by providing for minimum features which should be embodied in the contract as follows:

a. There shall be no stipulation whereby legal title to the money or property for management is transferred to the financial manager while beneficial title is retained by the client or reserved for a third party beneficiary.

b. The contract shall be clear that the financial manager acts only in a representative capacity and therefore his acts are designed to be those of his client.

c. The contract shall not stipulate fixed interest.

d. Any arrangement based on "income expectation" or like terms, shall be clarified by including a clause that said "income expectation" or like terms is not a guaranty of return or income, nor does it entitle the client to a fixed interest or return on the money invested; and

e. There shall be a stipulation that in case of withdrawals and/or termination of contract, agreement, etc., before the agreed period, the client shall be entitled to such income as the money invested may have earned, less commission, if any.

Section 1424 enumerates the eligible investments for financial managers, and provides for rules to prevent self-dealing and conflict of interest transactions.

Section 1425 - Unlike in trust transactions, financial managers are not allowed under this provision to commingle the funds of two or more accounts for the purpose of investing in money market.

Section 1426 - The basic rule of maintaining trust operations independent of the other businesses of trustee is restated by providing that fund management operations shall be independent of the other businesses of the financial manager. The financial manager is further required to render periodic reports to the owner (s) of the funds/accounts to apprise the fund owners of significant developments in the administration of the account.

Section 1427 contains provisions on fees and commissions of financial managers based on services rendered.

Section 1428 provides for the deposit of cash or eligible securities for the faithful performance of fund management duties at the same rate per volume required for the performance of trust duties. This requirement was provided in lieu of the original prerequisites for engaging in fund management operations.

The writer hopes that this article will succeed in informing the readers of the true concept of a trust company and the built-in safeguards for public protection entailed in its operation.

By Stephen Cu-Unjieng

COMPARING THE PRESIDENTIAL IMMUNITY FROM SUIT UNDER THE 1935 AND 1973 CONSTITUTIONS, AND THE 1981 AMENDMENTS

The concept and nature of Presidential Immunity from Suit in Philippine Constitutional law has been quite varied. It was not stated in any particular provision of the 1935 constitution, but merely presumed. The immunity was limited to the President's tenure and to his person. In the 1973 Constitution, the provision on Immunity followed the concept applied under the '35 Constitution. However, the scope and breadth of Presidential Immunity as provided for in the 1981 amendments is wider and more comprehensive.

The rationale for Presidential Immunity from Suit is based on the nature of the Executive branch of government. As stated in "Watson on the Constitution (pp. 1022-25)":

> One man constitutes all there is of that, and upon him the Constitution has placed many great and important duties, and these duties are constant. He does not sit in authority at stated intervals like Congress and the courts. There is no recess in the discharge of his official duties. Anything which impairs his usefulness in the discharge of the duties, however slight, to that extent impairs the operation of government. [1]

Presidential immunity under the '35 Constitution was limited to the President and did not benefit his subordinates. This placed a check on presidential abuse of power as "the President acts through agents and subordinates, who can be brought within the jurisdiction of the courts". [2] Furthermore, although "Hardship or injustice might result from the re-

fusal of the President to be a party to, or to testify in a civil or criminal case. . . once the President is out of office, he becomes amenable to the jurisdiction of the courts." [3]

In the '73 Constitution, Presidential Immunity from Suit was explicitly provided for in Article 7, Section 7: "The President shall be immune from suit during his tenure". This implied the same privileges and restrictions on Presidential Immunity as understood under the '35 Constitution. However, the provision left certain questions unanswered, as pointed out by Fr. Bernas – "Thus, a number of questions are unanswered by this provision. May the President waive his immunity? If the President sues, is that a waiver of his immunity at least from a counterclaim?"[4]

It is evident that under the '35 and '73 Constitutions, Presidental Immunity from Suit was strictly construed and limited to it's bare essentials. It applied only during the President's tenure and did not extend to his subordinates.

