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POWER, PRIVILEGE & FREEDOM

The Supreme Court rules on three landmark cases – EO 464, the Calibrated Pre-emptive Response Policy and Proclamation 1017



It may have well been the summer of discontent for many officials in the executive branch of government when the Supreme Court issued its back-to-back rulings on three landmark cases that questioned the legality of Executive Order 464, the Calibrated Pre-emptive Response Policy and Proclamation 1017. At the core of these controversial cases are the conflicting issues of power, privilege and freedom.

EO 464, Executive Privilege and Congressional Inquiries in Aid of Legislation

In September, 2005 the Philippine Senate conducted a series of investigations on reported anomalies in the North Rail Project and allegations of electoral fraud in the 2004 presidential elections. The Senate invited, among others, Executive Secretary Eduardo Ermita and Armed Forces Chief of Staff General Generoso Senga. Both Ermita and Senga declined the invitation citing Executive Order

464, issued by President Gloria Macapagal Arroyo on September 26, 2005. EO 464, in effect, banned all officials of the executive branch from appearing before Congress unless prior presidential consent was secured.

The Senate questioned the constitutionality of this executive order in *Senate of the Philippines, et al., versus Eduardo Ermita*, G.R. No. 169777, April 20, 2006, alleging that it contravened the power of inquiry vested in Congress.

The Supreme Court on April 20, 2006 ruled that the provisions of EO 464 which required

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POWER, from page 1 executive officials to secure presidential consent before appearing in inquiries in aid of legislation were unconstitutional. "The infirm provisions of EO 464," the High Court said, "allow the executive branch to evade congressional requests for information without need of clearly asserting a right to do so and/or proffering its reasons therefor. By the mere expedient of invoking said provisions, the power of Congress to conduct inquiries in aid of legislation is frustrated."

In affirming the mandatory appearance of government officials in inquiries in aid of legislation as provided for in Article VI, Section 21 of the 1987 Constitution, the Supreme Court clarified that a cabinet official may refuse to testify if the testimony would involve matters relating to "executive privilege." These include state secrets involving national security, informer's privilege or keeping the identity of an informant secret, or generic privilege involving internal deliberations in crafting government policies.

However, the Supreme Court emphasized that: 1. Executive privilege may be invoked only by the President or the Executive Secretary, if so authorized; 2. The privilege must be asserted and the reasons for non-disclosure clearly stated; 3. The presumption is in favor of publicity; and, 4. In case of conflict, the Court may determine the nature of the privilege.

Calibrated Pre-emptive Response Policy

In the light of mounting protests against the Arroyo administration, the government instituted the so-called "calibrated pre-emptive response" (CPR) policy. In a statement on September 21, 2005, Executive Secretary Eduardo Ermita said, "The rule of calibrated pre-emptive response is now in force, in lieu of maximum tolerance. The authorities will not stand aside while those with ill intent are herding a willing or unwilling mass of people and inciting them into actions that are inimical to public order."

Ermita's pronouncement was followed by a series of rally dispersals, some of them violent, and the arrests of some protest leaders.



"They are playing with fire and, unless prudently restrained, they may one day wittingly or unwittingly burn down the country." CJ Panganiban on the authors of PP 1017

In the case of *Bayan v. Ermita*, G.R. No. 169838, April 25, 2006, the group Bayan and other petitioners asked the Supreme Court to declare the CPR policy as well as Batas Pambansa 880, otherwise known as the Public Assembly Act of 1985, unconstitutional.

In its ruling issued on April 25, 2006, the High Court highlighted the constitutional guarantees to the people's right to peaceably assemble and petition for redress of grievances and found in favor of the petitioners, saying that "the so-called calibrated pre-emptive response policy has no place in our legal firmament and must be struck down as a darkness that shrouds freedom."

While the Court did not declare BP 880 unconstitutional because "it merely regulates the use of public places," it clarified some of the law's provisions thereby restricting the interpretations of both the police and local government officials.

According to the Supreme Court: 1. Maximum tolerance must be observed; 2. Mayors must act immediately on applications for rally permits and failure to do so within two days of filing the application will render such applications automatically approved; 3. Mayors can only deny the issuance of rally permits if a clear and present danger to the public exists; and, 4. Local governments are mandated to establish freedom parks falling which permits may be dispensed with and rallies may be held in any public park or plaza.

Proclamation 1017 on the State of National Emergency

On February 24, 2006, President Arroyo issued Presidential Proclamation No. 1017 declaring a national state of emergency and called upon the military and the police to suppress "lawless violence."

Several people, including University of the Philippines Professor Randolph David, were arrested without warrants, the office of the newspaper *Daily Tribune* was raided and authorities threatened to close down media establishments that did not practice "balanced reporting."

