GRAFT, CORRUPTION AND CONFLICTS OF INTEREST: PROBLEMS IN PRESCRIBING NORMS OF OFFICIAL CONDUCT

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INTRODUCTION

Signs of the Times

What makes for an effective civil service? The question has often been asked and with each new legislative or executive fiat, the answer remains as evasive as ever. It is perhaps not so much the answer to the question which is enigmatic but rather the implications which brings the issue to the forefront of critical analysis.

Few can doubt that confidence in the government has eroded through the years. The growth of the problem of insurgency, both rural and urban, as well as the lowering value of the peso in the international dollar market, with the concommitant spiralling of cost of living, are mere manifestations of the gnawing erosion of public confidence. Indeed, we cannot close our eyes to the implications of a growing criminality rate nor of the increased boldness of the rebels in the hills. Thus, politically and economically, the first of dissent continue to be fed by alleged inadequacy and corruption in the civil service.

It has often been said that corruption is endemic in a developing state, although it would be erroneous to say that corruption is the hallmark of a decaying state. To a large extent, such an averment may seem to partake of the nature of a social truism. Specifically, when the economy is careening from the effects of the Dewey Dee fiasco and similar economic tragedies and miscalculations, the dwindling dollar reserves as a result of indiscriminate infrastructure projects, and the general economic slump in global economy, the scramble for economic advantages and selfish interests had tempted the erstwhile civic-minded citizen to prefer the yearnings of the stomach than the call of meritorious principle. It is, therefore, not surprising that the civil service should become the haven of opportunists and bootlickers who use their position in the government to improve their lot at the expense of the fellowmen. To be fair, there are still those who adhere to the tenets of morality expected of those who serve the people. For them, perhaps, the reward is in the fulfillment of a genuine desire to

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be of service and, for the religiously oriented, a reward in paradise after life in the hell of the flesh. For others, heaven is earthbound and corruption is a way of life.

But corruption is not limited to the attainment of economic advantage. The *"compadre"* system and the distorted interpretation of gratitude had prompted not a few civil servants to serve the interests of individuals rather than that of the collective whole. Likewise, the close family system, admittedly the unifying force in society, has acquired a perverted explication as to drive the civil service into the morass of perfidy. Despite repeated declarations against nepotism, the practice has acquired seeming permanence in politics and government. Being the friend of a political bigwig or a member of his family have become the marksof success in the government career service rather than individual merit.

Dimensions of the Problem

Needless to say, the complexities and intricacies of modern-day living require the evolution of a system of morality which could be both effective and acceptable. Public confidence and cooperation in government are essential to the machinery of a democratic system and it is the primary task of government to revive trust in its institutions. It is thus indispensable that government prevent the occurrence of further embarassments and scandals, although it is debatable whether a government founded on the *"compadre"* and family system could ever extricate itself from the mess it finds itself in. Of course, if we are to close the door on a creative and meaningful solution to the problem by maintaining that politics is inevitably enveigled in corruption—that politics and corruption are willing bedfellows—then there would be no point to this discussion nor for any attempt at the correction and creation of a cure for the malady. Neither would we ever take a step forward if we are to conclude that public conduct, with all the inevitable temptations which must necessarily influence it, can be effectively dominated.

Corruption has been defined as an act done with intent to gain advantage not consistent with official duties and the rights of others, and corruption in public office has been coined as a comprehensive phrase intended to cover every class of crime which amounts to a felony.[1] Defined otherwise, corruption is the act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another; what is in a given time and place considered unlawful and wrongful is not a matter of *a priori* ethics of conduct.[2] Thus the term corruption includes bribery, but is more compre-

[1] State v. Douglass, 144 S.W. 407 (1912).

[2] See Eliasburg, *Corruption and Bribery*, 42 J. CRIM. L. 317 (1951). The unlawfulness or wrongfulness of an act not as an *a priori* ethics of conduct means that there is no absolute rule by which wrongfulness or unlawfulness could be gauged becaused the standards thereof are set by the society according to present conditions and realities.

hensive because an act may be corruptly done though the advantage to be derived from it be not offered by another.[3]

Inherent in the problem of combatting corruption in public office is the issue of whether the government can make a frontal assault on such matters by means of legislation. Critics of any statutory approach contend that public morality cannot be legislated because the problem is one of politics and the only answer is to be found in the attraction of a higher caliber of men into public life.[4] Such a pessimistic conclusion is premature because criminological research suggests that a carefully drawn, effectively enforced statute could significantly deter the commission of white collar crimes[5] committed by public officials and, to be effective, such sanctions must be applied in conjunction with clearly defined standards of conduct for public officials in matters which involve the possibility of personal gain.[6] Further, the argument overlooks the essential purpose of anti-graft and corruption legislation. As stated before, a comprehensive and well-drafted statute would serve as a deterrent against dishonest men from entering government employment and, conversely, men of higher caliber and integrity should welcome legislation that establishes a set of guidelines by which they can recognize and avoid conflicts of interest and official corruption.[7]

The inherent weakness of traditional criminal sanctions, however, lies in the required specificity of proscriptive definitions. Yet, these statutes always seem inadequate to deal with anything but blatant thievery for, as ably put by Prof. Lenhoff, "corruption is a monster with not only as many heads as Hydra, but as many shapes as Proteus; the legislature no sooner isolates and prohibits one form of official pocket-lining than another is devised."[8] The set-back for making criminal any violation of a broadly-stated canon of ethics, as a solution to the Protean form of corruption, would, in all probability, be stricken as unconstitutional because of vagueness and uncertainty, thus increasing the possibility of likewise entrapping the innocent. A panacea has been suggested in the form of the "constructive trust" theory, a sanction which allows the public to recover from the culprit everything he gained from his misconduct, whether or not the public

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[3] BOUVIER'S LAW DICTIONARY. 688 (1914).

[4] Davis in University of Chicago Law School, Conference on Conflict of Interest No. 17, 86 (1961) as cited in Pillans, *Conflicts of Interest: A New Approach,* 18 U. FLA. L. REV. 675 (1966).

[5] White- collar crime is the violation of criminal law in the course of legitimate occupational activity by an individual having a high socio-economic status. See Quinney, *The Study of White Collar Crime: Toward a Re-Orientation in Theory and Research,* 55 J. CRIM. L. 208 (1964).

[6] Staines, *A Model Act for Controlling Public Corruption Through Financial Disclosure and Standards of Conduct,* 51 NOTRE DAME LAW. 638 (1976).

[7] Pollack in Univ. of Chicago Law School Conference on Conflict of Interests No. 17, 86 (1961) as cited in Pillans, *supra* at note 4.

[8] Lenhoff, *The Constructive Trust As a Remedy for Corruption in Public Office,* 54 COLUM. L. REV. 214 (1954). See also McEywain and Vorenberg, *The Federal Conflict of Interest Statutes,* 65 HARV. L. REV. 955 (1952).

suffered direct loss.[9] The theory is based on the precept that the public officer holds his position under a fiduciary trust and hence the ordinary rules which apply to a fiduciary's activities are applicable.[10]

But the problem is not circumscribed by such a solution. As a matter of fact, the issue of punishing official corruption is merely circumvented. Undoubtedly, there is no guaranty that corruption will be eradicated. Without the imposition of criminal sanctions, the propensity of others to do the same could not be seriously curbed, only a mite inhibited perhaps. So long as persons think that their personal liberty will not be curtailed by their invidious acts, they will be willing to gamble on the off-chance that they may get away with it or be able to keep their ill-gotten gains which had been unproven to be products of their corrupt acts.

The Ethical Standards Required in the Public Service

Whether we like it or not, therefore, corruption and conflicts of interest involve problems of individual ethics and the administration of the government. But experience would dictate that issues of public interest and ethics are not easily nor clearly defined. Nonetheless, it is essential that public confidence be maintained in both the higher and lower echelons of the hierarchical government. Significantly, a certain standard of morality must be established to insure the maintenance of public confidence. Hence, the policy of the law on public officers demand that one who holds a position of trust must not only be without suspicion but beyond suspicion, especially so when he occupies a position which directly influences the morality of the community.[11] Jurisprudential authority seem to be unanimous that where the public official's duties require him to be in direct contact with the people he had sworn to serve, he is expected to be above and beyond reproach both in his private and official conduct, and failure to live up to what is expected of him would open him to liabilities which the law strictly provides in its entirety. However, if not such direct contact is established, then the court will construe the law liberally as to his liabilities thereunder.[12]

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[9] *Ibid.*, p. 215.

[10] The Rules which apply to the fiduciary's activities are:

(a) The agent must not use his position for his own profit, regardless of his motives; regardless whether the principal suffers actual loss. Attention must be given undivided to the "stern demands of loyalty." See Mallory v. Mallory Wheeler Co., 61 Conn. 131 (1891).

(b) The agent, if he acts to his advantage, must surrender the profits to his principal even though the transaction could not have been impeached if no fiduciary relation had existed. See Consumers Co. v. Parker, 227 Ill. App. 552 (1932).

(c) Agent's profits are traced through the agent's subsequent dealings—they can be reached in whatever form they may be and in whosoever possession they are found, except if in the hands of a bona fide purchaser for value.

See Constructive Trust cases: Reading v. Atty. Gen. (1951) A.C. 507 (1949) as cited in 65 HARV. L. REV. 502 (1952); U.S. v. Carter, 217 U.S. 286 (1910); and City of Boston v. Santosuosso, 30 N.E. 2d 278 (1940).

[11] *Annot.*, 68 SCRA 366 (1975).

[12] Viojan v. Duran, Adm. Case No. 248, February 26, 1962, 4 SCRA 390 (1962) and De Dios v. Alejo, Adm. Matter P-137, December 15, 1975, 68 SCRA 354 (1975).

Thus a public servant need not live a life entirely encapsulized by the restrictions on official and private conduct. Indeed, a line must be drawn between the extremity of proscribing too many rules as to discourage qualified men from entering the government service and the equally destructive attitude of not creating a rule of conduct so as to make the public service susceptible to opportunism and selfish advancement.

Finally, before any rule or statute could be drafted, the universe of modern legal, ethical, social and economic phenomena must be fully considered and interpreted. And the synthesis of all concepts which make up the totality of all these phenomena into a statute, which has for its purpose the prescription of a just and meaningful moral standard to be required of public servants, is perhaps the most difficult undertaking of all.

> "(We) thought that they should have no property at all such as other people now have, but, as being athletes of war and guardians, they were to receive a wage for their guarding from the others, namely, the year's keep for these purposes, and their duty was to take care of the rest of the city and themselves."[13]
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> — PLATO

I. CORRUPTION AND CONFLICTS OF INTEREST

The Legislature and Its Double Standard

The *Batasan Pambansa* complex, and the Congressional Building prior to it, beckons as a stirring testimony to the people's will and determination to govern themselves, through their elected representatives, in a democratic form of government patterned after the republican-parliamentary system of government. What rhetoric and passionate speeches intoned in its hollowed walls only history will tell. And yet, for all its monumentality and historicity, the idea of a representative legislature is a democratic dream still to be evolved into reality. For it, too, has its share of official corruption. The members thereof vow to be the watchers of the people's faith in government. But the perennial question has been asked: Who watches the watchers?

Before plunging into the problem, it is well to accept as a constant that official corruption is not limited to the executive branch. Indeed the members of the legislative branch, being subject to the frailties which beset all mortals, are equally susceptible to the alluring temptations of personal enrichment and aggrandizements by granting favors, through preferential legislation, to those willing to pay the price. Nor can it be

[13] The Republic, Book VII, 543 (Conford, Oxford U. Press, N.Y. 1958, p. 178).

doubted that the "lobby" system of enacting laws means more political distributions and contributions for the candidacy of a political hopeful or the reelection of an incumbent. Pecuniary endowments to the personal treasury of the legislator is not uncommon in exchange for a favorable bill becoming a part of the law of the land.

But corruption, like the numerous tentacles of the octupus, dips its villainous fingers into not just a single proverbial cookie jar. One of the more prominent forms is economic involvement in government projects through the use of official position. American authorities had euphemistically dubbed this problem as "conflicts of interest."

The problem of solving pernicious economic involvement as a cause of graft is probably more difficult to solve when it concerns members of the legislature than when it involves administrators. There are fewer traditional safeguards, temptation is more subtle, there is no higher authority, and discipline is rare even for illegalities.[14] Parenthetically, whenever the interest of the public official in the proper administration of his office clashes, or appears to clash, with the official's interest in his private capacity, a conflict of interest arises. Obviously, there, a conflict of interest may be merely an apparent conflict whose appearance alone tends to undermine public confidence in the official's conduct. But it does not necessarily follow that when a legislator favors his private economic interests, it will inevitably result in his acting against the public interest. Thus there is a gray zone of legislative behavior which is, as aptly defined by Professor Eisenburg, "that area lying between behavior that is clean as a hound's tooth and behavior obviously improper and illegal, involving such things as bribery, embezzlement and theft."[15] This nebulous area has been of legislative draftsmen in enacting conflicts of interest legislation to protect both the interests of the public and that of the elected representative.

The underlying rationale for this type of legislation was expounded by Justice Warren in the case which had become known as the *Dixon-Yates* case,[16] as follows:

> "The moral principle upon which the statute is based has its foundation on the Biblical admonition that no man may serve two masters, Matt. 6:24, a maxim which is especially pertinent if one of the masters happens to be economic self-interest. Consonant with this salutary moral purpose, Congress has grafted a statute which speaks in very comprehensive terms. "(T)he statute establishes an objective standard of conduct, and that whenever a government agent fails to act in accordance with that standard,

[14] Krasnow and Lankford, *Congressional Conflicts of Interests: Who Watches the Watchers?*, 54 FED. B.J. 264, 265 (1964).

[15] Eisenberg, *Conflicts of Interest Situations and Remedies*, 13 RUTGERS L. REV. 666 (1959). Included in this behavioral gray zone are promises of more government contracts to elicit campaign contributions, use of official position to gain special advantages and privileges, acceptance of favors from industrial lobbyists, etcetera.

[16] U.S. v. Mississippi Valley Generating Co., 364 U.S. 520 (1960).

> he is guilty of violating the statute, regardless of whether there is positive corruption. The statute is thus directed not only at dishonor, but also at conduct which tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened xxx xxx xxx.
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> "(T)he statute is directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption."

