THE PCGG: A CRITICAL EXAMINATION OF ITS ENABLING LAWS, RULES AND REGULATIONS, AND PRACTICES*

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I. INTRODUCTION

I am grateful for your presence here this afternoon because, apart from honoring us, it gives the assurance that you share our belief in the transcendental importance and urgency of the issues involved in the topic of our discussion.

Necessity for continued and unabated discussion of the issues involved

We in the Law Center and in the Philippine Association for the Rule of Law firmly believe that, widely and extensively discussed though this controversial topic has been during the last five months, ventilation of the basic issues and their multifarious ramifications should remain unabated and relentless until the incomprehensible apathy of the authorities in whose hands they can be resolved shall have turned into solicitous concern and satisfactory and just solutions shall have been adopted and effected.

The authorities I am adverting to are the President who, seemingly unable to comprehend and appreciate the issues, has cavalierly evaded and literally laughed them off; the Supreme Court, which has failed to act with dispatch and has not issued a single preliminary injunction or restraining order in the face of numerous blatant and glaring assaults on basic rights sufficiently alleged and shown by documentary and other evidence, in some instances even admitted; the Constitutional Commission which, from a momentary show of determination to right the grievous wrongs and the anomalous set-up at the soonest possible time, has backtracked to a lame and half-hearted compromise solution that may come too late for those it is intended to succor or provide some relief; and, of course, the PCGG itself and its officials who, instead of admitting their mistakes and correcting them, have remained self-righteous and intransigent.

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The central issue

If in so speaking I am a little bit too impassioned, it is because the stakes in the problem at hand are too high to allow all the dilly-dallying we have witnessed. For it is no exaggeration to say that no less than the life and destiny of this nation hangs in the balance. At the heart of the problem is the central issue of whether or not we have and shall have a government of laws and not of men, for it is only under a government of laws that we can achieve peace and political stability which are the *sine qua non* for economic recovery and stability. We cannot have a government of laws if the government itself, instead of setting the example, behaves as if it is not bound by and is free to breach the law and to trample on the basic rights of individuals and entities. It is both farcical and preposterous to claim that we have and shall have a government of laws if mere creatures of the law like the PCGG and its officials and personnel are beyond the reach of the law, free to make a mockery of it and its institutions with impunity in the name of the national interest consisting of searching for and recovery of the so-called ill-gotten wealth.

Matters to be examined and discussed

With this long but necessary preliminary remarks, let me now ask you to examine with me certain provisions of the laws relied upon by the PCGG and its officials to justify their conduct or actuations, some provisions of their rules and regulations, and certain practices of theirs. I hope to be able to point out certain defects in the enabling laws and show that some of their provisions have been misinterpreted and misapplied, wittingly or unwittingly, by the Commission and its officials both in their rules and regulations and practices. I further hope to succeed in showing that, to the extent that said provisions lend support to their rules and regulations and practices or actuations, the same are repugnant to the Bill of Rights and so also are said rules and regulations and practices or actuations. I shall end with a statement of the position that the Bill of Rights has never been suspended from the inception of the present Government and that it should prevail and have primacy over all other objectives of the new Government, especially over the recovery of ill-gotten wealth.

II. Composition and Decisions or Binding Actions

Executive Order No. 1 creates and provides for the composition of the Commission by directly designating or naming the particular individuals who will serve as chairman and members, respectively. Thus Section 1 thereof states:

> There is hereby created a Commission to be known as the Presidential Commission on Good Government, composed of Minister Jovito R. Salonga as Chairman, Mr. Ramon Diaz, Mr. Pedro L. Yap, Mr. Raul Daza and Ms. Mary Concepcion Bautista as Commissioners.

Under other circumstances, this would have constituted a legislative usurpation of the Chief Executive's appointing power, pursuant to the holding in *Springer v. Government of the Philippine Islands.*[1] But in this instance it would be idle to raise this objection in view of the merger of both the legislative power and the executive power in the President of the new Government.

1. *Replacement of Members*

It should be noted, however, that, by so creating and specifying the composition of the Commission, the executive order has fused and made inseparable the position and the person occupying it, so that the moment either is out, there can be no vacancy to speak of and to fill. To replace the position and former occupant thereof, the mere issuance of a new appointment will not suffice; the executive order will have to be amended by recreating the position and designating a new member to occupy it. I do not know how the situation created by the appointment of Commissioner Yap to the Supreme Court was dealt with, but I am not aware of any amendment putting his supposed replacement, Mr. Quintin Doromal, there. I believe he was placed there by mere appointment. But appointment to what? A position that did not and does not exist because the position was abolished when Justice Yap ceased to be a member of the Commission.

This, of course, is a minor and trivial matter.

2. *Commission Not Acting as a Body*

The more important thing to look into is how the Commission or, rather, its members have been issuing hold-departure, sequestration and freeze orders as well as other orders.