In the case of *David v. GMA*, G.R. No. 171396, May 3, 2006, David questioned the constitutionality of Proclamation 1017 and the legality of all the acts committed by the police subsequent to the proclamation.

Significantly, the Court proceeded to rule on the case despite the filing of the proclamation, asserting that the "moot and academic" defense cannot be given merit especially on matters of great public interest.

The Supreme Court found sufficient constitutional support for a presidential declaration of a state of national emergency saying that Arroyo was in the "best position to determine the actual condition of the country." According to the Supreme Court, the President also had the power to call out the police and the military to suppress lawless violence.

However, the Supreme Court also ruled that all acts committed by the police pursuant to Proclamation 1017 violated the Bill of Rights. Chief Justice Artemio Panganiban, who voted with the majority, warned that the authors of the proclamation "may be testing the outer limits of presidential prerogatives." He added, "they are playing with fire and, unless prudently restrained, they may one day wittingly or unwittingly burn down the country."

The Court also clarified that while the President may declare a state of national emergency, such declaration does not unilaterally grant her the power to take over public utilities. Such takeovers must first be approved by Congress.

In ending his concurring opinion to the majority decision, Panganiban took occasion to highlight the role of the Supreme Court in guarding against executive excess:

"Perhaps this country would never have had to experience the wrenching pain of dictatorship; and a past President would not have fallen into the precipice of authoritarianism, if the Supreme Court then had the moral courage to remind him steadfastly of his mortality and the inevitable historical damnation of despots and tyrants. Let not this Court fall into that same rut."

LEGALESE FOR THE LAY PERSON UNDERSTANDING FREEDOM OF SPEECH

Freedom of speech is the idea of being able to speak freely without fear of censorship or punishment. This freedom is considered one of the most important liberties in democratic societies. The synonymous term "freedom of expression" is often preferred as it expands the freedom to include non-verbal speech.

Freedom of speech and expression is guaranteed under several international human rights instruments, notably under Article 19 of the Universal Declaration of Human Rights, and the First Amendment of the United States Constitution.

Freedom of speech and expression is enshrined in section 3, Bill of Rights of the 1987 Constitution of the Republic of the Philippines which provides thus:

"No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances."

As a political idea, freedom of speech is anchored on the belief that open discussions of issues such as governance and leadership promote public participation and government accountability. Freedom of speech is likewise grounded on the idea that it is essential to the discovery of truth. "The best test of truth," Justice Oliver Wendell Holmes of the US Supreme Court wrote, "is the power of the thought to get itself accepted in the competition of the market."

ERRATA. Our article on Chief Justice Artemio Panganiban entitled "Meet the New Chief" on page 2 of the January-March 2006 issue erroneously attributed the ponencia of the *Jalosjos* case to the Chief Justice. The article likewise erroneously reported that "Panganiban also penned the decision declaring the Mining Act of 1995 unconstitutional." The Supreme Court actually decided to rule in favor of the constitutionality of the Mining Act. Our sincerest apologies for these errors. — Ed.

LAW EXEMPTING YOUNG OFFENDERS FROM CRIMINAL LIABILITY PASSED

The much-awaited Juvenile Justice and Welfare Act (Republic Act No. 9344) was finally enacted into law last May 16, 2006. The law exempts youth offenders 15 years old and below from criminal liability. Offenders 15-18 years of age may also be exempted except in cases where the act was committed with full knowledge that it was a crime.

Children 15-18 years old may still be prosecuted but their cases must be handled by specially-trained prosecutors. They must be released on bail or under the care of their parents or guardians, or transferred to a youth rehabilitation center pending trial.

The law likewise mandates courts to automatically suspend the sentence of a child who has been found guilty. Once the child reaches the age of 18, the court must determine whether to discharge the child, execute the sentence or suspend the sentence further until the child reaches the age of 21.

According to the United Nations Children's Fund (UNICEF), more than 4,000 children languished in crowded jails in the Philippines in 2005 amid dire and inhumane conditions. UNICEF estimates that with the new law as much as 70 per cent of criminal cases against children will be dismissed outright.

The new law was adopted from several international agreements including the UN Standard Minimum Rules for the Administration of Juvenile Justice, UN Guidelines for the Prevention of Juvenile Delinquency, and the UN Rules for the Protection of Juveniles Deprived of Liberty.

Some of the more salient features of the Juvenile Justice and Welfare Act include:

1. The establishment and strengthening of local councils for the protection of children;
2. The establishment of community-based programs on juvenile justice and welfare;



3. The establishment of comprehensive juvenile intervention programs;
4. The adoption and implementation of a system of diversion with the end goal of disposing the case involving a youth offender without resorting to formal trial by the competent authority;
5. Exemption of minors from prosecution for the crime of vagrancy and prostitution, mendacity, and sniffing of rugby;
6. A provision on status offenses which means that any conduct not considered an offense or not penalized if committed by an adult shall not be considered an offense and shall not be punished if committed by a child;
7. A provision for child-sensitive proceedings; and,
8. Imposition of appropriate disposition measures.

