region, with an emphasis on operational flexibility and maximizing the value of U.S. assets despite the tyranny of distance. This is why the Department is working to develop a more distributed, resilient, and sustainable posture. As part of this effort, the United States will maintain its presence in Northeast Asia, while enhancing defense posture across the Western Pacific, Southeast Asia, and the Indian Ocean.

. . . . . .

In Southeast Asia, the Department is honing an already robust bilateral exercise program with our treaty ally, the Republic of the Philippines, to assist it with establishing a minimum credible defense more effectively. We are conducting more than 400 planned events with the Philippines in 2015, including our premier joint exercise, Balikatan, which this year was the largest and most sophisticated ever. During this year's Balikatan, more than 15,000 U.S., Philippine, and Australian military personnel exercised operations involving a territorial defense scenario in the Sulu Sea, with personnel from Japan observing.[62] (Emphasis supplied)

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[62] *Id*. at 22-23.

These changes in United States policy are reflected in the EDCA and not in the VFA. Thus, there is a substantial change of objectives.

If, indeed, the goal is only to enhance mutual defense capabilities under the Mutual Defense Treaty through conduct of joint military exercises authorized by the VFA, then it behooves this court to ask the purpose of providing control and authority over Agreed Locations here in the Philippines when it is outside the coverage of both the Mutual Defense Treaty and the VFA. Through a vague reference to the VFA, respondents fail to establish how the EDCA merely implements the VFA. They cannot claim that the provisions of the EDCA merely make use of the authority previously granted under the VFA. What is clear is that the Agreed Locations become a platform for the United States to execute its new military strategy and strengthen its presence in the Asia-Pacific, which is clearly outside the coverage of the VFA.

In addition, the EDCA does not merely implement the Mutual Defense Treaty and VFA when it provides for the entry of United States private contractors into the Philippines.

In the EDCA, United States contractors are defined as follows:

> 3. "United States contractors" means companies and firms, and their employees, under contract or subcontract to or on behalf of the United States Department of Defense. *United States contractors are not included as part of the definition of United States personnel in this Agreement, including within the context of the VFA.*[63] (Emphasis supplied)

This definition admits that the VFA does not provide for the entry of contractors into Philippine territory. The activities that United States contractors are allowed to undertake are specific to United States forces or personnel only as can be gleaned from this court's decisions in *Bayan, Lim,* and *Nicolas.* Hence,

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[63] Agreement between the Government of the Philippines and the Government of the United States of America on Enhanced Defense Cooperation (2014), Art. II (3).

the extensive authority granted to United States contractors cannot be sourced from the VFA:

Article II
DEFINITIONS

. . . . . .

4. "Agreed Locations" means facilities and areas that are provided by the Government of the Philippines through the AFP and that United States forces, *United States contractors,* and others as mutually agreed, *shall have the right to access and use pursuant to this Agreement.* Such Agreed Locations may be listed in an annex to be appended to this Agreement, and may be further described in implementing arrangements.

. . . . . .

Article III
AGREED LOCATIONS

1. With consideration of the views of the Parties, the Philippines hereby authorizes and agrees that United States forces, *United States contractors, and vehicles, vessels, and aircraft operated by or for United States forces may conduct the following activities with respect to Agreed Locations: training; transit; support and related activities; refuel big of aircraft; bunkering Of vessels; temporary maintenance of vehicles, vessels, and aircraft; temporary accommodation of personnel; communications; prepositioning of equipment, supplies, and materiel; deploying forces and materiel; and such other activities as the Parties may agree.*

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Article IV
EQUIPMENT, SUPPLIES, AND MATERIEL

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4. United States forces and *United States contractors shall have unimpeded access to Agreed Locations for all matters relating to the prepositioning and storage of defense equipment, supplies, and materiel, including delivery, management, inspection, use, maintenance, and removal of such equipment, supplies and materiel.*

5. The Parties share an intent that *United States contractors may carry out such matters in accordance with, and to the extent permissible under, United States laws, regulations, and policies.* (Emphasis supplied)

Respondents, through the Office of the Solicitor General, insist that the EDCA is an implementing agreement of the Mutual Defense Treaty and the VFA. They do so based on the conclusion that all treaties or agreements entered into by the Philippines pursuant to certain principles contained in the Mutual Defense Treaty may be considered subservient to these treaties. This will substantially weaken the spirit of Article XVIII, Section 25 and the sovereign desire to achieve an independent foreign policy.

X

The EDCA authorizes the use of Philippine territory as bases of operations. Although not as permanent as those set up pursuant to the 1947 Military Bases Agreement, they are still foreign military bases within the contemplation of Article XVIII, Section 25 of the Constitution.

The development and use of these Agreed Locations are clearly within the discretion of the United States. The retention of ownership by the Philippines under Article V(1)[64] of the EDCA does not temper the wide latitude accorded to the other contracting party. At best, the United States' only obligation is to consult and coordinate with our government. Under the EDCA, the consent of the Philippine government does not extend to the operations and activities to be conducted by the United States forces and contractors. Operational control remains solely with the United States government. The agreement did not create a distinction between domestic and international operations. Ownership of the Agreed Locations under the EDCA is a diluted concept, with the Philippine government devoid of any authority to set the parameters for what may and may not be conducted within the confines of these areas.

What constitutes a "base" in the context of United States-Philippine relations may be explored by revisiting the 1947 Military Bases Agreement.[65] In one of the agreement's preambular

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[64] "The Philippines shall retain ownership of and title to Agreed Locations."

[65] A copy is contained in Treaties and Other International Agreements of the United States of America 1776-1949, as compiled under the direction

clauses, the United States and Philippine governments agreed that in line with cooperation and common defense, the United States shall be granted the use of certain lands of the public domain in the Philippines, free of rent.[66] In line with the promotion of mutual security and territorial defense, the extent of rights of the contracting parties in the use of these lands was described in Article III of the agreement:

Article III
Description of rights

1. It is mutually agreed that *the United States shall have the rights, power and authority within the bases which are necessary for the establishment, use, operation and defense thereof or appropriate for the control thereof and all the rights, power and authority within the limits of territorial waters and air space adjacent to, or in the vicinity of, the bases which are necessary to provide access to them, or appropriate for their control.*

2. Such *rights, power and authority shall include,* inter alia, the right, power and authority:

a) *to construct (including dredging and filling), operate, maintain, utilize, occupy, garrison and control the bases;*

b) to improve and deepen the harbors, channels, entrances and anchorages, and to construct or maintain necessary roads and bridges affording access to the bases;

c) to control (including the right to prohibit) in so far as may be required for the efficient operation and safety of the bases, and within the limits of military necessity, anchorages, moorings, landings,

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of Charles I. Bevans, LL.B., *Assistant Legal Adviser, Department of State* <http://kahimyang.info/kauswagan/Downloads.xhtml?sortorder=znoblair> (visited November 5, 2015).

[66] WHEREAS, the Governments of the United States of America and of the Republic of the Philippines are desirous of cooperating in the common defense of their two countries through arrangements consonant with the procedures and objectives of the United Nations, and particularly through a grant to the United States of America by the Republic of the Philippines in the exercise of its title and sovereignty, of the use, free of rent, in furtherance of the mutual interest of both countries, of certain lands of the public domain;

takeoffs, movements and operation of ships and waterborne craft, aircraft and other vehicles on water, in the air or on land comprising or in the vicinity of the bases;

d) the right to acquire, as may be agreed between the two Governments, such rights of way, and to construct thereon, as may be required for military purposes, wire and radio communications facilities, including sub-marine and subterranean cables, pipe lines and spur tracks from railroads to bases, and the right, as may be agreed upon between the two Governments to construct the necessary facilities;

e) *to construct, install, maintain, and employ on any base any type of facilities, weapons, substance, device, vessel or vehicle on or under the ground, in the air or on or under the water that may be requisite or appropriate, including meteorological systems, aerial and water navigation lights, radio and radar apparatus and electronic devices, of any desired power, type of emission and frequency.*

3. In the exercise of the above-mentioned rights, power and authority, the United States agrees that the powers granted to it will not be used unreasonably or, unless required by military necessity determined by the two Governments, so as to interfere with the necessary rights of navigation, aviation, communication, or land travel within the territories of the Philippines. *In the practical application outside the bases of the rights, power and authority granted in this Article there shall be, as the occasion requires, consultation between the two Governments.* (Emphasis supplied)

The bases contemplated by the 1947 Military Bases Agreement contain the elements of (a) absolute control of space; (b) the presence of a foreign command; and (c) having a purpose of a military nature. The agreement also relegates the role of the Philippine government to a mere "consultant" in cases of applications falling outside the terms provided in Article III.

The EDCA contains similar elements.

However, the EDCA has an open-ended duration. Despite having an initial term of 10 years, Article XII (4) specifically provides for the automatic continuation of the agreement's effectivity until a party communicates its intent to terminate.[67]

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[67] 4. This Agreement shall have an initial term of ten years, and thereafter, it shall continue in force automatically unless terminated by either Party

The purpose of the Agreed Locations is also open-ended. At best, its definition and description of rights provide that the areas shall be for the use of United States forces and contractors. However, short of referring to Agreed Locations as bases, the EDCA enumerates activities that tend to be military in nature, such as bunkering of vessels, pre-positioning of equipment, supplies, and materiel, and deploying forces and materiel.[68] The United States is also allowed to undertake the construction of permanent facilities,[69] as well as to use utilities and its own telecommunications systems.[70]

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by giving one year's written notice through diplomatic channels of its intention to terminate this Agreement.

[68] Agreement between the Government of the Philippines and the Government of the United States of America on Enhanced Defense Cooperation (2014), Art. III(1).

[69] Agreement between the Government of the Philippines and the Government of the United States of America on Enhanced Defense Cooperation (2014), Art. V (4) provides: All buildings, non-relocatable structures, and assemblies affixed to the land, in the Agreed Locations, including ones altered or improved by United States forces, remain the property of the Philippines. Permanent buildings constructed by United States forces become the property of the Philippines, once constructed, but shall be used by United States forces until no longer required by United States forces.

[70] Agreement between the Government of the Philippines and the Government of the United States of America on Enhanced Defense Cooperation (2014), Art. VII provides for the use of utilities and communication systems:

1. The Philippines hereby grants to United States forces and United States contractors the use of water, electricity, and other public utilities on terms and conditions, including rates or charges, no less favorable than those available to the AFP or the Government of the Philippines in like circumstances, less charges for taxes and similar fees, which will be for the account of the Philippine Government. United States forces' costs shall be equal to their pro rata share of the use of such utilities.;

2. The Parties recognize that it may be necessary for United States forces to use the radio spectrum. The Philippines authorizes the United States to operate its own telecommunication systems (as telecommunication is defined in the 1992 Constitution and Convention of the International Telecommunication Union ("ITU")). This shall include the right to utilize

Most significant is the Philippine government's grant to the United States government of operational control over the Agreed Locations:[71]

Article VI
Security

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3. United States forces are authorized to exercise all rights and authorities within Agreed Locations that are necessary for their operational control or defense, including taking appropriate measures to protect United States forces and United States contractors. The United States should coordinate such measures with appropriate authorities of the Philippines.

4. The Parties shall take all reasonable measures to ensure the protection, safety, and security of United States property from seizure by or conversion to the use of any party other than the United States, without the prior written consent of the United States. (Citation omitted)

The United States Department of Defense Dictionary of Military and Associated Terms[72] defines "operational control" as:

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such means and services as required to ensure the full ability to operate telecommunication systems, and the right to use all necessary radio spectrum allocated for this purpose. Consistent with the 1992 Constitution and Convention of the ITU, United States forces shall not interfere with frequencies in use by local operators. Use of the radio spectrum shall be free of cost to the United States.

[71] Agreement between the Government of the Philippines and the Government of the United States of America on Enhanced Defense Cooperation (2014), Art. III (4).

[72] November 8, 2010, As Amended Through June 15, 2015 <http://fas.org/irp/doddir/dod/jpl_02.pdf> (visited November 5, 2015):

1. Scope

The Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms sets forth standard US military and associated terminology to encompass the joint activity of the Armed Forces of the United States. These military and associated terms, together with their definitions, constitute approved Department of Defense (DOD) terminology for general use by all DOD components.

[O]perational control — The authority to perform those functions of command over subordinate forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction necessary to accomplish the mission. Also called OPCON.

Similar to the 1947 Military Bases Agreement, the role of the Philippine government has been reduced to that of a consultant, except that the EDCA avoided the use of this label.

In some respects, too, the EDCA is similar to the Treaty of Friendship, Cooperation and Security between the Government of the Republic of the Philippines and the Government of the United States of America, which was rejected by the Philippine Senate in 1991. This rejected treaty[73] defines installations as:

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2. Purpose

This publication supplements standard English-language dictionaries and standardizes military and associated terminology to improve communication and mutual understanding within DOD, with other federal agencies, and among the United States and its allies.

[73] This treaty contains a Supplementary Agreement on Installations and Military operating Procedures (Supplementary Agreement Number Two), which provides:

ARTICLE 1

PURPOSES OF THE UNITED STATES MILITARY PRESENCE IN THE PHILIPPINES

The Government of the Republic of the Philippines authorizes the Government of the United States of America to station United States forces in the Philippines, and in connection therewith to use certain installations in Subic Naval Base, which is a Philippine military base, designated training areas and air spaces, and such other areas as may be mutually agreed, for the following purposes and under the terms and conditions stipulated in this Agreement:

a. training of United States forces and joint training of United States forces with Philippine forces;

b. servicing. provisioning, maintenance, support and accommodation of United States forces;

c. logistics supply and maintenance points for support of United States forces;

"Installations" on the base authorized for use by the United States forces are buildings and structures to include non-removable buildings, structures, and equipment therein owned by the Government of the Philippines, grounds, land or sea areas specifically delineated for the purpose. "Non-removable buildings and structures" refer to buildings, structures, and other improvements permanently affixed to the ground, and such equipment, including essential utility systems such as energy and water production and distribution systems and heating and air conditioning systems that are an integral part of such buildings and structures, which are essential to the habitability and general use of such improvements and are permanently attached to or integrated into the property.

The treaty, which was not concurred in by the Senate, sets the parameters for defense cooperation and the use of installations in several provisions:

Article IV
Use of Installations by the US Forces

1. Subject to the provisions of this Agreement, the Government of the Philippines authorizes the Government of the United States to continue to use for military purposes certain installations in Subic Naval Base.

2. The installations shall be used solely for the purposes authorized under this Agreement, and such other purposes as may be mutually agreed upon

3. Ownership of all existing non-removable buildings and structures in Subic Naval Base is with the Government of the Philippines which has title over them. The Government of the Philippines shall also become owner of all non-removable buildings and structures that shall henceforth be constructed in Subic Naval Base immediately

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d. transit point for United States forces and United States military personnel;

e. projecting or operating United States forces from the installations under conditions of peace or war, provided that military combat operations of United States forces directly launched from installations on the base authorized for United States use shall be subject to prior approval of the Government of the Philippines;

f. such other purposes, consistent with this Agreement, as may be mutually agreed.

after their completion, with title thereto being vested with the Government of the Philippines.

