Teehankee, and Aquino. The rest concurred only in the dismissal of the case.
18. 42 SCRA at 512-13.
19 5 U. S. (1 Cranch) 137 (1803)
20 212 U. S. 788, 84-85 (1909)
21 287 U. S. 378 (1932)
22 62 SCRA 275, 297 (January 31, 1975).
23 90 Phil. 172 (1951)
24 Id. at 180-185, 213-215
25. Id. at 204 The waiver by the state operates as a reverse analogue of the principle established by the Court that when a detainee posts bail he thereby waives his right to challenge any irregularity in his arrest. Callanta v. Villanueva, 77 SCRA 377 (June 20, 1977).
26 Ex Parte Merryman, 17 Fed. Cas. 144, 153 (D. Md. 1861)
27 4 Wall. 2, 123 (1866)
28 SCHWARTZ, 1 THE RIGHTS OF THE PERSON 74, and cases cited.
29 73 SCRA 333 (October 12, 1976).

OPEN LETTER TO SOLICITOR GENERAL ESTELITO P. MENDOZA, MINISTER OF JUSTICE RICARDO C. PUNO, & PRESIDENTIAL ASSISTANT FOR LEGAL AFFAIRS MANUEL M. LAZARO – RE: PCO CASES & LANSANG DOCTRINE

Dear Sirs,

I have just read your articles in the *Philippine Law Gazette* Volume 7, Nos. 7& 8, April-May, 1983, where you made the following statements:

Solicitor General Mendoza: "xxx I took pains to make a numerical count of the Justices' votes in view of the erroneous impression that the *Padilla* case was reversed six days later by the *Morales* case. This must have been due to the statement in the *Morales* case to the effect that 'we reiterate this doctrine' – referring to *Lansang.* However, careful scrutiny of the votes of the Justices in the *Morales* case will show that only the Chief Justice, Mr. Justice Teehankee and Mr. Justice Concepcion agreed to retain the rule of *Lansang.* That only makes *three* of them. But the nine Justices who had previously voted to abandon the *Lansang* rule in the *Padilla* case stuck to their position. They either merely concurred in the result of the case, meaning in the dismissal of the petition, or explained their concurrence. One Justice, Mr. Justice Aquino, who was on leave in the *Padilla* case also merely concurred in the result of the *Morales* case. Another Justice, Madam Justice Herrera, also simply concurred in the result. In her separate concurring opinion, she said that 'there should be no justification in these cases to assail whatever has been said or resolved in *Lansang v. Garcia.*' It is thus crystal clear that with nine Justices sticking to their views in the *Padilla* case, the *Lansang* doctrine was not resuscitated in the *Morales* case. The *Lansang* doctrine remains abandoned" (pp. 3-4, *supra).*

Minister Puno: (Thru Ministry Circular No. 16) "5. *The Presidential power to suspend the privilege of the writ of habeas corpus on which the authority to issue PCO is based , is not subject to judicial inquiry;*

'The significance of the conferment of this power, constitutionally upon the President as Commander-in-Chief, is that the exercise thereof is not subject to judicial inquiry, with a view to determine its legality in the light of the bill of rights guarantee to individual freedom. This must be so because the suspension of the privilege is a military measure the necessity of which the President alone may determine as an incident of his grave responsibility as the Commander-in-Chief of the Armed Forces, of protecting not only public safety but the very life of the State, the government and duly constituted authorities.' *(Padilla v. Ponce-Enrile, ibid.,* reiterating the doctrine in *Barcelona v. Baker,* 5 Phil. 87 [1905], and *Montenegro v. Castaneda,* 91 Phil. 882 [1952]).

(The decision penned by J. Hermogenes Concepcion in the *Morales* case, *supra*, decided six [6] days after the aforesaid *Padilla* case, stated that in all petitions for *habeas corpus* the court must inquire into every phase and aspect of petitioner's detention, and reiterated the ruling in *Lansang v. Garcia,* 48 SCRA 448, but did not have the unqualified concurrence of the majority of the Members of the Supreme Court.)" (p. 21, *supra*, PLG).

Presidential Assistant Lazaro: "Ratio decidendi of the Morales and Moncupa cases. There are doubts whether the abandonment of the *Lansang* doctrine in the *Garcia-Padilla* case holds true in view of the statement in the subsequent decision of *Morales and Moncupa* cases that - "We reiterate the *Lansang* doctrine."

In the *Morales and Moncupa* cases, the majority of the Court was only for the dismissal of the petition for *habeas corpus* filed by Morales, Jr. and Moncupa, Jr. On the other issues (right to bail and reiteration of *Lansang),* the Court was divided without any preponderant majority. In essence, the Supreme Court's decision merely upheld the validity of the PCOs issued and the continued detention of the petitioners.

Though the main opinion reiterates the *Lansang* doctrine, the majority of the Justices limited their concurrence only in the result, i.e., dismissal of the petitions. Thus, the statement of the *ponente* Justice Concepcion reiterating the *Lansang* ruling is not doctrinal. A decision of the Supreme Court becomes doctrinal only when at least 8 Justices concur not only in the result - but also in the *raison d' etre* leading to the conclusion. At best, such reiteration is merely an opinion of the *ponente* and shared by Chief Justice Enrique Fernando and Justice Claudio Teehankee" (pp. 40-41, *supra).*

To these statements, please allow me to raise - humbly and respectfully - the following questions and points of observation:

1) I quote the pertinent provisions of the Constitution. Article X thereof provides:

"SEC. 2. x x x

(2) All cases involving the constitutionally of a treaty, executive agreement, or law shall be heard and decided by the Supreme Court *en banc,* and no treaty, executive agreement, or law may be declared unconstitutional without the concurrence of at least ten Members. All other cases, which under its rules are required to be heard *en banc,* shall be decided with the concurrence of at least eight Members.

