[248]Magdaluyo vs. Director, National Bureau of Investigation, 119 Phil. 664, 670, People vs. Villasor, 30 SCRA 518, 528; National Bureau of Investigation vs. Yatco, CA-G-R No. 33905-R, January 5 1965.

[249]People vs. Jarencio, 128 SCRA 614, 616.

[250]United States vs. Vallejo, 11 Phil. 193, 195. United States vs. Delos Reyes, 20 Phil. 467, 487.

[251]Dizon vs. Castro, G.R. No. 67923, April 11, 1985.

LEGAL ASPECTS OF RECOVERING ILL-GOTTEN WEALTH

By JOVITO R. SALONGA

Let us first define the term "ill-gotten wealth".

On June 18, 1955, the Congress of the Philippines enacted Republic Act No. 1379, "declaring forfeiture in favor of the State any property found to have been unlawfully acquired by any public officer or employee and providing for the procedure therefor."

Section 2 of this Republic Act provides that "whenever any public officer or employee has acquired during his incumbency an amount of property which is manifestly out of proportion to this salary as such public officer or employee and to his other lawful income and the income from legitimately acquired property, said property shall be presumed to have been unlawfully acquired."

Three years later, on August 17 1960, Congress enacted Republic Act No. 3019, entitled "Anti-Graft and Corrupt Practices Act" which adopts the same definition that is, any property which is manifestly out of proportion to a person's salary and to his other lawful income. Section 3 of the Anti-Graft law, as it is popularly called, enumerates the corrupt practices of public officers, and penalizes both the public officer and the person giving the gift, present, share, percentage or benefit mentioned in the Act. Sections 4 and 5 of the Act impose certain prohibitions on private individuals and close relatives of high officials of the Government.

Executive Order No 1, issued by President Corazon C. Aquino on February 28, 1986, uses the term "ill-gotten wealth", whether located in the Philippines or abroad, and includes all business enterprises and entities owned or controlled, during his administration, by the former president, his immediate family, relatives, subordinates, and close associates "directly or through nominees, by taking undue advantage of their public office and/or using their powers, authority, influence, or connections." The Rules and Regulations of the Presidential Commission on Good Government, otherwise known as the PCGG, issued on April 11, 1986, adopts the same standard found in Republic Act No. 1379, the Anti-Graft Law, and Executive Order No. 1, and enumerates the various means by which ill-gotten wealth is acquired.

Perhaps it might be more appropriate and accurate to speak only of some legal aspects of recovering ill-gotten wealth, since on second thought, the title of tonight's lecture which I had suggested – "Legal Aspects of Recovering Ill-Gotten Wealth is so broad, given the fact that much of this ill-gotten wealth is not located in the Philippines but in various places abroad, notably the United States and Switzerland.

Were we to confine our discussion to Philippine internal law, without taking into account the conflicts aspects, our treatment would be unrealistic. Indeed, most of the cases now pending are being handled abroad – in such jurisdictions as New York, New Jersey, Texas, California, Hawaii, and Switzerland. Proceedings will probably be instituted in other countries as well.

*Lecture delivered by Senator Jovito R. Salonga, former Chairman, Presidential Commission on Good Government, at the Gregorio Araneta Memorial Foundation Lecture Series at the Ateneo College of Law Auditorium.

On the other hand, we cannot omit a discussion of Philippine internal and conflicts law, for various reasons : the principal actors are Filipinos, most of the incriminating documents come from the Philippines, important acts and transactions were carried out or took place here, a good number of corporations and enterprises were incorporated or organized in accordance with Philippine law, real and personal properties of many relatives and business associates are located here, and in fact some important proceedings having to do with the recovery of the ill-gotten wealth have already been initiated here.

The evidence –

Shortly after the Marcoses left Malacanang in a hurry on the night of February 25, thousands of documents and boxes of papers were found in the Palace and then turned over to us. These documents, some in the handwriting of Mr. Marcos himself, furnished us valuable insights into the nature and magnitude of the offense which Mr. Marcos himself had so eloquently denounced on September 19, 1975 :the use of high office for personal enrichment.

Then, on March 18, 1986 – after negotiations with high U. S. officials – copies of the papers Mr. Marcos and his entourage brought to Honolulu, which had been seized and detained there by U.S. Customs authorities, were turned over to us by the U.S. State Department.

All these documents brought home to us one important point :the recovery of Mr. Marcos' ill-gotten wealth does not involve simple cases of malversation of public funds, bribery, extortion, theft, or graft. These incriminating documents speak of grand larceny, of the plunder of an entire nation–an offense, unfortunately, which does not exist in our statute books. Congressman Solarz, after our testimony before his Committee, described Marcos' reign of greed by coining a new word– kleptocracy. That offense, however, does not exist in U.S. statutes or in Philippine law.

The Revised Penal Code, the Anti-Graft Law, and Republic Act No. 1379, which authorize forfeiture of unexplained wealth of public officials, did not anticipate that which had been committed in the last 20 years. Even Republic Act No. 1379, while progressive in some respects, cannot cope with a series of acts that involve so many persons, here and abroad, and which touch so many states and territorial units.

One fundamental rule in Conflict of Laws is that foreign penal laws, in this case Philippine penal laws, and foreign penal Judgements, that is to say, penal judgments of our courts, cannot be recognized or enforced abroad.