The practice before and after the rules

The Commission was created as a collegiate body of five members (including the chairman) but, to all indications, its supposed orders—at any rate, many, if not most, of such orders—have been issued by individual members singly. Except in one instance I know of, none of those issued to or concerning TDFSI has been signed by more than one member. In the exceptional instance I mentioned only two signed, and this refers to a minor order directing the closure of a store in the Manila Hotel of the TDFSI. This is at variance with the practice of all other existing collegiate bodies, such as the Supreme Court, Court of Appeals, or the Securities and Exchange Commission in which all the members participating in the disposition of a case sign the decision or order indicating who voted for the decision or order and who dissented.

[1] 50 Phil. 259, 277 U.S. 189.

Allow me to cite some glaring instances.

The orders sequestering the TDFSI and its properties and freezing its bank accounts, dated March 11, 1986, were both signed only by Commissioner Mary Concepcion Bautista. There was even no indication that she signed them for the Commission, although later, starting March 18, 1986 when she began implementing the sequestration order, she signed other orders purportedly "For the Commission" but still alone.

But she could not have issued these orders for the Commission, for all of them were issued from March 11, 1986, when Chairman Salonga and Commissioners Diaz and Yap had already left for their missions abroad, up to the first week of April 1986, when they had just returned. And this is also true of the first hold-order list of March 21, 1986 preventing the travel abroad of 134 persons.

Confirmation of practice by the rules and individual pronouncements

This practice and these facts are confirmed by the Commission's own rules and regulations, which were issued much later, on April 11, 1986. Indeed, they even fall short of the requirements of said rules and regulations. For it is required in Section 3 thereof that:

> SECTION 3. *Who may issue.* A writ of sequestration or a freeze or hold order may be issued by the Commission upon the authority of at least two Commissioners, based on the affirmation or complaint of an interested party or motu propio when the Commission has reasonable grounds to believe that the issuance thereof is warranted.

Commissioner Daza had also made an earlier confirmation of these facts during the hearing on April 18, 1986 on the first motion for reconsideration filed by TDFSI in the Commission. He said that even before the promulgation of the Commission's rules and regulations, it was already the practice for one Commissioner to orally consult only one other Commissioner prior to the issuance of a sequestration, freeze, or hold-departure order.

The Commission, therefore, never observed the quorum and voting requirements that should be observed by a collegiate body in order to be able to act with legal effect binding on itself and on any person affected thereby.

Quorum and votes required for valid action by PCGG

Quorum signifies such a number of the officers or members of any body as is competent by law or constitution to transact business.[2]

[2] People v. Dale, 179 P. 2d 870; Snider v. Rinehart, 31 P. 716; West v. Stephenson, 151 S.E. 853, 855.

The quorum of a body is an absolute majority of it unless the authority by which the body was created fixes it at a different number.[3]

The word "quorum" implies a meeting,[4] and the action must be group action, not merely action of a particular number of members as individuals.[5]

Since the law creating it (EO No. 1) does not fix a different number, the quorum of the PCGG has to be three, which is the absolute majority of its five members (the Chairman included). To make a decision or binding action, a majority of those present in a meeting or session must give their affirmative vote. If four or five are present, then the vote of three is required for valid action. If only three are present then the vote of two is required for the purpose. It is thus improper and a usurpation of the legislative power as well as a violation of the legislative will for the Commission to provide in its rules that the authority of two Commissioners is sufficient for the issuance of even a sequestration or freeze order. A meeting, not mere individual and separate consultation, is required so that the proper and thorough discussion can be held.

The upshot of the foregoing is that all sequestration, freeze, and hold-departure orders issued without a meeting at which a quorum was present and the necessary number of votes was obtained, are invalid for lack or excess of authority or jurisdiction on the part of the individual members who issued them.

Considering its extraordinary powers, this is hardly the fair and orderly procedure contemplated by law.

III. HOLD DEPARTURE ORDERS

1. *No Statutory Basis*

One is hard put to find any provision in any of the enabling laws of the PCGG authorizing it to issue a hold order (or hold-departure order) which it defines in its rules and regulations as "an order to prevent a person from leaving the country where his departure will prejudice, hamper or otherwise obstruct the task of the Commission in the enforcement of Executive Orders Nos. 1 and 2, because such person is known or suspected to be involved in the properties or transactions covered by said Executive Orders." It is considered valid for a maximum period of six month unless for good reasons extended by the Commission *en banc*.[6]

The only possible statutory basis for this authority being exercised by the Commission is Section 3(d) of Executive Order No. 1 which empowers it "(t)o enjoin or restrain any actual or threatened commission of acts by

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[3] 74 C.J.S. 171; Application of McGovern, 44 N.Y.S.2d 132, 137.
[4] *Supra*, note 3.
[5] *Id.*; 74 C.J.S. 171.
[6] PCGG RULES AND REGS., Sec. 1(2).

any person or entity that may render moot and academic, or frustrate, or otherwise make ineffectual the efforts of the Commission to carry out its tasks under (the executive) order."