DEATH PENALTY ABOLISHED

On June 24, 2006 President Gloria Macapagal Arroyo signed Republic Act 9346 thereby effectively abolishing the death penalty in the Philippines. Under the law, penalties of life imprisonment and reclusion perpetua (imprisonment for 20 years and 1 day to 40 years) shall replace the death penalty for some 1,200 death row convicts.

Persons convicted of offenses punishable by reclusion perpetua, or those whose sentences will be reduced to reclusion perpetua will not be eligible for parole under Republic Act 4013, or the Indeterminate Sentence Law.

The 1987 Constitution already provided for the abolition of the death penalty, making the Philippines the first Asian country to abolish capital punishment for all crimes. However, in 1993, the administration of President Fidel Ramos reinstated the death penalty by virtue of Republic Act No. 7659 to address the rising incidence of heinous crimes during the period. Republic Act No. 8177 subsequently mandated that all death sentences shall be carried out by lethal injection.

Did you know? The death penalty, also known as "capital punishment", derives from the Latin "capitalis" which means "concerning the head." To be subjected to capital punishment, therefore, means to figuratively lose one's head.

13 Years of FNS



1993



1997

This June, the law firm of Fortun Narvasa & Salazar (FNS) celebrated its thirteenth year anniversary. Here, we take occasion to look at some of the highlights of FNS' history as one of the country's leading law firms.

What's in a name?

Fortun & Associates was established by Atty. Philip Sigmond A. Fortun in January, 1993. Atty. Gregorio Y. Narvasa II and Atty. Roderick R.C. Salazar III joined Atty. Fortun on June 15, 1993 and formed Fortun and Narvasa.

In 1999, the Firm name was changed to Fortun Narvasa & Salazar.

FNS now has a total of 30 lawyers from the four (4) lawyers when it started 13 years ago.

Moving up

FNS previously held offices at the 4th Floor of Cityland 10 Tower I along Ayala Avenue, Makati. In 2003, FNS transferred its principal office to the 23rd Floor of the Multinational Bancorporation on Ayala Avenue. Subsequently, FNS occupied the 22nd Floor of the same building.

Global FNS

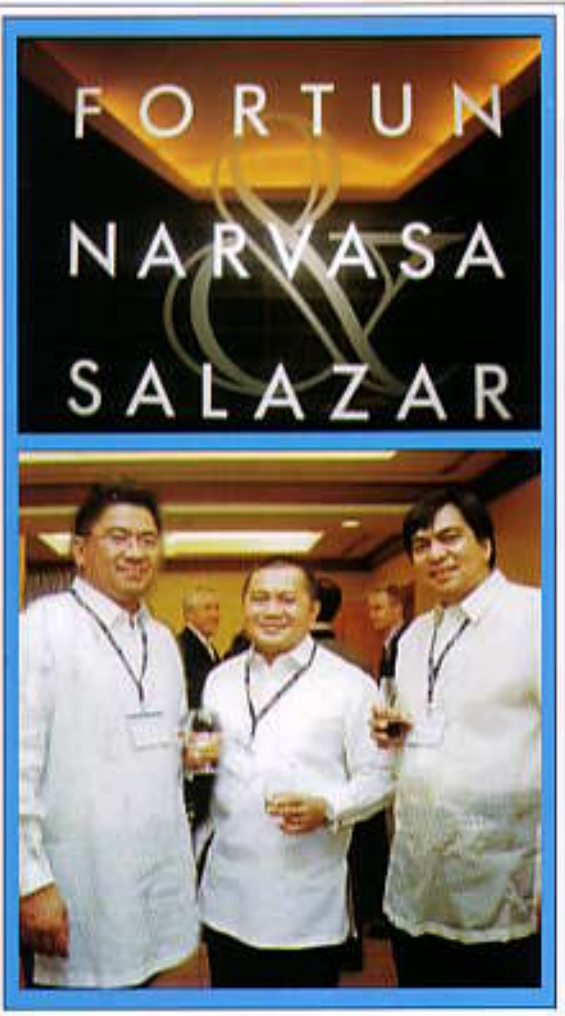
FNS is the sole Philippine member of the international organization Globalaw. Globalaw is a worldwide network of law firms with more than 3,000 lawyers located in over 75 countries.

New Frontiers

FNS opened its first branch in Cavite in June of 1999. Another branch was set up in Baguio in August 2003. FNS also set up a liaison office in Hong Kong in January of 2002.

Clients Served

After being in existence for only 13 years, FNS has managed to enroll more than 1,600 clients. This roster of clients includes the Asian Development Bank, Ayala Land Inc., RCBC, Indophil Resources Limited, and POSCO of Korea.



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