It is noteworthy that a standard of conduct applicable to both the legislative and executive branches cannot be successfully formulated nor implemented because of the fundamental differences which exist between both. First, the role of the elected official is that of representing the interests of a particular district, the spokesman and the promoter of the economic interests of his constituents. Therefore, it is not surprising that the personal interests of the legislator may be wedded to or identical with the interests of his electorate. Secondly, members of the legislative branch must stand for election periodically while administrative personnel base their tenure on career status. Theoretically, the election device weeds out corrupt public officials. But the theory bogs down in practical application especially where there is no effective two-party system or where the electorate are not well-informed of the issues in any electoral joust.[17] Lastly, the legislator differs from the administrator in the field of special immunities and rewards endowed upon them for the effective performance of their official duties.[18]

Be that as it may, the Constitution imposes certain disqualifications on members of the *Batasan Pambansa.* These disqualifications possess two characteristics: their adversity to the interests of the government;[19] and the possibility of the attainment of pecuniary advantages by virtue of their position in the government.[20]

How far the government in willing to implement the mandatory provisions of the Constitution has been open to doubt and the subject of much heated debates.

Who watches the watchers? The Constitution watches the watchers. One cannot help but reflect the inadequacy of constitutional provisions

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[17] The process, barring the existence of the two abovementioned limitations, cannot be said to be foolproof. It is in fact the problem of being reelected or elected which urges the candidate to accept contributions from the more interested persons or groups of persons who contribute funds to protect their own interests.

[18] See CONST. Art. VIII, sec. 9.

[19] CONST., Art. VIII, sec. 9.

[20] CONST., Art. VIII, sec. 8, par. 1.

in solving the problem of conflicts of interest, euphemistically speaking, in the legislative branch. Concededly, laws must be enacted to insure the purity of the legislature, at the most, or to guaranty the implementation of the constitutional mandate, at the very least. But how can the legislature take positive steps to curb the conflicts of interest which exist in their ranks. There would be no problem for those acts which could easily be defined such as bribery and dishonesty. But the shadowed areas of conflict, so long as they remain undefined and misunderstood, remain sore thumbs in legislative hands. Perhaps, the greatest impediment to the regulation of such problems is the unwillingness of the policeman to police himself. Understandably so, considering that to do so would be to tacitly admit corruption—an admission which the legislature, as it is right now, seems reluctant to make.

The Judiciary and Judicial Impartiality

Many have noted the sharp decline of the prestige and integrity of the Supreme Court, in particular, and the administration of justice, in general. Indeed, so grave was the problem that the Judiciary Reorganization Act of 1981[21] was passed to improve the administration and disposition of justice.[22] No sooner had the Supreme Court made its pronouncements in favor of the said law, considering the rather awkward position of some justices who as drafters of the law were also called upon to decide on its constitutionality, when the very pillars which support the highest court in the land was rocked by scandal which had acquired a seemingly insurmountable obstacle to the attainment of judicial independence. The bar examinations scandal of 1981 exploded with unrelenting fury in the daily periodicals, definitely not lacking in sensationalism, which shook the very credibility of the Supreme Court as the final arbiter of the people's grievances against their fellowmen and against the State, particularly, the integrity of those who sit on its august benches. It cannot be denied that it is not really a matter of he who is without sin must cast the first stone but rather, the Supreme Court, like Caesar's wife, should be above and beyond suspicion. The proposition is based on the ideal of an independent and impartial judiciary, one to which the people confide public trust as the fountainhead of justice.

The need for an independent judiciary was succinctly stated by Alexander Hamilton when he said that "judicial review does not suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the

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21 Batas Pambansa Blg. 129 (1981). There were previous reorganization legislation prior to the above—Act No. 136 (1901) as amended by Act No. 2347 (1914); Act No. 3107 (1923); Act No. 4007 (1932); Com. Act No. 145 (1936); and Rep. Act No. 296 (1948).

22 For a fuller understanding of the Reorganization Act of 1981, see Gutierrez, *The Judiciary Reorganization Act—A Question of Necessity*, 56 PHIL. L. J. 327 (1981).

people, as declared in the Constitution, the judges ought to be governed by the latter rather than the former.."[23]

From the earlier times, the ethical behavior of judges has been the subject of concern. The oft-quoted Biblical passages are specifically directed to the moral conduct of judges. Thus —

> "And I charged your judges at that time, saying Hear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him. "Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man."[24]

The admonition to the duty of the judges to be impartial was further stated thus —

> "Thou shalt not wrest judgment; thou shalt not respect persons, neither take a gift; for a gift doth blind the eyes of the wise, and pervert the words of the righteous."[25]

Thus, impartiality is the most important virtue of a judge and the most difficult to acquire because of its broadness and vagueness. Such impartiality encompasses objective as well as subjective fairness because a judge must not only be impartial, he must likewise avoid the appearance of partiality. In addition, there are both obvious and obscure influences which may affect a judge's point of view of a given case. The obvious take the form of prejudgment, favoritism and corruption. At the other end of the spectrum are the more subtle influences arising from the judge's own personality which, in turn, must necessarily change his outlook. Thus, as written by Justice Cardozo —

> "Deep below consciousness are other forces, the likes and dislikes, the predilections and prejudices, the complex of instincts and emotions and habits and convictions which make the man, whether he be litigant or judge."[26]

That a judge should not sit in a case in which he has an interest is a firmly established maxim which had withstood the test of time and experience. To do otherwise would, in effect, allow the judge to judge himself, a task no man could be expected to perform impartially.[27] Indeed, the Canons of Judicial Ethics specifically provide in Canon 31 that "(a) judge's conduct should be above reproach, and in the discharge of his offiicial duties he should be conscientious, studios, thorough, courteous,

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[23] As quoted by Mendoza, *The Administration of Justice* in LAW AND SOCIETY 48 (1978). See also Ocampo v. Cabangis, 15 Phil. 626 (1910); Borromeo v. Mariano, 41 Phil. 322 (1921); Radiowealth v. Aggregado, 86 Phil. 429 (1950); *Re* Sotto, 82 Phil. 597 (1949); and Vargas v. Rilloraza, 80 Phil. 297 (1948).

[24] Deuteronomy 1:16, 17.

[25] Deuteronomy 16:19.

[26] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 167 (1921).

[27] *In Re* MURCHINSON, 349 U.S. 133 (1955).

patient, punctual, just, impartial, fearless of public clamor, and regardless of private influence should administer justice according to law and should deal with the patronage of the position as a public trust; and he should not allow outside matters or his private interests to interfere with the proper performance of his office." The third Canon embodies the so-called "Caesar's wife" doctrine which states that a "judge's official conduct should be free from the appearance of impropriety, and his personal behavior, not upon the bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach."

Fundamentally, there are two general categories of conflicts of interest which may impair a judge's non-partisanship—relationship to the parties and pecuniary interest. A judge should not act in cases where near parties are technical parties to a case. Absent a definition of the degree of relationship which would disqualify a judge, *In Re Eatonton*[28] is authority to the suggestion that the degree should be in the fourth of consanguinity and affinity. Canon 12 provides that a "judge should not, unless it is unavoidable, sit in litigation where a near relative is a party or of counsel, and he should not suffer his conduct to create the impression that any person can unduly influence him or enjoy his favor, or that he is affected by the rank, position or influence of any party." The qualification that the judge may sit in a case provided that it is unavoidable militates against the belief that the rule is absolute. Of course, what may be considered as unavoidable is a matter within the discretion of the judge who is to review the case either on appeal or any other legal remedy questioning the property lower court judge's action.

A judge should disqualify himself from presiding over a case where he has a direct pecuniary interest in the outcome of such case or where his property will be affected thereby.[29] Canon 29 prohibits a judge from accepting presents or gifts from litigants or lawyers practicing before him. More broadly, Canon 23 prescribes the acceptance of inconsistent duties nor incur any obligations which will in any way interfere with his devotion to the performance of his official duties. Canon 25 prohibits the judge to make personal investments which are apt to be involved in litigation in his court nor enter into relations which would normally tend to arouse suspicion that such relations warp his judgment, or prevent his impartial rendition of his judicial duties. Should he have made such personal investments after accession to office, he should dispose of them, if possible, without loss to him. Although the Canons do not prohibit the making of investments, however should such investments be involved in litigation before him, he must refrain from doing any judicial act in accordance with Canon 28. Canon 25 proscribes the use of information obtained in his official capacity for purposes of speculation while Canon 24 forfends the utilization of

[28] 120 Fed. 1010 (S.D. Ga. 1903).
[29] See In Re Honolulu Consol. Oil Co., 243 Fed. 348 (9th Cir. 1917).

prestige and power to persuade or coerce others to patronize or contribute either to the success of a private business venture, or to charitable institutions. Lastly, Canon 26, although not disqualifying judges from the holding of executorships or trusteeships, mandates that they should avoid holding such positions if the same would interfere with the proper performance of their duties, or if the business interests of those represented require investments which are apt to come before the court, or to be involved in questions of law determined by it.

Justice Frankfurter once queried: "Does a man become any different when he puts on a gown?" Answering his own question, he replied: "If he's any good, he does."[30] The donning of the black robe symbolizes the assumption of certain privileges and duties. All persons in attendance must stand when the judge enters the courtroom and he is addressed as "Your Honor," and not merely "sir" which is of a lesser degree in respect. In return for the veneration and singular privileges, the public expects, nay demands, that the judges live up to their honored stations over and above temptations of partiality and bias. But while judges remain susceptible to the weaknesses of the human species, it would be naive to expect them to be supermen, saints, or automatons, who are merely programmed to do their duties without consideration of personal feelings of compassion. Indeed, the administration of justice would be in a contrite state if they were anything more for then the quality of mercy would likewise be absent and law would become a meaningless compilation of brutish tenets. And yet, if the honored symbol of the judicial institution be of any value to society, those who sit on its distinguished benches should themselves be distinguished. The demands of a meaningful administration of justice cannot have it otherwise.

The President and his Cabinet: The Riddle of Executive Immunity and Official Corruption

The highest and most prestigious office in the land has, as its locus, the banks of the Pasig River within the Hispanic architecture of Malacañang Palace, the seat of past and present Chief Executives. Within its historic walls are enshrined both noble and ignoble deeds which had shaped the destiny of the Filipino people ever since an enterprising Spanish Governor-General had it constructed. For the past seventeen years, the incumbent had issued directives and orders to his minions and cohorts on how best to implement the laws, as enacted by the erstwhile Congress, and, ultimately, on how best to rule. But history will tell that the high office has not been free from official corruption nor do the people who surround such lofty throne, as members of that elite group called "the Cabinet", claim in all honesty to have had a spot free life while serving their tenure in the confines of their bureaucratic offices.

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[30] Frankfurter, *Chief Justices I Have Known,* 39 VA. L. REV. 883 (1953).

To safeguard the integrity of the Presidency and that of his Cabinet, which is beyond doubt of paramount importance for securing the public faith and confidence in government, the Constitution has mandated certain disqualifiications upon them, which are:

1. The President shall not, during his tenure, hold any appointive office, practice any profession, participate directly or indirectly in the management of any business, or be financially interested directly or indirectly in any contract with, or in any franchise or special privilege granted by, the Government or any subdivision, agency, or instrumentality thereof, including any government-owned or controlled corporation.[31]

2. The Prime Minister (president) and members of the Cabinet shall be subject to the provisions of Sections 10 and 11 of Article VIII of the Constitution and may not appear as counsel before any Court or administrative body or participate in the management of any business, or practice any profession.[32]

3. The President or any Member of the Cabinet "shall not hold any other office or employment in the Government, or any subdivision, agency, or instrumentality thereof, including government-owned or controlled corporations ' . .. Neither shall he be appointed to any civil office which may have been created or the emoluments thereof increased while he was a member of the National Assembly."[33]

The abovementioned constitutional provisions are expressions of situations where a conflict of interest may arise. But the ensconcing of a rule is entirely different from its fulfillment. The usual digressions and circumventions inherent in general statements are, of course, to be expected. Of singular interest, however, is Section 2, Article VIII of the Constitution, which provides:

> "The President, Members of the Supreme Court, and the Members of the Constitutional Commissions shall be removed from office on impeachment for, and conviction of, culpable violation of the Constitution, treason, bribery, other high crimes, or graft and corruption."

The specific inclusion of graft and corruption is indeed heartening. The purpose of impeachment, as stated by a former dean of the University of the Philippines College of Law, is "to protect the people from official delinquencies or malfeasances. Impeachment, therefore, is primarily intended for the protection of the state, not for the punishment of the of-

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31 CONST., art. VII, sec. 6, par. (2).

32 CONST., art. IX, sec. 8. Under the 1981 Amendments to the Constitution, the President has assumed the powers of the Prime Minister who was left merely with the function of supervising the Ministries without power of control. Thus, it is reasonable to assume that the disqualifications pertinent to the office of Prime Minister applies to the President.

33 CONST., art. VIII, sec. 10.

fender. The penalties attached to impeachment are merely incidental to the primary intention of protecting the people as a body politic." [34]

Impeachment proceedings are, however,, cumbersome. Section 3 of Article XIII of the Constitution states:

> "The National Assembly shall have the exclusive power to initiate, try, and decide all cases of impeachment. Upon the filing of a verified complaint, the National Assembly may initiate impeachment by a vote of at least one-fifth of all the Members thereof. When the National Assembly sits in impeachment cases, its Members shall be on oath or affirmation."

Indubitably, therefore, even if the opposition could well recruit enough votes to constitute the requisite number to initiate such proceedings, it is questionable whether it could muster enough votes for impeachment. As if not enough, the Immunity from Suit amendment further seems to shut out any remedy against corrupt executive officials.

At the very least, a legal dilemma has been created by the introduction of the 1981 Amendments on Presidential Immunity from Suits. Originally, the Constitution provides that "(t)he President shall be immune from suit during his tenure." [35] Such immunity was further extended to read—

> "The President shall be immune from suit during his tenure. Thereafter, no suit whatsoever shall lie for official acts done by him or by others pursuant to his specific orders during his tenure.
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> "The immunities herein provided shall apply to the incumbent President referred to in Article XVII of this Constitution."

The broadness of the grant of immunity has given rise to the enigma. Although it has been argued that illegal and unlawful acts are not deemed official so as to come within the application of the immunity, doubts remain whether it could really be delineated what official acts are and those which are not. As voiced-out by Professor P.V. Fernandez:

> "The claim is made that the Immunity lies only for official acts done according to law, but not for violation of law. If this be so, then the Immunity amendment is not needed. Under existing jurisprudence, no official is accountable for acts in accordance with law, there is no official liability for erroneous acts, so long as these were done in good faith. Hence, the Immunity could only be intended to provide a shield for official acts in violation of law."[36]

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[34] As quoted from FERNANDO & SISON, PHILIPPINE POLITICAL LAW: CASES AND MATERIALS 1520 (1975).