But the departure of a person from the country can hardly be said to have any of these effects. For the Commission can still conduct the investigations regarding, and still procure through the courts the sequestration of, the so-called ill-gotten wealth referred to in Executive Orders Nos. 1 and 2, whether such wealth is here or abroad. And this is what it has actually been doing with respect to certain properties attributed to Marcos and his supposed cronies or business associates and nominees who are already out of the country. If the presence in the country of any such person departing should be needed, his passport can always be cancelled and his return to the country compelled, if necessary. What actually is happening, however, is that such persons who are already abroad are not wanted back in, nay, are even prevented from coming back to, the country even if only to defend themselves respecting the charges against them. One possible, and even probable, reason is: that would make it easier to prove the charges.

How this attitude squares with the avowals of the new Government to restore freedom and uphold individual rights, highlighted not only by the adoption of a "Freedom Constitution" but by the government's ratification of the International Covenant on Civil and Political Rights on February 28, 1986, the same date on which Executive Order No. 1 was signed, is beyond anyone.

2. *Unconstitutional, Being Violative of Liberty of Travel, Due Process, and Presumption of Innocence*

At any rate, to the extent that Section 3(d) may be said to allow the issuance by the Commission of hold-departure orders, the same would be unconstitutional. And the Commission, in adopting such an interpretation in its rules and regulations, has contravened a cardinal tenet of statutory construction, namely, that a law should be interpreted so as to assure its being in consonance with, rather than repugnant to, any constitutional command or prescription.[7]

Liberty of travel

The Bill of Rights prohibits any impairment of the liberty of travel except upon lawful order of the court, or when necessary in the interest of national security, public safety, or public health.[8] In any case—whether or not there is a court order or national security, public safety or public health necessitates impairment—due process must be observed. For, as

[7] Mutuc v. Commission on Elections, L-32717, Nov. 26, 1970, 36 SCRA 228.
[8] 1973 CONST., Art. IV, Sec. 5; PROV. CONST., Sec. 1.

Section 1 of the Bill of Rights says, "(n)o one may be deprived of his life, liberty or property without due process of law." Part of the liberty protected by this clause is the right or freedom to travel. As expressed by the U.S. Supreme Court in *Kent v. Dulles*:[9] "Travel abroad, like travel within the country, may be necessary for livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads . . . Travel is, indeed, an important aspect of the citizen's 'liberty' ".

None of the hold-departure orders issued by the Commission or contemplated by its rules and regulations is preceded by a lawful court order. And the tasks of the Commission, which have to do solely with the recovery of the ill-gotten wealth of Marcos and his cronies, business associates and the like, are not comprehended in the terms national security, public safety, or public health.

Due process and presumption of innocence

These legal considerations conclusively demonstrate the total lack of authority on the part of the Commission to issue hold-departure orders, and this lack of authority by itself should suffice to make them violative of due process. But this transgression is aggravated by the manner such orders have been issued and implemented, which desecrates not only the right to due process but, equally, the right to be presumed innocent.

Allow me to give an example to drive home the point: Here is a fellow who had bought two round-trip air tickets for himself and his wife for a three-day holiday in Hongkong. Accompanied by their children and some relatives who wanted to see them off, he and his wife went to the airport on July 20, 1986 for the 12:45 p.m. flight of Cathay Pacific Airways for Hongkong. They had travelled once before during the year without any hitch just as in previous years. Upon arrival at the airport, he and his wife proceeded to the check-in counter of Cathay Pacific where they had to line up and wait for their turn to check-in their luggage and get their boarding passes. After having done so, they hugged and kissed their children goodbye and waved to the other relatives who went to see them off, and then proceeded to the immigration passport control area. There they again lined up and when their turn came the immigration officer, to whom they had handed their passports and boarding passes, scanned a list contained in two or three sheets and after a minute or two looked up and told them: "I am sorry, sir, but you cannot leave. Your name is in this revised list of persons against whom the PCGG has issued a hold-departure order." He looked at the list and saw the name Victor Ortega. His full name is Victor Ortega y Campos. He and his wife were shocked and deeply embarrassed amidst the crowd; they were not aware of any reason why he should be in the hold-order list and they also could not comprehend why

[9] 357 U.S. 116, 2 L. Ed. 2d 1204.

they were never previously informed about his name's inclusion. After some remonstrations the frantic couple had to hurry back to the check-in counter of their airline and have their luggage recalled. They had to cancel the trip. His only fault: he is related to certain other Ortegas of La Union and his wife is somehow related to the Benedictos.

On the basis of copies we obtained from the Commission on Immigration and Deportation, his name was not included in the first list dated March 21, 1986 which had a total of 134 names. Nor was his name in the revised list of 264 persons dated July 10, 1986. Apparently, it needed only ten or a lesser number of days to include his name and those of other persons, especially because no notice of pending action or proceeding of any kind is given at all.

None of those included in the lists has ever seen a copy of the hold-departure order issued against him or her. Nor has the Commission shown any to anyone. It is, therefore, not known who issued them, when and how they were issued, and on what grounds they were issued. Least of all, no one knows whether there was a determination of at least a probable cause. When one considers that by March 21, 1986 there were already 134 names included in the list and the Commission was then barely fourteen days old with its chairman and two members out of the country since before March 10, there was simply no time to make an honest-to-goodness finding of probable cause with respect to each of these persons whose names were included in the list. And with the sequestration and freeze orders directed against more than 200 corporations that followed and the work that they entailed, it was simply physically impossible likewise to base the subsequent list of more than 264 on investigations leading to a finding of probable cause.