(3) Cases heard by a division shall be decided with the concurrence of at least five Members, but if such required number is not obtained, the case shall be decided *en banc;* Provided, that no doctrine or principle of law laid down by the Court in a decision rendered *en banc* or in division may be modified or reversed except by the Court sitting *en banc."*

"SEC. 8. The conclusions of the Supreme Court in any case submitted to it for decision *en banc* or in division shall be reached in consultation before the case is assigned to a Member for the writing of the opinion of the Court. Any Member dissenting from a decision shall state the reasons for his dissent. The same requirements shall be observed by all inferior collegiate courts."

2) The question that the aforequoted statements answer in the negative is: Did the *Morales* case effectively re-establish the *Lansang* doctrine (that the President's power to suspend the privilege of the writ of *habeas corpus* is subject to judicial inquiry)? *Padilla* abandoned *Lansang. Morales* decided only six days after *Padilla* categorically reiterated *Lansang.* The question therefore, is: Did *Morales* effectively reverse *Padilla* insofar as *Lansang* is concerned?

3) The rule is that a "doctrine or principle of law laid down by the Court ... may be modified or reversed ... by the Court sitting *en banc."* What is the true import of the captions *"EN BANC"* and *"D E C I S I O N"* appearing on the first page of the *Morales* case? Is not the ruling *"We reiterate this doctrine (Lansang)"* an opinion of *"the Court"* (not merely that of the *ponente)?* Was *Morales* decided by the "Court sitting *en banc"?* If the answer is yes, then *Morales* effectively reversed *Padilla* with the result that *Lansang* is re-established.

4) But the aforequoted statements answer the question in the negative. Apparently, reliance is made on the constitutional rule:

> "All other cases, which under its rules are required to be heard *en banc*, shall be decided with the *concurrence of at least eight Members.*"

5) Solicitor General Mendoza would count the individual votes of the Justices on the *Lansang* issue to test whether the 8-vote requirement has been satisfied to sustain an effective reversal of *Padilla.* Finding that there are indeed less than eight concurring votes on the reiteration of *Lansang* he accordingly concludes that the main opinion's ruling - 'We reiterate this doctrine *(Lansang)* - is ineffective.

6) *Questions:* Is this not an absurd situation where a clear, substantial, and categorical "opinion of the Court" (Art. X, Sec. 8, *supra*) *as distinguished from the opinion of an individual Justice,* is rendered nugatory by the application of a technical requirement? Or is there a way different from that now taken by which the vote requirement may be construed without arriving at an absurd situation? Is the *Morales* case a partially invalid Supreme Court decision? Who can lawfully declare such partial invalidity? Or should a distinction be made between invalidity and inefficacy? Who can lawfully declare that a Supreme Court decision is partially ineffective? Is not the "opinion of the Court" the *decision* of the Court? Until lawfully declared as ineffective by competent authority does not the "opinion of the Court" command fealty and obedience?

7) Minister Puno and Presidential Assistant Lazaro would only count the *unqualified* concurrences for purposes of filling the vote requirement. I reiterate the questions in the immediately preceding paragraph. Further: Would not a concurrence *"in the result"* satisfy the constitutional vote requirements, i.e., 8 for *en banc* decisions and 5 for division decisions? The Supreme Court appears to be on the affirmative side on this matter. I cite for the meantime, only one case as basis. In *Quisumbing v. Court of Appeals,* G. R. No. 60364, dated June 23, 1983, decided by the First Division, only five Justices sat in judgment one of whom, Justice Teehankee, qualified his concurrence with the phrase *"In the result."* Had Justice Teehankee's *qualified* concurrence not been counted, the 5-vote requirement for a decision in division would not have been reached.

8) Presidential Assistant Lazaro states that: "A decision of the Supreme Court becomes doctrinal *only when at least 8 Justices concur* not only in the result - but also in the *raison d' etre* leading to the conclusion." It is unfortunate that the statement is unaccompanied by a citation of legal authority. In any case, Art. X, 2 (3), *supra* provides:

> "xxx that no doctrine or principle of law laid down by the Court in decision rendered *en banc or in division* may be modified or reversed except by the Court sitting *en banc.*"

The clear implication is that a doctrine may be laid down by a division of say 7 Justices. Stated otherwise, a decision of the Supreme Court may become doctrinal even when *less than 8 Justices concur;* and considering *Quisumbing v. CA, supra,* even a mere concurrence *"in the result"* may be counted to render a valid and effective decision which may, in turn, be doctrinal, i.e., it lays down a "doctrine or principle of law".

What appears to be crucial in all the foregoing is the application of the 8-vote requirement for the purpose of reversing a prior doctrine.

Without repeating what has been here said, please allow me now to state my humble position on the matter.

Firstly, a distinction should be made between a *"decision"* and a *"doctrine or principle of law".* A *"decision"* is broader in that it may lay down one or more doctrines or principles of law.

Secondly, following the clear wording of the pertinent constitutional provisions, the 8-vote or 5-vote requirements should be applied for the purpose of rendering a valid decision. It should not be applied in the sense of reversing a prior doctrine. The Constitution merely requires that reversal must be made by the Court *"sitting en banc".* So that where the Court renders a valid decision *en banc* as in the *Morales* case where more than 8 concurrences was reached (including *qualified* concurrences), reversal - if called for by the *"opinion of the Court"* - perforce follows as a matter of course. To hold otherwise seem to result in absurd situations as earlier pointed out.

Thank you so much for your patience in reading this letter.

Very respectfully,

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