[35] *Const.*, art. VII, sec. 7.

[36] Fernandez, *Position Paper on the Proposed Constitutional Amendments in the April 7, 1981 Plebiscite,* in U.P. LAW CENTER, THE 1981 CONSTITUTIONAL AMENDMENTS 35 (1981). Justice Moreland in Forbes v. Chuoco Tiaco, 16 Phil. 534 (1910), stated that to allow the Chief Executive to be sued "will produce only evil results as action upon matters of state will be delayed, the time and subsance of the Chief Executive will be spent in wrangling litigation, disrespect upon his person will be generated and distrust in government will soon follow." See also Moon v. Harrison, 43 Phil. 27 (1922).

The distinguished law professor goes further:

> "When a person violates the law, he incuds criminal or civil liability, and can be prosecuted (in) court to answer for the wrong. If such person cannot be prosecuted in court although he has done wrong, then he is above the law. In a democracy, no person can be above the law; every citizen, including public officials, must be under the law. This is (the) safeguard of citizens, that persons entrusted with public power must comply with, and not violate, the law."[37]

If the learned professor's reservations could be given credence, it becomes undeniable that the immunity likewise covers conflicts of interest acts veiled with the all-too dangerous excuse of national development. The point is not whether such national development will come to pass, but rather whether the privilege could be used to destroy the rights of others to contribute to such development. Tyranny is even more obnoxious when it exists for the economic benefit of a few.

Even assuming the professor's thesis to be wrong, the result would be the same because the very broadness and vagueness of the grant would make an opportunistic position easily defensible by legal standards. By widening the umbrella of immunity to private persons and public servants who do the bidding of the President, the field is opened to abuse and misuse.

The 1981 Amendments on Immunity has thus raised serious issues on the accountability of the President or any of his agents. In fact, the conclusion seems unassailable that the supposedly blindfolded symbol of justice is being allowed a peek as to who should be prosecuted or not. The consequences are appalling and its relevance to the other constitutional provisions on disqualification negating. Tragically, it seems that all our legislations and judicial institutions stand as helpless witnesses to the death of our democratic ideals.

> "From the time Republic Act No. 3019 was forged in the legislative furnace xxx, we are unhappy witnesses to the burgeoning, rather than the diminishing, of graft and corruption in our midst. This is a very sad commentary of our times and of our social morality. But this, to my mind, has been largely due to the fact (that) prosecution under the present Anti-Graft and Corrupt Practices Act is not only extremely difficult and oftentimes self-defeating but also because the law handles these scums and dregs of society with less than adequate force and dedication."[38]
>
> —ASSEMBLYMAN FERMIN CARAM, JR.

[37] *Id.*, at 29.

[38] Speech before the First Regular Session of the Batasan Pambansa.

II. LAWS SAFEGUARDING THE PURITY OF PUBLIC OFFICE

A. THE ANTI-GRAFT LAW

Scope and Purpose of Republic Act No. 1379

Strictly speaking, a public officer is a person clothed by virtue of law and not as an incidental or transient authority but for such time as denotes duration, and with independent powers to control the property of the public, or with public functions to be exercised in the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation or title.[39] Admittedly, this definition is replete with limitations for the purposes of the anti-graft laws. For one thing, the duties and powers incident to the exercise of public functions must be by virtue of law and not as an incidental or transient authority. This removes from the ambit of the law those persons who exercise a certain amount of power over public property who do so by virtue of contracts of convenience for a limited and specified duration of time — usually as stipulated in the contract or until the object of the contract has been fulfilled. Secondly, the performance of functions appurtenant to the office must be for a stated compensation. There are persons who, for one reason or another, abrogate their right to compensation for services performed and yet must not be allowed to fall beyond the scope of the law because of the pecuniary temptations which the exercise of their functions entail.

Perhaps, to finally settle the issue, the Anti-Graft Act succinctly, albeit adequately, defined public officers or employees to apply to "any persons holding any public office or employment by virtue of an appointment election or contract, and any person holding any office or employment, by appointment or contract, in any State-owned or controlled corporation or enterprise."[40] Thus by a stroke of legislative fiat, the difference between a public officer and employee as well as the issues which had been raised in the prior definition had been settled.

As for the property which may be forfeited pursuant to the Act, the law enumerates the following[41]:

> "1. Property unlawfully acquired by the respondent, but its ownership is concealed by its being recorded in the name of, or held by, the respondent's spouse, ascendants, descendants, relatives, or any other persons.
>
> "2. Property unlawfully acquired by the respondent, but transferred by him to another person or persons on or after the effectivity of this Act.
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> "3. Property donated to the respond during his incumbency, unless he can prove to the satisfaction of the court that the donation is lawful."

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39 State v. Brennan, 49 Ohio St. 33, 29 N.E. 593 (1892).
40 Rep. Act No. 1379 (1955), sec. 1, subsec. (a).
41 Rep. Act No. 1379 (1955), sec. 1, subsec. (b).

The problem arises when the issue of what properties are to be deemed unlawful enters into consideration. Of course, at the very outset, there would be no issue at all as to properties specifically denominated as illegal by general and/or special laws. The dispute emerges as to property which are legal *per se* but becomes illegal when coming into the hands of certain persons — in this case, property reaching the possession of public officials. In fact, there is a *prima facie* presumption of unlawfulness in the acquisition by a public officer or employee during his incumbency of property which is manifestly out of proportion to his salary as such and to his other lawful income and from income derived from legitimately acquired property.[42] The existence, however, of such presumption cannot be taken as a conclusive definition of what unlawful property really is. To remedy the inadequacy, the law answers the issue by defining the contrary. Hence, legitimately acquired property means "(a)ny real or personal property, money or securities which the respondent has at any time acquired by inheritance and the income thereof, or by gift *inter vivos* before his becoming a public officer or employee, or any property (or income thereof) already pertaining to him when he qualified for public office or employment, or the fruits and income of the exclusive property of the respondent's spouse."[43] All other property, by necessary implication, should be considered as unlawful for the purposes of this Act, unless the respondent satisfactorily proves the lawfulness thereof.

The Anti-Graft Law was enacted to deter public officers or employees from committing acts of dishonesty and, in so doing, improve the tone of morality in the public service.[44]

Substantive Aspects Of the Proceedings For Forfeiture

Any public officer or employee may not lawfully acquire property during his incumbency by virtue of his public office. The acquisition of such property does not cease to be unlawful even if its ownership is concealed by having it recorded in the name of the officer's spouse, ascendants, descendants, relatives or any other person[45]; property transferred by him to another person or persons before, on or after June 18, 1955[46]; and property donated to such public servant during his incumbency unless he can prove to the court's satisfaction that the donation is lawful.[47]

Section 8 of the Act exempts any person from criminal prosecution "for or on account of any transaction, matter or thing concerning which

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42 Rep. Act No. 1379 (1955), sec. 2.
43 Rep. Act No. 1379 (1955), sec. 1, subsec. (b).
44 Morfe v. Mutuc, G.R. No. 20387, Jan. 31, 1968, 22 SCRA 424 (1968).
45 Rep. Act No. 1379 (1955), sec. 1.
46 Rep. Act No. 1379 1955), sec. 14 provides that the Act "shall take effect on its approval, and shall apply not only to property thereafter unlawfully acquired but also to property unlawfully acquired before the effective date of this Act."
47 Logically, a donation is deemed lawful when the consideration for such interest in the public officer as a private person and not as consideration for services rendered in his capacity as a civil servant.

he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence" under the said law. This exemption is necessary because the Anti-Graft Law commands that no person "shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda or other records on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to prosecution."[48] Consequently, in *Santos v. Flores*,[49] respondent was sued both in a civil action for forfeiture of property under Republic Act No. 1379 and in two other criminal actions for falsification of public documents and malversation of public funds through falsification of public documents in connection with alleged irregularities in the purchase of Viriginia tobacco of which the respondent was officially charged also in an administrative case. Respondent's plea of immunity from criminal prosecution was denied because the exemption provided by law applies only after it is shown that the person claiming the exemption has already testified or produced evidence in a civil case for forfeiture under the Anti-Graft Law and such person must show the nature of said testimony or evidence, as well as its bearing, if any, in the criminal case on which he is likewise being prosecuted.

In the case of *Almeda v. Perez*,[50] the Supreme Court held that "forfeiture proceedings may be either civil or criminal in nature, and may be *in rem* or *in personam*. If they are under a statute such that if an indictment is presented and the forfeiture can be included in the criminal case then they are criminal in nature although they may be civil in form; and where it must be gathered from the statute that the action is meant to be criminal in nature, it cannot be considered as civil. If, however, the proceeding does not involve the conviction of the wrongdoer for the offense charged the proceeding is of a civil nature; and under statutes which specifically so provided, where the act or omission for which the forfeiture may be sued for and recovered in a civil action." Using this test as a guideline, the Supreme Court opined that the proceeding provided for by the Act was civil in nature because of two principal reasons: first, the procedure outlined therein leading to forfeiture is that provided for in a civil action;[51] and, second, the proceeding is not criminal because it does not terminate in the imposition of a penalty but merely in the forfeiture of the properties illegally acquired in favor of the state.[52]

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[48] Rep. Act No. 1379 (1955), sec. 8.

[49] G.R. No. 18251, Aug. 31, 1962, 5 SCRA 1136 (1962).

[50] G.R. No. 18428, Aug. 30, 1962, 5 SCRA 970 (1962).

[51] Sec. 3 of the Act requires the filing of a petition and sec. 4 provides for the period within which the respondent must answer, which is 15 days, and lastly, the requirement of a hearing.

[52] Rep. Act No. 1379 (1955), sec. 6 provides, in part, that "(i)f the respondent is unable to show to the satisfaction of the court that he has lawfully acquired the property in question, then the court shall declare such property forfeited in favor of the State, and by virtue of such judgment the property shall become property of the State xxx xxx xxx. The Court may, in addition, refer this case to the corresponding Executive Department for administrative or criminal action, or both."

The ruling in *Almeda v. Perez,* was modified in a subsequent case[53] where it was held, *inter alia,* that a petition for forfeiture under the Act is technically civil in form with respect to the purely procedural aspect of the proceeding but criminal in effect or substance. In support of this dictum, the Court, speaking through Justice Concepcion, stated that "(i)n a strict signification, a forfeiture is a divestiture of property without compensation, in consequence of a default or an offense x x x. A forfeiture, a strict signification, a forfeiture is a divestiture of property without convention of the parties, but by the lawmaking power, to ensure a prescribed course of conduct. It is a method deemed necessary by the legislature to restrain the commission of an offense and to aid in the prevention of such an offense. The effect of such forfeiture is to transfer the title to the specific thing from the owner to the sovereign power."

The forfeiture proceedings, being thus essentially criminal in nature, the rights guaranteed to the accused by the Constitution are necessarily operational. Of particular relevance is the right of the accused against self-incrimination. Hence, although as a general rule, informations for the forfeiture of goods that seek no judgment of fine or imprisonment against any person are deemed to be civil proceedings *in rem,* such proceedings are criminal in nature to the extent that where the person using the *res* illegally is the owner or rightful possessor of it, the forfeiture proceeding is in the nature of a punishment.[54] According to American authorities,[55] such proceedings, where the owner of the property appears, are so far considered as quasi-criminal proceedings as to relieve the owner from being a witness against himself and to prevent the compulsory production of his books and papers. Specifically, section 8 of Republic Act No. 1379 provides:

> "Neither the respondent nor any other person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda and other records on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to prosecution; but no individual shall be prosecuted criminally for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incriminaton, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and conviction for perjury or false testimony committed in so testifying or from administrative proceedings."

Therefore, the privilege of a witness not to incriminate himself is not infringed by merely asking a witness a question he refused to answer. A question is not improper merely because the answer may tend to incriminate

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53 Cabal v. Kapunan, G.R. No. 19052, Dec. 29, 1962, 6 SCRA 1059 (1962).

54 33 Am. Jur. 612.

55 See Boyd v. U.S., 616 (1886); and Lees v. U.S., 150, U.S. 476, 37 L. Ed. 1150 (1893).

the witness but, where the latter exercises his constitutional right not to answer, a question by counsel as to whether the reason for refusing to answer is because the answer may tend to incriminate the witness is improper. The possibility that the examination of the witness will be pursued to the extent of requiring self-incrimination will not justify the refusal to answer questions. However, where the position of the witness is virtually that of an accused on trial, it would appear that he may invoke the privilege in support of blanket refusal to answer any and all questions.[56] The privilege against self-incrimination applies whenever the proceeding is not purely remedial, or intended as a redress for a private grievance but primarily to punish a violation of duty or a public wrong and to deter others from offending in a like manner.[57] The *Almeda* doctrine—which laid down the rule that after the filing of respondent's answer to a petition for forfeiture, said petition may be amended as to substance on the ground that such forfeiture proceeding is civil in nature—refers to the purely procedural aspect of such proceeding and has no bearing on the substantial rights of the respondents therein particularly their right against self-incrimination.[58]

The next issue which deserves consideration is whether or not the constitutional right against double jeopardy[59] may be availed of as a defense in a prosecution initiated under the provisions of the Act under discussion. In *Cabal v. Kapunan,* it was laid down as a rule that the law is criminal and penal in nature and hence the right against self-incrimination is available. So too is the right against double jeopardy available to the accused because of the very nature of the proceedings for forfeiture. However, a distinction must be drawn as to cases which are provisionally dismissed or, in legal parlance, dismissed without prejudice.