4. The Government of the United States shall not remove, relocate, demolish, reconstruct or undertake major external alterations of non-removable buildings and structures in Subic Naval Base without the approval of the Philippine commander. The United States shall also not construct any removable or non-removable buildings or structures without the approval of the Philippine Commander. The Philippine Commander will grant such approval for reasons of safety as determined jointly by the Philippine and United States Commanders

. . . . . .

8. The Government of the United States shall bear costs of operations and maintenance of the installations authorized for use in accordance with Annex B to this Agreement.

9. The Government of the Philippines will, upon request, assist the United States authorities in obtaining water, electricity, telephone and other utilities. Such utilities shall be provided to the Government of the United States, United States contractors and United States personnel for activities under this Agreement at the rates, terms and conditions not less favorable than those available to the military forces of the Philippine government, and free of duties, taxes, and other charges.

. . . . . .

Article VII
Defense Cooperation and Use of Philippine Installations

1. Recognizing that cooperation in the areas of defense and security serves their mutual interest and contributes to the maintenance of peace, and reaffirming their existing defense relationship, the two Governments shall pursue their common concerns in defense and security.

2. The two Governments recognize the need to readjust their defense and security relationship to respond to existing realities in the national, regional, and global environment. To this end, the Government of the Republic of the Philippines allows the Government of the United States to use installations in Subic Naval Base for a specified period, under specific conditions set forth in Supplementary Agreement Number Two: Agreement on Installations and Military Operating Procedures and Supplementary Agreement Number Three: Agreement on the Status of Forces.

3. Both governments shall also cooperate in the maintenance, upgrading and modernization of the defense and security capabilities of the armed forces of both countries, particularly of those of the Republic of the Philippines. In accordance with the common desire of the Parties to improve their defense relationship through balanced, mutual contributions to their common defense, the Government of the United States shall, subject to the constitutional procedures and to United States Congressional action, provide security assistance to the Government of the Philippines to assist in the modernization and enhancement of the capabilities of the Armed Forces of the Philippines and to support appropriate economic programs.

The 1987 Constitution does not proscribe the establishment of permanent or temporary foreign military bases. However, the Constitution now requires that decisions on the presence of foreign military bases, troops, and facilities be not the sole prerogative of the President and certainly not the prerogative at all of the Secretary of Defense or Philippine Representatives to the Mutual Defense Board and the Security Enhancement Board.

Absent any transmission by the President to the Senate, the EDCA remains a formal official memorial of the results of intensive negotiations only. It has no legal effect whatsoever, and any implementation at this stage will be grave abuse of discretion.

XI

Thus, the EDCA amends the VFA. Since the VFA is a treaty, the EDCA cannot be implemented.

Treaties, being of the same status as that of municipal law, may be modified either by another statute or by the Constitution itself.[74] Treaties such as the VFA cannot be amended by an executive agreement.

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[74] See *Gonzales v. Hechanova,* 118 Phil. 1065 (1963) [Per *J*. Concepcion, *En Banc*) and *Ichong v. Hernandez,* 101 Phil. 1155 (1957) [Per *J*. Labrador, *En Banc*].

XII

Petitioners invoke this court's power of judicial review to determine whether respondents from the Executive Branch exceeded their powers and prerogatives in entering into this agreement on behalf of the Philippines "in utter disregard of the national sovereignty, territorial integrity and national interest provision of the Constitution, Section 25 of the Transitory provisions of the Constitution, Section 21 and other provisions of the Philippine Constitution and various Philippine laws and principles of international law."[75]

Petitioners submit that all requisites for this court to exercise its power of judicial review are present.[76] Petitioners in G.R. No. 212444 discussed that they had legal standing and they raised justiciable issues. Petitioners in G.R. No. 212426 similarly discussed their legal standing, the existence of an actual case or controversy involving a conflict of legal rights, and the ripeness of the case for adjudication.[77]

Respondents counter that only the Senate may sue on matters involving constitutional prerogatives, and none of the petitioners are Senators.[78] They submit that "[t]he silence and active non-participation of the Senate in the current proceedings is an affirmation of the President's characterization of the EDCA as an executive agreement,"[79] and "there is no such actual conflict between the Executive and the Senate."[80] They add that the overuse of the transcendental importance exception "has cheapened the value of the Constitution's safeguards to adjudication."[81]

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[75] Memorandum for Petitioners Bayan, *et al*., pp. 3-4.

[76] Memorandum for Petitioners Bayan, *et al*., pp. 19-25; Memorandum for Petitioners Saguisag, pp.11-17; Memorandum for Petitioners-in-Intervention KMU, pp. 5-6.

[77] Memorandum for Petitioners Saguisag, pp. ll-17.

[78] Memorandum for Respondents, pp. 4-5.

[79] *Id*. at 6.

[80] *Id*. at 7.

[81] *Id*. at 8.

Article VIII, Section 1 of the Constitution now clarifies the extent of this court's power of judicial review "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."[82]

The 1936 landmark case of *Angara v. Electoral Commission*[83] explained the fundamental principle of separation of powers among government branches and this court's duty to mediate in the allocation of their constitutional boundaries:

> In times of social disquietude or political excitement, the great landmarks of the Constitution are apt to be forgotten or marred, if not entirely obliterated. In cases of conflict, the judicial department is the only constitutional organ which can be called upon to determine the proper allocation of powers between the several departments and among the integral or constituent units thereof.
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> . . .The Constitution sets forth in no uncertain language the restrictions and limitations upon governmental powers and agencies. If these restrictions and limitations are transcended it would be inconceivable if the Constitution had not provided for a mechanism by which to direct the course of government along constitutional channels, for then the distribution of powers would be mere verbiage, the bill of rights mere expressions of sentiment, and the principles of good government mere political apothegms. Certainly, the limitation and restrictions embodied in our Constitution are real as they should be in any living constitution. . .
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> The Constitution is a definition of the powers of government. . . The Constitution itself has provided for the instrumentality of the judiciary as the rational way. And when the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not in reality nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them. This is in truth all that is involved in what is

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[82] CONST., Art. VIII, Sec. 1.

[83] 63 Phil. 139 (1936) [Per *J.* Laurel, *En Banc*].

termed "judicial supremacy" which properly is the power of judicial review under the Constitution. Even then, this power of judicial review is limited to actual cases and controversies to be exercised after full opportunity of argument by the parties, and limited further to the constitutional question raised or the very *lis mota* presented. Any attempt at abstraction could only lead to dialectics and barren legal questions and to sterile conclusions unrelated to actualities. Narrowed as its function is in this manner, the judiciary does not pass upon questions of wisdom, justice or expediency of legislation. More than that, courts accord the presumption of constitutionality to legislative enactments, not only because the legislature is presumed to abide by the Constitution but also because the judiciary in the determination of actual cases and controversies must reflect the wisdom and justice of the people as expressed through their representatives in the executive and legislative departments of the governments of the government.[84]

Jurisprudence abounds on these four requisites for the exercise of judicial review. It must be shown that an actual case or controversy exists; that petitioners have legal standing; that they raised the constitutionality question at the earliest possible opportunity; and that the constitutionality question is the very *lis mota* of the case.[85]

This court can only exercise its power of judicial review after determining the presence of all requisites, such as an actual case or controversy, in consideration of the doctrine of separation of powers. It cannot issue advisory opinions nor overstep into the review of the policy behind actions by the two other co-equal branches of government. It cannot assume jurisdiction over political questions.

XIII

The requirement for an actual case or controversy acknowledges that courts should refrain from rendering

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[84] *Id*. at 157-159 (1936) [Per *J*. Laurel, *En Banc*].

[85] See *Francisco, Jr. v. House of Representatives,* 460 Phil. 830, 892 (2003) [Per *J*. Carpio-Morales, *En Banc*].

advisory opinions concerning actions by the other branches of government.[86]

Courts resolve issues resulting from adversarial positions based on existing facts established by the parties who seek the court's application or interpretation of a legal provision that affects them.[87] It is not for this court to trigger or re-enact the political debates that resulted in the enactment of laws after considering broadly construed factual circumstances to allow a general application by the Executive.[88]

The requisite actual case or controversy means the existence of "a conflict of legal rights, an assertion of opposite legal claims susceptible of judicial resolution; the case must not be moot or academic or based on extra- legal or other similar considerations not cognizable by a court of justice."[89] It means the pleadings show "an active antagonistic assertion of a legal right, on the one hand, and a denial thereof on the other; that is, it must concern a real and not a merely theoretical question or issue."[90]

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[86] *Lozano v. Nograles,* 607 Phil. 334, 340 (2009) [Per *C.J.* Puno, *En Banc*]. *See also J.* Leonen, Dissenting and Concurring Opinion in *Disini, Jr. v. Secretary of Justice,* G.R. No. 203335, February 18, 2014, 716 SCRA 237, 535 [Per *J.* Abad, *En Banc*].

[87] *Diocese of Bacolod v. COMELEC,* G.R. No. 205728, January 21, 2015 <http://sc.judiciary .gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/january2015/205728.pdf> [Per *J.* Leonen, *En Banc*].

[88] *Id.*

[89] *Information Technology Foundation of the Philippines v. COMELEC,* 499 Phil. 281, 304 (2005) [Per *J.* Panganiban, *En Banc*], *citing Republic v. Tan,* G.R. No. 145255, 426 SCRA 485, March 30, 2004 [Per *J.* Carpio-Morales, Third Division]. *See also J.* Leonen, Dissenting and Concurring Opinion in *Disini, Jr. v. Secretary of Justice,* G.R. Nos. 203335, February 18, 2014, 716 SCRA 237, 534 [Per *J.* Abad, *En Banc*]; and *In the Matter of: Save the Supreme Court Judicial Independence and Fiscal Autonomy Movement v. Abolition of Judiciary Development Fund (JDF) and Reduction of Fiscal Autonomy,* UDK-15143, January 21, 2015 <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/january2015/15143.pdf> [Per *J.* Leonen, *En Banc*].

[90] *Information Technology Foundation of the Philippines v. COMELEC,* 499 Phil. 281, 305 (2005) [Per *J.* Panganiban, *En Banc*], *citing Vide: De*

Thus, it is not this court's duty to "rule on abstract and speculative issues barren of actual facts."[91] Ruling on abstract cases presents the danger of foreclosing litigation between real parties, and rendering advisory opinions presents the danger of a court that substitutes its own imagination and predicts facts, acts, or events that may or may not happen.[92] Facts based on judicial proof must frame the court's discretion,[93] as "[r]igor in determining whether controversies brought before us are justiciable avoids the counter majoritarian difficulties attributed to the judiciary."[94]

Abstract cases include those where another political department has yet to act. In other words, a case not ripe for adjudication is not yet a concrete case.

Republic of the Philippines v. Roque[95] clarified the concept of having an actual case or controversy and the aspect of ripeness:

Pertinently, a justiciable controversy refers to an existing case or controversy that is appropriate or ripe for judicial determination, not one that is conjectural or merely anticipatory. Corollary thereto,

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Lumen v. Republic, 50 OG No. 2, February 14, 1952, 578. *See also J.* Leonen, Dissenting and Concurring Opinion in *Disini, Jr. v. Secretary of Justice,* G.R. No. 203335, February 18, 2014, 716 SCRA 237, 534-535 [Per *J.* Abad, *En Banc*]; and *In the Matter of: Save the Supreme Court Judicial Independence and Fiscal Autonomy Movement v. Abolition of Judiciary Development Fund (JDF) and Reduction of Fiscal Autonomy,* UDK-15143, January 21,2015 <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/january2015/15143.pdt> [Per *J.* Leonen, *En Banc*].

[91] *J.* Leonen, Dissenting Opinion in *Imbong* v. *Ochoa,* G.R. No. 204819, April 8, 2014, 721 SCRA 146, 731 [Per *J.* Mendoza, *En Banc*], *citing Angara v. Electoral Commission,* 63 Phil. 139, 158 (1936) [Per *J.* Laurel, *En Banc*]; and *Guingona, Jr. v. Court of Appeals,* 354 Phil. 415, 429 (1998) [Per *J.* Panganiban, First Division].

[92] *Id.*

[93] *Id.*

[94] *Id.* at 721.

[95] G.R. No. 204603, September 24, 2013, 706 SCRA 273 [Per *J.* Perlas-Bernabe, *En Banc*].

by "ripening seeds" it is meant, not that sufficient accrued facts may be dispensed with, but that a dispute may be tried at its inception before it has accumulated the asperity, distemper, animosity, passion, and violence of a full blown battle that looms ahead. The concept describes a state of facts indicating imminent and inevitable litigation provided that the issue is not settled and stabilized by tranquilizing declaration.

A perusal of private respondents' petition for declaratory relief would show that they have failed to demonstrate how they are left to sustain or are in immediate danger to sustain some direct injury as a result of the enforcement of the assailed provisions of RA 9372. Not far removed from the factual milieu in the *Southern Hemisphere* cases, private respondents only assert general interests as citizens, and taxpayers and infractions which the government could prospectively commit if the enforcement of the said law would remain untrammelled. As their petition would disclose, private respondents' fear of prosecution was solely based on remarks of certain government officials which were addressed to the general public. They, however failed to show how these remarks tended towards any prosecutorial or governmental action geared towards the implementation of RA 9372 against them. In other words, there was no particular, real or imminent threat to any of them As held in *Southern Hemisphere:*

> Without any justiciable controversy, the petitions have become pleas for declaratory relief, over which the Court has no original jurisdiction. Then again, declaratory actions characterized by "double contingency" where both the activity the petitioners intend to undertake and the anticipated reaction to it of a public official are merely theorized, lie beyond judicial review for lack of ripeness.
>
> The possibility of abuse in the implementation of RA 9372 does not avail to take the present petitions out of the realm of the surreal and merely imagined. Such possibility is not peculiar to RA 9372 since the exercise of any power granted by law may be abused. Allegations of abuse must be anchored on real events before courts may step in to settle actual controversies involving rights which are legally demandable and enforceable.[96]
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> (Emphasis supplied, citations omitted)

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[96] *Republic of the Philippines v. Roque,* G.R. No. 204603, September 24, 2013, 706 SCRA 273, 284-285 [Per *J*. Perlas-Bernabe, *En Banc*]. See

Our courts generally treat the issue of ripeness for adjudication in terms of actual injury to the plaintiff.[97] The question is whether "the act being challenged has had a direct adverse effect on the individual challenging it."[98] The Petitions are premature. Since the Senate has yet to act and the President has yet to transmit to the Senate, there is no right that has been violated as yet.

XIV

There is still a political act that must happen before the agreement can become valid and binding. The Senate can still address the constitutional challenges with respect to the contents of the EDCA. Thus, the challenges to the substantive content of the EDCA are, at present, in the nature of political questions.

However, the nature of the EDCA, whether it is a treaty or merely an executive agreement, is ripe for adjudication.