This clandestine procedure, characteristic of a police state, is not only a deliberate practice; it is expressly sanctioned by the Commission's rules and regulations. In contrast to a sequestration or freeze order, a hold-departure order is, under said rules and regulations, not served on the party against whom it is issued;[10] hence such party may request its lifting within five days from the date of knowledge thereof.[11]

This practice and procedure is, to say the least, patently contrary to the concept of fair play, fairness, and freedom from arbitrariness which, as stated in *Ermita-Malata Hotel v. City Mayor of Manila,*[12] is the essence of due process. In fact it smacks of sadism and maliciousness, for it should be obvious to the Commission and to anyone else that, as in the case of Mr. Ortega, it can cause undue hardships, embarrassment and prejudice. It is fortunate in Mr. Ortega's case that he and his wife were only on a

[10] PCGG RULES AND REGS., Sec. 4.
[11] *Id.*, Sec. 5.
[12] L-24693, July 31, 1967, 20 SCRA 849.

short holiday trip. One can imagine the consequences if his trip was for a pressing professional or business engagement non-fulfillment of which would have cost the life of a person or resulted in tremendous financial loss.

And on account of what? A mere suspicion caused by accidental similarity of names or by relationships, filial or friendly, inordinately and improperly appreciated as creating the presumption that he could be a party to acquisition or the concealment of the so-called ill-gotten wealth. And this presumption is now incumbent upon him to overcome instead of the other way around.

3. *Exaction of Bonds Per Trip*

Lately, the Commissioners have adopted a practice which is sanctioned by neither law nor the Commission's own rules and regulations.

With respect to one who has learned of his inclusion in the hold-departure list before going on a trip, the so-called "hearing Commissioner" now exacts a cash bond of from ₱50,000.00 to ₱400,000.00 per trip.

Some of those who can afford have availed themselves of this onerous alternative to an absolute travel ban. But even here one finds "the oppressor's wrong, the proud man's contumely, (and) the insolence of office" that Hamlet found in Denmark. In the case of someone I know who put up a cash bond of ₱400,000.00 for a recent trip, the lawyer who secured the bond for her was made to wait for two-and-a-half hours for the release—just the release — of the temporary clearance even if the Commissioner who had it released had no other visitor at the time and he knew that the lawyer was waiting.

Not only is there total lack of authority to make the exaction here. There is denial of equal protection of the law to those who cannot afford or who refuse to put up the bond, while those who can and have no choice but to do so still have to submit themselves to the indignities and abuse of public office such as that adverted to above. In either case there is impairment of the liberty of travel without due process of law.

IV. FREEZE ORDERS

1. *No Statutory Basis*

There is likewise no statutory basis for the authority exercised by the Commission or its members to issue a freeze order, which in its rules and regulations it defines as one "intended to stop or prevent any act or transaction which may affect the title, possession, status, condition, integrity or value of the asset or property which is or might be the subject or object of any action or proceeding under Executive Orders Nos. 1 and 2, with a

view to preserving and conserving the same or to preventing its transfer, concealment, disposition, destruction or dissipation."[13]

As in the case of hold-departure orders, the only statutory provision that might arguably be invoked as granting this authority is Section 3(d) of Executive Order No. 1 which we have quoted earlier. It can even be observed that said section can more plausibly be invoked for the issuance by the Commission of freeze orders than for the issuance of hold-departure orders.

It is, however, both strange and significant that while Executive Order No. 1, which was issued on February 28, 1986, does not speak of freeze orders, Executive Order No. 2, which was issued twelve days later (March 12, 1986), expressly freezes all and the same assets that the Commission is charged with the duty to recover. And it is President Aquino who, by the terms of this later executive order, directly and immediately effected the freezing. No similar authority is given thereby to the Commission.

It can readily be deduced from this circumstance that Executive Order No. 1 withheld from the Commission the authority to issue freeze orders, otherwise there would have been no necessity for President Aquino to freeze by means of Executive Order No. 2 the same assets and funds that the Commission is charged with recovering under the prior executive order.

2. *Executive Order No. 2*
Unconstitutional

The trouble is that President Aquino could not legally do what she did in Executive Order No. 2. For her act of directly freezing those assets and funds by law constitutes a bill of attainder and at the same time a usurpation of the judicial function.

It is a bill of attainder since by it she acted as legislator assuming the role of a judge and finding the persons or class of persons mentioned in the executive order guilty of a crime or crimes without giving them a chance to be heard.[14]

It constitutes a usurpation of the judicial power for the reason that the question of whether or not someone has committed a crime is a matter that pertains exclusively to the domain of the courts,[15] but the executive order already assumes and declares that Marcos and company have committed the crimes attributed to them.

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[13] PCGG RULES AND REGS., Sec. 1(c).
[14] U.S. v. Lovett, 328 U.S. 303.
[15] U.S. v. Donoso, 3 Phil. 234; U.S. v. Montecillo, 11 Phil. 109; Scoty's Department Store v. Micaller, 52 O.G. 5119 (1956).