In *Melo v. People,*[60] the Supreme Court, through Chief Justice Moran, held that the rule is that not only must the second offense charged be exactly the same as the one alleged in the first information, but also that the two offenses are identical. And there is identity between the two offenses when the evidence to support a conviction for one offense would be sufficient to warrant a conviction for the other. This "same evidence" test was expanded and restated under the provisions of the Rules of Court.[61] However, although jeopardy had attached with a valid complaint having been filed in a court of competent jurisdiction and defendants having been arraigned and pleaded,[62] this does not mean that the same has been ter-

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56 98 C.J.S. 252.
57 29 A.L.R. 8 (1923).
58 Cabal v. Kapunan, *supra* at note 53.
59 CONST., art IV, sec. 22.
59a *Supra,* note 53.
60 85 Phil. 766 (1950).
61 See RULES OF COURT, Rule 117, sec. 9. As a further clarification, see RULES OF COURT, Rule 120, sec. 5.
62 People v. Ylagan, 58 Phil. 851 (1935).

minated because there has neither been a conviction nor acquittal but a mere dismissal without prejudice. As Justice Ozaeta in *Jaca v. Blanco*[63] stated:

> "We held that the dismissal contemplated in the above-quoted section of the rule is a definite or unconditional dismissal which terminates the case, and not a dismissal without prejudice xxx. In the absence of any statutory provision to the contrary, we find no reason why the court not, in the interest of justice, dismiss a criminal case provisionally, i.e. without prejudice to reinstating it before the order becomes final or to the subsequent filing of a new information for the same offense. If the accused should deem such conditional or provisional dismissal to be unjust and prejudicial to him because he has been deprived of his right to a speedy trial, he could and should object to such dismissal and insist that the case be heard and decided on the merits. Upon such objection and insistence by the accused, if the prosecution does not present its evidence and if its failure to do so is unjustified, the court should dismiss the case for failure to prosecute. Such dismissal would come under the purview of Section 9, Rule 113 (now section 9 of Rule 117)."

Technical Aspects of the Forfeiture Proceedings Under the Anti-Graft Law.

The petition for the forfeiture of unexplained wealth alleged to have been acquired by the public servant is very much similar to the complaint or information filed in criminal proceedings. However, there are certain differences worth mentioning.

1. The complaint in the petition must be filed by any taxpayer, whether or not injured by the unlawful acquisition while a complaint must be filed and "subscribed by the offended party, any peace officer or other employee of the government or governmental institution in charge of the enforcement and execution of the law violated."[64]

2. The petition for forfeiture must be filed by the Solicitor General in the name of and on behalf of the Republic while a complaint in ordinary criminal offenses must be filed by the offended party, any peace officer or government employee charged with the enforcement and execution of the law violated in the name of the people.[65] The distinction

[63] 86 Phil. 452 (1950). See also Co Te Hue v. Encarnacion, 94 Phil. 258 (1954). In the case of Republic v. Agoncillo, G.R. No. 27257, August 31, 1971, 40 SCRA 579 (1971), which was a proceeding for the forfeiture of unexplained wealth under the provisions of the Anti-Graft Law, the dismissal without prejudice of the prior case on the ground that the prosecution needed more time for a thorough study of the case was held not to be a bar to the subsequent case which was filed for the same cause of action because defendants ought to have known that the complaint could thus be filed again. That being the case, they should have objected to the dismissal and sought for a trial on the merits, pursuant to the Jaca case, and any dismissal after such objection would amount to a dismissal of unconditional character thereby constituting a bar to any subsequent prosecution for the same offense for the same set of facts. Since they did not so object, defendants were, at the very least, in estoppel.

[64] RULES OF COURT, Rule 110, sec. 2; *cf.* Rep. Act No. 1379 (1955), sec. 2.

[65] RULES OF COURT, Rule 110, sec. 1; *cf.* Rep. Act No. 1379 (1955), sec.2.

acquires added significance when we consider the right of an offended party to an unlawful acquisition of property by a civil servant to intervene in the proceedings. In ordinary criminal cases, the offended party may intervene in the proceedings provided that certain conditions are fulfilled.[66] In forfeiture proceedings, it would seem that since the injury is caused to the government, as a proprietary entity, and not to individual persons, it may seem that private parties may not intervene considering that the underlying rationale or such intervention was the right of the offended party to civil damages arising from the criminal act.

3. The petition for forfeiture must be filed, as specifically mandated by the Act, in the Court of First Instance, and thus the value of the property alleged to have been unlawfully acquired and the amount of the injury sought to be redressed is immaterial whereas in ordinary criminal actions, the specification of the crime alleged to have been committed in the complaint or information is decisive in the determination of the jurisliction of the court. Likewise, the determination of the prescriptive period of the offense and of the penalty depends upon the severity of the offense while the ordinary rules on prescription is unavailing in the case of forfeiture[67] and the Act is definite in stating it to be four years after the date of the resignation, dismissal, or separation or expiration of the term of the officer or employee concerned.[68]

4. The Court of First Instance taking cognizance of the case has no jurisdiction to impose a penalty of imprisonment or fine, or both, aside of course from the forfeiture of the property proven to have been unlawfully acquired, on the public servant found guilty of unlawfully acquiring such wealth. To be capable of imposing the penalty of imprisonment or fine, or both, a new action must be filed by the corresponding Executive Department.[69] The only instance when the court is empowered to impose such penalty is when the culprit transfers or conveys the *res* to a third person, the latter being liable in like manner if he knowingly accepted such property despite the unlawfulness of his transferor's title.[70]

5. The petition for forfeiture may not be filed within one year prior to any general election or within three months before any special election[71]

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[66] RULES OF COURT Rule 110, sec. 15 provides that "(u)nless the offended party has waived the civil action or expressly reserved the right to institute it separately from the criminal action, and subject to the provisions of section 4 hereof, he may intervene, personally or by attorney, in the prosecution of the offense."

[67] See REV. PEN. CODE, arts 90 and 91; *cf.* Rep. Act No. 1379 (1955), sec. 11.

[68] Rep. Act No. 1379 (1955), sec. 2.

[69] Rep. Act No. 1379 (1955), sec. 6 provides, in part, that "(t)he Court *may*, in addition, refer this case to the corresponding Executive Department for administrative or criminal action, or both." The use of the word MAY instead of the mandatory SHALL seems to point to the conclusion that if the court does not refer the case back to the executive department concerned for the filing of the proper criminal action, then the same cannot do so *motu propio*. See Cabal v. Kapunan, *supra* at note 53 and 58. Of course, if an adverse decision is made by the trial court, the government may appeal.

[70] Rep. Act. No. 1379 (1955), sec. 12.

[71] Rep. Act No. 1379 (1955), sec. 2.

while judgment may not be rendered within six months before any general election or within three months prior to a special election.[72] These provisions were undoubtedly inserted to protect electoral candidates or incumbents from harassment. In ordinary criminal actions, no such exemption exists.

6. Unlike in ordinary criminal actions, both parties, even the government, may appeal from the adverse decisions of the lower court. Section 22 of Article IV of the Constitution provides, in part, that "(i)f an act is punished by a law or ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act."

7. The Solicitor General may grant immunity from criminal prosecution to any person who testifies to the unlawful manner by which respondent acquired the property in question where such testimony is necessary to prove violations of the Act. However, in ordinary criminal prosecutions, the prosecuting officer has no authority to grant immunity since he must include all persons who are involved in the criminal act, and immunity may only be granted to an accused after a lawful order by the competent court.[73]

B. THE ANTI-GRAFT AND CORRUPT PRACTICES ACT

The Scope and Purpose of Republic Act No. 3019

The Anti-Graft and Corrupt Practices Act, as amended by Republic Act No. 3047 and Presidential Decree Nos. 677 and 1288, like its predecessor, affects both natural and juridical persons.[74] It includes in its coverage officers and employees in the national and local governments, including the *barangay* government as provided for in Republic Act No. 3590 as amended, government-owned and controlled corporations and all other governmental instrumentalities or agencies of the government and all their branches.[75] It includes elective and appointive officials and employees, permanent or temporary, whether in the classified or unclassified or exempt service receiving compensation, even nominal.[76] In this instance, the scope of the Anti-Graft Law is much broader because it applies to persons holding employment by virtue of a contract, although it could not be successfully maintained that the Anti-Graft and Corruption Law does not apply to these employees. Private persons had also been included within the ambit of the law in two instances,[77] *viz*:

1. Where such person capitalizes or exploits or takes advantage of his close family relationship or close personal relation—which includes close personal friendship, social and fraternal connections, and professional employment—or take advantage of such relationship by directly or in-

[72] Rep. Act No. 1379 (1955), sec. 6.
[73] Rep. Act No. 1379 (1955), sec. 9; *cf.* RULES OF COURT, Rule 119, sec. 9.
[74] Rep. Act No. 3019 (1960), sec. 2, subsec. (d).
[75] Rep. Act No. 3019 (1960), sec. 2, subsec. (b).
[76] Rep. Act No. 3019 (1960), sec. 1, subsec. (b).
[77] Rep. Act No. 3019 (1960), sec. 4.

directly requesting or receiving any material or pecuniary advantage from any other person having some business or transaction with the government in which such public official has to intervene; and

2. Where such person knowingly induces or causes any public official to commit any of the offenses enumerated by the Act.

It is the declared state policy that "in line with the principle that a public office is a public trust, to repress certain acts of public officers and private persons alike which constitute graft or corrupt practices or which may lead thereto."[78] Thus the avowed purpose of the statute, as held in *Morfe v. Mutuc*,[79] is to deter public officers and employees from committing acts of dishonesty and to improve the tone of morality in the public service. It was aimed at curtailing and minimizing the opportunities for official corruption and, in the process, maintain a standard of honesty in the public service.

The Constitutionality of the Anti-Graft and Corrupt Practices Law

Republic Act No. 3019, during its inception in 1960, was the most comprehensive and broad anti-graft law ever legislated. Being thus as comprehensive and broad as it was, it was challenged in *Morfe v. Mutuc*, the Supreme Court ultimately upholding its validity. In this declaratory relief proceeding, originally decided by the Pangasinan Court of First Instance, the constitutionality of section 7 of the said law was placed in issue as violative of the due process clause, being an oppressive exercise of police power, and as an unlawful invasion of the constitutional right to privacy, implicit in the ban against unreasonable search and seizure construed together with the prohibition against forcing the accused to incriminate himself. In reversing the decision of the lower court,[80] the Supreme Court, through Justice Fernando, stated the following reasons:

1. In the absence of a factual foundation, or evidence to rebut the presumption of validity of a law, such presumption must prevail.[81] The presumption is not overthrown by considering the matter purely in the pleadings and stipulation of facts. Furthermore, if the liberty involved were freedom of the mind or of the person, the standard for the validity of government acts is much more rigorous and exacting, but where the liberty

[78] Rep. Act No. 3019 (1960), sec. 1.

[79] G.R. No. 20387, Jan. 31, 1968, 22 SCRA 424 (1968).

[80] The trial court declared unconstitutional, null and void section 7 of the Act insofar as it required periodical submission of sworn statements of financial conditions, assets and liabilities of an official or employee of the government after he had once submitted such a sworn statement upon assuming office Dec. of July 19, 1962, Record on Appeal, pp. 36, 37 as quoted in Morfe v. Mutuc, *supra* at note 79).

[81] Ermita-Malate v. Mayor of Manila, G.R. No. 24693, July 31, 1967, 20 SCRA 849 (1967).

curtailed affects, at the most, rights of property, the permissible scope of regulatory measure is wider.[82]

2. While in the attainment of the public good, no infringement of constitutional rights is permissible, there must however be a clear showing that, categorical and undeniable, what the Constitution condemns, the statute allows. There was no showing that the constitutional rights were indeed trampled upon by the questioned law.

3. The enactment of the statute in issue was within the police power of the State to promote morality in the public service. Although the public official may avail himself of the constitutional guarantee of due process to strike down a law which infringes his liberty, however, such a restriction is allowable as long as due process is observed. It would be fallacious to ignore the harsh and glittering realities of public service with its omnipresent temptations to greed and avarice to condemn as arbitrary and oppressive a requirement as that imposed on public officers and employees to file such sworn statement of assets and liabilities every two years after having done so upon assuming office. Due process is responsiveness to the supremacy of reason, obedience to the dictates of jusice.

4. Plaintiff's allegation that his constitutional right to the "privacy of communication and correspondence x x x except upon lawful order of the court or when public safety and order requires otherwise"[83] was violated by the challenged statutory provision, which calls for the divulgence of information, is likewise untenable. It cannot be denied that the rational relationship such a requirement possesses with the objective of a valid statute precludes such an objection. Nor was there a violation of his right against unreasonable search and seizure because such guaranty does not give freedom from testimonial compulsion. Nor could there be a violation of the non-incrimination provision because what the said constitutional mandate seeks to prevent is the compulsory disclosure of incriminating facts, and hence the protection it affords will have to await the existence of actual cases.[84]

5. Lastly, the provision cannot be nullified on the allegation that it constitutes an insult to the personal integrity and official dignity of public officials. This raises the issue of wisdom of the law, an issue which the court is not competent to decide upon.[85]

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[82] "Because of the libertarian values underlying constitutional government, and and the relationship of basic freedoms to the institutions of representative government, there is a strong and definite tendency of the Court to apply a stricter standard to legislation or regulation that demonstrably limits or curtails personal freedoms, and to apply a more permissive standard to legislation or regulation affecting purely property rights." FERNANDEZ, 1 PHILIPPINE CONSTITUTIONAL LAW 501 (1977).

[83] CONST. (1935), art. III, sec. 1, par. (5).

[84] Suarez v. Tengco, G.R. No. 17113, May 23, 1961, 2 SCRA 71 (1961).

[85] See Angara v. Electoral Commission, 63 Phil. 115 (1957); and Gonzales v. COMELEC, G.R. Nos. 28224 and 128196, Nov. 9, 1967, 21 SCRA 774 (1967).

Nature of the Proceedings Under the Anti-Graft and Corrupt Practices Act

Unlike the Anti-Graft Law, Republic Act No. 3019 does not create a presumption either for or against a public officer or employee. It, however, enumerates a list of the acts punishable and established the mandatory requirement of submitting a statement of their assets and liabilities, a requisite which had been unsuccessfully challenged in the *Morfe v. Mutuc* case.

The proceedings under the Anti-Graft and Corruption Law is clearly penal in nature, both procedurally and substantially, unlike the proceedings under Republic Act No. 1379 which is ambiguous at the very least and which, as earlier intimated, was decided by jurisprudence to be criminal in nature but civil in procedural and technical matters. Thus the constitutional and statutory rights granted to the accused in a criminal prosecution are available to the defendant in a prosecution under the provisions of Republic Act No. 3019.