In 1957, *Tañada v. Cuenca*[99] explained the concept of political questions as referring to issues that depend not on the legality of a measure but on the wisdom behind it:

> As already adverted to, the objection to our jurisdiction hinges on the question whether the issue before us is political or not. In this connection, Willoughby lucidly states:
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> > "Elsewhere in this treatise the well-known and well-established principle is considered that it is not within the province of the courts to pass judgment upon *the policy* of legislative or executive action. Where, therefore, *discretionary* powers are granted by the Constitution or by statute, the

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also J. Leonen, Dissenting and Concurring Opinion in *Disini, Jr. v. Secretary of Justice,* G.R. No. 203335, February 18, 2014, 716 SCRA 237, 536-537 [Per *J.* Abad, *En Banc*].

[97] *Lawyers Against Monopoly and Poverty v. Secretary of Budget and Management,* 686 Phil. 357 [Per *J.* Mendoza, *En Banc*].

[98] *Id.* at 369, *citing Lozano v. Nograles,* 601 Phil. 334 (2009) [Per *C.J.* Puno, *En Banc*], *in turn citing Guingona, Jr. v. Court of Appeals,* 354 Phil. 415, 427-428 [Per *J.* Panganiban, First Division].

[99] 103 Phil. 1051 (1957) [Per *J.* Concepcion, *En Banc*].

> *manner* in which those powers are exercised is not subject to judicial review. The courts, therefore, concern themselves only with the question as to the *existence and extent of these discretionary powers.*
>
> As distinguished from the judicial, the legislative and executive departments are spoken of as the *political* departments of government because in very many cases their action is necessarily dictated by considerations of public or political policy. ***These considerations of public or political policy of course will not permit the legislature to violate constitutional provisions, or the executive to exercise authority not granted him by the Constitution or by statute, but, within these limits,*** they do permit the departments, separately or together, to *recognize that a certain set of facts exists* or that a given status exists, and these determinations, together with the consequences that flow therefrom, may not be traversed in the courts."

To the same effect is the language used in Corpus Juris Secundum, from which we quote:

> "It is well-settled doctrine that political questions are not within the province of the judiciary, except to the extent that power to deal with such questions has been conferred upon the courts by express constitutional or statutory provisions.
>
> "It is not easy, however, to define the phrase 'political question', nor to determine what matters fall within its scope. It is frequently used to designate all questions that the outside the scope of the judicial questions, which under the constitution, are to be *decided by the people in their sovereign capacity,* or in regard to which *full discretionary authority* has been delegated to the *legislative or* executive branch of the government."

Thus, it has been repeatedly held that the question whether certain amendments to the Constitution are invalid for non-compliance with the *procedure* therein prescribed, is *not* a political one and may be settled by the Courts.

In the case of In re McConaughy, the nature of political question was considered carefully. The Court said:

> "At the threshold of the case we are met with the assertion that the questions involved are political, and not judicial. If

this is correct, the court has no jurisdiction as the certificate of the state canvassing board would then be final, regardless of the actual vote upon the amendment. The question thus raised is a fundamental one; but it has been so often decided contrary to the view contended for by the Attorney General that it would seem, to be finally settled.

. . . . . .

. . . What is generally meant, when it is said that a question is political, and not judicial, is that ***it is a matter which is to be exercised by the people in their primary political capacity*****, or that it has been specifically delegated to some other department or particular officer of the government,** ***with discretionary power to act****.* Thus the *Legislature may in its discretion* determine whether it will pass a law or submit a proposed constitutional amendment to the people. The courts have no judicial control over such matters, not merely because *they involve political question,* but because they are matters which the people have by the Constitution delegated to the Legislature. The Governor may exercise the powers delegated to him, free from judicial control, *so long as he observes the laws and acts within the limits of the power conferred* His discretionary acts cannot be controllable, not primarily because they are of a political nature, but because the Constitution and laws have placed the particular matter under his control *But every officer under a constitutional government must act according to law and subject him to the restraining and controlling power of the people, acting through the courts, as well as through the executive or the Legislature.* One department is just as representative as the other, and *the judiciary is the department which is charged with the special duty of determining the limitations which the law places upon all official action.* The recognition of this principle, unknown except in Great Britain and America, is necessary, to 'the end that the government may be one of laws and not men'—words which Webster said were the greatest contained in any written constitutional document."

In short, the term "political question" connotes, in legal parlance, what it means in ordinary parlance, namely, a question of policy. In other words, in the language of Corpus JurisSecundum *(supra),* it refers to *"those questions which, under the Constitution, are to be* ***decided by the people*** *in their sovereign capacity, or in regard to which* ***full discretionary authority*** *has been delegated to the*

Legislature or executive branch of the Government." It is concerned with issues dependent upon the ***wisdom****, not legality, of a particular measure.*[100] (Emphasis supplied, citations omitted)

Francisco v. House of Representatives[101] involved the second impeachment Complaint filed against former Chief Justice Hilario Davide before the House of Representatives and raised the issue of whether this raised a political question. It traced the evolution of jurisprudence on the political question doctrine and the effect of this court's expanded power of judicial review under the present Constitution on this doctrine:

As pointed out by *amicus curiae* former dean Pacifico Agabin of the UP College of Law, this Court has in fact in a number of cases taken jurisdiction over questions which are not truly political following the effectivity of the present Constitution.

In *Marcos v. Manglapus,* this Court, speaking through Madame Justice Irene Cortes, held:

> The present Constitution limits resort to the political question doctrine and broadens the scope of judicial inquiry into areas which the Court, under previous constitutions, would have normally left to the political departments to decide....

In *Bengzon v. Senate Blue Ribbon Committee,* through Justice Teodoro Padilla, this Court declared:

> The "allocation of constitutional boundaries" is a task that this Court must perform under the Constitution. Moreover, as held in a recent case, (t)he political question doctrine neither interposes an obstacle to judicial determination of the rival claims. The jurisdiction todelimit constitutional boundaries has been given to this Court. It cannot abdicate that obligation mandated by the 1987 Constitution, although said provision by no means does away with the applicability of the principle in appropriate cases.

And in *Daza v. Singson,* speaking through Justice Isagani Cruz, this Court ruled:

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[100] *Id.* at 1065-1067.

[101] 460 Phil. 830 (2003) [Per *J.* Carpio Morales, *En Banc*].

> In the case now before us, the jurisdictional objection becomes even less tenable and decisive. The reason is that, even if we were to assume that the issue presented before us was political in nature, we would still not be precluded from resolving it under the expanded jurisdiction conferred upon us that now covers, in proper cases, even the political question ....
>
> . . . . . .
>
> In our jurisdiction, the determination of a truly political question from a non-justiciable political question lies in the answer to the question of ***whether there are constitutionally imposed limits on powers or functions conferred upon political bodies. If there are, then our courts are duty-bound to examine whether the branch or instrumentality of the government properly acted within such limits***[.][102] (Emphasis supplied)

In *Diocese of Bacolod v. COMELEC,*[103] this court held that the political question doctrine never precludes this court's exercise of its power of judicial review when the act of a constitutional body infringes upon a fundamental individual or collective right.[104] However, this will only be true if there is no other constitutional body to whom the discretion to make inquiry is preliminarily granted by the sovereign.

Ruling on the challenge to the content of the EDCA will preclude and interfere with any future action on the part of the Senate as it inquires into and deliberates as to whether it should give its concurrence to the agreement or whether it should advise the President to reopen negotiations to amend some of its provisions. It is the Senate, through Article VII, Section 21 in

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[102] *Id*. at 910-912 (2003) [Per *J*. Carpio-Morales, *En Banc*]. See *also Diocese of Bacolod v. COMELEC,* G.R. No. 205728, January 21, 2015 <http://sc.judiciary.gov.ph/pdf/web/viewer .html?file=/jurisprudenee/2015/january2015/205728.pdf> [Per *J*. Leonen, *En Banc*].

[103] G.R. No. 205728, January 21, 2015<http://sc.judiciary.gov. ph/pdf/web/viewer.html ?file=/jurisprudenee/2015/january2015/205728.pdf> [Per *J*. Leonen, *En Banc*].

[104] *Diocese of Bacolod v. COMELEC,* G.R. No. 205728, January 21, 2015<http://judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence 2015/january2015/205728.pdf> [Per *J*. Leonen, *En Banc*].

relation to Article XVIII, Section 25, that was given the discretion to make this initial inquiry exclusive of all other constitutional bodies, including this court. A policy of deference and respect for the allocation of such power by the sovereign to a legislative chamber requires that we refrain from making clear and categorical rulings on the constitutional challenges to the content of the EDCA.

XV

It is true that we have, on certain occasions, substantially overridden the requirements of justiciability when there is an imminent threat to the violation of constitutional rights. In *Garcia v. Drilon,*[105] I stated that:

> I am aware of our precedents where this Court has waived questions relating to the justiciability of the constitutional issues raised when they have "transcendental importance" to the public. In my view, this accommodates our power to promulgate guidance "concerning the protection and enforcement of constitutional rights." We choose to rule squarely on the constitutional issues in a petition wanting all or some of the technical requisites to meet out general doctrines on justiciability but raising clear conditions showing imminent threat to fundamental rights. ***The imminence and clarity of the threat to fundamental constitutional rights outweigh the necessity for prudence.*** In a sense, our exceptional doctrine relating to constitutional issues of "transcendental importance" prevents courts from the paralysis of procedural niceties when clearly faced with the need for substantial protection.[106] (Emphasis supplied, citations omitted)

There is, however, no need to invoke these exceptions. The imminence of the implementation of the EDCA and, therefore, the clarity of the impending threat to constitutional rights do not appear cogent if we declare that the EDCA, without Senate concurrence, is not yet valid and binding as a treaty

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[105] *J.* Leonen, Concurring Opinion in *Garcia v. Drilon,* G.R. No. 179267, June 25, 2013, 699 SCRA 352 [Per *J.* Perlas-Bernabe, *En Banc*].

[106] *Id.* at 493.

or fully complying with the requirements of Article XVIII, Section 25.

XVI

The proposed disposition of this case does not in any way discount the deployment of the expertise of the Executive as it conducts foreign policy. Nor should we arrogate executive discretion by compelling the President to transmit the agreement to the Senate for concurrence.[107]

Nevertheless, the judiciary has the duty to ensure that the acts of all branches of government comply with the fundamental nature of the Constitution.[108] While the EDCA is a formal and official memorial of the results of negotiations between the Philippines and the United States, it is not yet effective until the Senate concurs or there is compliance with Congressional action to submit the agreement to a national referendum in accordance with Article XVIII, Section 25 of the Constitution.

It is, thus, now up to the President. Should he desire to continue the policy embedded in the EDCA, with deliberate dispatch he can certainly transmit the agreement to the Senate for the latter to initiate the process to concur with the agreement. After all, on these matters, the sovereign, speaking through the Constitution, has assumed that the exercise of wisdom is not within the sole domain of the President. Wisdom, in allowing foreign military bases, troops, or facilities, is likewise within the province of nationally elected Senators of the Republic.

On these matters, the Constitution rightly assumes that no one person—because of the exigencies and their consequences—has a monopoly of wisdom.

In my view, the same security concerns that moved the President with haste to ratify the EDCA signed by his Secretary of Defense will be the same security concerns—

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[107] *Pimentel, Jr. v. Office of the Executive Secretary,* 501 Phil. 303 (2005) [Per *J*. Puno, *En Banc*].

[108] CONST., Art. VIII, Sec. 1 and 5(2).

and more—that will move the Senate to consider the agreement with dispatch. There are matters of national consequence where the views of an elected President can be enriched by the views of an elected Senate. Certainly, the participation of the public through these mechanisms is as critical as the foreign policy directions that the EDCA frames.

By abbreviating the constitutional process, this court makes itself vulnerable to a reasonable impression that we do not have the courage to enforce every word, phrase, and punctuation in the Constitution promulgated by our People. We will stand weak, as an institution and by implication as a state, in the community of nations. In clear unequivocal words, the basic instrument through which we exist requires that we interpret its words to make real an independent foreign policy. It requires measures be fully publicly discussed before any foreign resource capable of making war with our neighbors and at the command of a foreign sovereign—foreign military bases, troops and facilities—becomes effective.

Instead, the majority succumbed to a narrative of dependence to a superpower.

Our collective memories are perilously short. Our sense of history is wanting.

The Americans did not recognize the Declaration of Independence of 1898, which was made possible by the blood of our ancestors. They ignored their agreements with the Filipino revolutionaries when they entered Intramuros and staged the surrender of the Spanish colonizers to them. They ignored our politicians when they negotiated the Treaty of Paris. Not a single Filipino was there—not even as an observer. They triggered armed conflict with the Filipino revolutionaries. The schools they put up attempted to block out the inhumanity and barbarism in the conflict that followed. Only a few remember the massacres of Samar, of Bud Dajo, and of other places in our country. In the memory of many Filipinos today, these brutalities have been practically erased.

Filipino veterans of World War II who fought gallantly with the Americans, now gray and ailing, still await equal treatment with United States war veterans. Filipina comfort women of that war still seek just treatment and receive no succor from the ally with and for whom they bled and suffered.

The 1951 Mutual Defense Treaty and the Visiting Forces Agreement was in effect when the Chinese invaded certain features within our Exclusive Economic Zone in the West Philippine Sea. The Americans did not come to our aid. The President of the United States visited and, on the occasion of that visit, our own President announced the completion of the EDCA. No clear, unequivocal, and binding commitment was given with respect to the applicability of the Mutual Defense Treaty to the entirety of our valid legal claims in the West Philippine Sea. The commitment of the United States remains ambiguous. The United States' statement is that it will not interfere in those types of differences we have with China, among others.

The inequality of the Mutual Defense Treaty is best presented by the image of a commissioned but rusting and dilapidated warship beached in a shoal in the West Philippine Sea. This ship is manned by a handful of gallant heroic marines, and by the provisions of the Mutual Defense Treaty, an attack on this ship—as a public vessel—is what we are relying upon to trigger mutual defense with the United States.

We remain a permanent ally of the United States. For decades, we relied on them for the training of our troops and the provision of military materiel. For decades, we hosted their bases. Yet, our armed forces remain woefully equipped. Unlike in many of their other allies, no modern US- made fighter jet exists in our Air Force. We have no credible missile defense. Our Navy's most powerful assets now include a destroyer that was decommissioned by the United States Coast Guard.

It is now suggested that these will change with the EDCA. It is now suggested that this court should act to make that change possible. Impliedly, it is thus also suggested that the Senate, or Congress, or the People in a referendum as provided

in our Constitution, will be less patriotic than this court or the President.

There has never been a time in our history—and will never be a time in the future—when the national interest of the United States was subservient to ours. We cannot stake our future on how we imagine the United States will behave in the future. We should learn from our history. If we wish the United States to behave in a way that we expect, then our government should demand clear commitments for assistance to our primary interests. The likelihood that this will happen increases when agreements with them run through the gauntlet of public opinion before they become effective.

Certainly, this is what the Constitution provides. Certainly, this is the least that we should guarantee as a court of law.

FINAL NOTE

In 1991, there was the "Senate that Said No" to the extension of the stay of military bases of the United States within Philippine territory. That historical decision defined the patriotism implicit in our sovereignty. That single collective act of courage was supposed to usher opportunities to achieve the vision of our Constitution for a more meaningful but equal relationship with the American empire. That act was the pinnacle of decades of people's struggles.