Our first case –

Within hours after the formation of the Commission, we received an urgent call from Washington, D.C.,: the four Manhattan buildings– Crown Building on 5th Avenue, Herald Center on 6th Avenue, The 40 Wall Street Building, and 200 Madison Avenue Building - known to be Marcos' properties, were about to be sold. It was necessary to hire the services of lawyers who could obtain a temporary restraining order. That order, without previous notice to Mr. and Mrs. Marcos, was immediately obtained by a group of distinguished U.S. lawyers based

in New York who– in view of the condition of the philippine treasury– rendered, and continue to render, legal services free of cost to the Philippine Government, that is, *pro bono*. But since a TRO is only good for a limited period (around 2 weeks), it was necessary for us to give our testimony in New York so that the TRO could ripen into an injunction.

The plaintiff in the New York case is the Republic of the Philippines. The principal defendants[1] are former President Ferdinand E. Marcos and his wife Imelda Romualdez Marcos. They were served with process but did not appear. The complaint alleges that during Mr. Marcos' tenure, he and Mrs. Marcos wrongfully took funds belonging to the Republic of the Philippines. Part of the money so taken were used by Mr. & Mrs. Marcos to invest in valuable New York real properties on Manhattan and the Lindenmere estate in Long Island. We sought recovery of the properties by invoking the doctrine of constructive trust.

The other defendants were the various corporations, several real estate holding companies, their principals and managers, who acted as nominees for Mr. and Mrs. Marcos. It might be helpful to state that the names of Mr. and Mrs. Marcos do not appear on any title to the property. Every building in New York is titled in the name of a Netherlands Antilles corporation, which in turn is purportedly owned by three Panamanian corporations, with bearer shares. This means that the shares of this corporation can change hands any time, since they can be transferred, under the law of Panama, without previous registration on the books of the corporation.

One of the first documents that we discovered shortly after the February revolution was a declaration of trust handwritten by Mr. Joseph Bernstein on April 4, 1982 on a Manila Peninsula Hotel stationery stating that he would act as a trustee for the benefit of President Ferdinand Marcos and would act solely pursuant to the instructions of Marcos with respect to the Crown Building in New York.

This was the evidence that compelled the Bernsteins to admit before the Solarz Committee that Marcos was, in fact, the beneficial owner of the four Manhattan buildings, and it was the evidence, along with other proof, that induced the U.S. District Court in New York to eventually convert the TRO into an injunction.

As stated by Federal Judge Pierre Laval in his carefully prepared opinion of May 2, 1986 :

> "Documentary and testimonial evidence submitted by the plaintiff gives support to the contention by the Republic of the Philippines that Ferdinand and Imelda Marcos misappropriated funds of the Republic, and that they have used such misappropriated funds in connection with the New York properties."

The Lavalle decision, granting the motion of the Republic of the Philippines for a preliminary injunction, is now on appeal.

[1]Republic of the Philippines v. Ferdinand Marcos et al, U.S. District Court, Southern District of New York, Civ. 2294 (PNL).

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Legal defenses of Marcos and company –

Although Mr. and Mrs. Marcos did not appear in the New York Court, the other defendants invoked certain legal defenses which should interest lawyers and students of law everywhere. To be sure, these defenses have also been raised in proceedings initiated by the PCGG in other states and jurisdictions. I am referring to the act of state doctrine, the alleged immunity from suit of Mr. Marcos as a head of state, and the defense of *forum non conveniens.*

Act of State doctrine –

The classic statement of the act of state doctrine is found in Underhill v. Fernandez, 168 U.S. 250, p. 252 :

> "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

Or as Restatement, Second, Foreign Relations Law of the United States (1962) says in Section 41, a court of the United States "will refrain from examining the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interest."

In other words, to come within the purview of the doctrine, the act of a defendant must be the act of a sovereign authority designed to give effect to the state's public interest.

Now, the claim of restitution by the Philippine Government does not challenge the validity of any governmental statue or decree; it seeks to recover the proceeds of the ill-gotten wealth committed against the government by a former official, acts committed not in the eye of the public but with elaborate stealth and secrecy.

The acts of Mr. Marcos are comparable to those of Marcos Perez Jimenez, former president of Venezuela, which sought his extradition from the United States on charges of murder and the commission of a group of financial crimes for his own private personal gain. In rejecting the claim of Jimenez that his acts as a dictator were acts of state, the legality of which the act of state doctrine precluded an extradition judge from adjudicating, the Court of Appeals observed

> "Even though characterized as a dictator appellant was not himself the sovereign government of Venezuela within the Act of State Doctrine. He was chief executive, a public officer, of the sovereign nation of Venezuela. It is only when officials having sovereign authority act in an official capacity that the Act of State Doctrine applies. . .
>
> "Appellant's acts constituting the financial crimes of embezzlement or malversation, fraud or breach of trust, and receiving money or valuable securities knowing them to have been unlawfully obtained as to which probable cause of guilt had been shown were not acts of Venezuelan sovereignty. . . They constituted common crimes committed by the Chief of State done in violation of his position and not in pursuance of it. They are as far from being an act of state as rape which appellant concedes would not be an "Act of State."