The provisions of the said law cannot be given retroactive effect although the proceedings for forfeiture of unexplained wealth depends not on the effectivity date of the Anti-Graft Law nor of that of the Anti-Graft and Corruption Act, but on the date of the assumption of office of the public officer or employee concerned.[86] This tangentially supports the thesis that the latter is penal in nature in exempting from the operation of the law graft and corrupt practices done by public officials prior to the effectivity date of the Act. Thus, in *De la Cruz v. Better Living, Inc.*,[87] the Supreme Court held that although plaintiff had capitalized on his friendship and intimacy with the General Manager of the People's Housing and Homesite Corporation (PHHC) in promoting the sale of the lands to his clients, the exploitation of such friendship and intimacy ceased on July 21, 1960 when the Board of Directors approved the said sale prior to the enactment of the Anti-Graft and Corruption Law. The act constituting a violation was perfected prior to the enactment and effectivity of the said Law and it is immaterial whether or not the fruits of such act continue to be gathered by the person whose act in influencing the public officer to do his bidding so long as the act was consummated prior to the effectivity date of the Act and so long as the public officer or employee has not gained pecuniarily or materially so as to come within the operation of Republic Act No. 1379.

Graft and Corrupt Practices Punished by Republic Act No. 3019

Private persons who violate the provisions of the Anti-Graft and Corrupt Practices Act by inducing a public officer to act for his benefit may be punished by imprisonment for not less than one year nor more than

[86] Rep. Act No. 3019 (1960), sec. 16.
[87] G.R. No. 26936, August 19, 1977, 78 SCRA 274 (1977).

ten years depending on the gravity of the offense. In addition to incarceration, he is perpetually disqualified from holding public office and any advantage he may have acquired as a result of his act will be forfeited in favor of the government, or he may be liable for reimbursement should he have dissipated such interests. This is the clear import of Section 9, subsection (a) in providing that "(a)ny public officer or private person committing any of the unlawful acts or omissions enumerated in Sections 3, 4, 5, and 6 of this Act shall be punished with imprisonment for not less than one year nor more than ten years, perpetual disqualification from public office, and confiscation x x x in favor of the Government of any prohibited interest x x x." Further, such private person shall be disqualified, permanently or temporarily in the discretion of the Court, from transacting business in any form with the Government.[88]

Before going into a detailed enumeration of the acts punishable under the Act, a cursory look at the enumeration yields a number of general characteristics. First, a violation of the law may be either by willful conduct or by negligent omission. Second, the deed or dereliction itself may be done or not done by him, or by another at his inducement. Third, the benefit to him may be direct or indirect. Fourth, material or pecuniary benefits need not have been received by him. Specifically, the acts or omissions deemed as violations of the provisions of the Anti-Graft and Corruption Law are as follows:[89]

1. Acts or omissions already penalized by existing laws.[90]

2. Persuading, inducing or influencing another public officer to perform an act constituting a violation of rules and regulations duly promulgated by competent authority or an offense in connection with the official duties of the latter, or allowing himself to be persuaded, induced, or influenced to commit such violation or offense.

3. Directly or indirectly requesting or receiving any gift, present, share, percentage, or benefit, for himself or for any other person, in connection with any contract or transaction between the government and any other party, wherein the public officer in his official capacity has to intervene under the law.

4. Directly or indirectly requesting or receiving any gift, present, or other pecuniary or material benefit, for himself or for another, from any person for whom the public officer, in any manner or capacity, has secured or obtained or will secure or obtain, any Government permit or license in consideration for the help given or to be given.

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88 Rep. Act No. 3019 (1960), sec. 3, last par.

89 Rep. Act No. 3019 (1960), sec. 3.

90 For example, see REV. PEN. CODE, arts. 204 to 241 excluding arts. 209, 212, 215, 222, and 234-238; and TAX CODE 1977, as amended, sec. 330, 332, and 333.

5. Accepting or having any member of his family accept employment in a private enterprise which has pending business with him during the pendency thereof or within one year after its termination.

6. Causing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of his official administrative or judicial functions through manifest partiality, evident bad faith, or gross inexcusable negligence. This provision applies only to officers and employees of offices or government corporations charged with the grant of licenses or permits or other concessions.

7. Neglecting or refusing, after due demand or request, without sufficient justification, to act within a reasonable time on any matter pending before him for the purpose of obtaining, directly or indirectly, from any person interested in the matter some pecuniary or material advantage or benefit or for the purpose of favoring his own interest or giving undue advantage in favor of or discriminating against any other interested party.

8.Entering, on behalf of the Government, into any contract or transaction manifestly and grossly disadvantageous to the same, whether or not the public officer profited thereby.

9. Directly or indirectly having financial or pecuniary interest in any business, contract or transaction in connection with which he intervenes or takes part in his official capacity, or in which he is prohibited by the Constitution or by any law from having any interest.

10. Directly or indirectly becoming interested, for personal gain, or having a material interest in any transaction or act requiring the approval of a board, panel or group of which he is a member, and which exercises discretion in such approval, even if he votes against the same or does not participate in the election of the board, committee, panel or group. Interest for personal gain shall be presumed against those public officers responsible for the approval of manifestly unlawful, inequitable, or irregular transactions or acts by the board, panel or group to which they belong

11. Knowingly approving or granting any license, permit, privilege or benefit in favor of any person not qualified for or not legally entitled to such license, permit, privilege or advantage, or of a mere representative or dummy of one who is not qualified or entitled.

12. Divulging valuable information of a confidential character, acquired by his office or by him on account of his official position to unauthorized persons, or releasing such information in advance of its authorized release date.

A public officer or employee found guilty of the acts or omissions committed in the above enumeration shall be punished with imprisonment

for not less than one year nor more than ten years, perpetual disqualification from public office, and confiscation or forfeiture in favor of the Government of any prohibited interest and unexplained wealth manifestly out of proportion to his calary and other lawful income.[91]

This is not to mean, of course, that the public officer or employee is absolutely prohibited from receiving or accepting gifts or presents nor of prohibiting them from practising any profession, lawful trade or occupation during their incumbency. To give such an interpretation would be too narrow-minded and unmindful of the economic realities. Although the largest employer of manpower, the Government pays one of the lowest salaries. Thus, it would be the height of folly to prohibit public officers from supplementing their income through the practice of other professions or trades.[92]

An interesting provision in the Anti-Graft and Corruption Law is the provision on the right if a private person to recover from the public officer property which he may have given the accused. Specifically, "(a)ny complaining party at whose complaint the criminal prosecution was initiated shall, in case of conviction of the accused, be entitled to recover in the criminal action with priority over the forfeiture in favor of the Government, the amount of money or the thing he may have given to the accused, or the fair value of such thing."[93] This provision is an innovation of Republic Act No. 3019. Were we to contsrue this provision literally, the implication is unavoidable that a private person who, with the prodding of the public officer, agrees to give property to such public servant in exchange for benefits or advantages and then fails to obtain such promised benefits or advantages, may file a complaint against such public officer and, if successful, may recover the property he has given. This would, in effect, open an avenue for further corruption and bribery since one of the parties to the criminal act is allowed to recover his capital in an unlawful enterprise which failed to materialize profits. In that case, no coercive state action is effective to hinder private persons from doing such invidious practice. The private person who was a participant goes scot free. Of course there would be no problem if such person was forced to agree and immediately reported or filed the complaint to the proper authorities. It is evident that the intent of the law was to encourage persons to report any corrupt acts

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91 Rep. Act No. 3019 (1960), sec. 9, subsec. (a), par. (1).

92 Rep. Act No. 3019 (1960), sec. 14 provides:

"Unsolicited gifts or presents of small or insignificant value offered or given as a mere ordinary token of gratitude or friendship according to local customs or usage, shall be excepted from the provisions of this Act.

"Nothing in this Act shall be interpreted to prejudice or prohibit the practice of any profession, lawful trade or occupation by any private person or by any public officer who under the law may legitimately practice his profession, trade or occupation during his incumbency, except where the practice of such profession, trade or occupation involves conspiracy with any other person or public official to commit any of the violations penalized in this Act."

93 Rep. Act No. 3019 (1960), sec. 9, subsec. (b), par. (2).

done by public servants. But this purpose would be fulfilled at the expense of another ideal, "that he who comes to court must come with clean hands" and that all parties responsible for the commission of the criminal act must be prosecuted.

Prohibition Against Elective Officials

The law is clear that the Anti-Graft and Corruption Law shall apply to both appointive and elective officials.[94] As for elective public officials, the law could be construed as applicable to both national and local officials since the law makes no distinction.

However, the law, aside from making the acts or omissions enumerated in Section 3 thereof as applicable to all public officers of whatever rank or designation, provides for special disqualifications as to the relatives of the Chief Executive and the leadership of the *Batasan Pambansa* as well as other members of the legislature. Relatives, by consanguinity or affinity, within the third civil degree of the Chief Executive and Speaker of the *Batasan Pambansa* shall be committing an unlawful act should they intervene, directly or indirectly, in any business, transaction, contract or application, with the Government.[95] As exceptions to this rule, "any person who prior to the assumption of office of any of the above officials to whom he is related has been already dealing with the Government along the same line of business, nor to any transaction, contract or application already existing or pending at the time of such assumption of public office, nor to any application filed by him the approval of which is not discretionary on the part of the official or officials concerned but depends upon compliance with requisites provided by law, or rules or regulations issued pursuant to law, nor to any act lawfully performed in an official capacity or in the exercise of a profession."[96]

As to members of the *Batasan Pambansa,* two situations are therein contemplated: first, the acquisition by such member of any personal pecuniary interest in any specific business enterprise which will be directly favored or benefited by any law or resolution authored by him previously approved or adopted by the *Batasan Pambansa* during the same term; and, second, should such official have such interest prior to the approval of such law or resolution authored or recommended by him, continues for thirty days after such approval to retain such interest.[97]

The two provisions abovementioned is quite limited or minor. Indeed, it fails to fully grasp the problem of conflicts of interest. It may be a bold step towards the curbing of corruption in the highest offices in the

[94] Rep. Act No. 3019 (1960), sec. 2, subsec. (b).
[95] Rep. Act No. 3019 (2960), sec. 5.
[96] Rep. Act No. 3019 (1960), sec. 5.
[97] Rep. Act No. 3019 (1960), sec. 6.

land. But, on the whole, it fails to cover other situations which had already been pinpointed earlier.

An interesting, although admittedly dealt upon before, issue is whether the reelection of a public official wipes out the criminal liability in his previous term. In *Pascual v. Provincial Board of Nueva Ecija*,[98] the Supreme Court held that "each term is separate from other terms, and that the reelection to office operates as a condonation of the officer's previous misconduct to the extent of cutting off the right to remove him therefor."

In subsequent cases, the *Pascual* doctrine was overturned. In *Ingco v. Sanchez*,[99] it was categorically held that the reelection of a public officer for a new term does not in any manner wipe out the criminal liability incurred by him a previous term. Likewise, in *Luciano v. Provincial Governor*,[100] it was held that the *Pascual* and *Lizares* cases are authority only for the rule that reelected public officers can no longer be liable for administrative sanctions, but may be held liable for criminal prosecution, particularly for violations of the Anti-Graft and Corruption Law. Finally, in *Oliveros v. Villaluz*,[101] Justice Teehankee speaking for the Court stated that "(p)unishment for a crime is a vindication for an offense against the State and the body politic. The small segment of the national electorate that constitutes the electorate of the municipality x x x has no power to condone a crime against the public justice of the State and the entire body politic. Reelection to public office is not provided for in Article 89 of the Revised Penal Code as a mode of extinguishing criminal liability incurrel by a public officer prior to his reelection. On the contrary, Article 9 of the Anti-Graft Act imposes as one of the penalties in case of conviction perpetual disqualification from public office and Article 30 of the Revised Penal Code declares that such penalty of permanent disqualification entails 'the deprivation of the public offices and employments which the offender may have held, even if conferred by popular election'."

Grounds for Dismissal or Removal of Public Officers Due to Unexplained Wealth

Although it could be argued that the intent and purpose of the Anti-Graft Law dictates that public servants found guilty of possessing unexplained wealth should be removed from the government service, still the said Act

[98] 106 Phil. 466 (1959). Reaffirmed in Lizares v. Hechanova, G.R. No. 22059, May 17, 1966, 17 SCRA 58 (1966), citing the Pascual case thus: "The Court should never remove a public officer for acts done prior to his present term of office. To do otherwise would be to deprive the people of their right to elect their officers. When the people have elected a man to office, it must be assumed that they did this with knowledge of his life and character, and that they disregarded or forgave his faults or misconduct, if he has peen guilty of any. It is not for the court. by reason of such faults or misconduct to practically overrule the will of the people."

[99] G.R. No. 23220, Dec. 18, 1967, 21 SCRA 1292 (1967).

[100] G.R. No. 30306, June 20, 1969, 28 SCRA 517 (1969).

[101] G. R. No. 34636, May 30, 1974, 57 SCRA 163 (1974).

does not specifically provide for such disciplinary action. As a matter of fact, the trial judge is merely empowered to declare such property forfeit in favor of the State and refer the case to the corresponding Executive Department for the filing of administrative or criminal action, or both.[102] This view is further supported by the fact that it is only when any public officer transfers or conveys such property, after the effectivity date of Republic Act No. 1379, to a third person may imprisonment or fine, or both, be imposed by the trial court.[103] Otherwise, it wiuld seem that only a decree of forfeiture is possible.

Republic Act No. 3019, in providing for the penalty of dismissal or removal from public office, puts to rest any controversy which the ambiguity of the Anti-Graft Law may have created. As held in *Re Lanuevo*,[104] the failure of an investigation to unearth direct evidence that the illegal acts of the respondent to enable a bar candidate to pass the examinations was committed for valuable consideration, did not operate to release respondent from liability so long as it could be shown, as it was indeed shown, that respondent made acquisitions immediately after the official release of the Bar results which may be out of proportion to his salary as bar confidant and Deputy Clerk of Court of the Supreme Court. Thus, even though the public officer may have resigned after being apprised of the charges mentioned in the confidential letter and after filing his answer thereto, he may still be removed from office thereby making him liable for the cash value he received on his vacation and sick leave pay immediately after the Bar results were released.

> "Any public officer against whom any criminal prosecution under a valid information under this Act or under the provisions of the Revised Penal Code on bribery is pending in court, shall be suspended in office. Should he be convicted by final judgment, he shall lose all retirement or gratuity benefits under any law, but if he is acquitted, he shall be entitled to reinstatement and to the salaries and benefits which he failed to receive during suspension, unless in the meantime administrative proceedings have been filed against him."[105]

The Anti-Graft and Corrupt Practices Act was explicit in stating that "any public officer against whom any criminal prosecution under a valid information under this Act or under the provisions of the Revised Penal Code on bribery is pending in court, shall be suspended in office. Should he be convicted by final judgment, he shall lose all retirement or gratuity benefits under any law, but if he is acquitted, he shall be entitled to reinstatement and to the salaries and benefits which he failed to receive during the suspension, unless in the meantime administrative proceedings have been filed against him."

