

**THE MUNICIPALITY OF MALABANG, LANA DEL SUR, AND AMER
MACAORAO BALINDONG, PETITIONERS, VS. PANGANDAPUN BENITO,
HADJI NORODIN MACAPU-NUNG, HADJI HASAN MACA-RAMPAD,
FREDERICK V. D...**

G.R. No. L-28113. March 28, 1969

Ponente: RUIZ CASTRO, J.

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RUIZ CASTRO, J.:

The petitioner Amer Macaorao Balindong is the mayor of Malabang, Lanao del Sur, while the respondent Pangandapun Benito is the mayor, and the rest of the respondents are the councilors, of the municipality of Balabagan of the same province. Balabagan was formerly a part of the municipality of Malabang, having been created on March 15, 1960, by Executive Order 386 of the then President Carlos P. Garcia, out of barrios and sitios[1] of the latter municipality.

The petitioners brought this action for prohibition to nullify Executive Order 386 and to restrain the respondent municipal officials from performing the functions of their respective offices, relying on the ruling of this Court in *Pelaez v. Auditor General*[2] and *Municipality of San Joaquin v. Siva*. [3]

In *Pelaez* this Court, through Mr. Justice (now Chief Justice) Concepcion, ruled: (1) that section 23 of Republic Act 2370 [Barrio Charter Act, approved January 1, 1960], by vesting the power to create barrios in the provincial board, is a "statutory denial of the presidential authority to create a new barrio [and] implies a negation of the bigger power to create municipalities," and (2) that section 68 of the Administrative Code, insofar as it gives the President the power to create municipalities, is unconstitutional (a) because it constitutes an undue delegation of legislative power and (b) because it offends against section 10(1) of article VII of the Constitution, which limits the President's power over local governments to mere supervision. As this Court summed up its discussion: "In short, even if it did not entail an undue delegation of legislative powers, as it certainly does, said section 68, as part of the Revised Administrative Code, approved on March 10, 1917, must be deemed repealed by the subsequent adoption of the Constitution, in 1935, which is utterly incompatible and inconsistent with said statutory enactment."

On the other hand, the respondents, while admitting the facts alleged in the petition, nevertheless argue that the rule announced in *Pelaez* can have no application in this case because unlike the municipalities involved in *Pelaez*, the municipality of Balabagan is at least a de facto corporation, having been organized under color of a statute before this was declared unconstitutional, its officers having been either elected or appointed, and the municipality itself having discharged its corporate functions for the past five years preceding the institution of this action. It is contended that as a de facto corporation, its existence cannot be collaterally attacked, although it may be inquired into directly in an action for quo warranto at the instance of the State and not of an individual like the petitioner Balindong.

It is indeed true that, generally, an inquiry into the legal existence of a municipality is reserved to the State in a

proceeding for quo warranto or other direct proceeding, and that only in a few exceptions may a private person exercise this function of government.[4] But the rule disallowing collateral attacks applies only where the municipal corporation is at least a de facto corporation.[5] For where it is neither a corporation de jure nor de facto, but a nullity, the rule is that its existence may be questioned collaterally or directly in any action or proceeding by any one whose rights or interests are affected thereby, including the citizens of the territory incorporated unless they are estopped by their conduct from doing so.[6]

And so the threshold question is whether the municipality of Balabagan is a de facto corporation. As earlier stated, the claim that it is rests on the fact that it was organized before the promulgation of this Court's decision in Pelaez.[7]

Accordingly, we address ourselves to the question whether a statute can lend color of validity to an attempted organization of a municipality despite the fact that such statute is subsequently declared unconstitutional.

This has been a litigiously prolific question, sharply dividing courts in the United States. Thus, some hold that a de facto corporation cannot exist where the statute or charter creating it is unconstitutional because there can be no de facto corporation where there can be no de jure one,[8] while others hold otherwise on the theory that a statute is binding until it is condemned as unconstitutional.[9]

An early article in the Yale Law Journal offers the following analysis:

"It appears that the true basis for denying to the corporation a de facto status lay in the absence of any legislative act to give vitality to its creation. An examination of the cases holding, some of them unreservedly, that a de facto office or municipal corporation can exist under color of an unconstitutional statute will reveal that in no instance did the invalid act give life to the corporation, but that either in other valid acts or in the constitution itself the office or the corporation was potentially created. ...

"The principle that color of title under an unconstitutional statute can exist only where there is some other valid law under which the organization may be effected, or at least an authority in potentia by the state constitution, has its counterpart in the negative propositions that there can be no color of authority in an unconstitutional statute that plainly so appears on its face or that attempts to authorize the ousting of a de jure or de facto municipal corporation upon the same territory; in the one case the fact would imply the imputation of bad faith, in the other the new organization must be regarded as a mere usurper. ...