Head of State immunity –

In the New York case, the defendants– not Mr. Marcos himself– invoked the head of state immunity defense. Judge Pierre Leval made short shrift of the immunity claim by holding that without reading the merits of these defenses, "it is sufficient to say that Mr. Marcos has not appeared in this action, and that none of the appearing defendants is entitled to raise either defense on nis behalf."

But suppose Mr. Marcos had appeared in the New York suit, would the result have been any different? In Switzerland, Mr. Marcos has apparently invoked the head of state immunity defense. Presumably, he would do the same in the anti-racketeering case pending against him, Mrs. Marcos, and their associates in California.

If Mr. Marcos were still the head of state, if the plaintiff were not the current Government of the Republic of the Philippines, and if finally the act in question did not involve any commercial transaction such as the purchase of four office buildings in New York and a luxurious estate in Long Island, the New York court would not have rejected the claim of immunity. Perhaps, the U.S. State Department might have been persuaded to suggest to the New York Court that even if the third assumption were not present, Mr. Marcos should be given immunity in order to avoid embarrassment to the foreign relations of the United States vis-a-vis the Philippines. This is the real rationale for the head of state immunity doctrine.

But this is not the case. The United States Government, shortly after the installation of President Corazon C. Aquino, has made it clear that (1) it wishes to see the law take its course; and (2) that its interest is in maintaining friendly relations with the Aquino Government.

Note that there is no authority in international law that holds that former heads of state are entitled to immunity for *private acts* done during their venture of office. On the contrary, a sovereign who has been repudiated by his people is not placed on the same footing as a reigning sovereign.[2]

In any case, the suggestion has been made that under the 1973 Constitution, as amended, Mr. Marcos enjoys immunity from suit, by virtue of Article VII, Section 15, which provides as follows :

> "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."

It seems clear that for as long as the President holds office as President, the immunity from suit is absolute, although he may be vulnerable to impeachment charges. After his tenure, his immunity is only for "official acts" performed during his tenure.

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[2]See McNair, Aspects of State Sovereignty 1949 British Yearbook of International Law, 7, 18, 21.

By no stretch of the imagination can investments in the Manhattan buildings with an estimated worth of $350 million of his deposits in Swiss banks under the pseudonym William Saunders or in the name of various foundations organized in Switzerland or Liechtenstein be considered "official acts" though they were performed during his tenure. The mantle of immunity, as former Assemblyman Tolentino pointed out in his interpellation of Minister Puno with respect to other executive officers, is not a sanction for wrong-doing.[4]

The defense of forum non conveniens –

Where the court has jurisdiction over a case that involves the legal systems of two or more states, it may, by invoking the principle of *forum non conveniens,* refuse to entertain the case if it believes to be a seriously inconvenient forum, provided that a more convenient forum is available to plaintiff.

In considering what is the most convenient forum for a problem in conflict of laws, three factors may be considered : first, whether the forum is one to which the parties may conveniently resort; second, whether it is in a position to make an intelligent decision as to the law and the facts; and third, whether it has or is likely to have the power to enforce its decision. A court has no right to pronounce a judgment if it cannot enforce said judgment within its territory.

Where there is no substantial nexus between the forum and the plaintiff's cause of action, the principle of *forum non conveniens* should be applied. The central purpose of the principle is to ensure that the trial is convenient.[3]

The question, therefore, is whether there is such a substantial nexus between the New York court and the action filed by the Republic of the Philippines involving real properties located in New York. To be noted is that the defendants, principally Mr. and Mrs. Marcos, opened bank accounts in New York, transferred millions of dollars to and among those bank accounts, organized corporations to take title and hide beneficial ownership, retained New York firms, and more importantly engaged in the purchase, development, and management of New York estate.

Judge Pierre Leval held that while it is true that much of the evidence is to be found in the Philippines, "the action focuses on New York properties . . . Numerous financial documents are in New York. The likelihood of dismissal based on *forum non conveniens* is not sufficiently high to justify denying preliminary restraints necessary for plaintiff's protection."

The co-defendants of Marcos cite the recent case against the former Shah of Iran.[4]

Let us consider this important case.

On October 22, 1979, the former Shah of Iran, who had fled Iran in January 1979, arrived in New York City and was admitted to a hospital for treatment of cancer. Iran instituted an in personam action against the former Shah and his wife, alleging that they had, in breach of Iranian law and fiduciary duty, accepted bribes, misappropriated funds, and embezzled or converted billions of dollars rightfully belonging to the National Treasury of Iran. The suit sought a declaration of constructive trust in regard to all the property of the Shah, whereever located in the world, and billions of dollars in damages. Defendants moved to dismiss the complaint on several grounds, including *forum non conveniens.* Dismissal was granted on that ground in reliance on New York's traditional policy of dismissing burdensome litigation with little or no nexus in the state. The Court of Appeals noted that there was nothing before the Court to establish the claim that assets of the Shah were located in New York. As the New York court put it, "its judgment might be ineffectual because of its inability to impose a constructive trust on defendant's assets if they are not in New York."