3. *Bank Accounts*

A usual target of the freeze orders issued by the Commission or its members are the bank accounts of persons it has included in its hold-departure list.

In this respect the freeze orders can be characterized as not only unauthorized and violative of due process but also an impairment of the contract between the bank and the depositor concerned.

They further contravene the Banking Secrecy Law[16] and pose a grave danger to the entire banking system which that law seeks to promote and protect and impairment of which will have very serious repercussions on the national economy.

That law provides:

> SECTION 1. It is hereby declared to be the policy of the Government to give encouragement to the people to deposit their money in banking institutions and to discourage private hoarding so that the same may be properly utilized by banks in authorized loans to assist in the economic development of the country.
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> SEC. 2. All deposits of whatever nature with banks or banking institutions in the Philippines including investments in bonds issued by the Government of the Philippines, its political subdivisions and its instrumentalities, are hereby considered as *of an absolutely confidential nature* 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.
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> SEC. 5. Any violation of this law will subject offender upon conviction, to an imprisonment of not more than five years or a fine of not more than twenty thousand pesos or both, in the discretion of the court.[17]

The decisions of the Supreme Court have not been uniform in holding that disclosure of savings and current accounts may be justified in prosecutions for violation of the Anti-Graft and Corrupt Practices Act.

In *Tatalon Barrio Council v. Chief Accountant of the Bank of the Philippine Islands,*[18] the Court held that such disclosure was not justified.

In *Philippine National Bank v. Dionisio,*[19] however, the Court made a turnabout, holding that:

> Cases of unexplained wealth under Section 8 of the Anti-Graft and Corrupt Practices Act (Rep. Act No. 3019) are similar to cases of bribery or dereliction of duty and no reason is seen why these two classes of cases

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16 REP. ACT No. 140g.
17 Italics supplied.
18 L-18360, Jan. 31, 1963, 7 SCRA 170.
19 L-18342, Sept. 19, 196v, 9 SCRA 10.

> cannot be excepted from the rule making bank deposits confidential. The policy as to one cannot be different from the policy as to the other. This policy expresses the notion that a public office is a public trust and any person who enters upon its discharge does so with the full knowledge that his life, sa far as relevant to duty, is open to public scrutiny.

This latter holding was reiterated verbatim in *Philippine National Bank v. Gancayco*.[20]

This notwithstanding, it has not been squarely decided yet whether or not the examination, inquiry, or looking into a bank deposit may be authorized except upon order of a competent court, as seems to be required by the statute.

Since the PCGG is not a court, it may be doubted whether it could lawfully make such examination, inquiry or looking into in the cases where it has frozen bank accounts. Furthermore, none of the frozen bank accounts is the subject matter of pending litigation, no single court action concerning them having been brought by the PCGG.

It may further be argued, even on the basis of the *Dionisio* and *Gancayco* rulings, that the policy sought to be promoted thereby — namely, the notion that a public office is a public trust and any person who enters upon its discharge does so with the full knowledge that his life, so far as relevant to duty, is open to public scrutiny — does not apply to non-government officials like the persons and enterprises whose bank accounts it has frozen.

V. SEQUESTRATION

1. *Sequestration in Historical Context*

Sequestration in the Philippines is, as legal concept and institution, as old as our civil law. It was provided for in Articles 1785 to 1789, inclusive, of the Spanish (or old) Civil Code. Said articles were reproduced in the new Civil Code which reproduced those articles of the Spanish Code.

Much later, the Revised Anti-Subversion Law[21] and the Anti-Subversion Law of 1981,[22] also embodied a provision on sequestration.

Under old and new Civil Code

Under both the Spanish Civil Code and the new Civil Code, sequestration "takes place when the attachment or seizure of property in *litigation* is ordered."[23] The person entrusted with the care and custody of the property sequestrated was referred to in the Spanish Civil Code as "bailee"

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[20] L-18343, Sept. 30, 1965, 15 SCRA 91, 96.
[21] P.D. No. 885, Feb. 3, 1976.
[22] P.D. No. 1835, Jan. 16, 1981.
[23] SPAN. CIV. CODE, Art. 1786; NEW CIV. CODE, 2005.

and in the New Civil Code as "depositary." He was and is obliged to comply, with respect to said property, with all the obligations of a good father of a family[24] and could not and cannot be released of his responsibility until the controversy which occasioned the sequestration is ended, unless the court should so order.[25]

All other matters were, pursuant to Article 1789 of the Spanish Civil Code, governed by the provisions of the Law of Civil Procedure; and are, pursuant to Article 2009 of the New Civil Code, governed by the Rules of Court.

Justice Fred C. Fisher, who annotated both the Spanish Civil Code and the Code of Civil Procedure (Act No. 190), points to the Code of Civil Procedure's provisions on receivers, manual delivery of personal property (replevin), and attachment as the ones governing sequestration under the old (Spanish) Civil Code.[26] All these provisions are substantially reproduced in the Rules of Court of 1940 as well as in the Revised Rules of Court in 1964, the corresponding provisions of which should thus be the governing law on sequestration under the new Civil Code.