History will now record that in 2016, it is this Supreme Court that said yes to the EDCA. This decision now darkens the colors of what is left of our sovereignty as defined in our Constitution. The majority's take is the aftermath of squandered opportunity. We surrender to the dual narrative of expediency and a hegemonic view of the world from the eyes of a single superpower. The opinion of the majority of this Supreme Court affirms executive privileges and definitively precludes Senate and/or Congressional oversight in the crafting of the most important policies in our relations with the United States and, implicitly, its enemies and its allies. In its hurry to abbreviate the constitutional process, the majority also excludes the

possibility that our people directly participate in a referendum called to affirm the EDCA.

Article XVIII, Section 25 does not sanction the surreptitious executive approval of the entry of United States military bases or any of its euphemisms (i.e., "Agreed Locations") through strained and acrobatic implication from an ambiguous and completely different treaty provision.

The majority succeeds in emasculating our Constitution. Effectively, this court erases the blood, sweat, and tears shed by our martyrs.

I register more than my disagreement. I mourn that this court has allowed this government to acquiesce into collective subservience to the Executive power contrary to the spirit of our basic law.

I dissent.

ACCORDINGLY, I vote to **PARTIALLY GRANT** the Petitions and to **DECLARE** the Enhanced Defense Cooperation Agreement (EDCA) between the Republic of the Philippines and the United States of America as a ***formal and official memorial of the results of the negotiations*** concerning the allowance of United States military bases, troops, or facilities in the Philippines, which is **NOT EFFECTIVE** until it complies with the requisites of Article XVIII, Section 25 of the 1987 Philippine Constitution, namely: (1) that the agreement must be in the form of a treaty; (2) that the treaty must be duly concurred in by the Philippine Senate and, when so required by Congress, ratified by a majority of votes cast by the people in a national referendum; and (3) that the agreement is either (a) recognized as a treaty or (b) accepted or acknowledged as a treaty by the United States before it becomes valid, binding, and effective.

EN BANC

[G.R. No. 215847. January 12, 2016]

GOV. EXEQUIEL B. JAVIER, *petitioner, vs.* **COMMISSION ON ELECTIONS, CORNELIO P. ALDON, and RAYMUNDO T. ROQUERO,** *respondents.*

SYLLABUS

1. POLITICAL LAW; ADMINISTRATIVE LAW; ELECTIONS; ELECTION AND CAMPAIGN PERIODS; THE COMMISSION ON ELECTIONS (COMELEC) IS NOT PRECLUDED FROM FIXING THE LENGTH AND THE STARTING DATE OF THE ELECTION PERIOD AND THE ACT THEREOF OF FIXING THE ELECTION PERIOD DOES NOT AMOUNT TO AN ENCROACHMENT ON LEGISLATIVE PREROGATIVE.— No less than the Constitution authorizes the Commission to fix the dates of the election period. Article IX-C, Section 9 provides: Section 9. **Unless otherwise fixed by the Commission in special cases**, the election period shall commence ninety days before the day of election and shall end thirty days thereafter. Congress, through the Election Code, explicitly recognizes this authority. x x x. Evidently, the 120-day period is merely the default election period. The Commission is not precluded from fixing the length and the starting date of the election period to ensure free, orderly, honest, peaceful, and credible elections. This is not merely a statutory but a *constitutionally granted* power of the Commission. Contrary to the petitioner's contention, the Commission's act of fixing the election period does not amount to an encroachment on legislative prerogative. The Commission did not prescribe or define the elements of election offenses. Congress already defined them through the Omnibus Election Code, the Fair Elections Act, and other pertinent election laws. As defined by Congress, some election offenses and prohibited acts can only be committed during the election period. An element of these offenses (*i.e.*, that it be committed during the election period) is variable, as election periods are not affixed to a specific and permanent date. Nevertheless, the

definition of the offense is already complete. By fixing the date of the election period, the Commission did not change what the offense is or how it is committed. There is thus no intrusion into the legislative sphere.

2. ID.; ID.; ID.; THE LAW DOES NOT DISTINGUISH BETWEEN ELECTION OFFENSES AND OTHER PRE-ELECTION ACTIVITIES IN TERMS OF THE APPLICABLE ELECTION PERIOD, FOR TWO DISTINCT ELECTION PERIODS FOR THE SAME ELECTION ARE NOT ALLOWED.— There is also no merit in the petitioner's argument that the extended election period only applies to pre-election activities other than the determination of administrative or criminal liability for violating election laws. Neither the law nor the Constitution authorizes the use of two distinct election periods for the same election. The law does not distinguish between election offenses and other pre-election activities in terms of the applicable election period. Where the law does not distinguish, neither should this Court.

3. ID.; ID.; ID.; A FORMAL HEARING IS NOT ALWAYS NECESSARY AND THE OBSERVANCE OF TECHNICAL RULES OF PROCEDURE IS NOT STRICTLY APPLIED IN ADMINISTRATIVE PROCEEDINGS; THUS, WHERE THE COMELEC HEARS BOTH SIDES AND CONSIDERS THEIR CONTENTIONS, THE REQUIREMENTS OF ADMINISTRATIVE DUE PROCESS ARE COMPLIED WITH.— SPA No. 13-254 was an administrative proceeding for disqualification and not a criminal prosecution of an election offense. The due process requirements and the procedures for these are not the same. Section 265 of the Election Code only applies to criminal prosecutions. Disqualification cases are summary in nature and governed by Rule 25 of the COMELEC Rules of Procedure. x x x. *Administrative due process* cannot be fully equated with due process in its strict judicial sense. A formal hearing is not always necessary and the observance of technical rules of procedure is not strictly applied in administrative proceedings. The essence of administrative due process is the right to be heard and to be given an opportunity to explain one's side. Where the Commission hears both sides and considers their contentions, the requirements of administrative due process are complied with.

4. ID.; ID.; ID.; WHEN THE COMMISSION EN BANC, AS A MATTER OF INTERNAL ARRANGEMENT, AGREED AMONG THEMSELVES TO SUBMIT THEIR OWN OPINION EXPLAINING THEIR RESPECTIVE VOTE OR MERELY THEIR CONCURRENCE WITH THE POSITION OF OTHER COMMISSIONERS ON THE MATTER, NO LEGAL OR ETHICAL IMPEDIMENT EXISTS PREVENTING A COMMISSIONER, WHO INITIALLY ABSTAINED FROM VOTING AND PARTICIPATING IN THE DELIBERATIONS IN THE PROCEEDINGS BEFORE THE DIVISION, FROM SUBSEQUENTLY PARTICIPATING IN THE EN BANC DELIBERATIONS AND VOTING.— The petitioner's reliance on *Estrella* is misplaced because the facts of this case are different from those of the present case. x x x. In the present case, Commissioner Arthur Lim did not inhibit from the proceedings. If the Commissioner had inhibited, there would have been a need to replace him pursuant to Rule 3, Section 6 of the COMELEC Rules of Procedure (as what happened in *Estrella* where there was an issuance of an order designating Commissioner Borra as Commissioner Lantion's substitute). Commissioner Arthur Lim only abstained from voting; he did not participate in the deliberations. When the Commission *en banc*, as a matter of internal arrangement, agreed among themselves to submit their own opinion explaining their respective vote or merely their concurrence with either Commissioner Elias R. Yusoph or Commissioner Luie Tito F. Guia's position on the matter, no legal or ethical impediment existed preventing him (Commissioner Arthur Lim) from subsequently participating in the deliberations and from casting his vote.

5. ID.; ID.; ID.; THE COMMISSION IS AUTHORIZED TO SUSPEND THE STRICT APPLICATION OF ITS RULES IN THE INTEREST OF JUSTICE AND THE SPEEDY DISPOSITION OF CASES.— The COMELEC Rules specifically authorize the Commission to suspend the strict application of its rules in the interest of justice and the speedy disposition of cases. In this case, the Commission suspended Rule 18, Section 1. The Commission, as a body, dispensed with the preparation of another *ponencia* and opted to vote on the legal positions of Commissioners Yusoph and Guia.

Nevertheless, the decision was evidently reached through consultation. Then Chairman Sixto Brillantes, Jr., Commissioner Lucenito Tagle, and Commissioner Arthur Lim concurred with Commissioner Yusoph. Commissioner Christian Robert Lim joined Commissioner Guia's dissent. Chairman Brillantes, Jr. and Commissioner Arthur Lim also wrote separate concurring opinions. The Court does not see any arbitrariness or infirmity in this internal arrangement that would have deprived the petitioner of due process. Moreover, the Commission resorted to this arrangement because, as the petitioner pointed out, three Commissioners were retiring soon. There was a need to resolve the cases because the impending vacancies would have resulted in further delay.

6. **ID.; ID.; ID.; "MIDNIGHT DECISIONS" ARE NOT ILLEGAL, AS JUDGES AND OTHER QUASI-JUDICIAL OFFICERS CANNOT SIT BACK, RELAX, AND REFUSE TO DO THEIR WORK JUST BECAUSE THEY ARE NEARING RETIREMENT OR ARE NEAR THE END OF THEIR TERM, FOR THEY ARE EXPECTED TO DILIGENTLY CARRY OUT THEIR DUTIES UNTIL THEIR SEPARATION FROM SERVICE.—** Contrary to the petitioner's insinuations, "midnight decisions" are not illegal. Judges and other quasi-judicial officers cannot sit back, relax, and refuse to do their work just because they are nearing retirement or are near the end of their term. As civil servants, they are expected to diligently carry out their duties until their separation from service. Thus, the Commission's suspension of its rules and use of an internal arrangement to expedite its internal proceedings is not at all unusual in collegial bodies. We note that the vote was divided and dissents were filed, thereby indicating the absence of any malicious departure from the usual procedures in arriving at the Commission's ruling on the case.

7. **ID.; ID.; ID.; THE FAILURE OF THE COMELEC TO SERVE AN ADVANCE COPY OF ITS ORDER TO THE PARTIES DOES NOT AFFECT THE VALIDITY OF THE ORDER AND IS INSUFFICIENT TO WARRANT THE GRANT OF A WRIT OF CERTIORARI IN THE ABSENCE OF ANY GRAVE ABUSE OF DISCRETION PREJUDICING THE RIGHTS OF THE PARTIES.—** With respect to the absence of a promulgation date on the first page of the assailed order,

this Court directs the petitioner's attention to the last page stating that the Order was "*Given this 12th day of January 2015, Manila, Philippines*." Promulgation is the process by which a decision is published, officially announced, made known to the public, or delivered to the clerk of court for filing, coupled with notice to the parties or their counsel. The order was evidently promulgated on January 12, 2015. The Commission does not deny that it failed to serve an advance copy of the order to the petitioner as required under Rule 18, Section 5 of its Rules. But as we previously held in the cases of *Lindo v. COMELEC and Pimping v. COMELEC*, this kind of procedural lapse does not affect the validity of the order and is insufficient to warrant the grant of a writ of *certiorari* in the absence of any grave abuse of discretion prejudicing the rights of the parties.

8. ID.; ID.; ID.; UNLESS TAINTED WITH GRAVE ABUSE OF DISCRETION, SIMPLE ERRORS OF JUDGMENT COMMITTED BY THE COMELEC CANNOT BE REVIEWED EVEN BY THE COURT; ERRORS OF JUDGMENT AND ERRORS OF JURISDICTION, DISTINGUISHED. — No less than the Constitution empowers the Commission to decide all questions affecting elections except those involving the right to vote. It is the sole arbiter of all issues involving elections. Hence, unless tainted with grave abuse of discretion, simple errors of judgment committed by COMELEC cannot be reviewed even by this Court. An error of judgment is one that the court may commit in the exercise of its jurisdiction; they only involve errors in the court or tribunal's appreciation of the facts and the law. An error of jurisdiction is one where the act complained of was issued by the court without or in excess of its jurisdiction, or with grave abuse of discretion tantamount to lack or excess of jurisdiction. A review of the October 3, 2014 COMELEC Second Division resolution (penned by Commissioner Yusoph), however, showed that the main thrust of this resolution to which four Commissioners concurred in when the case was elevated to the en banc – is faulty. It considered the repeal of Section 261(d) by R.A. No.7890 to be an implied one, which is contrary to the wordings of R.A. 7890.

9. STATUTORY CONSTRUCTION; STATUTES; EXPRESS REPEAL DISTINGUISHED FROM IMPLIED REPEAL; IN THE ABSENCE OF AN EXPRESS REPEAL, A SUBSEQUENT LAW CANNOT BE CONSTRUED AS

REPEALING A PRIOR LAW UNLESS AN IRRECONCILABLE INCONSISTENCY AND REPUGNANCY EXIST IN THE TERMS OF THE NEW AND THE OLD LAWS; R.A. NO. 7890 EXPRESSLY REPEALED SECTION 261, PARAGRAPHS (d) (1) AND (2) OF THE OMNIBUS ELECTION CODE. — A repeal may be express or implied. 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. An implied repeal, on the other hand, transpires when a substantial conflict exists between the new and the prior laws. In the absence of an express repeal, a subsequent law cannot be construed as repealing a prior law unless an irreconcilable inconsistency and repugnancy exist in the terms of the new and the old laws. In the present case, it is clear that R.A. No. 7890 expressly repealed Section 261, paragraphs (d)(1) and (2) of the Omnibus Election Code.

10. ID.; ID.; ID.; A LAW THAT HAS BEEN EXPRESSLY REPEALED CEASES TO EXIST AND BECOMES INOPERATIVE FROM THE MOMENT THE REPEALING LAW BECOMES EFFECTIVE; THE EXPRESS REPEAL OF SECTION 261 (d) OF THE OMNIBUS ELECTION CODE (BP BLG. 881) REMOVED COERCION AS A GROUND FOR DISQUALIFICATION. — A law that has been expressly repealed ceases to exist and becomes inoperative from the moment the repealing law becomes effective. The discussion on implied repeals by the Yusoph resolution, (and the concurring opinion of Chairman Brillantes, Jr.), including the concomitant discussions on the absence of irreconcilable provisions between the two laws, were thus misplaced. The harmonization of laws can only be had when the repeal is implied, not when it is express, as in this case. The COMELEC's reasoning that coercion remains to be a ground for disqualification under Section 68 of the Election Code despite the passage of R.A. No. 7890 is erroneous. To the point of our being repetitive, R.A. No. 7890 expressly repealed Section 261 d(1) and (2) of Batas Pambansa Blg. 881, rendering these provisions inoperative. The effect of this repeal is to *remove* Section 261(d) from among those listed as ground for disqualification under Section 68 of the Omnibus Election Code.