Unlike the Iran case, the case we filed against Mr. Marcos and company in New York involves a dispute as to the ownership of real properties in New York; there is no attempt to impress constructive trust on assets of the defendants throughout the world, only on real properties located in New York. New York law is, therefore, the *lex rei sitae,* the law which has the most substantial connection with the assets in question. In a sense, it was the defendants, not the plaintiff Republic of the Philippines, who has chosen New York when they decided to bury their plunder in the bedrock of Manhattan. The only logical alteracquire jurisdiction over the corporations organized by the defendants in Netherlands Antilles and Panama-which is a questionable assumption– it is highly doubtful whether the Sandiganbayan can impose a constructive trust on New York properties and effect the transfer of title to the plaintiff, the Republic of the Philippines. Under the Rules of Private International Law of virtually all legal systems, only the court in the situs of the properties can do that, and only the New York court can, as it did issue an effective writ of injunction affecting those properties. The case, as we stated earlier, is now on appeal, and we expect the decision of the appellate court on these legal defenses in the very near future.

Judge Pierre Leval in his opinion , anticipated that a parallel case might be initiated in the Philippines, and indeed, counsel for Republic of the Philippines has suggested that the question of whether there has been a misappropriation of assets or a breach of fiduciary trust, or a violation of Philippine laws will probably be resolved by a Philippine court in accordance with Philippine law.

Philippine Law –

This brings us back to Philippine law, both its domestic rules and its conflicts rules.

Criminal proceedings for violation of the anti-graft law and pertinent provisions of the Revised Penal Code on bribery, malversation of public funds, extortion, and the like, have been initiated against the Marcoses and their associates by the Solicitor General and these are now pending preliminary investigation by the PCGG, in accordance with Executive Order No. 1 and Executive Order No. 14 and 14-A.

[3] Piper Aircraft v. Reyno, 454 U.S. 235, 256 (1981).

[4] Islamic Republic of Iran v. Phalavi, 94 A.D. 2d 374, 464 N.Y. S. 2d 487 (1st Dept. 1983) aff d 62 N.Y. 2d 474 (1984) in support of their stand.

Now, in so far as those respondents outside the Philippines are concerned, who have also apparently decided not to return to the Philippines in the meanwhile, the proceedings may not progress beyond preliminary investigation and formal filing of charges with the Sandiganbayan. Their physical presence here is necessary for purposes of arraignment and rendition of judgment. There is no such impediment with respect to the others who are physically present in the Philippines.

In any case, as stated earlier, our penal laws and penal judgments are not entitled to recognition and enforcement abroad. The usual justification is that a State has no concern in the enforcement of the penal laws of another State but this rationale has been criticised by a number of authorities. The growing number of extradition treaties seem to erode the merit of the justification.

As stated by Mr. Justice Marshall in *The Antelope* (10 Wheaton 66, 123): "No society takes any concern in any crime not hurtful to itself."

The point of difficulty is in determining when a foreign law is pean or merely remedial. In the case of *Huntington* v. *Attrill*[5], the U. S. Supreme Court said:

> The question whether a statute of one state, which in some aspect may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose to punish an offense against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act."

Hence, if the purpose is to administer a punishment imposed upon an offender against the State, the statute is penal, otherwise, not.

There is a conflict of decisions as to whether Republic Act 1379, which authorizes forfeiture of ill-gotten wealth is penal or remedial. In *Cabal* v. *Kapunan*[6], the law was declared penal, thus reversing the earlier decision in *Almeda v. Perez*[7], which held that a proceeding for forfeiture under RA No. 1379 is civil, not penal. Then, in the later case of *Republic v. Agoncillo*[8], the Court adhered to the *Cabal* characterization saying that RA No. 1379 was the first of the basic statutes intended to minimize, if not put an end to the incidence of graft and corruption in public office. Such a law, according to the Court, is criminal or penal in character.

Now, if all the properties were located in the Philippines, it would not matter at all whether the law on forfeiture is called penal or not. However, the properties of the former president, his wife, and their close relatives and associates are found in various places in the world.

[5] 146 U.S. 657 (1892)

[6] 6 SCRA 1059 (1962)

[7] 5 SCRA 970 (1962)

[8] 40 SCRA 579 (1971)

It would seem that in the United States, especially in such jurisdictions as New York and California, the weight of authority is in favor of the proposition that forfeiture of illegally-acquired property held by a person and acquired by him in violation of a fiduciary duty, should be considered a mere remedial measure, and any act that authorizes such forfeiture may not be considered penal.[9]

Or course, a civil complaint in the Philippines, stating a claim in constructive trust against Mr. Marcos, Mrs. Marcos, and their associates, based on the doctrine that the properties they acquired here and abroad, in breach of their fiduciary responsibility, must be returned to the Republic of the Philippines, since they cannot in good conscience retain the beneficial interest in these properties, will obviate the theoretical difficulties arising from differences in characterization, but this may require a different degree of proof.

In any case, we have set up a panel of distinguished jurists in the United States, composed of leading law professors and practitioners to advise us on the steps that should be taken to make sure that any judgment promulgated here will be recognized and enforced in the United States and other countries of the world, such as Switzerland, where assets, belonging to Mr. Marcos, Mrs. Marcos and their associates have already been established. A similar panel has also been established here for purposes of coordination.

Insofar as the United States is concerned, section 98 of the Conflict Restatement embodies the generally accepted rule:

> "A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned."

Practical difficulties and the issue of sequestration

From the very day we were organized as a Commission, it became immediately obvious to us that we had to resort to sequestration, if we were to carry out the mandate to recover ill-gotten wealth here in the Philippines.