"As a result of this analysis of the cases the following principles may be deduced which seem to reconcile the apparently conflicting decisions:

"I. The color of authority requisite to the organization of a de facto municipal corporation may be:

"1. A valid law enacted by the legislature.

"2. An unconstitutional law, valid on its face, which has either (a) been upheld for a time by the courts or (b) not yet been declared void; provided that a warrant for its creation can be found in some other valid law or in the recognition of its potential existence by the general laws or constitution of the state

"II. There can be no de facto municipal corporation unless either directly or potentially, such a de jure corporation is authorized by some legislative fiat.

"III. There can be no color of authority in an unconstitutional statute alone, the invalidity of which is apparent on its face.

"IV. There can be no de facto corporation created to take the place of an existing de jure corporation, as such organization would clearly be an usurper." [10]

In the cases where a de facto municipal corporation was recognized as such despite the fact that the statute creating it was later invalidated, the decisions could fairly be made to rest on the consideration that there was some other valid law giving corporate vitality to the organization. Hence, in the case at bar, the mere fact that Balabagan was organized at a time when the statute had not been invalidated cannot conceivably make it a de facto corporation, as, independently of the Administrative Code provision in question, there is no other valid statute to give color of authority to its creation. Indeed, in *Municipality of San Joaquin v. Siva*,^[11] this Court granted a similar petition for prohibition and nullified an executive order creating the municipality of Lawigan in Iloilo on the basis of the Pelaez ruling, despite the fact that the municipality was created in 1961, before section 68 of the Administrative Code, under which the President had acted, was invalidated. Of course the issue of de facto municipal corporation did not arise in that case.

In *Norton v. Shelby County*,^[12] Mr. Justice Field said: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." Accordingly, he held that bonds issued by a board of commissioner's created under an invalid statute were unenforceable.

Executive Order 386 "created no office." This is not to say, however, that the acts done by the municipality of Balabagan in the exercise of its corporate powers are a nullity because the executive order "is, in legal contemplation, as inoperative as though it had never been passed." For the existence of Executive Order 386 is "an operative fact which cannot justly be ignored." As Chief Justice Hughes explained in *Chicot County Drainage District v. Baxter State Bank*:^[13]

"The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. *Norton v. Shelby County*, 118 U.S. 425, 442, *Chicago, I. & L. Ry. Co. v. Hackett*, 228 U.S. 559, 566. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects - with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."

There is then no basis for the respondents' apprehension that the invalidation of the executive order creating Balabagan would have the effect of unsettling many an act done in reliance upon the validity of the creation of that municipality.^[14]

ACCORDINGLY, the petition is granted, Executive Order 386 is declared void, and the respondents are hereby permanently restrained from performing the duties and functions of their respective offices. No pronouncement as to costs.

Concepcion, C.J., as clarified in the concurring opinion of J. Fernando.

Reyes, JBL, Dizon, Makalintal, Zaldivar, Sanchez, and Capistrano, JJ., concur.

Fernando, J., concurs fully and, in addition, submits a separate opinion.

Teehankee and Barredo, JJ., did not take part.

[1] The barrios and sitios are Barorao, Baguiangan, Kalilangan, Balabagan, Itil, Banago, Budas, Igabay, Magolalong, Da-goan, Matimus, Bongabon and Lusain.

[2] 64 O.G. 4781 (1965).

[3] L-19870, March 18, 1967, 19 SCRA 599.

[4] E.g., 1 E. McQuillin, *The Law of Municipal Corporations*, sec. 3.49, p. 592 (3rd ed. 1949).

[5] *Hunt v. Atkinson*, (Tex. Com. App.), 12 S.W. 2d 142, 145 (1929), rev'g 300 S. W. 656 (1927).

[6] E. McQuillin, *op. cit. supra*, note 4, at sec. 3.50, p. 595-96.

[7] *Supra*, note 2.

[8] E.g., *Brandenstein v. Hoke*, 101 Cal. 131, 35 P. 562 (1894) (levee district organized under statute earlier declared to be unconstitutional); *Atchison T. & S.F.R.R. v. Board of Comm'rs*, 58 Kan. 19, 48 P. 583 (1897) (county organized under statute void on its face).

[9] See, e.g., *Lang v. City of Bayonne*, 74 N.J.L. 455, 68 A. 90 (1907); *St. Louis v. Shields*, 62 Mo. 247 (1876); *School Dis-trict No. 25, v. State*, 29 Kan. 57 (1882)

[10] *Tooke, De Facto Municipl Corporations under Unconstitutional Statutes*, 37 Yale L.J. 935, 951-53 (1928).

[11] *Supra*, note 3.

[12] 118 U.S. 425, 442 (1886) (emphasis added).