11. POLITICAL LAW; ADMINISTRATIVE LAW; ELECTIONS; THE JURISDICTION OF THE COMELEC TO DISQUALIFY CANDIDATES IS LIMITED TO THOSE ENUMERATED IN SECTION 68 OF THE OMNIBUS ELECTION CODE, AND ALL OTHER ELECTION OFFENSES ARE BEYOND THE AMBIT OF JURISDICTION THEREOF, AS THEY ARE CRIMINAL AND NOT ADMINISTRATIVE IN NATURE.— In his Memorandum/Concurring Opinion, Commissioner Arthur Lim stated that the petition for disqualification is anchored not only on violation of Section 261 (d), but also on the violation of Section 261(e) in relation to Section 68 of the OEC. We point out, however, that the COMELEC Second Division's October 3, 2014 resolution in SPA No. 13-254 (disqualifying Gov. Javier and annulling his proclamation as the Governor of Antique) was premised solely on violation of Section 261(d) of the OEC; it did not find that Gov. Javier – even by substantial evidence violated the provisions of Section 261(e). x x x With the express repeal of Section 261(d), the basis for disqualifying Javier no longer existed. As we held in *Jalosjos, Jr. v. Commission on Elections*, [t]he jurisdiction of the COMELEC to disqualify candidates is limited to those enumerated in Section 68 of the Omnibus Election Code. All other election offenses are beyond the ambit of COMELEC jurisdiction. They are criminal and not administrative in nature. Pursuant to Sections 265 and 268 of the Omnibus Election Code, the power of the COMELEC is confined to the conduct of preliminary investigation on the alleged election offenses for the purpose of prosecuting the alleged offenders before the regular courts of justice.

12. ID.; ID.; ID.; THE DISQUALIFICATION OF A CANDIDATE AND ANNULMENT OF HIS PROMULGATION BASED ON A PROVISION OF LAW THAT HAD ALREADY BEEN EXPRESSLY REPEALED CONSTITUTE GRAVE ABUSE OF DISCRETION.— There is grave abuse of discretion justifying the issuance of the writ of *certiorari* when there is such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction, where power is exercised arbitrarily or in a despotic manner by reason of passion, prejudice, or personal hostility amounting to an evasion of positive duty, or to virtual refusal to perform the duty enjoined, 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 and hostility. [T]he COMELEC gravely abused its discretion when it disqualified Gov. Javier based on a provision of law that had already been *expressly* repealed. Its stubborn insistence that R.A. No. 7890 merely impliedly repealed Section 261(d) despite the clear wordings of the law, amounted to an arbitrary and whimsical exercise of judgment.

APPEARANCES OF COUNSEL

Maria Bernadette R. Carrasco, Robin P. Rubinos and *Guillermo M. Alcantara* for petitioner.

The Solicitor General for public respondent Commission on Elections.

Victoriano V. Orocio for private respondents Cornelio P. Aldon and Raymundo T. Roquero.

Rolly O. Pedriña for intervenor Rhodora Cadiao.

D E C I S I O N

BRION, *J.*:

This is a petition for *certiorari* under Rule 65 in relation to Rule 64 of the Rules of Court, filed to challenge the January 12, 2015 *per curiam* order of the Commission on Elections *(COMELEC/The Commission) en banc* in **SPA No. 13-254 (DC)**.[1] The Commission granted the petition to disqualify the petitioner Exequiel Javier and to annul his proclamation as the duly elected governor of Antique.

THE ANTECEDENTS

On December 3, 1985, the Batasang Pambansa enacted the Omnibus Election Code *(Election Code)*.[2] **Section 261(d) and (e)** of this Code prescribe the following elements of coercion as an election offense:

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[1] *Rollo*, pp. 10-42, 51-55, 63-82.

[2] Batas Pambansa (B.P.) Blg. 881, (1985).

Section 261. *Prohibited Acts.* – The following shall be guilty of an election offense: x x x

(d) **Coercion of subordinates**. —

(1) Any **public officer**, or any officer of any public or private corporation or association, or any head, superior, or administrator of any religious organization, or any employer or landowner who **coerces or intimidates or compels, or in any manner influence, directly or indirectly, any of his subordinates** or members or parishioners or employees or house helpers, tenants, overseers, farm helpers, tillers, or lease holders **to aid, campaign or vote for or against any candidate or any aspirant** for the nomination or selection of candidates.

(2) Any **public officer** or any officer of any commercial, industrial, agricultural, economic or social enterprise or public or private corporation or association, or any head, superior or administrator of any religious organization, or any employer or landowner who **dismisses or threatens to dismiss, punishes or threatens to punish** by reducing his salary, wage or compensation, or by demotion, transfer, **suspension**, separation, excommunication, ejectment, or causing him annoyance in the performance of his job or in his membership, **any subordinate** member or affiliate, parishioner, employee or house helper, tenant, overseer, farm helper, tiller, or lease holder, for disobeying or not complying with any of the acts ordered by the former **to aid, campaign or vote for or against any candidate, or any aspirant for the nomination or selection of candidates**.

(e) Threats, intimidation, terrorism, use of fraudulent device or other forms of coercion. — Any person who, directly or indirectly, threatens, intimidates or actually causes, inflicts or produces any violence, injury, punishment, damage, loss or disadvantage upon any person or persons or that of the immediate members of his family, his honor or property, or uses any fraudulent device or scheme to compel or induce the registration or refraining from registration of any voter, or the participation in a campaign or refraining or desistance from any campaign, or the casting of any vote or omission to vote, or any promise of such registration, campaign, vote, or omission therefrom. (emphases supplied)

Coercion, as an election offense, is punishable by imprisonment of not less than one year but not more than six years.[3] Notably, Section 68 of the Election Code provides that the Commission may administratively disqualify a candidate who violates Section 261(d) or (e).

On February 20, 1995, Congress enacted Republic Act No. 7890 amending the definition of Grave Coercion under the Revised Penal Code.[4] It increased the penalty for coercion committed in violation of a person's right to suffrage to *prision mayor*. Further, Section 3 of R.A. 7890 expressly repealed Section 26, paragraphs (d)(1) and (2) of the Election Code.

On April 3, 2012, COMELEC issued **Resolution No. 9385**[5] fixing the calendar of activities for the May 2013 elections. The resolution set the election period from January 13, 2013 until June 12, 2013.

On September 3, 2012, Valderrama Municipal Vice-Mayor Christopher B. Maguad filed an administrative complaint for Gross Misconduct/Dereliction of Duty and Abuse of Authority against Valderrama Mayor Mary Joyce U. Roquero *(Mayor Roquero)*. This complaint was docketed as Administrative Case No. 05-2012.

On November 9, 2012, the Sangguniang Panlalawigan (*SP*) issued **Resolution No. 291-2012** recommending to Antique Governor Exequiel Javier *(Gov. Javier)* the preventive suspension of Mayor Roquero.

On November 21, 2012, Mayor Roquero filed a petition for *certiorari* and prohibition with prayer for the issuance of a temporary restraining order (*TRO*) before the Regional Trial

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[3] Sec. 264, Election Code.

[4] An Act Amending Article 286, Section Three, Chapter Two, Title Nine of Act No. 3815, as Amended, Otherwise Known as the Revised Penal Code.

[5] Calendar of Activities and Periods of Certain Prohibited Acts in Connection with the May 13, 2013 National and Local Elections.

Court (*RTC*), Branch 12, Antique, against Gov. Javier and the members of the SP to restrain them from proceeding with Administrative Case No. 05-2012. The petition was docketed as **Special Civil Action No. 12-11-86**.

The case was re-raffled to the RTC, Branch 11 which issued a writ of preliminary injunction.

Gov. Javier, Vice-Governor Dimamay, and the members of the SP filed a petition for *certiorari* with urgent prayer for TRO and preliminary injunction before the CA, docketed as CA-G.R. SP-07307.

On December 18, 2012, COMELEC issued **Resolution No. 9581**[6] prohibiting any public official from suspending any elective provincial, city, municipal, or barangay officer during the election period for the May 13, 2013 elections. This resolution implements Section 261 (x)[7] of the Election Code.

On January 15, 2013, the CA issued a TRO in CA-G.R. SP-07307.

On January 16, 2013, the RTC, Branch 11 promulgated its judgment granting *certiorari* and prohibition. It ordered the SP

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[6] In the Matter of Enforcing the Prohibitions Against Appointment or Hiring of New Employees, Creating or Filling of New Positions, Giving Any Salary Increase or Transferring or Detailing Any Officer or Employee in the Civil Service and Suspension of Elective Local Officials, in Connection with the May 13, 2013 Automated Synchronized National, Local and ARMM Regional Elections.

[7] Section 261. **Prohibited Acts** – the following shall be guilty of an election offense:

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(x) *Suspension of elective provincial, city, municipal or barangay officer* –The provisions of law to the contrary notwithstanding during the election period, any public official who suspends, without prior approval of the Commission, any elective provincial, city, municipal or barangay officer, unless said suspension be for purposes of applying the Anti-Graft and Corrupt Practices Act in relation to the suspension and removal of elective officials; in which case the provision of this section shall be inapplicable.

to cease and desist from further proceeding with Administrative Case No. 05-2012. It likewise ordered Gov. Javier to refrain from implementing **SP Resolution No. 291-2012** and from preventively suspending Mayor Roquero.

On January 23, 2013, Gov. Javier issued **Executive Order No. 003, S. 2013**, preventively suspending Mayor Roquero for thirty (30) days.

On February 7, 2013, the SP of Antique issued a decision finding Mayor Roquero guilty of **Grave Misconduct in relation with Section 3(e) of R. A. 3019, the Anti-Graft and Corrupt Practices Act,** and **Grave Abuse of Authority** in relation with Section 5(e) of R.A. No. 6713. The SP suspended her for four (4) months.

Mayor Roquero filed an Election Offense complaint against Gov. Javier for violating Section 261(x) of the Election Code. The case was filed before the COMELEC Law Department and docketed as **Election Offense Case (EOC) No. 13-025.**

Meanwhile (or on March 15, 2013), the CA granted the writ of preliminary injunction filed by Gov. Javier, et al., in CA-G.R. SP-07307. It enjoined Judge Nery Duremdes of the RTC, Branch 11 from conducting further proceedings in SPL Civil Action No. 12-11-86.

On March 22, 2013, private respondents Cornelio P. Aldon (*Aldon*) and Raymundo T. Roquero *(Roquero*) also filed a petition for disqualification before the Commission against Gov. Javier, Vice-Governor Rosie A. Dimamay, and the other members of the SP. The case was docketed as COMELEC **Special Action (SPA) No. 13-254 (DC.)**

Aldon and Roquero sought to disqualify Gov. Javier and the other incumbent officials from running in the 2013 elections on the ground that the latter committed the election offenses of **Coercion of Subordinates** [Sec. 261(d)] and **Threats, Intimidation, Terrorism x x x or Other Forms of Coercion** [Sec. 261(e)] by suspending Mayor Roquero. They alleged that

the suspension was political harassment calculated to intimidate the Roqueros into backing out of the 2013 elections.[8]

On April 29, 2013, the Clerk of the Commission conducted a conference hearing between the parties.

On April 30, 2013, Gov. Javier (together with the SP Members) filed a motion to dismiss with answer *ex abundante ad cautelam.*

After the May 13, 2013 Elections, only Gov. Javier and SP Members Tobias M. Javier, Edgar D. Denosta, Teopisto C. Estaris, Jr., and Victor R. Condez were proclaimed winners. Hence, the Commission considered the disqualification cases against the losing candidates moot.

On October 3, 2014, the COMELEC Second Division issued a resolution in **SPA No. 13-254 (DC)** disqualifying Gov. Javier and annulling his proclamation as the Governor of Antique. The resolution was penned by Commissioner Elias R. Yusoph.

The COMELEC held that the preventive suspension of Mayor Roquero under **Executive Order No. 003** violated the election period ban because it was not for the purpose of applying the Anti-Graft and Corrupt Practices Act. It also considered the Commission's findings in **EOC No. 13-025** that there was substantial evidence showing that Gov. Javier acted in bad faith when he suspended Mayor Roquero as a form of punishment for opposing him.[9]

The COMELEC ruled that Gov. Javier's act of preventively suspending Mayor Roquero during the election period ban *fell within the contemplation of Section 261(d) of the Election Code, which is a ground for disqualification under Section 68*. It held that while Section 261(d) of the Election Code was repealed

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[8] Aldon and Roquero were members of the United Nationalist Alliance (*UNA*) Coalition while Gov. Javier and the SP members belonged to the Liberal Party. Aldon was the candidate for governor running against Gov. Javier. On the other hand, Roquero, the husband of suspended Mayor Roquero, was running against Congressman Paolo Everardo S. Javier, the son of Gov. Javier, for a seat in the House of Representatives.

[9] *Rollo,* pp. 79-80.

by Republic Act No. 7890, it did not remove coercion "as a ground per se for disqualification under [Section] 68." In fact, R.A. 7890 made Coercion (an election offense) a felony with a higher penalty.[10] The COMELEC added that the general repealing clause of R.A. No. 7890 cannot impliedly repeal Section 68 because the latter was "not absolutely and irreconcilably incompatible with Article 286."[11]

Commissioner Luie Tito F. Guia dissented from the resolution. Commissioner Guia reasoned that the legal basis to dismiss Gov. Javier no longer exists because Section 3 of Republic Act No. 7890 had repealed Section 261(d) of the Election Code. Commissioner Arthur D. Lim took no part in the vote because he did not participate in the deliberations.

With the votes tied at 1-1-1 (one voted to grant, one dissenting, and one not participating), the case failed to obtain the necessary majority. Consequently on October 14, 2014, the COMELEC Second Division issued an order elevating the case to the *en banc* for its disposition.[12]

The Commission *en banc* agreed, as a matter of internal arrangement, to submit their respective opinions explaining their respective votes or their concurrence with either Commissioner Yusoph or Commissioner Guia.

Three (3) Commissioners concurred with Commissioner Yusoph: Chairman Sixto Brillantes, Jr., Commissioner Lucenito Tagle, and Commissioner Arthur Lim. Commissioner Christian Robert Lim joined Commissioner Guia's dissent. Commissioner Al A. Parreño did not participate in the vote as he was away on official business. Thus, the vote was 4-2-1 in favor of disqualification; in a *per curiam* order promulgated on January 12, 2015, the Commission *en banc* disqualified Gov. Javier and annulled his proclamation as the governor of Antique.

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[10] *Id*. at 80.

[11] *Id*. at 81.

[12] Pursuant to COMELEC Resolution No. 9711 promulgated on May 28, 2013, in relation to COMELEC Resolution No. 9145.

On January 20, 2015, Gov. Javier filed the present petition for *certiorari* under Rule 65 in relation with Rule 64 of the Rules of Court.

THE PETITION

The petitioner argues that the Commission *en banc* committed grave abuse of discretion because: (1) its January 12, 2015 order was arrived at on the basis of an "internal arrangement; and (2) the order did not obtain a majority vote because Commissioner Arthur Lim should not have been allowed to participate.

The petitioner also asserts that the Commission erred in ruling that R.A. 7890 did not remove Section 261(d) of the Election Code as a ground for administrative disqualification. Finally, the petitioner maintains that the Commission unconstitutionally set the Election Period for the May 13, 2013 elections in violation of Article IX-C, Section 9 of the Constitution, Sec. 62 (c) of the Local Government Code, and Section 8 of Republic Act No. 7056.[13]

In its comment on the petition, COMELEC, through the Office of the Solicitor General (*OSG*), counters that it did not abuse its discretion in issuing the January 12, 2015 order disqualifying Gov. Javier. The Commission insists that the procedure observed during the proceedings was not infirm and that there was no legal impediment for Commissioner Arthur Lim to participate in the *en banc* vote.