Bank deposits, shares of stock, and personal properties were being moved out day by day; agreements and contracts were being drawn up for the purpose of disposing of or concealing properties and assets identified with the close associates of the former President and his family.

We know the import of "sequestration" during the Marcos years, when the properties of the Lopezes, for example, were actually taken over and confiscated by the military and later delivered, as in the case of Meralco and the *Manila Chronicle,* to Mrs. Marcos' younger brother, Mr. Benjamin "Kokoy" Romualdez, or as in the case of the ABS-CBN tv-radio network, to Mr. Roberto Benedicto, for their personal benefit. Sequestration by the PCGG does not mean confiscation. It means placing a questioned asset, fund, or property under the control or custody of the Commission, in order to prevent its disposition, concealment, or dissipation, pending judicial determination by the Sandiganbayan of whether the said asset, fund, or property constitutes ill-gotten wealth. In the case of an on-going

[9] See e.g. the cases mentioned in 36 Am. Jur 2d 11, pp. 618, 619).

corporation, 40% of whose outstanding shares, for instance, have been sequestered, the Commission usually appoints a fiscal agent to prevent the transfer, siphoning or dissipation of corporate funds and assets. Sequestration does not result in the takeover of the operations of the enterprise, unless otherwise warranted by the exigences of the situation, such as when the evidence shows that the firm is completely or almost completely owned or controlled by the Marcos cronies or business associates, or the take-over is required in the national interest.

"Freeze order" on the other hand, is an order intended to stop or prevent any act or transaction which may affect the title, condition, or value of the asset or property, which is or might be the object of any proceeding under Executive Orders Nos. 1 and 2, in order to preserve the same or to prevent its transfer, concealment, or dissipation.[10] In the United States and Europe, freeze orders have the same function as orders of sequestration.

At the start of the Aquino Government, it was the military establishment that assumed the power to issue "hold orders" to prevent certain persons from leaving the country. In due time, the Ministry of National Defense relinquished the power to the PCGG. A "Hold order", temporarily preventing a person from leaving the country where his departure will prejudice 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 orders, shall be valid only for a maximum period of six months, unless extended for good reasons by the Commission en banc.[11]

The power of the Commission to issue sequestration orders was challenged in the Supreme Court in the case filed by the Tourist Duty Free Shops.[12] The facts show that the corporation, otherwise referred to as TDFS, was incorporated by relatively unknown persons with a paid-up capital of P250,000. In 1975, it obtained a special permit from Mr. Marcos to operate duty-free shops and then obtained its exclusive franchise to continue its operation for 25 years under PD 1193, with several special privileges: store spaces at international airports and in hotels and commercial centers, duty and tax-free importations. All it had to pay the government for all these was franchise tax of 7% of its net sales.

Of the 7%, only 2% went to the government, and 5% went to 3 private foundations controlled by Mrs. Marcos. By 1983, TDFS capitalization had reached P80 million with the daughters of Mrs. Gliceria Tantoco holding 98.5% of of its shares of stock. It appeared, however, on the basis of documentary evidence that it was Mrs. Tantoco herself running the enterprise and that she had written letters to Mrs. Marcos reporting on the profits of the company far exceeding their projections. TDFS asked for a restraining order, but the PCGG opposed it on the ground that TDFS was wholly, not partly, owned by Imelda Marcos and her managing partner Gliceria Tantoco. On May 27, 1986, the Supreme Court promulgated a resolution *en banc* denying the petition of TDFS and ruling that–

[10] See Section 1, Rules and Regulations of the Commission promulgated April 11, 1986.

[11] (Idem.)

[12] Tourist Duty Free Shops, Inc. v. PCGG, et al, GR No. 74302).

> "The Court is satisfied that responded Commission acted with prima facie basis in issuing the sequestration order of petitioner's assets."

In practice the Commission meets *en banc,* considers the evidence, and does not authorize the issuance of a writ of sequestration unless it is convinced that there is a *prima facie* basis for the issuance of a writ of sequestration. One high official of the present government says the Commission is too legalistic. "Why", he asked, should it require documentary evidence? " Our answer was simple: we have to be convinced that the property was acquired illegally.

On the other hand, the cronies and their propagandists tell us the Commission is moving too fast when we do not give them previous notice and hearing.

It should be noted that the issuance of writs of sequestration and freeze orders is sanctioned by the Freedom Constitution. Article II, Section 1 of the Freedom Constitution provides that –

> "Section 1. Until a legislature is elected and convened under a new Constitution, the President shall continue to exercise legislative power.
>
> The President shall give priority to measures to achieve the mandate of the people to:
>
> (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 or accounts."

Nonetheless, it has been contended that the exercise of the power of sequestration, without previous notice and hearing, violates the constitutional provision that no person shall be deprived of his life, liberty, or property without due process of law.

Unfortunately, as contended by the Solicitor General, those who invoke the due process clause and have asked the Supreme Court to issue injunctive relief are among the persons who benefitted from the confiscatory acts of the previous regime, and did not utter any word of disapproval in the face of gross violations of basic human rights by the regime's agents of terror and deceit. Worse, some of those who have gone to the Supreme Court to challenge the *ex parte* issuance of the sequestration orders were, on the basis of documentary evidence, involved with Mr. and Mrs. Marcos in the surreptitious accumulation of ill-gotten wealth, here and abroad, during the martial law years, and in one case, long before Mr. Marcos imposed martial law.