All of these provisions contemplate a pending principal action of which a receivership, replevin, attachment or sequestration proceeding is but an ancillary, incident or auxiliary. The purpose is to preserve and guard the property in litigation. The receiver, sequestrator, attaching or seizing officer is either appointed by and always subject to the control of the court where the principal action is pending. In all cases, a bond is always required to be filed by the applicant to answer for all damages sustained by reason of the appointment of a receiver or sequestrator or by reason of the appointment of a receiver or sequestrator or by reason of the attachment or seizure in case the applicant shall have procured the remedy without sufficient cause; in receivership and sequestration cases, an additional bond may be required as further security for such damages. Furthermore, the receiver or sequestrator must also file a bond, executed to such person and in such sum as the court may direct, to the effect that he will faithfully discharge the duties of receiver or sequestrator in the action and obey the orders of the court therein. A copy of each bond must be served on every interested party, who may except to its sufficiency or that of the surety or sureties.[27] It must also be noted that the applicant for the provisional remedy is always separate and different from the receiver, sequestrator or attaching officer.

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[24] *Id.*, Art. 1788; *id.*, Art. 2008.
[25] *Id.*, Art. 1787; *id.*, Art. 2007.
[26] FISHER, THE CIVIL CODE OF SPAIN WITH PHIL. NOTES AND REFERENCES 668 (1947).
[27] REVISED RULES OF COURT, Rule 59, Secs. 3, 5-6.

Under Anti-Subversion Law

Both the Revised Anti-Subversion Law of 1976[28] and the Anti-Subversion Law of 1981[29] authorize the sequestration of the property of any person, natural or artificial, engaged in subversive activities against the government and its duly constituted authorities.

For purposes of said decrees, the term sequestration is defined as "the seizure of private property or assets in the hands of any person or entity in order to prevent the utilization, transfer and conveyance of the same for purposes inimical to national security, or when necessary to protect the interest of the Government or any of its instrumentalities. It shall include the taking over and assumption of the management, control and operation of the private property or assets seized."

The sequestration shall be in accordance with rules and regulations issued by the Minister of National Defense.

We have made inquiries at the Ministry of National Defense and have been given the information, by General Samuel Soriano no less, that the Minister of National Defense has not issued any such rules and regulations and that the provisions of the Anti-Subversion decrees on sequestration have not yet been implemented.

We venture to observe, however, that the sequestration authorized is overbroad and thus violative of due process because it applies to any and all properties of the person engaged in subversive activities, whether or not they are actually used or intended to be used in the pursuit of such activities, including those that may be necessary for the daily needs of his family. And since the question of whether or not such person is engaged in subversive activities is a (in fact, *the*) principal and prior matter to be determined by the court in the criminal case, the sequestration should be just an adjunct of the criminal case and therefore should be a matter for judicial, not administrative, determination. Thus, these provisions of the Anti-Subversion decrees encroach on the judicial power insofar as they empower the Minister of National Defense to issue the rules and regulations to govern the sequestration proceedings.

Under laws relied upon by PCGG and its own rules and regulations

The laws relied upon by the Commission or its members as basis of their supposed authority to issue sequestration orders are Executive Orders Nos. 1 and 2 and the Provisional Constitution.

[28] P.D. No. 885, Feb. 3, 1976.
[29] P.D. No. 1835, Jan. 16, 1981.

All that E.O. No. 1, which creates the Commission, provides on the matter are the following:

> Section 2. The Commission shall be charged with the task of assisting the President in regard to the following matters:
>
> (a) The recovery of all ill-gotten wealth accumulated by former President Ferdinand E. Marcos, his immediate family, relatives, subordinates and close associates, whether located in the Philippines or abroad, including the takeover or sequestration of all business enterprises and entities owned or controlled by them during his administration, directly or through nominees, by taking undue advantage of their public office and/or using their powers, authority, influence, connections or relationship.
>
> x x x
>
> Section 3. The Commission shall have the power and authority:
>
> x x x
>
> (b) To sequester or place or cause to be placed under its control or possession any building or office wherein any ill-gotten wealth or properties may be found, and any records pertaining thereto, in order to prevent their destruction, concealment or disappearance which would frustrate or hamper the investigation or otherwise prevent the Commission from accomplishing its task.

E.O. No. 2 is entirely silent about the matter. Nowhere in its title, preamble, and provisions is the term sequestration used. And it is President Aquino herself who, by the terms of this Executive Order, freezes the assets and properties of Marcos, etc., prohibits their transfer, etc., and requires full disclosure by person holding them, the PCGG being limited to being authorized to request and appeal to foreign governments to do likewise with respect to similar properties found within their respective jurisdictions.

The Provisional "Freedom" Constitution, on the other hand, merely states:

> SECTION 1. x x x
>
> The President shall give priority to measures to achieve the mandate of the people to
>
> x x x
>
> (d) Recover ill-gotten properties amassed by the leaders and supporters of the previous regime and protect the interest of the people through orders of sequestration or freezing of assets of accounts.

Note that it does not specify who will issue the sequestration and freeze orders.