On the alleged errors of law, the Commission insists that there was legal basis to disqualify Gov. Javier under both Sections 261 (d) and (e) of the Election Code; the repeal of Section 261(d) by R.A. 7890 did not *ipso facto* remove coercion as a ground for disqualification under Section 68 of the Election Code. It added that Section 261(e), on the other hand, has not been repealed, either expressly or impliedly.

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[13] An Act Providing for the National and Local Elections in 1992, Paving the Way for Synchronized and Simultaneous Elections Beginning 1995, and Authorizing Appropriations Therefor (1991).

Finally, the Commission asserts that COMELEC Resolution No. 9581 fixing the date of the election period is expressly authorized by Article IX, Section 9 of the Constitution and Section 8 of Republic Act No. 7056.

Based on these submissions, the following issues now confront the Court:

I.

Whether the Commission gravely abused its discretion when it issued Resolution No. 9581 fixing the 2013 election period from January 13, 2013 until June 12, 2013, for the purpose of determining administrative and criminal liability for election offenses.

II.

Whether the Commission erred in ruling that R.A. No. 7890 did not remove coercion as a ground for disqualification under Section 68 of the Election Code.

III.

Whether the Commission *en banc* committed grave abuse of discretion in issuing its Order dated January 12, 2015, disqualifying Gov. Javier and annulling his proclamation as the governor of Antique.

OUR RULING:

After due consideration, we resolve to *grant* the petition.

The COMELEC is expressly authorized to fix a different date of the election period.

The petitioner contends that the election period for the reckoning of administrative and criminal liabilities under election laws should always be the same — 90 days before and 30 days after an election — fixed in Article IX-C, Section 9 of the Constitution and Section 8 of Republic Act No. 7056.[14] He

[14] *Rollo,* p. 41.

argues that the Commission's authority to fix the pre-election period refers only to the period needed to properly administer and conduct orderly elections. The petitioner argues that by extending the period for incurring criminal liability beyond the 90-day period, the Commission encroached on the legislature's prerogative to impute criminal and administrative liability on *mala prohibita* acts. Therefore, COMELEC Resolution Nos. 9385 and 9581 were issued *ultra vires.*

We do not find this argument meritorious.

No less than the Constitution authorizes the Commission to fix the dates of the election period. Article IX-C, Section 9 provides:

> Section 9. **Unless otherwise fixed by the Commission in special cases**, the election period shall commence ninety days before the day of election and shall end thirty days thereafter.[15]

Congress, through the Election Code, explicitly recognizes this authority:

> Sec. 3. Election and campaign periods. – **Unless otherwise fixed in special cases by the Commission on Elections**, which hereinafter shall be referred to as the Commission, the election period shall commence ninety days before the day of the election and shall end thirty days thereafter.[16] (emphases supplied)

Evidently, the 120-day period is merely the default election period. The Commission is not precluded from fixing the length and the starting date of the election period to ensure free, orderly, honest, peaceful, and credible elections. This is not merely a statutory but a *constitutionally granted* power of the Commission.

Contrary to the petitioner's contention, the Commission's act of fixing the election period does not amount to an encroachment on legislative prerogative. The Commission did not prescribe or define the elements of election offenses. Congress

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[15] Art. IX-C, Section 9, PHIL. CONST.

[16] This provision would be subsequently reproduced in Republic Act No. 7056 (1991).

already defined them through the Omnibus Election Code, the Fair Elections Act, and other pertinent election laws.

As defined by Congress, some election offenses and prohibited acts can only be committed during the election period. An element of these offenses (*i.e.*, that it be committed during the election period) is variable, as election periods are not affixed to a specific and permanent date. Nevertheless, the definition of the offense is already complete. By fixing the date of the election period, the Commission did not change what the offense is or how it is committed. There is thus no intrusion into the legislative sphere.

There is also no merit in the petitioner's argument that the extended election period only applies to pre-election activities other than the determination of administrative or criminal liability for violating election laws. Neither the law nor the Constitution authorizes the use of two distinct election periods for the same election. The law does not distinguish between election offenses and other pre-election activities in terms of the applicable election period. Where the law does not distinguish, neither should this Court.

The Alleged Lack of Due Process

We find the petitioner's claim – that the Commission committed grave abuse of discretion since there was no preliminary investigation as required under Section 265 of the Omnibus Election Code – to be misplaced.[17]

SPA No. 13-254 was an administrative proceeding for disqualification and not a criminal prosecution of an election

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

offense. The due process requirements and the procedures for these are not the same. Section 265 of the Election Code only applies to criminal prosecutions. Disqualification cases are summary in nature and governed by Rule 25 of the COMELEC Rules of Procedure.

There is likewise no merit in the petitioner's allegation that he was denied due process because the Commission adjudicated the issue without conducting any subsequent hearings and without requiring the submission of position papers or memoranda, notarized witness affidavits, or other documentary evidence aside from the annexes included in the petition and the answer.

Administrative due process cannot be fully equated with due process in its strict judicial sense.[18] A formal hearing is not always necessary and the observance of technical rules of procedure is not strictly applied in administrative proceedings.[19] The essence of administrative due process is the right to be heard and to be given an opportunity to explain one's side.[20] Where the Commission hears both sides and considers their contentions, the requirements of administrative due process are complied with.

As we held in *Lanot v. Commission on Elections*:[21]

> 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.

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[18] *Vivo v. PAGCOR,* G.R. No. 187854, November 12, 2013, 709 SCRA 276, 281.

[19] *Id.* at 281 citing *Imperial, Jr. v. GSIS,* G.R. No. 191224, October 4, 2011, 658 SCRA 497, 505.

[20] *Ombudsman v. Reyes,* G.R. No. 170512, October 5, 2011, 658 SCRA 626, 640.

[21] 537 Phil. 332, 359-360 (2006).

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.

Commissioner Arthur Lim's Participation in the En Banc Voting

The petitioner further argues that the Commission committed grave abuse of discretion by allowing Commissioner Arthur D. Lim to participate in the proceedings before the Commission *en banc.* The petitioner maintains that because Commissioner Arthur Lim took no part in the proceedings before the COMELEC Second Division, then he should have inhibited from the *en banc* proceedings pursuant to the ruling in *Estrella v. COMELEC*.[22] If we disregard Commissioner Arthur Lim's vote, then the Commission would have failed to attain the necessary majority vote of all the members of the Commission.

The petitioner's reliance on *Estrella* is misplaced because the facts of this case are different from those of the present case. *Estrella* involved two related election cases between the same parties: an election protest and an action for *certiorari.* One party moved for Commissioner Lantion's inhibition which the Commission denied. However, Commissioner Lantion later inhibited himself from the *certiorari* proceeding and was substituted by another Commissioner.[23] The substitution order was also adopted in the election protest case. When the election protest was elevated to the COMELEC *en banc,* Commissioner Lantion participated in the deliberations and voted despite his

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[22] G.R. No. 160465, April 28, 2004, 428 SCRA 315, 320.

[23] Commissioner Ressureccion Borra was designated in place of Commissioner Ralph Lantion *via* an Order dated August 25, 2002.

prior inhibition. This Court granted *certiorari* and held that Commissioner Lantion's piecemeal voluntary inhibition was illegal and unethical.

In the present case, Commissioner Arthur Lim did not inhibit from the proceedings. If the Commissioner had inhibited, there would have been a need to replace him pursuant to Rule 3, Section 6 of the COMELEC Rules of Procedure[24] (as what happened in *Estrella* where there was an issuance of an order designating Commissioner Borra as Commissioner Lantion's substitute). Commissioner Arthur Lim only abstained from voting; he did not participate in the deliberations. When the Commission *en banc,* as a matter of internal arrangement, agreed among themselves to submit their own opinion explaining their respective vote or merely their concurrence with either Commissioner Elias R. Yusoph or Commissioner Luie Tito F. Guia's position on the matter, no legal or ethical impediment existed preventing him (Commissioner Arthur Lim) from subsequently participating in the deliberations and from casting his vote.

COMELEC's Internal Arrangement

The petitioner also maintains that the Commission gravely abused its discretion when it set aside its own rules and resolved the case through an "internal arrangement." He submits that the Commission should have waited for the assigned *ponente* to write an opinion before agreeing to vote based on the

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[24] RULES GOVERNING PLEADINGS, PRACTICE AND PROCEDURE BEFORE IT OR ANY OF ITS OFFICES (1993).

Sec. 6. Change in Composition; Substitution. – The composition of a Division may be changed by the Chairman of the Commission whenever necessary, Provided that no change shall be made more than once every three (3) months; Provided Moreover, that notice thereof in writing shall be furnished the parties in cases pending before the Division concerned. **Whenever there is a vacancy in a Division because a member inhibits himself**, is absent, or is disqualified from sitting in a case, or when a division has only two (2) regular members, the Chairman may appoint a substitute Commissioner, or the Chairman himself may sit as substitute or third member, and in that event he shall preside.

positions of Commissioner Yusoph and Commissioner Guia. The petitioner also claims that the assailed Order is a "midnight decision" and cites the absence of a promulgation date on the front page and of a certification signed by the Chairman as procedural infirmities.

The petitioner clearly refers to Rule 18 of the COMELEC Rules of Procedure which states:

Part IV
Rule 18 – Decisions

Sec. 1 *Procedure in Making Decisions.* – The conclusions of the Commission in any case submitted to it for decision *en banc* or in Division **shall be reached in consultation** before the case is assigned by raffle to a Member for the writing of the opinion of the Commission or the Division and a certification to this effect signed by the Chairman or the Presiding Commissioner, as the case may be, shall be incorporated in the decision. Any member who took no part, dissented, or abstained from a decision or resolution must state the reason therefor.

Every decision shall express therein clearly and distinctly the facts and the law on which it is based. (emphasis supplied)

To our mind, the essence of this provision is: (1) that decisions of the Commission, whether in Division or *en banc*, must be reached in consultation; and (2) that the decisions must state their factual and legal bases. Moreover, Rule 18, Section 1 must be read together with the other provisions of the COMELEC Rules of Procedure, particularly the following related portions:

Rule 1 – Introductory Provisions

Sec. 3. *Construction* – These rules shall be **liberally construed** in order to promote the effective and efficient implementation of the objectives of ensuring the holding of free, orderly, honest, peaceful and credible elections and to achieve just, expeditious and inexpensive determination and disposition of every action and proceeding brought before the Commission.

Sec. 4. *Suspension of the Rules* – In the interest of justice and **in order to obtain speedy disposition of all matters** pending before the

Commission, these rules or **any portion thereof may be suspended** by the Commission.

The COMELEC Rules specifically authorize the Commission to suspend the strict application of its rules in the interest of justice and the speedy disposition of cases. In this case, the Commission suspended Rule 18, Section 1. The Commission, as a body, dispensed with the preparation of another *ponencia* and opted to vote on the legal positions of Commissioners Yusoph and Guia. Nevertheless, the decision was evidently reached through consultation. Then Chairman Sixto Brillantes, Jr., Commissioner Lucenito Tagle, and Commissioner Arthur Lim concurred with Commissioner Yusoph. Commissioner Christian Robert Lim joined Commissioner Guia's dissent. Chairman Brillantes, Jr. and Commissioner Arthur Lim also wrote separate concurring opinions. The Court does not see any arbitrariness or infirmity in this internal arrangement that would have deprived the petitioner of due process.

Moreover, the Commission resorted to this arrangement because, as the petitioner pointed out, three Commissioners were retiring soon. There was a need to resolve the cases because the impending vacancies would have resulted in further delay. Contrary to the petitioner's insinuations, "midnight decisions" are not illegal. Judges and other quasi-judicial officers cannot sit back, relax, and refuse to do their work just because they are nearing retirement or are near the end of their term. As civil servants, they are expected to diligently carry out their duties until their separation from service. Thus, the Commission's suspension of its rules and use of an internal arrangement to expedite its internal proceedings is not at all unusual in collegial bodies. We note that the vote was divided and dissents were filed, thereby indicating the absence of any malicious departure from the usual procedures in arriving at the Commission's ruling on the case.

Absence of a Promulgated Date and Failure to Serve Advance Copy

With respect to the absence of a promulgation date on the first page of the assailed order, this Court directs the petitioner's

attention to the last page stating that the Order was *"Given this 12th day of January 2015, Manila, Philippines."*[25] Promulgation is the process by which a decision is published, officially announced, made known to the public, or delivered to the clerk of court for filing, coupled with notice to the parties or their counsel.[26] The order was evidently promulgated on January 12, 2015.

The Commission does not deny that it failed to serve an advance copy of the order to the petitioner as required under Rule 18, Section 5[27] of its Rules. But as we previously held in the cases of *Lindo v. COMELEC*[28] and *Pimping v. COMELEC*,[29] this kind of procedural lapse does not affect the validity of the order and is insufficient to warrant the grant of a writ of *certiorari* in the absence of any grave abuse of discretion prejudicing the rights of the parties.

Repeal of Section 261 (d) of Batas Pambansa Blg. 881 by Republic Act No. 7890

No less than the Constitution empowers the Commission to decide all questions affecting elections except those involving the right to vote.[30] It is the sole arbiter of all issues involving elections. Hence, unless tainted with grave abuse of discretion, simple errors of judgment committed by COMELEC cannot be reviewed even by this Court.[31]

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[25] *Rollo,* p. 55.

[26] *Lindo v. COMELEC,* 271 Phil. 844, 851 (1991) citing *Neria v. Commissioner of Immigration,* 132 Phil. 276, 284 (1968).

[27] Sec. 5. Promulgation – The promulgation of a decision or resolution of the Commission or a Division shall be made on a date previously fixed, of which notice shall be served in advance upon the parties or their attorneys personally or by registered mail or by telegram.

[28] *Supra* note 26.

[29] 224 Phil. 326, 359 (1985).

[30] Article IX-C, §2(3), PHILIPPINE CONSTITUTION.

[31] See this Court's *en banc* ruling involving the review of Commission on Audit cases in *Reblora v. Armed Forces of the Philippines,* G.R. No. 195842, June 18, 2013, 698 SCRA 727, 735.

An error of judgment is one that the court may commit in the exercise of its jurisdiction;[32] they only involve errors in the court or tribunal's appreciation of the facts and the law.[33] An error of jurisdiction is one where the act complained of was issued by the court without or in excess of its jurisdiction, or with grave abuse of discretion tantamount to lack or excess of jurisdiction.[34]

A review of the October 3, 2014 COMELEC Second Division resolution (penned by Commissioner Yusoph), however, showed that the main thrust of this resolution — to which four Commissioners concurred in when the case was elevated to the en banc – is faulty.[35] It considered the repeal of Section 261(d) by R.A. No.7890 to be an implied one, which is contrary to the wordings of R.A. 7890.