Were the PCGG to give previous notice and conduct a hearing before it could issue a writ of sequestration, the ill-gotten wealth sought to be sequestered would probably disappear before the scheduled date of hearing. Bank accounts, shares of stock, expensive jewelry and other personal properties can be easily moved out to inaccessible places, beyond the reach of the Government. Our experience in the Commission shows that even the present method is not fool-proof. For instance, the Commission issued a freeze order covering the accounts of a trusted official of the former First Lady in the Ministry of Human Settlements. Due to work overload, the order was served in the afternoon. Shortly before actual service, the officer concerned was able to withdraw $260,000. Likewise, on March 10, 1986,

a writ of sequestration was issued to enable the Commission to seize jewelry, dollars, documents, and firearms at the Romus head office at 144 Romualdez Avenue, Manila. The order was served at 10:00 p.m. But the jewelry and dollars had been carted away three hours earlier. Fortunately, the pieces of jewelry were recovered at the MIA from a Greek national who was able to leave the country. If the life of the law is not logic, but experience– as Justice Holmes aptly pointed out– giving previous notice and conducting a previous hearing would be the best way not to recover the ill-gotten wealth of Mr. Marcos and Company.

The reported suggestion of a friend, a professor of law, that the matter should be left to the Sandiganbayan first before sequestration can be carried out suffers from the same defect. He admits that since the Sandiganbayan was reorganized only recently (June 2, 1986), the action of the PCGG in issuing freeze and sequestration orders was probably justified but no longer. He also contends that while it is true that the Bureau of Internal Revenue and the Bureau of Customs have the power to seize and detain goods and properties, without previous notice to the owner, this should not be equated with the power to sequester since the two bureaus exercise the powers of taxation.
the powers of taxation.

Be it noted, however, that sequestration is rooted in the police power of the State, the most pervasive and the least limitable powers of Government. It is superior to the power of taxation, since police power is "the power of sovereignty, the power to govern men and things within the limits of its domain."[13]

Those who are prepared to concede to the Commissioner of Internal Revenue the legality of his power, without prior notice of hearing, to issue distraint orders which effectively freeze the property of a taxpayer who, on the basis of his opinion, "is retiring from any business subject to tax, or intends to leave the Philippines, or remove his property therefrom, or hide or conceal his property, or perform any act tending to obstruct the proceedings for collecting the tax due or which may be due from him"[14] should not find it difficult to concede the superior right of the President to sequester, through the Commission of her creation, what had been secretly, surreptitiously accumulated for 20 years by Mr. Marcos and his company.

Part of the problem is that some well-meaning people demand instant miracles through impossible means; that which had been so stealthily piled up and so cleverly concealed in secret deposits and investments here and abroad for twenty years must be uncovered and recovered right away in *open hearings* with *previous notice* to the perpetrators. I do not know of any country which had had to cope with the problem of ill-gotten wealth– France, China Euthopia, Iran, and Nicaragua that was able to achieve this kind of a miracle.

Incidentally, the Honolulu customs authorities seized and detained the goods articles of value, and documents Mr. Marcos and company had brought to Honolulu on February 26, 1986, without benefit of previous hearing. The right of the customs authorities to continue detaining them, in the light of the conflicting

[13]Chief Justice Taney cited by Justice Fernando in *Morfe* v. *Mutuc*, 22 SCRA 424, 1968).

[14]Section 303 National Internal Revenue Code.

claims of ownership by Mr. Marcos and his entourage, on the one hand, and the Aquino Government, on the other, has been sustained by the U.S. Circuit Court of Appeals.

This is why the arguments of the Marcos associates that in a democracy, sequestration– without previous notice and hearing– is inherently repulsive is not sustained in actual practice, whether in the United States or elsewhere.

Charles de Gaulle of France, after the second World War, took over and confiscated, for the benefit of the French Republic, the properties of collaborators, without any judicial intervention.

More to the point, democratic, neutralized Switzerland, without waiting for any petition from the Aquino Government, and on the basis of inside information, immediately and unilaterally froze the assets of Mr. Marcos, Mrs. Marcos, their relatives, and associates in Swiss banks, last March 25, without any notice to them and without benefit of any previous hearing. That freeze order has been regularized through the effort of the PCGG and prevails up to this hour.

In both countries, as well as in the United States, individual rights and liberties– such as the liberty of the mind, free speech and free press, and what we now call basic human rights including the right to survival– occupy a higher place than property rights. As much was also stated in the 1967 Philippine case of Ermita-Malate Hotel et al v. *City Mayor of Manila:*[15]

> ' '. . . What may be stressed. . . is that if the liberty involved were freedom of the mind or the person, the standard for the validity of governmental act is much more rigorous and exacting, but where the liberty curtailed affects at the most rights of property, the permissible scope of regulatory measure is wider." '

The important thing is that after the freeze or sequestration order is issued, the affected parties can impugn its legality before administrative agencies or courts of justice in appropriate proceedings. This, the associates of Mr. and Mrs. Marcos have actually done in cases filed with the Supreme Court. Twice, the PCGG has been sustained by the Supreme Court in the cases filed by former GSIS Manager, Mr. Roman Cruz, Jr., and the TDFS of Mrs. Tantoco and Mrs. Marcos.