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102 Rep. Act No. 1379 (1955), sec. 6.
103 Rep. Act No. 1379 (1955), sec. 12.
104 Adm. Case No. 1162, Aug. 29, 1975, 66 SCRA 245 (1975).
105 Rep. Act No. 3019 (1960), sec. 13.

More importantly, "(n)o public officer shall be allowed to resign or retire pending an investigation, criminal or administrative, or pending a prosecution against him, for any offense under ths Act or under the provisions of the Revised Penal Code on bribery."[106]

C. THE CARAM AMENDMENTS: INNOVATIVE OR SUPERFLUOUS?

During the First Regular Session of the *Batasan Pambansa,* Assemblyman Caram introduced Parliamentary Bill No. 453 with the purpose of amending certain provisions of the previous Anti-Graft and Corruption Laws. Generally, the Amendments seek to introduce five major changes: first, the scope of the *prima facie* presumption of guilt was widened to include the civil servant's dependents; second, the removal of the right of a person found guilty to the benefits under the provisions of the Probation Law; third, increasing the penalty for persons found guilty by raising the period of imprisonment; fourth, transfering jurisdiction from the Courts of First Instance to the *Sandiganbayan;* and, lastly, extending the prescription period from ten years to fifteen years.

Acts Constituting a Prima Facie Presumption of Guilt

Under the Anti-Graft Law, "(w)henever any public officer or employee has acquired during his incumbency an amount of property which is manifestly out of proportion to his salary as such public officer or employee and to his other lawful income from legitimately acquired property, said property shall be presumed *prima facie* to have been unlawfully acquired."[107] The Anti-Graft and Corrupt Practices Act by including within the scope of the presumption to include those property which the public officer or employee may have acquired during his incumbency in his name or even in the name of other persons, including those in the name of his spouse and unmarried children, which are manifestly out of proportion to his salary and other lawful income.[108] Taking a step even further, the Caram Amendments sought to include within the scope of the law not only property acquired but also property expended excessively by the public officer, his spouse and dependents.[109] Thus the development of the *prima facie* presumption of guilt which, if undisputed, shall constitute a ground for the public officer's removal or dismissal, is indeed an interesting conceptual advance. Before the public officer's property was the only one looked into. Then the spouse and unmarried children and their property were included in the list of those to be investigated and if there are found in their possession property which could not be explained, the same would be considered as property unlawfully acquired and hence gives rise to a *prima facie* evidence of guilt. Thus was closed the door on fraudulent conveyances or transfers to those persons to whom the property would, in

106 Rep. Act No. 3019 (1960), sec. 12.
107 Rep. Act No. 1379 (1955), sec. 2.
108 Rep. Act No. 3019 (1960), sec. 8.
109 Parliamentary Bill No. 453, sec. 1.

reality, be retained by the culprit public officer but under the name of his spouse and unmarried children. What the Caram Amendments seek to plug is the further loophole of a fraudulent conveyance to married and legally emancipated children but still dependents.

The legality of *prima facie* presumptions of guilt had long been challenged and upheld. Indeed, the general rule is well-established that it is competent for a legislative body to provide by statute or ordinance that certain facts shall be *prima facie* or presumptive evidence of other facts, if there is a rational and natural evidentiary relation between the facts proved and those presumed; such statutes are within the well-settled powers of the legislature to change the rules of evidence, and do not infringe upon the rights of the judiciary, or violate constitutional provisions. In *Bandini Petroleum Co. v. Superior Court,*[110] the United States Supreme Court held that the state, in the exercise of its general powers to prescribe rules of evidence, may provide that proof of a particular fact, or of several facts, or of several facts taken together collectively, shall be *prima facie* evidence of another fact when there is some rational connection between the fact proved and the ultimate fact presumed; but the legislative presumption is invalid when it is merely arbitrary, or creates an invidious discrimination, or operates to deprive a party of a reasonable opportunity to present the pertinent facts in his defense. A disputable presumption disappears as a matter of law when the contrary evidence comes from such sources and is of such nature that rational and unprejudiced minds could not reasonably or properly differ as to the non-existence of the presumed fact will stand as proved and the jury will be so instructed where no countervailing evidence offered is but a scintilla or amounts to no more than speculation and surmise.[111]

Several grounds have been raised challenging the constiutionality of *prima facie* presumptions. First, that such constitute a violation of the due process clause.[112] This objection is unavailing because the strength of a presumption rests on its rational connection with the facts proved and the same is overcome when the accused has produced evidence to the contrary. Second, it constitutes a violation of the equal protection of the laws clause.[113] This too is untenable because the accused is not denied the right to contest the existence of a fact presumed to manifest his guilt nor is he prevented from presenting evidence to overcome such presumption. Third, the presumption encroaches upon the powers of the judiciary and an abridgment of the presumption of innocence. Professor Wigmore said that "(a) rule of presumption is merely a rule changing one of the burdens of proof xxx xxx xxx (and) if the legislature can abolish the rules of dis-

[110] 284 U.S. 8 (1931).
[111] Hinds v. John Hancock Mutual Life Ins. Co., 85 ALR 2d 703 (1959).
[112] See Morrison v. Cal., 291 U.S. 82 (1934).
[113] See Atlantic Coastline R. Co. v. Claughton, 295 U.S. 765 (1935).
[114] See Flores v. Tucson Gas, 97 P. 2d 206 (1939).

qualification of a witness and grant the rule of discovery from an opponent, it can shift the burden of producing evidence." [115] Lastly, the creation of a presumption constitutes a compulsion on the defendant to be a witness against himself because the accused has the burden of going forward with the evidence and negativing the presumption. In *Yee Hem v. U.S.*[116], it was held that if the effect of the legislative act is to give to the facts from which the presumption is drawn an artificial value to some extent, it is no more than what happens in respect of a variety of presumptions not resting on statute; the point is that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself is unmeritorious since the statute compels nothing.

Thus in the case of *State v. Brown* [117], a statute providing that in trials against a public officer accused of embezzlement, upon production of evidence tending to prove that any such officer or other person has received public funds and failed to account therefor, as required by law, there shall arise a presumption that the funds received and unaccounted for have been fraudulently appropriated by such officer or person, and the burden at such stage of the case shall rest upon such officer or person to show otherwise, is not a denial of due process since there was a direct and rational connection with the ultimate fact to be proved and the presumption was neither arbitrary nor unreasonable.

Aside from the "rational connection" test, the test of "comparative convenience" has likewise been devised for criminal cases. According to this test, it is permissible to create a statutory presumption in those cases where the defendant is in an easier position than the prosecutor to produce proof (relative factor) and where, in addition to it, the requirement to produce such proof does not constitute unfairness or hardship for them (absolute factor).[118] To be valid, the presumption must conform with the relative and absolute factors concurrently.

The next issue of importance is the legality of compulsory bank disclosures. Concededly, it is state policy that bank deposits are confidential and "may not be examined, inquired or looked into by any person, government official, bureau or office, except upon written permission of the depositor, or in cases of impeachment, or upon order of a competent court in cases of bribery or dereliction of duty of public officials, or in cases where the money deposited or invested is the subject matter of the litigation." [119] As held in *Brex v. Smith* [120], as to the records of the depositor's accounts, the bank had an implied obligation to keep these from scrutiny

[115] 4 WIGMORE, EVIDENCE. 724 (3 ed., 1976).
[116] 268 U.S. 178 (1925). Reaffirmed in People v. Jackson, 273 N.W. 327 (1937).
[117] 298 U.S. 639 (1935).
[118] Morrison v. Cal., *supra* at note 112; Tot v. U.S., 319 U.S. 463 (1943); and People v. Scott, 151 P. 2d 517 (1944).
[119] Rep. Act No. 1405 (1955), sec. 2.
[120] 146 A. 34 (1929).

until compelled by a court of competent jurisdiction. Pointing out that the prosecutor had available an adequate inspection procedure in presenting the matter to the grand jury, which might subpoena the relevant records and review them in the privacy of their deliberations, the court said that to permit the prosecutor to inspect the accounts of the policemen as he demanded would be to take away the right of personal privacy and that the public would then lose confidence in the institutions to which they entrusted their finances. But in *Cooley v. Bergin* [121], the court held that when a bank receives a "summons" from an internal revenue agent, amounting to no more than a request to furnish information in its possession relative to its dealings with one of the depositors, the bank has the privilege of deciding whether it will respond or await an appropriate order of the court. The books and records of the bank were the property of the bank and that the most that the depositor could claim was that the information they contained not be disclosed for the deliberate purpose of inflicting substantial injustice upon him. American jurisprudence has yet been unsettled. Fortunately, in *Philippine National Bank v. Gancayco*[122], the Court held that section 2 of Republic Act No. 1405, although declaring bank deposits as "absolutely condential", allows such disclosure in the cases therein enumerated. It was held that cases of unexplained wealth are similar to cases of bribery or dereliction of duty upon the same policy that a public office is a public trust and that any person who enters upon its discharge does so with full knowledge that his life, so far as relevant to his duty, is open to public scrutiny.

Excessive expenditures by the public officer and his spouse and dependents have also been included within the scope of the law. The indicia provided for in the law are those spent in activities in any club or association, as well as the ostentatious display of wealth like frequent travel abroad of a non-official character.[123] Under the first, it is well to note that the increasing popularity of sports clubs and exclusive entertainment clubs or associations have provided avenues for the dissipation of wealth obtained through corrupt practices. As for the second indicium, the objection that such provision is unconstitutional as an impairment of the freedom of abode and travel under section 5 of Article IV could be dismissed because what is prohibited is not the freedom to travel but to spend moneys in the course of such travels which were acquired through corrupt acts. Indeed, he is not prohibited from traveling so long as he is able to explain from whence he has obtained the money for such travels.

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121 27 F. 2d 930 (1928).
122 G.R. No. 18343, Sept. 30, 1965, 15 SCRA 91 (1965).
123 Parliamentary Bill No. 453, sec. 1.

Removal or Dismissal And Administrative Suspensions

Section 3 of Article XII-B of the Constitution provides that "(n)o officer or employee in the Civil Service shall be suspended or dismissed except for cause as provided by law." This rule admits of no exception.[124]

However, due process of law in respect to the removal of an officer does not necessarily mean a trial before a judicial tribunal. This guarantee may be fully satisfied by an investigation made by an officer or body lawfully vested with the power of removal and this even though the board or officer upon which the power of removal is conferred is given the power not only to decide on the removal, but to present the charges and employ counsel in the investigation.[125] Indeed, the act of removing a public employee for cause is primarily alministrative in nature and, although judicial in a sense, is not an act that requires performance by the judicial branch of the government.[126]

Justice Abad Santos stated that "due process in relation to security of tenure xxx simply means that no civil service official or employee shall be disciplined except upon complaint in proper form, and the respondent shall be entitled to a formal investigation if he so elects, in which case he shall have a right to appear and defend himself at said investigation in person or by counsel to confront and examine the witnesses against him and to have the attendance of witnesses and production of documents in his favor through the compulsory process of subpoena or subpoena *duces tecum*."[127]

A more intriguing concept is that of preventive suspension. Section 1 of the Caram Amendments provides that if the circumstances mentioned in the same section are present, these "shall constitute valid ground for the administrative suspension of the public official concerned for an indefinite period until the investigation of the unexplained wealth is completed." Section 8 of Republic Act No. 3019 contains no similar provision. It is debatable whether the amendments is necessary considering that the imposition of preventive suspensions is well-settled to be within the power of the investigating body. However, an interesting twist is that such suspension may be indefinite, at least until after the investigation is completed. Section 35 of Republic Act No. 2260 provides that "(w)hen the administrative case against the officer or employee under preventive suspension is not finally decided by the Commissioner of Civil Service within the period of sixty (60) days after the date of suspension of the respondent, the

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[124] See Corpuz v. Cuaderno, G.R. No. 23721, March 31, 1965, 13 SCRA 591 (1965).

[125] Atty. Gen. *ex rel.* Rich v. Jochim, 58 N.W. 611 (1894).

[126] Re Harold Fredericks, 125 ALR 259 (1938).

[127] Abad Santos, *The Law on Public Officers—A General Overview*, in LAW ON PUBLIC OFFICERS AND ADMINISTRATIVN OF MILITARY JUSTICE 14 (1974). See also Pres. Decree No. 6)1972), sec. 3; Parliamentary Bill No. 453, sec. 1; *cf.* Rep. Act No. 3019 (1960), sec. 2.

respondent shall be reinstated in office." Both Republic Act No. 3019 nor the Caram proposals mention a period within which the suspension is to last although the latter specifies that it is to exist until the investigation is completed, which may be longer than 60 days.

Two requisites must be present before any public officer may be suspended from office: a criminal prosecution must have been instituted; and such prosecution must have been under a valid information for acts committed in violation of Republic Act No. 3019 or under the provisions of the Revised Penal Code on bribery or for any offense involving fraud upon government or public funds or property.[128] It is puzzling why the law specifically mentioned bribery and fraud against the government, to the exclusion of all other offenses included under Title Seven of the Revised Penal Code. Two reasons could be advanced for such seeming oversight. First, the acts by public officers or employees deemed as taboo under the Anti-Graft and Corrupt Practices Act are concerned with the procurement of material or pecuniary advantage which the provisions of the Revised Penal Code on bribery and other fraud on government funds are likewise concerned in. Second, even assuming that the acts committed by such public officer or employee were not motivated by material gain, such public officer would still be held liable under the Revised Penal Code if the latter makes such act punishable.

It would seem that Section 5 of the Caram Amendments, and for that matter Section 13 of Republic Act No. 3019, becomes a superfluity in the light of the amendment introduced by Section 1 of the Caram proposals on preventive suspensions. Upon closer examination, this is not so. The first speaks of a suspension made by judicial authority while the second refers to preventive suspensions made by administrative bodies.

