The added benefit of consent decrees over normal negotiations is that it has the imprimatur of the court and can be enforced though a court order. While the parties have a wide discretion over the remedial actions, the court still has the power to determine whether the action is reasonable, without having to decide by itself what the actual terms should be.

To make progress on this, the Supreme Court may want to adopt rules on consent decrees for environmental cases. The Department of Environment and Natural Resources and other agencies may also want to develop capacity to negotiate and enter into consent agreements. Citizen organizations will also need capacity building in this regard.

## VII. SUMMARY AND CONCLUSION

When the Supreme Court said in *Oposa* that the constitutional right of the people to a healthy environment was as fundamental as the right to self-preservation, it elevated the environmental right to the level of civil and political rights. In my view, this is appropriate given the importance of the right to a good quality of life for all citizens and for the sustainable development of the country. This is the reason why an effective and efficient framework for environmental adjudication is necessary.

To fully develop this framework, this article discussed the issues that need to be addressed and the options that the judicial system, through the Supreme Court, as the administrator of the system, may undertake. In sum, environmental cases have features that distinguish them from ordinary civil and criminal cases. Treating them differently does not mean giving special favors or bias to environmental causes, instead, it is recognition that the nature of environmental cases makes it difficult for injured parties to find redress. The special rules only try to balance the playing field.

Administrative measures are intended to make adjudication more efficient, by giving judges the right training and by ensuring that trained judges are available in the areas where the cases are likely to occur. Finally, alternative modes should be encouraged because the nature of environment cases requires broader settlements that are more appropriate to negotiation or agency action.

# Charter Places Absolute Ban on Use of Illegal Wiretap*

*Senator Miriam Defensor Santiago***



## I. CONSTITUTIONAL BAN IS ABSOLUTE

The Bill of Rights provides:

> Sec. 3 (1) The privacy of communication and correspondence shall be inviolable, except upon order of the court, or when public safety or order requires otherwise, as prescribed by law.
>
> (2) Any evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding.[1]

This provision came down to us from the 1935 Constitution. It has no counterpart in the Constitution of the United States. In the 1967 case of *Katz v. United States*,[2] however, the U.S. Supreme Court ruled that wiretapping is banned, under the search and seizure clause of the U.S. Constitution.

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1. PHIL. CONST. art III § 3.
2. Katz v. United States of America, 38 U.S. 347 (1967).

In the Philippine Constitution, there are only two exceptions to this constitutionally protected right of privacy:

1. When the wiretap, for example, is authorized by court order; and
2. Where there is a law which allows the wiretap, on the ground of public safety or order.[3]

Neither exception is applicable in the present case confronting the Senate. There is no relevant court order, and there is no relevant law authorizing wiretapping on grounds of public safety or order.

The 1971 Constitutional Convention in its deliberations, defined the phrase "public order and safety" as "the security of human lives, liberty, and property against the activities of invaders, insurrectionists, and rebels."[4] The parties to the illegally wiretapped conversation sought to be investigated do not belong to any of these groups.

## II. RECONCILE BAN WITH PARLIAMENTARY IMMUNITY

The constitutionally protected right to privacy of communication could arguably trench on other constitutional provisions. One relevant constitutional provision concerns the parliamentary immunity enjoyed by senators and representatives, thus:

> No Member [of Congress] shall be questioned nor be held liable in any other place for any speech or debate in the Congress or in any committee thereof.[5]

Another constitutional provision authorizes congressional committees to conduct hearings, thus:

> The Senate or House of Representatives or any of its respective committees may conduct inquiries in aid of legislation, in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected.[6]

These provisions do not, even if only implicitly, allow the use of wiretaps. Under the rule of constitutional construction — that apparently conflicting provisions should be reconciled — these two provisions on the Legislative Department should be reconciled with the antecedent provision in the Bill of Rights. Parliamentary immunity does not trump privacy of communication.

3. PHIL. CONST. art III, § 3, ¶ 1.
4. Minutes of the Session of the Constitutional Convention of 1971 (Nov. 25, 1972).
5. PHIL. CONST. art VI, § 11.
6. PHIL. CONST. art VI, § 21.