The 1981 Amendments changed the whole rationale behind Presidential Immunity from Suit from that of a temporary nature to a permanent one. If previously it was limited to the President's tenure, now it became absolute as no suit can be brought for official acts at any time. Furthermore, the Immunity has been extended to include all others who act pursuant to the President's specific orders. The provision on Presidential Immunity as amended is 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.
>
> The immunities herein provided shall apply to the incumbent President referred to in Article 7 of this Constitution." [5]

There are several interpretations of this provision which encompass all views and touch both extremes. The most comprehensive and eloquent views are those of Prof. Perfecto Fernandez and Assemblyman Arturo Tolentino, for the negative and positive sides, respectively.

Fernandez' comments are found in his "Position Paper on the Proposed Constitutional Amendments in the April 7, 1981 Plebiscite". [6]

The main points are as follows:

> "Such immunity would make the highest officials no longer the servants of the people, but their masters . . . While the President and other officials are bound to obey the law, the immunity removes all sanctions against them for violation of the law.
>
> . . .
>
> It is often claimed that immunity is merely a shield against harassing suits. From the language of the provision, the immunity is absolute; there is simply no basis for the distinction between *bona fide* and harassing suits.
>
> . . .
>
> The immunity from suit comprehends all types of legal liability, and includes exemption from liability for violations of a) the criminal law and b) the civil law. There is thus a blanket or total shield from Judicial Power.
>
> . . .
>
> Persons entitld to the proposed Immunity are not specified, hence they may be indefinite in number . . . Such others could include: a) Civil officials b) Military officials of all grades and ranks, including soldiers c) Private persons, such as cronies and relatives". [7]

Fernandez adds:

> "The claim is made that the immunity lies only for official acts done according to law, but not for violations of the law. If this be so, then the Immunity amendment is not needed. Under existing jurisprudence, no official is accountable for acts in accordance with law, there is no liability for lawful acts. In fact under present law, there is no liability for erroneous acts, so long as they were done in good faith. Hence, the Immunity could only be intended to provide a shield for official acts in violation of the law". [8]

The jurisprudence Prof. Fernandez referred to is probably based on Article 11, sec. 6 of the Revised Penal Code which states:

> "Justifying Circumstances. The following do not incur any criminal liability:

6. Any person who acts in obedience to an order issued by a superior for some lawful purpose."

The requisites to fall under Article 11 are that "Both the person who gives the order and the person who executes it, must be acting within the limitations provided by law." [9]

Assemblyman Tolentino's views can be found in the transcript of the Batasan Pambansa Session Proceedings of Feb. 26, 1981. The following are portions of those proceedings:

"Mr. Tolentino. Am I correct, Mr. Speaker in my impression that this proposed amendments reffering to official acts refer to acts which are lawful and that where the act is unlawful or contrary to law or quasi-delictual, it is not within the characteristic of being an official act.

"Mr. Puno. Subject to the qualification that the presumption is always in favor of legality.

. . .

Mr. Puno. In other words, he who alleges that it is illegal or unlawful, has the burden of the proof.

. . .

Mr. Tolentino.. We now go to the matter of procedure, Mr. Speaker. Of course, if a complaint is filed against a public official, in compliance or in execution of an order of the President, performed this and that act, and by reason of that act performed, the complainant suffered certain damages by that fact alone, it would seem to me that the principle of immunity would throw out that case from the court.

Mr. Puno. As a General rule.

Mr. Tolentino. Because of the presumption of legality and lawfulness of the act. . . But supposing the complaint says that pursuant to an order of arrest issued either by the President or by the Minister of National Defense on instruction of the President, this particular military official apprehended the complainant in spite of the fact that he was unarmed, he did not offer any resistance, was beaten up by the arresting officer.

Under this set of of facts alleged in the complaint, it would seem that the immunity from suit would not apply, am I correct?

Mr. Puno. Mr. Speaker, it is my own view that, that can still be subject to a motion to dismiss.

Mr. Tolentino. Yes. Then they have to litigate; they have to at least go into some kind of preliminary hearing to determine whether there is really an illegal act as a basis of the action of the complaint.

Mr. Puno. And whether the mantle of immunity applies."

In summary, Tolentino's view is that the provision does not remove wrong-doing and felonious acts from liability and that these are not protected by the provision.