Parenthetically, and by way of contrast, when Mr. Marcos, by virtue of his martial law powers, confiscated the properties of his political opponents and critics, not a single case was brought to court questioning his orders.

Can sequestered shares be voted?

The argument has been put forward that voting in shareholders' meetings is an exercise of the power of dominion over shares of stock; how can the PCGG which is a mere custodian of the shares vote them?

[15]20 SCRA 849, 865-866 (1967)

To say that voting is a necessary attribute of ownership is not legally correct. Receivers and administrators vote shares under their custody, under Section 55 of the Corporation Code.

The authority of PCGG to vote sequestered shares springs from the practical necessity of preserving the property and preventing disposition or dissipation of the assets in its custody. Under the Corporation Code, shareholders have the power to authorize the corporate directors to dispose of all or substantially all of the assets of the Corporation[19], invest the funds of the corporations in any other corporation or business or for any purpose other than its primary purpose[20]; or even dissolve the corporation (Section 118)[21] or shorten its corporate life[22]. It would be rather strange for the PCGG to sit by and wait for any of these things to happen. In any case, the President of the Philippines has confirmed the right of PCGG to vote shares sequestered by it in a Memorandum issued on June 26, 1986. If PCGG has the right to vote these shares, its right to vote for the election of directors must, of necessity, be conceded.

Are Executive Orders Nos. 1 and 2 bills of attainder?

Associates of Mr. and Mrs. Marcos who filed cases with the Supreme Court against the PCGG contend that Executive Orders Nos. 1 and 2 are bills of attainder in that the preambular paragraphs state that –

> "WHEREAS, vast resources of the government have been amassed by former President Ferdinand E Marcos, his immediate family, relatives, and close associates here and abroad.[23]
>
> "WHEREAS, the Government of the Philippines is in possession of evidence showing that there are assets and properties purportedly pertaining to President Ferdinand E. Marcos, and/or his wife Mrs. Imelda Romualdez Marcos, their close relatives, subordinates, business associates, . . . which had been or were acquired by them directly or indirectly through, or as a result of the improper or illegal use of funds or properties owned by the Government of the Philippines . . . (and)
>
> "WHEREAS, said assets and properties are in the form of bank accounts, deposits trust accounts, shares of stock, buildings . . . and other kinds of real or personal properties in the Philippines and in various countries of the world."[24]

The argument is that without previous notice and hearing, persons are branded and convicted as criminals and punitive action taken against them.

The question may be posed: After the discovery of thousands of incriminating documents in Malacañang, does the President have to give previous notice and hearing before she could legally make those statements which served as the basis for issuing Executive Order No. 1, creating the Presidential Commission on Good Government and Executive Order No. 2, freezing all the ill-gotten assets of Marcos, Mrs. Marcos, and company.

Parenthetically, they admit that the Aquino Government is a revolutionary government, but at the same time they do not want any specific reference to the very cause which inspired the revolution– the need to overthrow a corrupt, greedy and brutal dictatorship. How, may I ask, can a revolutionary government suddenly render itself blind to that which led to the revolution.

In any case, a bill of attainder is a legislative act which inflicts punishment without judicial trial. But there is nothing in the two orders that inflict punishment on the Marcoses and their associates. No guilt has been established. In fact, the order, along with Executive Order No. 14, contemplate investigation and prosecution by the PCGG and a judicial determination of their guilt by the Sandiganbayan. The preambular paragraphs merely state a fact based on the documents that had been left by the Marcoses when they left the Palace in a hurry, which necessitated the creation of the Presidential Commission on Good Government.

The statement that it is the PCGG that acts as accuser, prosecutor, judge, and executor at the same time is both unkind and frivolus. In actual practice, what usually happens is that PCGG receives a complaint from a private citizen against a person alleged to be a crony, subordinate, or associate of the president; the accusat on is then turned over to a team of researchers to find out whether there is some basis in fact. If there is no basis, the matter usually ends there. If there is basis, the matter usually ends there. If there is basis in documents made available to, or in the possession of the Commission, the PCGG meets *en banc* and determines whether there is *prima facie* basis for the issuance of a writ of sequestration. Now, a person may be a substantial shareholder in, let us say, 30 corporations, but if the evidence before the PCGG links him to only 3 corporations, the writ of sequestration is limited only to the shares of stock in the 3 corporations in question. The evidence in the possession of the Commission is then turned over to the Office of the Solicitor General for an independent evaluation of the evidence. If the evidence warrants, the Solicitor General then files the case for preliminary investigation by the PCGG. If the PCGG finds that there is probable cause it will authorize the filing of the necessary information with the Sandiganbayan for violation of the Anti-Graft Law or other provisions of the Revised Penal Code. It is the Sandiganbayan that will make the determination of guilt or innocence, and its decision is subject to review by the Supreme Court.

There is nothing in this whole procedure that justifes the wild charge that the PCGG accuses prosecutes, judges, and executes its sentence, or that Executive Orders Nos. 1 and 2 are bills of attainder.

The first case filed with the Commission by the Office of the Solicitor General involves 28 respondents, including Mr. and Mrs. Marcos. The evidence is so voluminous that the documents had to be submitted in series. So far, the first and second series of documents have been submitted by the Solicitor General. It will take some time to complete the submission of many thousands of documents involving the accumulation of ill-gotten wealth not only in the Philippines but also in the various states of the United States, Canada, Austria, Australia, Switzerland, Italy, Liechtenstein, and other countries of the world.