The rule on constitutional construction is that all sections and provisions of the Constitution must be construed *in pari materia*,[7] particularly where the provisions were adopted at the same time. As early as the 1957 case of *People v. Uy Jui Pio*[8] the Court ruled that "the statute must be so construed as to prevent a conflict between parties to it. For it is only by construing a statute that the statute will be given effect as a whole."[9]

Further, the rules of statutory construction mandate harmonization.[10] One rule upholds a particular provision over a general provision.[11] The Bill of Rights provision is a particular provision with respect to privacy of communication; while the Legislative Department provisions on parliamentary immunity and on congressional hearings are general provisions. The rule on statutory construction provides that in case of apparent conflict, the particular provision shall apply.[12]

Another applicable rule of statutory construction is that a law should be interpreted, with a view to upholding, rather than destroying it.[13] *Interpretatio fienda est ut res magis valeat quam pereat.* The constitutional provision on parliamentary immunity should not be construed so as to render ineffective the constitutional provision protecting privacy of communication. The provisions should be harmonized and reconciled, if possible.

Hence, under the rule that constitutional provisions should be harmonized, parliamentary immunity means only that a Congress member incurs no liability, outside of Congress, for violating the ban on communicating the contents of an illegal wiretap. But the doctrine of parliamentary immunity does not allow any other person, particularly a non-Congress member who is merely testifying in a Senate hearing, to make such communication on the contents of an illegal wiretap. If we allow such a witness to talk about the contents of the wiretap, this would result in outright violation against illegal wiretaps and their use. The doctrine of parliamentary immunity does not allow such use of an illegal wiretap, which

7. Philippine Global Communications, Inc. v. Relova, 100 SCRA 254 (1986) (citing City of Naga v. Agna, 71 SCRA 176, 184 (1976)).
8. People v. Uy Jui Pio, 102 Phil. 679 (1957).
9. *Id.* at 681.
10. Patricio Tan v. Commission on Elections, 128 SCRA 61 (1986) (citing Helvering v. Hutchings, 85 L. Ed. 909 (1941)).
11. Sto. Domingo v. De Los Angeles, 96 SCRA 139 (1980).
12. Leveriza v. Intermediate Appellate Court, 157 SCRA 282 (1988).
13. People of the Philippines v. Isidro Baldimo, 271 SCRA 633 (1997).

would result in an outright violation of the absolute constitutional prohibition against admissibility.

The absolute constitutional language creates an invincible legal fortress against eavesdroppers and spies. The Constitution[14] sternly and strictly provides that an illegal wiretap "shall be inadmissible for any purpose in any proceeding."

The rule is that where the law does not distinguish, we should not distinguish.[15] *Ubi lex non distinguit, nec nos distinguere debemos*. The Philippine Supreme Court has applied this rule of statutory construction for decades. As early as the 1948 case of *Tolentino v. Catoy*,[16] the Supreme Court ruled that where the law does not make any exception, the courts may not make an exception.[17] This rule was recently reiterated in the 1992 case of *Ramirez v. Court of Appeals*.[18]

Hence, there is simply no constitutional basis for claiming an exception in favor of the Senate.

## III. STATUTORY BAN COVERS SENATE HEARING

The constitutional right to privacy of communication is self-executing, for the rule is that in case of doubt, the Constitution should be considered self-executing.[19] However, in an abundance of caution, or *ex abundanti cautela*, Congress in 1965 passed Republic Act No. 4200.[20] In effect, section 4 provides that any illegal wiretap "shall not be admissible in evidence in any legislative hearing or investigation."

It has to be emphasized that the Anti-Wiretapping Law penalizes a variety of prohibited acts,[21] namely:

1. The act of wiretapping.

2. Knowing possession of the tape or record.

3. Replaying the tape for other persons.

14. PHIL. CONST. art III, § 3, ¶ 1.

15. Cecilio de Villa v. Court of Appeals, 195 SCRA 722 (1991).

16. Tolentino v. Catoy, 82 Phil. 300 (1948).

17. *Id.* at 306.