For clarity, we reproduce the pertinent provisions of R.A. No. 7890, thus:

SECTION 1. Article 286, Section Three, Chapter Two, Title Nine of Act No. 3815, as amended, is hereby further amended to read as follows:

"ART. 286. *Grave Coercions*. – The penalty of *prision correccional* and a fine not exceeding Six thousand pesos shall be imposed upon any person who, without any authority of law, shall, by means of violence, threats or intimidation, prevent another from doing something not prohibited by law, or compel him to do something against his will, whether it be right or wrong.

"If the coercion be committed in violation of the exercise of the right of suffrage, or for the purpose of compelling another to

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[32] *Fernando v. Vasquez,* G.R. No. L-26417, January 30, 1970, 31 SCRA 288, 292.

[33] *Villareal v. Aliga*, G.R. No. 166995, January 13, 2014, 713 SCRA 52, 73 citing *People v. Hon. Tria-Tirona,* 502 Phil. 31, 39 (2005).

[34] *Id*.

[35] The COMELEC *en banc*'s January 12, 2015 order essentially summarized the positions and votes of the Chairman and the Commissioners en route to granting the petition for disqualification.

perform any religious act, to prevent him from exercising such right or from so doing such act, the penalty next higher in degree shall be imposed."

SEC. 2. **Section 261, Paragraphs (d)(1) and (2), Article XXII of Batas Pambansa Blg. 881 is hereby repealed**.

SEC. 3. All other election laws, decrees, executive orders rules and regulations, or parts thereof inconsistent with the provisions of this Act are hereby repealed.

x x x x x x x x x

A repeal may be express or implied.[36] 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.[37] An implied repeal, on the other hand, transpires when a substantial conflict exists between the new and the prior laws. In the absence of an express repeal, a subsequent law cannot be construed as repealing a prior law unless an irreconcilable inconsistency and repugnancy exist in the terms of the new and the old laws.[38]

In the present case, it is clear that R.A. No. 7890 expressly repealed Section 261, paragraphs (d)(1) and (2) of the Omnibus Election Code. The COMELEC Second Division's October 3, 2014 resolution, however, treated this repeal as merely an implied one. Commissioner Yusoph reasoned out as follows:

Moreover, the general repealing clause in Section 3 of RA 7890 **cannot impliedly repeal** Section 68 because the latter is not absolutely and irreconcilably incompatible with Article 286, as amended by RA 7890. Meaning, a case for disqualification due to coercion under Section 68 can very well stand apart from the criminal case for coercion under Article 286, as amended. This is so because

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[36] See *Commissioner of Internal Revenue v. Solidbank Corp*., 462 Phil. 96, 119 (2003).

[37] *Penera v. Commission on Elections*, G.R. No. 181613, September 11, 2009, 599 SCRA 609, 639-640.

[38] See *Bank of Commerce v. Planters Development Bank*, G.R. Nos. 154470-71, September 24, 2012, 681 SCRA 521, 545.

Section 68 involves an administrative proceeding intended to disqualify a candidate whereas Article 286, supra, involves a criminal proceeding intended to penalize coercion. Both laws, therefore, can be given effect without nullifying the other, hence the inapplicability of implied repeal.

To firm up our stance against **implied repeal** of coercion as a ground for disqualification, the following pronouncements of the Supreme Court are guiding:

"**Implied repeal** by irreconcilable inconsistency takes place when the two statutes cover the same subject matter; they are so clearly inconsistent and incompatible with each other that they cannot be reconciled or harmonized; and both cannot be given effect, that is, that one law cannot be enforced without nullifying the other."

"Well-settled is the rule is statutory construction that **implied repeals** are disfavored. In order to effect a repeal by implication, the latter 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. x x x"[39]

We point out that this resolution and the dissenting opinion of Commissioner Guia became the basis of the internal arrangement reached upon by the Commission *en banc* whereby the commissioners agreed to submit their respective opinions explaining their votes or their concurrence with either Commissioner Yusoph or Guia.

As earlier stated, the vote was 4-2-1 in favor of disqualification; in a *per curiam* order promulgated on January 12, 2015, the Commission *en banc* disqualified Gov. Javier and annulled his proclamation as the governor of Antique. Chairman Brillantes and Commissioner Arthur Lim wrote their own opinions concurring with the position of Commissioner Yusoph, while Commissioner Tagle submitted his vote concurring with the opinions of Commissioner Yusoph and Chairman Brillantes.

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[39] *Rollo*, p. 81, emphasis ours.

In his Separate Opinion, Chairman Brillantes agreed with Commissioner Yusoph that the repeal of Section 261(d) by R.A. No. 7890 was merely implied, and made the following disquisition:

x x x x x x x x x

> The Supreme Court, in a long line of cases, has constantly disfavored and struck down the use of repeal by implication. Pursuant to jurisprudence, well entrenched is the rule that an implied repeal is disfavored. The apparently conflicting provisions of a law or two laws should be harmonized as much as possible, so that each shall be effective. For a law to operate to repeal another law, the two laws must actually be inconsistent. The former must be so repugnant as to be irreconcilable with the latter act. Stated plainly, a petition for disqualification on the ground of coercion shall be taken differently and distinctly from coercion punishable under the RPC for the two can very well stand independently from each other. x x x Therefore, unless proven that the two are inconsistent and would render futile the application and enforcement of the other, only then that a repeal by implication will be preferred. x x x[40]

A law that has been expressly repealed ceases to exist and becomes inoperative from the moment the repealing law becomes effective.[41] The discussion on implied repeals by the Yusoph resolution, (and the concurring opinion of Chairman Brillantes, Jr.), including the concomitant discussions on the absence of irreconcilable provisions between the two laws, were thus misplaced. The harmonization of laws can only be had when the repeal is implied, not when it is express, as in this case.

The COMELEC's reasoning that coercion remains to be a ground for disqualification under Section 68 of the Election Code despite the passage of R.A. No. 7890 is erroneous. To the point of our being repetitive, R.A. No. 7890 expressly repealed Section 261 d(1) and (2) of Batas Pambansa Blg. 881, rendering these provisions inoperative. The effect of this repeal is to *remove* Section 261(d) from among those listed as ground for disqualification under Section 68 of the Omnibus Election Code.

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[40] *Id.* at 57.

[41] See *JG Summit Holdings, Inc. v. Court of Appeals*, 458 Phil. 581, 609-610 (2003).

In his Memorandum/Concurring Opinion, Commissioner Arthur Lim stated that the petition for disqualification is anchored not only on violation of Section 261 (d), but also on the violation of Section 261(e) in relation to Section 68 of the OEC. We point out, however, that the COMELEC Second Division's October 3, 2014 resolution in SPA No. 13-254 (disqualifying Gov. Javier and annulling his proclamation as the Governor of Antique) was premised solely on violation of Section 261(d) of the OEC; it did not find that Gov. Javier – even by substantial evidence — violated the provisions of Section 261(e). For clarity and accuracy, we quote the pertinent portions of the COMELEC's (Second Division) October 3, 2014 resolution:

> Ineluctably, the act of Gov. Javier in preventively suspending Mayor Roquero during the Election period ban falls within the contemplation of Section 261(d) of the Election Code which is a ground for disqualification under Section 68, Election Code. That is, Gov. Javier issued Executive Order No. 003 suspending Mayor Roquero to coerce, intimidate, compel, or influence the latter to collaborate with or campaign for the former, or to punish the latter for having manifested political opposition against the former. For that, he must be disqualified.[42]

With the express repeal of Section 261(d), the basis for disqualifying Javier no longer existed. As we held in *Jalosjos, Jr. v. Commission on Elections*,[43] [t]he jurisdiction of the COMELEC to disqualify candidates is limited to those enumerated in Section 68 of the Omnibus Election Code. All other election offenses are beyond the ambit of COMELEC jurisdiction. They are criminal and not administrative in nature.[44] Pursuant to Sections 265 and 268 of the Omnibus Election Code, the power of the COMELEC is confined to the conduct of preliminary investigation on the alleged election offenses for the purpose of

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[42] *Rollo*, p. 80.

[43] G.R. No. 193237, October 9, 2012, 683 SCRA 1, 29-30, citing *Codilla, Sr. v. de Venecia*, 442 Phil. 139, 177-178, 393 SCRA 639, 670 (2002).

[44] *Id*.

prosecuting the alleged offenders before the regular courts of justice.[45]

There is grave abuse of discretion justifying the issuance of the writ of *certiorari* when there is such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction,[46] where power is exercised arbitrarily or in a despotic manner by reason of passion, prejudice, or personal hostility amounting to an evasion of positive duty, or to virtual refusal to perform the duty enjoined, 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 and hostility.[47]

To our mind, the COMELEC gravely abused its discretion when it disqualified Gov. Javier based on a provision of law that had already been *expressly* repealed. Its stubborn insistence that R.A. No. 7890 merely impliedly repealed Section 261(d) despite the clear wordings of the law, amounted to an arbitrary and whimsical exercise of judgment.

WHEREFORE, premises considered, we hereby **GRANT** the petition and **SET ASIDE** the January 12, 2015 *per curiam* order of the Commission on Elections *en banc* in SPA No. 13-254 (DC).

SO ORDERED.

Sereno, C.J., Carpio, Leonardo-de Castro, Villarama, Jr., Perez, Mendoza, Reyes, Perlas-Bernabe, Leonen, and *Jardeleza, JJ.,* concur.

Velasco, Jr., Peralta, Bersamin, and *del Castillo, JJ.,* no part.

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[45] See *Blanco v. COMELEC, et al.*, 577 Phil. 622, 633 (2008), citing *Codilla v. De Venecia*, G.R. No. 150605, December 10, 2002, 393 SCRA 639.

[46] *Abad Santos v. Province of Tarlac*, 67 Phil. 480 (1939); *Tan v. People*, 88 Phil. 609 (1951); *Pajo v. Ago,* 108 Phil. 905 (1960).

[47] *Tavera-Luna, Inc. v. Nable*, 67 Phil. 341 (1939); *Alafriz v. Nalde*, 72 Phil. 278 (1941); *Liwanag v. Castillo,* 106 Phil. 375 (1959).

EN BANC

[G.R. No. 217948. January 12, 2016]

ALMA G. PARAISO-ABAN, *petitioner*, *vs.* **COMMISSION ON AUDIT,** *respondent*.

SYLLABUS

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *CERTIORARI*; NO GRAVE ABUSE OF DISCRETION ON THE PART OF THE COMMISSION ON AUDIT (COA) WHEN IT DISREGARDED PETITIONER'S DEFENSE THAT SHE VERIFIED THE CORRECTNESS OF PAYMENT AFTER COMPLETING THE POST-AUDIT PROCESS.— The Court finds no grave abuse of discretion on the part of the COA in rendering its assailed decision, which disregarded the petitioner's defense that she had no knowledge of the above transaction, or of the two versions of the deed of sale, prior to her post-audit, or that the payments for the lots were made long before she signed "verified correct" after completing the post-audit process and finding the supporting documents to be complete, or that she did not benefit from the transaction in any way. It is well to be reminded that the exercise by COA of its general audit power is among the mechanisms of check and balance instituted under the 1987 Constitution on which our democratic form of government is founded. Article IX-D, Section 2(1) of the 1987 Constitution provides that the COA has "the power, authority, and duty to examine, audit, and settle all accounts pertaining to the revenue and receipts of, and expenditures or uses of funds and property, owned or held in trust by, or pertaining to, the Government, or any of its subdivisions, agencies, or instrumentalities, including government-owned or controlled corporations with original charters." Corollary to the COA's audit power, Section 2(2) of Article IX-D further provides: Sec. 2(2). The Commission shall have **exclusive** authority, x x x to x x x promulgate accounting and auditing rules and regulations, including those for the prevention and **disallowance** of irregular, unnecessary, excessive, extravagant, or unconscionable expenditures or uses of government funds and properties.

2. POLITICAL LAW; STATUTES; AUDITING CODE OF THE PHILIPPINES (PRESIDENTIAL DECREE NO. 1445); SECTION 124 THEREOF PROVIDES THAT IT IS THE DIRECT RESPONSIBILITY OF THE HEAD OF AGENCY TO INSTALL, IMPLEMENT, AND MONITOR A SOUND SYSTEM OF INTERNAL CONTROL.— As further provided in Section 124 of P.D. No. 1445, it is the direct responsibility of the head of agency to install, implement, and monitor a sound system of internal control. Needless to state, however, the agency head must rely on the diligent assistance and sound expertise of the internal audit head and staff in installing and operating a sound internal control system. In the case before this Court, the petitioner admitted that to verify the correctness of the subject transaction, all that she did was to check the same against AFP-RSBS's "approved" planned purchases and "approved" budgets, further pointing out that she "signed correct" on the vouchers months after payments had been released to Concord, and only after the post-audit by the audit staff, Narzabal, and the review by the head of the Financial Audit Branch, Peña. The petitioner consulted no independent sources, such as the documents submitted to the Bureau of Internal Revenue (BIR) and the RD, or any data of prevailing real estate prices. Had she done so, she could conceivably have discovered the loss. The Court agrees with the COA that the internal audit and verification conducted by the petitioner, as head of the AFP-RSBS Internal Auditor Office, failed to demonstrate the degree of diligence and good faith required in the performance of her sworn duty to safeguard the assets of AFP-RSBS. She admitted that she relied merely on the post-audit performed by her subordinates, who may be presumed to be less competent and responsible than she is. Considering the amount involved in the purchase, and indeed the very likelihood of padded prices so common in such a deal, the petitioner miserably failed to perform any necessary personal verification of the correctness of the prices paid for the lots purchased, which is surely demanded as part of her audit function.

3. ID.; ID.; SECTION 16 OF THE 2009-006 RULES AND REGULATIONS ON SETTLEMENT OF ACCOUNTS; BASIS OF LIABILITY OF PUBLIC OFFICERS FOR AUDIT DISALLOWANCES.— Section 16 of the 2009 Rules and Regulations on Settlement of Accounts, as prescribed in

COA Circular No. 2009-006, on who are liable for audit disallowances, provides: Section 16.1 The Liability of public officers and other persons for audit disallowances/charges shall be determined on the basis of (a) the nature of the disallowance/charge; (b) the duties and responsibilities or obligations of officers/employees concerned; (c) the extent of their participation in the disallowed/charged transaction; and (d) the amount of damage or loss to the government, x x x. By signing the verification in the check vouchers to "attest" to the "correctness" of AFP-RSBS's land banking purchase after merely comparing the same against the approved investment budgets, but without however performing the appropriate additional internal audit procedures to allow her to conduct further verification of the true amounts involved, the petitioner rendered herself liable upon the loss incurred by AFP-RSBS because she is thereby said to have lent her approval to the anomalous purchase.

APPEARANCES OF COUNSEL

Rodolfo G. Rabaja for petitioner.

The Solicitor General for public respondent Commission on Audit.

R E S O L U T I O N

REYES, *J.*:

Alma G. Paraiso-Aban (petitioner) comes to this Court on Petition for *Certiorari* under Rule 64, in relation to Rule 65, of the Rules of Court, with Prayer for Immediate Issuance of Temporary Restraining Order[1] seeking to nullify the Decision[2] of the Commission on Audit (COA) dated November 5, 2012 in Decision No. 2012-188, as well· as its Resolution[3] dated February 27, 2015 in COA CP Case No. 2012-175, which denied

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[1] *Rollo,* pp. 10-45.