There are arguments that further the likelihood of the courts adopting Fernandez' bleak scenario or Tolentino's qualifications in applying the provision. Here, the basic rules of Statutory Construction must be applied.

In favor of Fernandez' view there is the most basic rule in Statutory Construction, "Dura lex sed lex". This means that the law may be harsh but it is the law. Thus, when the law is clear no interpretation is needed. [10]

The amended provision is clear and categorical, thus, there is no need for interpretation, the law will apply as it is. Once it is proved that the act was done in pursuance of the President's specific orders it is covered by the Immunity provision.

Related to the above argument is the rule that "The courts will not allow any reference to the INDIVIDUAL motives of the legislators in enacting a statute, except as they are expressed IN THE STATUTE ITSELF. (2 Sutherland, Statutory Construction, 3rd ed. p. 505)." [11]

There is also the rule that when a statute is reenacted in exactly or substantially the same language it is to be given the construction applied to the old law. However, if the new law "differs substantially from the original, the foregoing rule does not apply". [12] Art. 11 Sec. 6 of the Revised Penal Code referred to "lawful" orders, and Art. 7 sec. 15 of the amended Constitution states "specific" orders and "official" acts. Thus, Fernandez' view that the provision covers all liability is plausible as the coverage of the Immunity provision has been extended from lawful to specific orders of the President.

There are also basic rules of Statutory Construction that can be used in bolstering the likelihood of Tolentino's view being adopted by the courts.

Tolentino's views constituted the main discussion on the Immunity provision in the Batasan. So they can be held to be the legislative intent behind that provision. If the courts apply the following rules of construction, then his views may apply in interpreting this provision.

The first is that "In construing the law, the legislative intent of the same may be examined". [13] This however, presumes there is something to contrue, that there is an ambiguity in the law. Related to this are the following rules, "In construing a statute, the court must look into the spirit of the law or the reason for it." [14], and that "Statutes in derogation of natural rights or common rights are to be strictly construed." [15] Lastly, there is the rule that a statute must be construed as a whole. [16] As the immunity provision is only part of the Constitution, it must be given a construction that will place in harmony with the other co-equal provisions of the Constitution like the Bill of Rights and those on the accountability of public officers. Furthermore, the provision on Immunity although clear in itself, becomes a bit ambiguous in terms of application when read beside other provisions of the Constitution like the Bill of Rights and Accountability of Public Officers. Following this view, the provision on Immunity must be strictly interpreted as Tolentino does interpret it.

It must be noted however, that the rules on applying legislative

intent are merely persuasive and not compulsory on the courts or even on the legislature when making a law to apply a constitutional provision. A recent example is the law making not voting punishable with a penal sanction. Article 5, section 4 of the Constitution provides that "It shall be the obligation of every citizen qualified to vote to register and cast his vote." The Constitutional Convention discussed providing a penal sanction for not voting, but rejected it. As this view was merely persuasive, the election law which provided for a penal penalty for not voting could and did ignore the legislative history and intent of Art. 5, sec. 4 of the Constitution.

So what will the courts do in construing and applying the amended provision on Immunity? Will Fernandez' or Tolentino's view be adopted?

Of course it is this writer's hope that Tolentino's restrictive view will be adopted. But on which view will actually be adopted, no one is certain how the Supreme Court will tackle this issue. However, it should be noted that the inescapable trend in Supreme Court's jurisprudence has been to grant wider latitude to the Executive Branch of government.

When the Executive has an opportunity to use this provision on immunity, or the Supreme Court a chance to construe it, it is this writer's hope that they be guided by Justice Louis Brandeis timeless warning:

"Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself." (Olmstead vs. Unites States, 277 U. S. 438 at 485)

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1 cited in p. 291, Tanada and Carreon, Political Law of the Philippines, 1961 Edition.
2 p. 291, IBid.
3 p. 291, Ibid.
4 p. 109, Bernas, The 1973 Philippine Constitution Notes and Cases Part 1, 1974 Edition.
5 Article 7, section 15, The 1973 Constitution (as amended)
6 p. 26-38. 1982 Constitutional Amendments, UP Law Center, 1981.
7 p. 34-36, ibid.