Those who are quite impatient should perhaps be reminded that in the Plaza Miranda bombing of August 21, 1971, no case has been presented in court– the bombing incident, which was quite a simple event, remains a deep, unresolved mystery.

Even the Ninoy Aquino assassination case, after more than 3 years, is still a deep mystery to many of our people.

Actual results –

After all is said and done, the task of recovering the ill-gotten wealth will be judged in terms of actual results, not in terms of legal niceties.

PCGG has turned over to the Office of the President around 2 billion pesos in cash, free of any lien. It has also delivered to the President– as a result of a compromise settlement– around 200 land titles involving vast tracts of land in Metro Manila, Rizal, Laguna, Cavite, and Bataan, worth several billion pesos. These lands are now available for low-cost housing projects for the benefit of the poor and the dispossessed amongst our people.

In the legal custody of the Commission, as a result of sequestration proceedings, are expensive jewelry amounting to 310 million pesos, 42 aircraft amounting to 718 million pesos, vessels amounting to 748 million pesos, and shares of stock amounting to around 215 million pesos.

But, as I said, the bulk of the ill-gotten wealth is located abroad, not in the Philippines. Through the efforts of the PCGG, we have caused the freezing or sequestration of properties, deposits, and securities probably worth many billions of pesos in New York New Jersey, Hawaii, California, and– more importantly– in Switzerland Due to favorable developments in Switzerland, we may expect, according to our Swiss lawyers, the first deliveries of the Swiss deposits in the foreseeable future perhaps in less than a year's time. In New York, PCGG, through its lawyers who render their services free of cost to the Philippine Government, succeeded in getting injunctive relief against Mr. and Mrs. Marcos and their nominees and agents. There is now an offer for settlement that is being studied and explored by our lawyers there.

If we succeed in recovering not all (since this is impossible) but a substantial part of the ill gotten wealth here and in various countries of the world– something the revolutionary governments of China, Ethiopia, Iran, and Nicaragua were not able to accomplish at all with respect to properties outside their territorial boundaries, the Presidential Commission on Good Government, which has undertaken the difficult and thankless task of trying to undo what had been done so secretly and effectively in the last twenty years, shall have more than justified its existence.

To parapharse Abraham Lincoln, himself the object of so much criticism and vilification during one of the most difficult periods in American history:

> ' If the end brings us out alright, a thousand angels saying we had been wrong would make no difference at all.'

SEQUESTRATION OR FREEZE ORDER BY PCGG

By AMBROSIO PADILLA*

The President and Officers of the Integrated Bar of the Philippines and fellow lawyers:

The theme of this IBP Congress reads: "The Integrated Bar – Its Role Today". I believe its immediate role is to help circulate copies and disseminate the contents of the new Constitution prepared by the 1986 Constitutional Commission, for the purpose of informing our people of its good and also *new* provisions.

As Vice President of the 1986 Constitutional Commission I dare say that the new Constitution is much better than the 1973 Constitution and it is more complete than the 1935 Constitution. It is a good Constitution that deserves the acceptance and ratification of our sovereign people.

The special elections of February 7, 1986

The special (snap) election was decreed by former President, Marcos on February 7 for him to seek a new mandate from our people and he even shortened his six (6) year term from his 1981 election. But President Marcos did *not* resign from his position, and so there was *no* vacancy in the Office of the President. The Batasang Pambansa passed Batas Pambansa Blg. 883 confirming the February 7 special election. Petitions were filed with the Supreme Court questioning the legality of said Presidential election of february 7, because there was *no vacancy* in the Office of the President and petitioners expected Pres. Marcos would resign and vacate his position. I was one of those who appeared as *amicus curiae* in the Supreme Court and I submitted that the election for President and of Vice President is *political,* rather than judicial, and therefore the honorable Supreme Court should not prevent nor restrain the holding of such election. The decision of the Hon. Supreme Court upheld that view and allowed said special election as agreed by the Executive and the Legislative. Despite massive vote buying, violence and terrorism, electoral frauds in the February 7 election, Cory Aquino and Doy Laurel were *voted* by the majority of our people, but the Batasan Pambansa included in its canvass of electoral returns many dubious, irregular, altered or manufactured returns, and declared as winners Marcos and Tolentino. Thereafter, the historical political *miracle* happened in EDSA on February 22-25, 1986.

The EDSA political miracle toppled the well entrenched dictatorial regime of fourteen (14) years of martial misrule, a historical fact unprecedented in the history of Asia, nay of the World. The Aquino Government was installed by "people power" based on the rule of law, truth, justice, freedom, love, equality and peace (Preamble of the new Constitution). The Aquino government is not only supported by our sovereign people, but its *legitimacy* is upheld by our Supreme Court, and is recognized by our Asean neighbor countries and by the entire community of nations throughout the world.

In your first workshop, the topic is sequestration and presidential powers.

Address delivered extemporaneously by former Sen. Ambrosio Padilla at the National Convention of "the IBP Chapter Presidents Congress" at the IBP Building, Julia Vargas Avenue, Pasig, Metro Manila on October 25, 1986.