18. Ramirez v. Court of Appeals, 248 SCRA 590 (1995).

19. Ma. Carmen G. Aquino-Sarmiento v. Manuel Morato, 203 SCRA 515 (1991).

20. An Act to Prohibit and Penalize Wire Tapping and Other Related Violations of the Privacy of Communication, and for Other Purposes, [Anti-Wire Tapping Law], Republic Act No. 4200 (1965).

21. *Id.* at § 1.



4. Communicating the contents of the tape, either verbally or in writing, or giving its transcriptions to any other persons.

5. The act itself, or efforts to act, prevent, or cause to be done any of the prohibited acts.[22]

This exclusionary rule was applied against these prohibited acts by the Supreme Court in the 1994 case of *Salcedo-Ortanez v. Court of Appeals*.[23] In that case, the illegal wiretap sought to be introduced in evidence was taped, when a person allowed his military friends to tap his house telephone. Predictably, the Supreme Court threw it out, and ruled that "the inadmissibility of the subject tapes is mandatory under Republic Act No. 4200."[24]

That the exclusionary rule applies to legislative proceedings was implied by the Supreme Court in the 1998 case of *People v. Olivares*.[25] The Court ruled: "The constitutional provision on the inadmissibility of evidence, known as the exclusionary rule, applies not only to criminal cases but even extends to civil, administrative, and any other forms of proceedings."[26]

Furthermore, the Rules on Electronic Evidence,[27] which in 2001 became part of the Rules of Court, provides in section 3 that "pertinent provisions on statutes containing rules on evidence shall apply."[28] Assuming hypothetically that the illegal wiretap has been reduced to an electronic document which is now admissible, still section 2 provides that the electronic document should comply with the rules on admissibility prescribed by related laws.[29]

## IV. U.S. CONSTITUTION HAS NO SIMILAR BAN

American jurisprudence is considered influential, although not authoritative, in our country. The U.S. Code[30] in effect provides that no evidence derived

22. *Id.*

23. Salcedo-Ortanez v. Court of Appeals, 235 SCRA 111 (1994).

24. *Id.* at 115.

25. People v. Olivares, 299 SCRA 635 (1998).

26. *Id.* at 648.

27. RULES ON ELECTRONIC EVIDENCE, A.M. No. 01-7-01-SC (2001).

28. RULES ON ELECTRONIC EVIDENCE, rule 1, § 3.

29. RULES ON ELECTRONIC EVIDENCE, rule 1, § 2.

30. Prohibition of Use as Evidence of Intercepted Wire or Oral Communications, 18 U.S.C. § 2515.

from an illegal wiretap may be received in evidence in any hearing or other proceeding before any legislative committee.

In the highly controversial 2001 case of *Bartnicki v. Vopper*,[31] the U.S. Supreme Court, by a split decision, ruled that a stranger's illegal conduct does not suffice to remove the constitutional shield from speech about a matter of public concern. But even this unpopular majority decision noted that "the fear of public disclosure of private conversations might well have a chilling effect on private speech."[32]

This U.S. case is particularly instructive, only because it implies that an illegal wiretap does not even need the facilities of a service provider, since a mere scanner will do.

In *Bartnicki*, the Court called attention to the fact that "calls placed on cellular and cordless telephones can be intercepted more easily than those placed on traditional phones ... and at one set of congressional hearings in 1997, a scanner, purchased off the shelf and minimally modified, was used to intercept phone calls of Members of Congress."[33]

And in *Katz*, the Court quoted from the 1972 case of *Branzburg v. Hayes*,[34] which ruled in effect: "Although private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news."[35]

In their dissent, three Justices, including the Chief Justice, agreed with the majority opinion that in effect, illegal wiretaps are "chilling the speech of the millions of Americans who rely upon electronic technology to communicate each day."[36] The dissent went on to say:

> The Court correctly observes that there are "content-neutral laws of general applicability" which serve recognized interests of the "highest order": "the interest in individual privacy and ... in fostering private speech ... . It nonetheless subjects these laws to the strict scrutiny normally reserved for governmental attempts to censor different viewpoints or ideas ... . There is scant support, either in precedent or in reason, for the Court's tacit application of strict scrutiny ... .
>
> Congress and the overwhelming majority of States reasonably have concluded that sanctioning the knowing disclosure of illegally intercepted communications will deter the initial interception itself, a crime which is extremely difficult to detect. It is estimated that over 20 million scanners capable of intercepting cellular transmissions directly are in operation ... . The chilling effect of the Court's decision upon these private conversations will surely be great: An estimated 49.1 million analog cellular telephones are currently in operation ... .
>
> Although public persons may have foregone the right to live their lives screened from public scrutiny in some areas, it does not and should not follow that they have also abandoned their right to have a private conversation without fear of it being intentionally intercepted and knowingly disclosed.
>
> The Court's decision to hold inviolable our right to broadcast conversations of "public importance" enjoys little support in our precedents ... . By no stretch of the imagination can the statutes at issue here be dubbed "prior restraints."
>
> Surely "the interest in individual privacy" ... at its narrowest must embrace the right to be free from surreptitious eavesdropping on, and involuntary broadcast of, our cellular telephone conversations.[37]

The *Bartnicki* majority opinion does not apply in the Philippines, because of the following reasons:

1. It was a split decision; and in law, a split decision has less weight than a unanimous one, and even less when it comes from a foreign court.

2. The U.S. Constitution, unlike the Philippine Constitution, does not contain a provision that not only protects privacy of communication, but also expressly declares a wiretap as "inadmissible for any purpose in any proceedings." The constitutional language is absolute, and permits no exception in our country.

Hence, for any of our colleagues to argue before media that so-called "public interest" authorizes use in a congressional hearing of an illegal wiretap, is to exhibit doctrinal confusion and jurisprudential colonial mentality in constitutional law, even if they do not know about the *Bartnicki* case.

## V. RECOMMENDATION

*Probe Persons Liable for Illegal Wire-Taps, but Exclude GARCI Tape and any Testimony on its Contents*

I respectfully submit the following recommendations to the Committee on Rules in particular, and to the Senate in general:

31. Bartnicki v. Vopper, 532 U.S. 514 (2001).

32. *Id.* at 533.

33. *Id.* at 523.

34. Branzburg v. Hayes, 408 U.S. 665, (1972).

35. *Id.* at 691.

36. *Bartnicki*, 532 U.S. at 533.

37. *Id.*

1. The proper Senate committee may proceed to conduct an inquiry in aid of legislation on alleged illegal wiretapping against public officials conducted by the Intelligence Service of the Armed Forces of the Philippines, the Philippine National Police, or any other entity concerned;

2. During the hearings, we obey the absolute constitutional prohibition, and we apply the corresponding statutory prohibition; hence, in the language of the Anti-Wiretapping Law, we prohibit possession, replay, or communication of the contents of the illegal wiretap. Otherwise, the Senate would be an unwitting accessory of a crime.

3. If my humble view is rejected by the majority vote of our colleagues, then those who, like me are devoted to constitutional law, may feel free to file the proper petition in the Supreme Court. However, that should be a last option, because we, in the legislative branch, should turn to the judicial branch only when we dispute the construction of the Constitution by the executive branch. When there is an internal dispute among ourselves in the Senate, we should settle it here and avoid going to court.

4. The record of this illegal wiretap was played and replayed to the point of surfeit during the aborted impeachment proceedings in the House of Representatives and in the media. If they were able to get away with that constitutional violation, it was because no one bothered to bring suit in court. But what the lower house has wrongfully done cannot possibly be held up for emulation by this upper house. On the contrary, it is the duty of the Senate to educate the House on pressing points of constitutional law.

5. During the hearings, full attention should be paid on whether the alleged illegal wiretap operations of the Intelligence Service of the Armed Forces of the Philippines and even the Philippine National Police may have included Congress members. In any case, the focus should be on pinpointing criminal liabilities. It is a crime to wiretap, and it is a crime to use a wiretap, by talking about its contents.