However, a pre-suspension hearing for a fair and adequate opportunity to challenge the validity of the criminal proceedings against those charged has been held to be an indispensable requirement for suspension of public officers indicted under the Anti-Graft and Corrupt Practices Act.[129] In *Luciano v. Mariano*[130], the Supreme Court held that since the information for alleged violation of the Anti-Graft Law was filed without any previous notice to petitioners and due preliminary investigation thereof, and despite the dismissal of the original charge for falsification as being without any factual or legal basis, petitioners are entitled to a new prelim-

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[128] Parliamentary Bill No. 453, sec. 5 provides that "(a)ny *incumbent* public officer against whom any criminal prosecution under a valid information under this Act or under the provisions of the Revised Penal Code on bribery, *or for any other offense involving fraud upon the government or public funds or property whether as a simple or as complex offense and in whatever stage of execution and mode of participation,* is pending in court, shall be suspended from office." The words underscored are amendments introduced by Parliamentary Bill No. 453.

[129] Sugay v Pamaran, G.R. No. 33877-79, Sept. 30, 1971, 41 SCRA 260 (1971).

[130] G.R. No. 32950, July 30, 1971, 40 SCRA 187 (1971).

inary investigation for the graft charge.[131] The court shall then hold in abeyance all proceedings in the case before it until after the outcome of such new preliminary investigation.[132] Should the fiscal, after such preliminary investigation, find sufficient evidence to maintain the information, then the trial court must hold a hearing on the validity of the information and make an affirmative finding of validity of the information, before it can issue the order of suspension from office.[133] Although the suspension is not automatic because the information filed must first be determined as valid, it is nevertheless mandatory.[134]

The procedure, therefore, to be followed before the power of suspension may be validly exercised is that upon the filing of the information, the trial court should issue an order with proper notice requiring the accused officer to show cause at a specific date of hearing why he should not be ordered suspended from office. However, such "show-cause" order is unnecessary where the prosecution seasonably files a motion for an order of suspension or the accused files a motion to quash or challenges the validity of the information. What is important is that the court must give the parties an opportunity to present their side at a hearing duly held for the determination of the validity of the information, and thereafter to hand down its ruling as to whether the accused officer should be suspended or not depending on its reasonable belief as to the validity or invalidity of the information.[135]

The Inapplicability of the Probation Law

Section 2 of the Caram Proposals, amending Section 9, subsection (a) of the Anti-Graft and Corruption Act, provides "that any person found guilty under this Act shall not be entitled to the benefits of the Probation Law." Section 4 of Presidential Decree No. 968 provides:

> "Subject to the provisions of this Decree, the court may, after it shall have convicted and sentenced a defendant and upon application at any time of said defendant, suspend the execution of said sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best.
>
> "Probation may be granted whether the sentence imposes a term of imprisonment or a fine only. An application for probation shall be filed with the trial court, with notice to the appellate court if an appeal has been taken from the sentence of conviction. The filing of the application shall

131 See Rep. Act No. 5180 (1967), as amended by Pres. Decree No. 77 (1972) and Pres. Decree No. 911 (1976). In brief. the above provisions of law require the submission of testimonies in affidavit form by the complainant and his witnesses duly sworn to before the investigating fiscal, and the right of the accused, through counsel, to cross-examine them and adduce evidence in his defense.

132 People v. Abejuela, G.R. No. 29715, March 31, 1971, 38 SCRA 324 (1971).

133 Luciano v. Mariano, *supra* at note 130.

134 See Rep.Act No. 3019 (1960), sec. 13.

135 Luciano v. Mariano, *supra* at notes 130 and 133, as reiterated in Bayos v. Villaluz, G.R. No. 48982, March 30, 1979, 89 SCRA 285 (1979).

> be deemed a waiver of the right to appeal, or the automatic withdrawal of a pending appeal.

"An order granting or denying probation shall not be appealable." The provision denying the benefits of the Probation Law to a public officer found guilty by the court or the commission or omission of those acts proscribed by Republic Act No. 3019 may seem to be hardly necessary. This in view of the amendment introduced by the Caram Amendment to the effect that such public servant shall be punished with imprisonment "for not less than six years and one month nor more than fifteen years."[136] The clear import of this provision removes the convicted public officer from the operation of the probation law.[137]

This provision could only be construed as to constitute a hedge against any future amendments to the Probation Law. For should such amendment extend to those convicted to imprisonment of more than six years and one month, then public officers convicted under the Anti-Graft and Corruption Law would then be able to benefit from the provisions of the Probation Law despite Assemblyman Caram's impassioned plea before the First Regular Session of the *Batasan Pambansa* as follows:

> "This bill, even if passed into law, would be a meaningless, a toothless tiger no less, if we did not plug all possible means by which the culprit could escape the full rigors of punishment. There is absolutely no sense in endeavoring to strike terror in the hearts of the corrupt if we allow him to escape retribution for his abominable deeds."

Augmentation of the Penalties Imposable Upon Violators

Imprisonment may be imposed upon any civil servant under any of two instances. The first is when he has been found guilty of an act or omission specifically proscribed under Sections 3, 4, 5, and 6 of Republic Act No. 3019 in which cases, the Caram proposals seek to increase the penalty from imprisonment of not less than one year nor more than ten years to not less than six years and one month nor more than fifteen years.[138]

The second instance is when there is a violation of Section 7 of the Anti-Graft and Corruption Practices Act on the preparation and filing of a statement of assets and liabilities. From the original term of imprisonment of one year, the Caram Amendments increased the same to one year and six months.[139] A more substantial change, however, was made in regard to the fine imposable by increasing the same from the original one hundred

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136 Parliamentary Bill No 453, sec. 2.

137 Pres. Decree No. 968 (1976), sec. 9 provides that "(t)he benefits of this Decree shall not be extended to those xxx sentenced to serve a maximum term of imprisonment of more than six years xxx xxx xxx."

138 Rep. Act No. 3019 (1960), sec. 9, subsec. (a); *cf.* Parliamentary Bill No. 453, sec. 2.

139 Rep. Act No. 3019 (1060), sec. 9, subsec. (b); *cf.* Parliamentary Bill No. 453, sec. 2.

pesos to one thousand pesos and one thousand pesos to five thousand pesos.[140]

Transmission of Jurisdiction From the Courts of First Instance to the Sandiganbayan

The amendment to transfer jurisdiction from the Courts of First Instance to the Sandiganbayan is a patent superfluity, although it was necessary to formalize such transfer as mandated by Section 5, Article XIII of the Constitution, as follows:

> "The National Assembly shall create a special court, to be known as *Sandiganbayan,* which shall have jurisdiction over criminal and civil cases involving graft and corrupt practices and such other offenses committed by public officers and employees, including those in government-owned or controlled corporations, in relation to their office as may be determined by law."

The Prescriptive Period of Acts or Omissions Committed In Violation of Anti-Graft and Corruption Law

Section 11 of Republic Act No. 3019 provides for a prescriptive period of ten years. This prescriptive period was increased to fifteen years by Section 4 of the Caram Amendments. The need for increasing the prescriptive period was aired by the sponsor in his sponsorship speech, thus:

> "There is xxx a need because, except for a few, the corrupt and the grafters are by training and practice, if not by nature, extremely clever and wily. Oftentimes, he succeeds in concealing his despicable accomplishments. Under this proposal, Mr. Speaker, he must be the devil incarnate himself who can elude the dragnet of the law."

The prescription of offenses punished under special laws provide that offenses punished by imprisonment for six years or more shall prescribe after twelve years.[141] On the other hand, Article 90 of the Revised Penal Code provides that crimes punishable by *reclusion temporal* shall prescribe in twenty years while those punishable by afflictive penalties shall prescribe in fifteen years. It is interesting to note that the amendment follows the formula established by the Revised Penal Code.

Be that as it may, the concept of prescription is a defense provided by statute and as such may be denied or the period lengthened or shortened by statute. Thus there could be no constitutional nor statutory objection possible in the lengthening of the prescriptive period as proposed by the Caram Amendments.

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[140] Parliamentary Bill No. 453, sec. 2.

[141] Act No. 3326 (1926), sec. 1, as amended by Act No. 3585 (1929) and Act No. 3763 (1930).

> "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[142]
>
> —OLIVER WENDELL HOLMES

III. APPLICATION OF OLD CONCEPTS TO PRESENT REALITIES

As each new law is passed to curb corruption, the innovative minds of men invent ways to circumvent it just as a virus learns to resist medicine administered to eradicate it. While no ultimate solution could be found to combat the socio-economic realities of our times, no meaningful anti-graft and corruption statute could be formulated to stamp out the lurking evil which had seemed so innate and endemic in us. Still, this is no reason to keep at a standstill efforts to check its disruptive effects. Just as the seemingly inevitable death which follows cancer does not stop scientists and pathologists from discovering cures for it, so too must the struggle against graft and corruption be a continuing battle.

In the light of the task for the discovery, nay invention, of a means to totally eradicate that which has blighted our government service since autonomy from foreign exploiters, and even before such time, the need for new methods to the campaign against the evil must be the foremost consideration in the minds of the surrogates of the people if they are to be called worthy of the causes and purposes of their exalted office. A graftless and corrupt-free civil service may very well spell the difference between progress and regression. Indeed it is an undeniable fact that the wheels of government grind slowly if hampered by obstacles created by the very people who run them. Graft and corruption destroys the fiber of swift government action.

Even if no new methods are discovered, old but still undeveloped concepts will do well to be evolved. Of these old concepts, two are of particular interest because of their wide potentials and their broad possibilities.

A. COMPULSORY FINANCIAL DISCLOSURE

Proscribing acts of public officers which are manifestations of corruption and prescribing sanctions for their commission would be meaningless and an exercise in futility when auxiliary measures are not created to buttress such sanctions. Indeed, just as substantive law is inutile without objective standards for their implementation, enumerating acts which are

[142] As quoted by Abad Santos, *supra* at note 127, p. 16.

prohibited to be done would be lost in the quagmire of obscurity without effective discovery procedures, the most effective of which is compulsory financial disclosure. Philippine law on the matter goes no further than the requirement of the making of a statement of assets and liabilities.[143] American legislation and jurisprudence go so far as to hold as valid the publication of such statements. Such innovation provides a feasible alternative to overdetailed regulation of official misconduct which becomes a hindrance to the entry of eligible persons to the government service.[144] However, compulsory financial disclosure measures tread on precarious constitutional grounds. Of the many objections thereto, the right to privacy and the right against self-incrimination have been prominent.

The Constitutional Right to Privacy and Compulsory Financial Disclosure

In the *City of Carmel-by-the-Sea v. Young* case,[145] a California compulsory disclosure statute was struck down as unconstitutional because it constitutes an excessive invasion into the right to privacy and because citizens must be protected from mandatory public disclosure of one's personal financial affairs, including those of one's spouse and children. The *Carmel* court concluded that the disclouse was not related to those assets or financial affairs having a rational connection with the functions and jurisdiction of the specific agency or of that of the public officer. Although the court opened an avenue for the enactment of a statute requiring financial disclosure, the statute in issue was nevertheless unconstitutional because if failed to establish an overriding necessity which justified the intrusion into relevant and irrelevant financial affairs of public officers subject to the statute. Within a year from its promulgation, the *Carmel* dictum was severely criticized.[146] First, the decision was based on the generic right to privacy which is non-existent because personal privacy issues arise only in the context of an unreasonable search and seizure. Second, the use of the penumbral rights theory raises private economic interests to a fundamental rights status; the majority was interested merely to the protection of private financial affairs and not with economic freedom or interest *per se*. Lastly, the court failed to consider in its balancing process the statute's assertion that full disclosure of a public servant's financial affairs is necessary to maintain public confidence in government.

However, in subsequent cases,[147] the court abandoned the doctrine enunciated by the Carmel court and judiciously held that the right of the

143 See Rep. Act No. 3019 (1960), sec. 7.

144 See Comment, *Texas Public Ethics Legislation: A Proposal Statute*, 50 TEX. L. REV. 931, 933-34 (1972).

145 85 Cal. Rptr. 1 (1970).

146 See Comment, *Financial Disclosure by Public Officials and Public Employees in Light of the Carmel-by-the-Sea v. Young*, 18 UCLA L. REV. 534 (1971).

147 County of Nevada v. MacMillen, 114 Cal. Rptr. 345 (1974); Stein v. Howlett, 412 U.S. 925 (1973); Illinois State Employees Ass'n. v. Walker, 315 N.E. 2d 9 (1974); and Fritz v. Gorton, 417 U.S. 902 (1974).

public to know and the government interest in both the prevention of official misconduct and the cultivation of public confidence in the integrity of government outweigh the interest of the public servant to financial privacy so long as the disclosure statute is not over-broad in its reach. Since it is next to impossible to match financial disclosure requirements to each existing standard, the proper test of overbreath is whether the disclosure requirements are irrationally unrelated to the valid purpose of the disclosure statute. The disclosure of the mere existence of a possible conflict of interest should be sufficient to alert the public to seek an explanation.[148]

The Constitutional Privilege Against Self-Incrimination as An Objection to Compulsory Financial Disclosure

In *Garrity v. New Jersey*,[149] certain police officers were being questioned during an investigation of alleged irregularities in the processing of municipal court cases. Before questioning, each officer was advised that anything he said could be used against him in a state criminal proceeding, that he could refuse to answer if the response might tend to incriminate him, but that refusal would subject him to removal from office pursuant to a New Jersey statute. The Court held that the alternative presented to appellants is the antithesis of free choice to speak out or remain silent. A statute, therefore, may not make the exercise of the privilege against self-incrimination grounds for the forfeiture of, or removal from, public office.

In *Gardner v. Broderick*,[150] appellant police officer appeared before a grand jury investigating police bribery and corruption; the grand jury planned to question him regarding the performance of his official duties. He refused to sign a form waiving immunity from prosecution and was dismissed from the service because of such refusal. The privilege prohibits any attempt at coercing a waiver of immunity it confers on penalty or discharge from public employment. However, if appellant had refused to answer questions related to the performance of his official duties, without being required to waive immunity from prosecution, the privilege would not have barred his dismissal.

Thus, a public officer may be dismissed for refusing to answer questions intended and designed to secure evidence solely to aid in evaluating the public servant's performance. He has no constitutional protection against answering such questions, and he may be dismissed after a hearing that meets the requirements of due process if his conduct is deemed substandard. But if the purpose of the questions propounded to him is to elicit evidence to be utilized in a criminal proceeding, the public officer may invoke the privilege and refuse to answer.

148 49 TEX. L. REV. 346 (1971).
149 385 U.S. 493 (1967).
150 392 U.S. 273 (1968).