About the only provision that seems to vest in the Commission the power to issue sequestration orders is that of Section 3(b) of Executive Order No. 1. But what it authorizes the Commission to sequester is "any building or office wherein any ill-gotten wealth or properties may be found, and any records pertaining thereto." There is a real problem here where the owner of the building or office is not aware of the presence therein of ill-gotten wealth or properties because, why should he be penalized when he has not committed any wrong? And what does "records pertaining

thereto" mean? Does it refer to the ill-gotten wealth or to the building or office? If it refers to the building or office, the objection already mentioned can likewise be made. There is faulty draftsmanship here that resulted in failure to express the obvious intention. But what was not expressed is too substantial to permit its being read into the provision.

Be that as it may, the provision need not be read to mean that the Commission itself issues the order. It must be noted that, unlike the old and new Civil Code and the Anti-Subversion decrees, the PCGG's enabling laws neither define nor provide for the procedure for sequestration. The basic rule is that, unless otherwise defined, words in a statute or law, will have to be interpreted as taking their ordinary, contemporary, and common meaning.[30]

2. *Proper Meaning of Sequestration*

In the Philippine context, what is the ordinary, contemporary, and common meaning of sequestration?

It cannot be that which provided for and described in the Anti-Subversion decrees since, by express provision, that meaning is a technical one specially applicable only for the purposes of those decrees.

Rather the ordinary, contemporary, and common meaning of sequestration should be that which is provided for in the Spanish Civil Code and the Code of Civil Procedure and subsequently and up to now in the new Civil Code and the Rules of Court, considering the length of time that they have been in force and also their general character and application. Besides, this is the common meaning the term is accorded in other countries, both of the civil law and the common law, of which ours is a common heir.

This means that the sequestration must be secured from the court in which the main action is already pending; the sequestrator must be different from the applicant (here the PCGG); the sequestrator must be appointed by the court and must always be subject to its control; the applicant and the sequestrator must both file a separation bond to answer for damages and to assure faithful performance of duty on the part of the sequestrator; and it is the court that fixes the sequestrator's fees.

It is only in this manner that we can avoid the constitutional objection that the Commission is usurping a judicial function. More importantly, it is only thus that we can avoid the charge of conflict of multiple interests and roles that precludes the presence of an impartial judge indispensable to due process.

Hence the interpretation and application of the sequestration provisions of E.O.s Nos. 1 and 2 and the Provisional Constitution adopted by the

[30] Perrin v. United States, 444 U.S. 37, 42, 62 L. Ed. 2d 199, 100 S. Ct. 311 (1979); Diamond v. Chakrabarty, 447 U.S. 303, 65 L. Ed. 2d 144, 100 S. Ct. 2204 (1980).

Commission and its members in their practice as well as in their rules and regulations is both erroneous and contrary to the Bill of Rights.

VI. IMMUNITY CLAUSE

For all the broad and extraordinary powers granted to it, the PCGG and its members and agents or representatives are guaranteed immunity from civil suit for any act or omission in the discharge of their task and may not be required to testify or produce evidence in any judicial, legislative or administrative proceeding concerning matters within their official cognizance.[31]

It is very probably these immunities and privileges that have emboldened them to commit wholesale violations of the Bill of Rights and even openly defy orders of the Supreme Court, which itself does not seem to appreciate the seriousness of the situation, as shown by its failure to act with dispatch on the petitions pending before it.

The immunity from suit granted by this provision is at war with the existence of a Constitution or the idea of a government of laws. Moreover, it is anathema to the requirements of due process because it virtually leaves without adequate remedy those suffering enormous or irreparable damages on account of the illegal acts of, or even sheer mismanagement of sequestered firms by, the Commission and its officers and agents.

The exemption from the duty to testify is subversive of the judicial power. For it cripples or puts restraint on the courts in the gathering of evidence. In cases of this nature where most of the evidence were gathered by the Commission's chairman and members or agents, their testimony would be indispensable in the identification or authentication of those documents as well as in explaining how, where and when they were found, since illegally seized evidence would be inadmissible under the Bill of Rights.[32] It would also deny the accused the right to confront the witnesses against them and thus also deny them the equal protection of the laws, since in this and other respects they are treated differently from other alleged violators of the Anti-Graft and Corrupt Practices Act or similar laws.

VII. PRIMACY OF BILL OF RIGHTS

But what is even more alarming is that they view themselves as beyond the restrictions of the Bill of Rights, supposedly on account of the circumstances of the PCGG's creation and their extraordinary powers. They have so expressly stated before the Supreme Court in their comment on the petition of TDFSI.

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[31] E.O. No. 1, Feb. 28, 1986, Sec. 4.
[32] 1973 CONST., Art. IV, Sec. 4 in rel. to PROV. CONST., Art. I, Sec. 1.

Something of the same attitude was again expressed by Chairman Salonga when he said before the Transitory Provisions Committee of the Concom that our concern for the recovery of the ill-gotten wealth of President Marcos, his family and his cronies is much greater than our concern for the protection of individual rights and liberties since it involves no less than the nation's survival.