[2] *Id*. at 46-52.

[3] *Id*. at 53.

her request for exclusion from liability under the COA's Notice of Disallowance (ND) No. 2010-07-084-(1996) dated July 28, 2010.[4]

Facts

During the 11th Congress (1998 to 2001), the Senate's Committees on Accountability of Public Officers and Investigations and on National Defense and Security held various hearings to investigate the alleged anomalous acquisitions of land by the Armed Forces of the Philippines Retirement and Separation Benefits System (AFP-RSBS) in Calamba, Laguna and Tanauan, Batangas. Acting on resolutions passed by the said Senate committees, the Deputy Ombudsman for the Military and Other Law Enforcement Offices on April 29, 2004 requested the COA to conduct an audit of the past and present transactions of the AFP-RSBS.[5]

Thus, per COA Legal and Adjudication Office Order No. 2004-125 dated December 29, 2004, a special audit team (SAT) was constituted, which found that in August 1996 the AFP-RSBS purchased from the Concord Resources, Inc. (Concord) four (4) parcels of land located in Calamba, Laguna with a total area of 227,562 square meters, but that the purchase was covered by two deeds of sale for different amounts; and, that the sale which was registered with the Register of Deeds (RD) of Calamba indicated a total price of ₱91,024,800.00 and bore the signatures of both vendor and vendee, whereas the deeds of sale found in the records of the AFP-RSBS, which was executed by Concord alone and which was entered in the books of accounts of AFP-RSBS, showed that the AFP-RSBS actually paid ₱341,343,000.00 for the lots, or a difference of ₱250,318,200.00.[6]

The SAT issued Audit Observation Memorandum Nos. 2005-01[7] and 2005-02, which were received by AFP-RSBS on

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[4] *Id*. at 54-55.

[5] *Id*. at 46.

[6] *Id*. at 46-47, 121-124.

[7] *Id*. at 337-340.

October 12, 2005 and October 20, 2005, respectively. It elicited no response from the latter,[8] hence, its conclusion that for all legal intents the true deed of sale was the one filed with the RD.

On July 28, 2010, the SAT issued ND No. 2010-07-084-(1996) for ₱250,318,200.00 representing the excess in the price paid for the above lots. It named the petitioner, then the Acting Head of the Office of Internal Auditor of the AFP-RSBS, as among the persons liable for the said disallowance, on the basis of her participation in the transaction through her "verifying the correctness of payment."[9] The other persons found liable and also named in the ND were Elizabeth C. Liang, President of Concord, for representing Concord and receiving payment for the land; Jesus S. Garcia, Treasurer of Concord, for representing Concord; Jose S. Ramiscal, Jr., President of AFP-RSBS, for approving the payment for the land; and Oscar O. Martinez, Vice President-Comptroller of AFP-RSBS, for recommending the approval of the said payment.[10]

The petitioner appealed to the COA Proper (COA *en banc),* where she reiterated that she had no knowledge of the above transactions prior to her department's conduct of the post-audit; that the payments had been made by the AFP-RSBS even before her verification and approval; that the documents supporting the payments were found to be complete; that until the COA audit she was not aware that there were two versions of the deeds of sale, nor did she have knowledge why two versions of the deeds of sale were executed; that she did not benefit in any way from the transaction; and, that she signed "verified correct" on the vouchers in good faith and only after the post-audit by the Audit Staff, Marilou R. Narzabal (Narzabal), and the review by the Head of the Financial Audit Branch, Dahlia B. Peña (Peña), which were undertaken several months after the payments were released to Concord.[11]

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[8] *Id.* at 51.

[9] *Id.* at 54-55.

[10] *Id.*

[11] *Id.* at 47-48.

On November 5, 2012, the COA *en banc* denied the petitioner's request for exclusion from liability under ND No. 2010-07-084-(1996).[12] On February 27, 2015, the COA *en banc* also denied her motion for reconsideration.[13]

Hence, this petition for *certiorari.*

Ruling of the Court

The petition is devoid of merit.

The Court finds no grave abuse of discretion on the part of the COA in rendering its assailed decision, which disregarded the petitioner's defense that she had no knowledge of the above transaction, or of the two versions of the deed of sale, prior to her post-audit, or that the payments for the lots were made long before she signed "verified correct" after completing the post-audit process and finding the supporting documents to be complete, or that she did not benefit from the transaction in any way.

It is well to be reminded that the exercise by COA of its general audit power is among the mechanisms of check and balance instituted under the 1987 Constitution on which our democratic form of government is founded[14] Article IX-D, Section 2(1) of the 1987 Constitution provides that the COA has "the power, authority, and duty to examine, audit, and settle all accounts pertaining to the revenue and receipts of, and expenditures or uses of funds and property, owned or held in trust by, or pertaining to, the Government, or any of its subdivisions, agencies, or instrumentalities, including government-owned or controlled corporations with original charters." Corollary to the COA's audit power, Section 2(2) of Article IX-D further provides:

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[12] *Id*. at 51.

[13] *Id*. at 53.

[14] *Delos Santos v. COA,* G.R. No. 198457, August 13, 2013, 703 SCRA 501, 513.

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

In a recent case, *Delos Santos v. COA,*[15] wherein the Court upheld the COA's disallowance of irregularly disbursed Priority Development Assistance Fund, the Court explained that:

At the outset, it must be emphasized that **the CoA is endowed with enough latitude to determine, prevent, and disallow irregular, unnecessary, excessive, extravagant or unconscionable expenditures of government funds**. It is tasked to be vigilant and conscientious in safeguarding the proper use of the government's, and ultimately the people's, property. **The exercise of its general audit power is among the constitutional mechanisms that gives life to the check and balance system inherent in our form of government**.

Corollary thereto, it is the general policy of the Court to sustain the decisions of administrative authorities, especially one which is constitutionally-created, such as the CoA, **not only on the basis of the doctrine of separation of powers but also for their presumed expertise in the laws they are entrusted to enforce**. Findings of administrative agencies are accorded not only respect but also finality when the decision and order are not tainted with unfairness or arbitrariness that would amount to grave abuse of discretion. It is only when the CoA has acted without or in excess of jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, that this Court entertains a petition questioning its rulings. x x x.[16] (Citation omitted and emphasis supplied)

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[15] G.R. No. 198457, August 13, 2013, 703 SCRA 501.

[16] *Id*. at 512-513.

By reason of their special knowledge and expertise over matters falling under their jurisdiction, administrative agencies are in a better position to pass judgment thereon, and their findings of fact are generally accorded great respect, if not finality, by the courts. Such findings must be respected as long as they are supported by substantial evidence, even if such evidence is not overwhelming or even preponderant. It is not the task of the appellate court or this Court to once again weigh the evidence submitted before and passed upon by the administrative body and to substitute its own judgment regarding the sufficiency of the evidence.[17] It is only when the agency has acted without or in excess of jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, that this Court entertains a petition questioning the agency's rulings.[18]

In its assailed decision, the COA cited Title II, Vol. III of the Government Accounting and Auditing Manual to point out that internal audit is part of internal control which the responsible agency officers must exercise over its transactions.[19] As Section 123 of Presidential Decree (P.D.) No. 1445 also provides:

> Sec. 123. *Definition of internal control.* Internal control is the plan of organization and all the coordinate methods and measures adopted within an organization or agency to safeguard its assets, check the accuracy and reliability of its accounting data, and encourage adherence to prescribed managerial policies.

As further provided in Section 124 of P.D. No. 1445, it is the direct responsibility of the head of agency to install, implement, and monitor a sound system of internal control. Needless to state, however, the agency head must rely on the diligent assistance and sound expertise of the internal audit head and staff in installing and operating a sound internal control system. In the case before this Court, the petitioner admitted that to verify the correctness

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[17] *Sps. Hipolito, Jr. v. Cinco, et al.,* 677 Phil. 331, 349 (2011).

[18] *Supra* note 15, at 513.

[19] *Rollo,* p. 49.

of the subject transaction, all that she did was to check the same against AFP-RSBS's "approved" planned purchases and "approved" budgets, further pointing out that she "signed correct" on the vouchers months after payments had been released to Concord, and only after the post-audit by the audit staff, Narzabal, and the review by the head of the Financial Audit Branch, Peña.[20] The petitioner consulted no independent sources, such as the documents submitted to the Bureau of Internal Revenue (BIR) and the RD, or any data of prevailing real estate prices. Had she done so, she could conceivably have discovered the loss.

The Court agrees with the COA that the internal audit and verification conducted by the petitioner, as head of the AFP-RSBS Internal Auditor Office, failed to demonstrate the degree of diligence and good faith required in the performance of her sworn duty to safeguard the assets of AFP-RSBS. She admitted that she relied merely on the post-audit performed by her subordinates, who may be presumed to be less competent and responsible than she is. Considering the amount involved in the purchase, and indeed the very likelihood of padded prices so common in such a deal, the petitioner miserably failed to perform any necessary personal verification of the correctness of the prices paid for the lots purchased, which is surely demanded as part of her internal audit function.

The petitioner insists that she did not know about the purchase until the vouchers and supporting documents were submitted to her for verification. Yet, as head of internal audit, it is surely part of her duties to require that she be apprised beforehand of such planned significant transactions. Moreover, because of the huge amount involved, it would not be too onerous and unrealistic to have expected her to verify the correctness of the amounts involved against the documents submitted to the RD and the BIR to effect the transfer of Concord's titles to AFP-RSBS. Has she done so, she easily could have discovered that there are two deeds of sale showing wide discrepancies in the prices for the same lots. The Court is convinced that the petitioner

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[20] *Id*. at 47.

neglected to exercise due care and diligence in preventing such huge loss to AFP-RSBS. Several months had elapsed from the time the payments were made to when she verified the sale, and meanwhile the petitioner and her staff could have procured independent data and documents such as those in the possession of the BIR and the RD.

But as the petitioner admitted, in attesting in the payment vouchers that the subject purchase was correct and duly authorized, she merely relied on the so-called approval sheets for the "land banking" investment planned by the AFP-RSBS's Board of Trustees. The approval sheet of the AFP-RSBS Investment Committee recommended the purchase of 611 hectares of land in Calamba, Laguna for "land banking" for ₱l ,576,100,000.00, while the approval sheet for the purchase of the subject right-of-way covering 22.725 hectares contained an estimate of ₱l ,500.00 per sq m. The petitioner failed to reckon that these prices were mere estimates for the proposed purchases.[21] In her own appeal memorandum, it is clear that she performed no other significant verification or examination to ensure that the budgets approved for the planned investment would be reflective of the prevailing values of similar real estate in Calamba.[22]

Surely, the approved budget for the land acquisition did not in itself constitute an authority for the AFP-RSBS to exhaust the entire amount of the budget set aside. As it now turns out, the deed of sale executed by both the AFP-RSBS and Concord and registered with the RD of Calamba shows that both the AFP-RSBS and Concord attested that ₱91,024,800.00 was the correct price, whereas the deed of sale on file with AFP-RSBS was signed by Concord alone, and it bore the amount of ₱341,343,000.00 actually paid by AFP-RSBS to Concord. On the basis of these two deeds of sale, the COA concluded that the AFP-RSBS squandered up to ₱250,318,200.00 in savings for the government.

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[21] *Id*. at 50.

[22] *Id*. at 62-77.

Section 16 of the 2009 Rules and Regulations on Settlement of Accounts, as prescribed in COA Circular No. 2009-006, on who are liable for audit disallowances, provides:

> Section 16.1 The Liability of public officers and other persons for audit disallowances/charges shall be determined on the basis of (a) the nature of the disallowance/charge; (b) the duties and responsibilities or obligations of officers/employees concerned; (c) the extent of their participation in the disallowed/charged transaction; and (d) the amount of damage or loss to the government, thus:
>
> 16.1.1 Public officers who are custodians of government funds shall be liable for their failure to ensure that such funds are safely guarded loss or damage; that they are expended, utilized, disposed of or transferred in accordance with law and regulations, and on the basis of prescribed documents and necessary records.
>
> 16.1.2 Public officers who certify as to the necessity, legality and availability of funds or adequacy of documents shall be liable according to their respective certifications.
>
> 16.1.3 Public officers who approve or authorize expenditures shall be held liable for losses arising out of their negligence or failure to exercise the diligence of a good father of a family.
>
> x x x (Emphasis supplied)

By signing the verification in the check vouchers to "attest" to the "correctness" of AFP-RSBS's land banking purchase after merely comparing the same against the approved investment budgets, but without however performing appropriate additional internal audit procedures to allow her to conduct further verification of the true amounts involved, the petitioner rendered herself liable upon the loss incurred by AFP-RSBS because she is thereby said to have lent her approval to the anomalous purchase.

WHEREFORE, the petition is **DISMISSED** for lack of merit. Hence, the application for a Temporary Restraining Order to restrain respondent Commission on Audit, its agents and representatives from implementing its Decision No. 2012-188 dated November 5, 2012, and Resolution in COA CP Case No. 2012-175 dated February 27, 2015 is hereby **DENIED.**

SO ORDERED.

Sereno, C.J., Carpio, Velasco, Jr., Leonardo-de Castro, Brion, Peralta, Bersamin, del Castillo, Villarama, Jr., Perez, Mendoza, Perlas-Bernabe, Leonen, and *Jardeleza, JJ.,* concur.

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—— The "activities" of U.S. personnel referred to in the VFA are meant to be specified and identified in further agreements; EDCA is one such agreement that clarifies said activities. (*Id.*)

—— The last standard considered by the Court is whether the EDCA provisions on agreed locations respect national security and territorial integrity of the Philippines; EDCA does not create a situation which would make the Philippines a legitimate target by a U.S. enemy; there is no basis to invalidate EDCA on fears that it increases the threat to our national security. (*Id.*)

Tax exemption —— Since the Philippine government stands to benefit not only from the structures to be built but also from the joint training with U.S. forces, the provision on the government assumption of tax liability does not constitute a tax exemption. (Saguisag *vs.* Exec. Sec. Ochoa, Jr., G.R. No. 212426, Jan. 12, 2016) p. 280

EVIDENCE

Admission against interest —— Does not dispense with the requirement that the admission be offered in evidence. (Ayala Land, Inc. *vs.* Castillo, G.R. No. 178110, Jan. 12, 2016) p. 99

Identification of accused —— 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. (People *vs.* Pepino *y* Rueras, G.R. No. 174471, Jan. 12, 2016) p. 29

In-court identification of accused —— The in-court identification cured whatever irregularity might have attended the police lineup. (People *vs.* Pepino *y* Rueras, G.R. No. 174471, Jan. 12, 2016) p. 29

Out-of-court identification of accused —— Test to determine the admissibility of such identification. (People *vs.* Pepino *y* Rueras, G.R. No. 174471, Jan. 12, 2016) p. 29

—— Victim's out-of-court identification found reliable and thus admissible. (*Id.*)

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