In the case of *Lefkowitz v. Turley*,[151] a statute empowered the state of New York to cancel existing contracts for a five year period if any party contracting with it refused to waive immunity from prosecution or to answer questions when summoned to testify regarding his contracts with the State. Appellee architects were summoned to testify before a grand jury investigating bribery and corruption but they refused to sign a waiver of the privilege. The Court held that a waiver obtained by threat of substantial economic sanction is not voluntary. Although they may be required to answer questions about their job performance or lose their public employment, the state may not, however, compel those with whom it contracts to waive the privilege against self-incrimination and consent to the use of their testimony in subsequent criminal proceedings.

In *Orloff v. Willoughby*,[152] the Court established the doctrine that appointees to public positions may be refused confirmation or may have their appointments withdrawn before the effective dates because of a refusal to answer questions relevant to their fitness for public service by invocation of the privilege against self-incrimination. This rationale applies also to elective candidates.

In *California v. Byers*,[153] respondent was charged with failing to stop and identify himself after a vehicular accident. The Court held that in order to invoke the privilege against self-incrimination, it must be shown that the compelled disclosures will create a substantial risk of self-incrimination. The "stop and identify" requirement does not violate such privilege because (1) it is directed at all persons and not at a group suspected of criminal conduct; (2) the required disclosures do not involve a substantial risk of self-incrimination; (3) the statutory purpose is non-criminal; and (4) self-reporting is essential to the fulfillment of the non-criminal purpose. Thus there is no constitutional right to refuse to file a required report or statement in order to avoid the mere possibility of self-incrimination.

Grants of immunity as a means of overcoming a refusal to answer questions by invocation of the privilege against self-incrimination has also been decided upon by the United States Supreme Court.[154] A grant of immunity from prosecution must grant protection equal to that of the privilege, but the immunity need not be greater. The test is whether the immunity grant leaves the witness and the prosecution in substantially the position both would have occupied had the witness claimed the privilege against self-incrimination, in which case, the immunity, being equal to the privilege, replaces the privilege.

One method of compelling testimony involving the performance of official duties or one's fitness for public office is to grant immunity from

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151 414 U.S. 70 (1973).
152 345 U.S. 83 (1953).
153 402 U.S. 424 (1971).
154 Kastigar v. U.S., 406 U.S. 441 (1972).

use and derivative use of the compelled testimony in subsequent criminal proceedings. If the compelled testiminy reflects unfavorably on performance or fitness, the public servant can be removed from office and the appointee's appointment withdrawn or not confirmed. Such actions are civil in nature and do not involve criminal proceedings in which the immunized testimony is being used in violation of the privilege against self-incrimination.

General Principles in American Case Law

First, it is constitutionally possible to prescribe criminal sanctions for the willful filing of false compulsory financial disclosure statements. Second, the public officer may not be removed from office for asserting his privilege against self-incrimination but he may be dismissed for refusing to answer questions involving his official performance in a non-criminal hearing. Third, the required disclosures do not involve a substantial risk of self-incrimination because their purpose is non-criminal and material to the accomplishment of the regulatory purpose. Fourth, public officers, whether elected, appointed or contractual, may be denied their office because of a refusal or failure to file the requisite financial disclosure statement. Lastly, the right of the public to be aware and the government interest in the prevention of official misconduct and the strengthening of public confidence in governmental integrity is of greater importance than the public officer's right to financial privacy.

B. THg CONCEPT OF DISQUALIFICATION AND THE PREVENTION OF CORRUPTION AND CONFLICTS OF INTEREST IN THE CIVIL SERVICE

The Philippine Constitution provides for certain incapacities or disabilities to those who hold public office specifically created by it. And, in fact, such disqualifications had been discussed in the previous chapters. Aside from the general statements of Article XIII, no hard and fast rule has been established in designing a standard of conduct on disqualifications of public servants. No doubt, such a code of conduct exists in each governmental agency or instrumentality. Nonetheless, the advantages of a uniform Code of Conduct for Public officers and Employees, especially on the disqualification aspect, cannot be forlorn. Be that as it may, certain difficulties cannot be avoided in the formulation of such a general rule. And yet, at least on the aspect of disqualification, some detailed rule has long been overdue. Hence certain acts should be proscribed because of the inherent danger and temptation which such acts may generate.

Prohibition Against the Possession of Interests in Government Contracts.

It has been said that a public servant's securing of a profitable contract for his private benefit incites more public wrath and indignation than

[155] Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972).

any other form of official misconduct.[156] Logic and experience would tell us that when a public officer becomes interested in a government contract, he is apt to prioritize his own interests over and above those of the government. Secondly, he is apt to exert his influence to pressure the other public officer or employee charged with the responsibility of awarding such contract to obtain the same for his own benefit. In such a case, the pressured civil servant will in turn be placed on the spot as to whether to perform his duties or accede to the pressure of a colleague. In such a case, the interests of the government is subverted by the private interests of the public servant. This in turn will result in the diminution of governmental efficiency and economy.

Two solutions have been suggested to remedy this malady. The first is to preclude the public officer from having any kind of private interest at any time during his term of office in any contract which requires his official consideration. This is impractical because it would discourage otherwise competent individuals from entering the government service.[157] The second and more feasible solution is that of requring the public officer to disclose any interest he has in the award of government contracts, to refrain from voting or issuing any decision pertinent to the award, and to execute a certificate that he has complied with such requirements.[158] If an elective official and such requirements are not met, then the electorate should remedy the situation at a subsequent election. If an appointed officer, then he should be discharged.

In cases where the public officer has interests in a firm which is the sole supplier of a good or service needed by the government, it would be erroneous to ban contracts such as this because then the government likewise loses. The solution in this case would be to closely monitor the acts of such public officer.

Even if the government contract may be awarded only by public bidding, the same rules on self-disqualification should apply. The interests of the public officer may still be served to the detriment of the government when such depends on his discretion in the selection of bidders to be notified, in the extent of advertising for bids, in the determination of the responsible bidder, and in all other aspects where such public servant exercises his discretion.[159] Excluded from this concept of "interest" are purchases made under conditional sales contracts from firms bidding on government contracts and commercial loans obtained from these firms which should be

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156 Legislative Comment, *Conflict of Interests*, 70 W. VA. L. REV. 400 (1968).

157 Note, *Conflict of Interests, of Government Personnel: An Appraisal of the the Philadelphia Situation*, 107 U. PA. L. REV. 985 (1959).

158 Comment, *Conflict of Interest in Public Contracts in California*, 44 CALIF. L. REV. 355, 369 (1956). See also Note, *A Conflict of Interest Act*, 1 HARV. J. LEGIS. 68, 70 (1964).

159 Comment, *Municipal Corporations—Right of Taxpayer to Enjoin or Avoid a Contract Awarded ohn Competitive Bidding—Officer Interested*, 35 MINN. L. REV. 322, 326 (1951).

covered by the prevailing commercial standards in the locality where such loan or retail purchase was made.[160]

The strict rule should be that contracts involving interested public servants are void as being violative of public policy and the government should be allowed recovery for profits earned therein. The risk of voidability and loss of profit, plus criminal sanctions, are remedies which serve as a sufficient deterrent for the commission of official misconduct.

Prohibition Against the Possession of Interests in Governmental Transactions

Whenever a public servant acts in an official capacity and exercises a certain amount of discretion on any matter brought for his consideration, his actions are premeated with public interest and he should not be allowed to officially act on any matter requiring his discretion for his own personal benefit unless such advantage is not peculiar to such public officer but is likewise beneficial to all individuals in the same class to which the public officer belongs. Hence, official misconduct does not only include government contracts but also other governmental transactions in which his discretion is exercised. To hold otherwise would create the hazard that such individual's personal interests may be patronized to the prejudice of public interest. Add to this the resultant erosion of public confidence and the end result would be an untrustworthy and inefficient civil service.

Thus a public official should be inhibited from acting officially on any private party's request, if benefit will accrue only to such private person and not to a class, when the acting official has an interest in the requesting party. This is so because "sentiment and friendship can exert just as profound an influence as proprietary and financial interests."[161]

The rule that retail purchases under conditional sales contracts and loans from commercial institutions do not create prohibited interests in a government contract involving such firms when obtain in accordance with prevailing commercial standards in the place where such retail purchase or loan was made applied to transactions involving such entities.

However, such a rule should be strictly construed and before any transaction will be allowed to fall within the exception, the same must be carefully and judiciously scrutinized. Otherwise a circumvention of the law may be perpetrated by the cunning public officer.

Prohibition Against Assisting in Transactions Involving the Government

It has been the tragedy of the history of Philippine government that public servants use their acquaintances, contacts and influence accruing to

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[160] Freilich & Larson, *Conflicts of Interest: A Model Statutory Proposal for the Regulation of Municipal Transactions*, 38 U. MO. K. C. L. REV. 373, 404 (1970).

[161] Kaufmann & Widiss, *The California Conflict of Interest Laws*, 36 S. CAL. L. REV. 186, 195 (1963).

them in their official capacity to advance their private interests or those of others in transactions involving the governmental institution in which they hold a position of public trust. Such misuse of official reputation may be of two types: first, if a public officer or employee represents private interests in a governmental agency, there is the risk that he may be able to exert influence on the agency making the ruling or decision; second, if the public servant has supervisory responsibilities in the agency, there is the further risk that he may exercise his subjective judgment in his supervisory position so as to favor his private interests or those of others.

The chief objection to legislation regulating the representation of private parties by public servants before government agencies is that such laws deter the recruitment of professionals, especially lawyers, into the government service.[162] Thus, statutes regulating official misconduct should not include the public servant's performance of his constiuency-service role in which representation is performed free of charge and in fulfilment of the obligations of his public office.[163] What is abominable is when such public officer accepts remuneration for his representations from such private person. In addition, such public officer should be restricted from representing corporations in which he holds financial interests since he will benefit, at the very least, indirectly from favorable agency decisions.

A circumvention of the rule is when a public servant is allowed to represent a client before a government agency when he believes his client should win merely by falsely stating that he believed that his client should prevail before the agency.[164]

As a further safeguard, confidential information which the public officer may have obtained by virtue of his position should not be prematurely disclosed if the same would be of value to private interests. Hence any breach of confidence should be punished severely in the interest of public welfare.

Prohibition Against the Representation by Former Public Officers in Governmental Agencies

Former public officers and employees whose subsequent activities in the private sector involve the representation of persons before government agencies is another situation where the potential for abuse is at its greatest. Indubitably, some of these private persons hire retired or resigned public officers because of their specialized knowledge in government acts and personal contacts which remain even after retirement or resignation.

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[162] Note, *supra* at note 157, at 1005.

[163] Comment, *State Legislative Conflicts of Interest: An Analysis of the Alabama Ethics Commission Recommendations*, 23 ALA. L. REV. 367, 387 (1971).

[164] Note, *State Conflict of Interest Laws: A Panacea for Better Government?*, 16 DEPAUL L. REV. 453, 460 (1967).

However, strict regulation of such situations must be balanced against the right of the individual to choose his own employment or occupation. The advantages of public servants, when representing persons before any agency of the national or local government, and especially the unit in which the former public servant was involved, are obvious but decrease over time.[165] Thus the check against possible post-employment abuses should be limited to two situations: first, that the prohibition should only apply to the government unit or agency with which the former public officer was connected; and, second, the prohibition should endure only for a specific period to be decided upon by the competent law-making body because the influence which may be exercised by the former public servant weakens through the passage of time.[166]

CONCLUSION

Is it within the limits of human ingenuity to put into words a standard of behavior—to put into law integrity and honesty—in the government service? Apparently, no. Indeed, enacting a statute has not always been the most effective manner of preventing public servants from serving their own selfish interests. Most of our statutes establishing a norm of conduct for government officers and employees has taken the form of penal law. It has often been suggested that the law on graft and corruption has been inadequate to meet the protean nature of the evil sought to be curbed. Thus may be so. But the more pertinent question is whether these laws have been enforced and implemented to the greatest advantage of the public. Laws creating agencies charged with the task of ensuring the strict and swift implementation of the graft and corruption law have been far from inadequate. But, alas, the results bear out a minimal return. Although it cannot be said with all candor that these agencies, in the performance of their legitimate functions, had not succeeded in at least lessening the incidence of graft and corruption, still it cannot also be said that they have succeeded in eradicating this evil. Thus the additional issue is how to utilize this potent disciplining rod to its fullest potential.

In any legislation seeking to curb official misconduct, the public and private lives of the public servant must inevitably be regulated since, more often than not, the public officer's activities overlap in both spheres of existence. The public eye is often harsh and unforgiving. It fails to delineate between that life which a civil servant must live as such and that which he must live as a member of society. But it cannot be otherwise. Perhaps this is in itself a check against the doing of graft and corrupt acts. If the state is unable to stretch its reach to cover the activities of a public servant, either because the act itself is not defined in the law as punishable

[165] Please see the Proposed Code of Professional Responsibility, in particular Rule 6.04, Appendix D in *Legal Ethics* by Ruben Agpalo. (1980).

[166] Note, *supra* at note 158, at 79.

or because of the general inadequacy thereof, then perhaps considerations of protecting his public image and reputation may constitute a barrier for the commission of graft and cordupt acts.

Thus, it is often said that high and lofty ethical norms are essentially predicated on individual conscience. This, however, does not preclude the establishment of guidelines for official conduct by legislation—"statutory enactments will not create honest public servants, but legislation can offer substantial encouragement to their development."[167]

As of this writing, Assemblyman Davide has introduced a bill in the *Batasan Pambansa* which penalizes any "cover-up" made by a public officer for the graft and corrupt acts of another public officer. If approved into law, this is an interesting innovation to the law although any discussion on its sufficiency would be highly premature and presumptious.

When former President Quezon was still a member of the Philippine Commission charged with the duty of obtaining an independence law for the Philippines during the American occupation, in exasperation to his failure to get the necessary law from the United States Congress he remarked, "I prefer a government run like hell by Filipinos than a government run like heaven by the Americans." As an outburst of the nationalistic spirit, it was perhaps a successful idea as a rallying point for the nationalists of that era. But for the present generation, it has become a dire prediction on the conditions of the times. And of efforts are not exerted to the fullest limit, the signs of the times may very well bear out the truth of Quezon's aside.

Thus, in the unrelenting struggle for an honest civil service, all weapons devised by man's ingenuity must be utilized to the greatest potential—criminal sanctions, forfeiture of property, etcetera. If not as panacea, then, at least, as deterrents.

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[167] Nowlin, *Legislative Ethics*, 1973, 5 ST. MARY'S L. J. 456, 473 (1973).