As I see it, the greatest concern that impelled the revolution that installed the new govrenment was to end 20 years of tyrannical rule and the restoration of our freedoms. And this finds expressions not only in the oath of office of President Aquino but also in the Provisional (or Freedom) Constitution.

The President of the New Government vowed, as part of her oath of office, to respect and uphold "the fundamental law." That "fundamental law" would have been nothing if it did not include the Bill of Rights.

This makes it clear that the Bill of Rights was never suspended from the inception or inauguration of the New Government up to the time it promulgated the Freedom Constitution.

Therefore, when the new President issued Executive Order No. 1, creating the respondent Commission, the intention must have been that the powers vested thereby and by Executive Order No. 2 in the Commission were to be exercised in accordance with 'the fundamental law," including the Bill of Rights.

At any rate, whatever the intention was, anything contained in Executive Order No. 1 (issued on February 28, 1986) and Executive Order No. 2 (issued on March 12, 1986) which are contrary to the Provisional Constitution must be deemed abrogated upon the promulgation of said Constitution on March 25, 1986. And so must all orders issued pursuant to such inconsistent provisions.

Indeed, the Provisional Constitution itself clearly intends that such inconsistent provisions and orders cannot continue to be maintained, reaffirmed or recognized. For section 1 of Article IV thereof provides that:

> All existing laws, decrees, executive orders, proclamations, letters of instruction, implementing rules and regulations, and other executive issuances not inconsistent with this Proclamation shall remain operative until amended, modified or repealed by the President or the regular legislative body to be established under a New Constitution.

The Bill of Rights (Article IV) of the 1973 Constitution are "adopted *in toto* as part of this Provisional Constitution."[32a]

The Bill of Rights is a limitation on the powers of the Government, whether those powers are provided in the Constitution or in a statute or merely inferable therefrom. They constitute a stipulation or reservation by

[32a] Art. I, Sec. 1.

the people that the powers of government are granted subject to those rights, which are for their protection against the excesses of government and which the latter is explicitly forbidden to infringe.[33]

Proclamation No. 3, in instituting the Provisional Constitution, itself emphasizes the primacy and predominance of the Bill of Rights during the period of transition to a New Constitution. Thus, its title reads as follows:

> Declaring a national policy to implement the reforms mandated by the people, *protecting their basic rights,* adopting a provisional constitution, and providing for an orderly transition to a government under a new Constitution.[34]

And the only two portions of its preamble which state its objectives and policies, assert in no uncertain terms:

> WHEREAS, the direct mandate of the people as manifested by their extraordinary action demands the complete reorganization of the government, restoration of democracy, *protection of basic rights,* rebuilding of confidence in the entire governmental system, eradication of graft and corruption, restoration of peace and order, maintenance of the supremacy of civilian authority over the military, and the transition to a government under a new Constitution in the shorten time possible;
>
> WHEREAS, *during the period of transition to a new Constitution it must be guaranteed that the government will respect basic human rights and fundamental freedoms.*[35]

Even if regarded as extraordinary or special, the PCGG cannot be excused for non-observance, nay blatant and oppressive disregard of, basic constitutional requirements, such as the Bill of Rights.

Provisions of the Constitution are mandatory rather directory, and mandatory provisions are binding on all departments of the government.[36]

It has further been held that the due process clause — indeed, the entire Bill of Rights — binds not only the Republic but also each and every one of its branches and agencies.[37]

If the Government that created it is not exempt from complying with constitutional requirements, why should the PCGG and its officers and agents be?

The matter has not been more aptly expressed than by the present Minister of Justice in a recent opinion:

> The government or its officials may not validly claim state immunity for acts they committed against a private party in violation of the law.
>
> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of

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[33] *See* McIlwain, C.H., *Bill of Rights,* 1 ENCYC. OF SOC. SCIENCES 544-546.
[34] Italics supplied.
[35] Italics supplied.
[36] Vargas v. Rilloraza, 80 Phil. 297.
[37] Halili v. Public Service Commission, 49 O.G. 1827.

> the government from the highest to the lowest are creatures of that law and are bound to obey it.[38]

VIII. Appeal or Suggestion

It is thus urged that the authorities who are in a position to remedy the crisis (national in dimensions and far-reaching in its repercussions) created by the PCGG and its officers and agents should immediately act to tame and bring back to the fold of the law the Frankeinstein of the new dispensation.

The immunities and exemptions given to the PCGG and its officers, personnel and agents must straightaway be removed, and the grant of the same in Executive Order No. 1 must be declared void.

In the same manner all orders and acts of the Commission or its members and agents issued or done without authority of law or in violation of the Bill of Rights must either be withdrawn by the Commission or declared void by the courts where they are questioned.

Only by the adoption and effectuation of such measures can we truly claim that we are on the way to a restoration of respect for law and justice, which alone can provide the basis for achieving peace and political stability that must precede any economic recovery and stability for this nation that has sunk deeper in crises and will continue to sink deeper in crises if the PCGG, its officials and their minions are allowed to hold sway.

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[38] Quoted in *The Tribune*. May 15, 1986, p. 6.