[13] 308 U.S. 371, 374 (1940); accord: *Rutter v. Esteban*, 93 Phil. 68 (1953); *Manila Motor Co., Inc. v. Flores*, 99 Phil. 739 (1956); *Fernandez v. Cuerva & Co.*, L-21114, Nov. 28, 1967, 21 SCRA 1102.

[14] Compare the technique of prospective overruling in *Linkletter v. Walker*, 381 U.S. 618 (1965), refusing to give retros-pective effect to *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclu-sionary rule), with that in *Johnson v. New Jersey*, 384 U.S. 719 (1966) holding that the rule concerning counsel as announced in *Gideon v. Wainwright*, 372 U.S. 335 (1963) was to be applied retrospectively.

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CONCURRING OPINION

FERNANDO, J.:

I concur fully with the well-written opinion of Justice Castro. It breaks new ground; it strikes out new paths. It is precisely because of its impact on the power of judicial review of executive acts that I deem a few additional words would not be amiss.

1. Insofar as the effect of a declaration of unconstitutionality is concerned, the latter and more realistic trend

reflected in *Chicot County Drainage District v. Baxter State Bank*[1] had pre-viously elicited our approval. Thus: "*Rutter vs. Esteban* (93 Phil., 68) may be construed to mean that at the time of the decision the Moratorium law could no longer be validly applied because of the prevailing circumstances. At any rate, although the general rule is that an unconstitutional statute -- 'confers no right, creates no office, affords no protection and justifies no acts performed under it.' * * * there are several instances wherein courts, out of equity, have relaxed its operation * * * or qualified its effects 'since the actual existence of a statute prior to such declaration is an operative fact, and may have consequences which cannot justly be ignored' * * * and a realistic approach is eroding the general doctrine * * *." [2] Also: "We have taken note of the fact that on June 30, 1961, Section 25 of Reorganization Plan No. 20-A had been declared unconstitutional by this Court in the case of *Corominas, et al. v. The Labor Standards Commission, et al.*, * * *. It appears, however, that the plaintiff had filed his claim before Regional Office No. 4 of the Department of Labor on July 26, 1960, or about one year before said Section 25 had been declared unconstitutional. The circumstance that Section 25 of Reorganization Plan No. 20-A had been declared unconstitutional should not be counted against the defendant in the present case. In the case of *Manila Motor Co., Inc. v. Flores*, * * *, this Court upheld the right of a party under the Moratorium Law which had accrued in his favor before said law was declared unconstitutional by this Court in the case of *Rutter v. Esteban*, 93 Phil., 68." [3]

2. Nothing can be clearer therefore in the light of the two above cases than that a previous declaration of invalidity of legislative acts would not be bereft of legal results. Would that view hold true of nullification of executive acts? There might have been doubts as to the correct answer before. There is none now.

A judicial decision annulling a presidential exercise of authority[4] is not without its effect either. That much is evident from the holding now reached. The act stricken down, whether proceeding from the legislature or the Executive, could in the language of the *Chicot County* case, be considered, prior to the declaration of invalidity, as "an operative fact and may have consequences which cannot justly be ignored."

Thus the frontiers of the law have been extended, a doctrine which to some may come into play when statute is voided is now considered equally applicable to a Presidential act that has met a similar fate. Such a result should not occasion surprise. That is to be expected.

There would be an unjustified deviation from the doctrine of separation of powers if a consequence attached to the annulment of a statute is considered as not operative where an executive order is involved. The doctrine of co-equal or coordinate departments would be meaningless if a discrimination of the above sort were considered permissible. The cognizance taken of the prior existence of an enactment subsequently declared unconstitutional applies as well to a Presidential act thereafter successfully assailed. There was a time when it too did exist and, as such, a fact to be reckoned with, though an infirm source of a legal right, if, as subsequently held, considered violative of a constitutional command.

3. Precisionists may cavil at the above view; they may assert, and with some degree of plausibility, that the holding in the *Pelaez* case goes no further than to locate a statutory infirmity in the Presidential act there challenged, creating muni-cipal corporations under what the then Executive considered a grant of authority found in the Revised Administrative Code.[5] Such a power having been, found not to exist, the decision, so it may be asserted, did not reach the constitutional issue of non-delegation of legislative power. Tersely put, there was no finding of nullity based on a violation of the Constitution.

To such a claim, it suffices to answer that while the challenged Administrative Code provision was in fact held as not containing within itself the authority conferred on the President to create municipal corporations, the opinion by the then Justice, now Chief Justice, Concepcion went further. As was pointed out by him: "Although Congress may delegate to another branch of the Government the power to fill in the details in the execution, enforcement or

administration of a law, it is essential, to forestall a violation of the principle of separation of powers, that said law: (a) be complete in itself - it must set forth therein the policy to be executed, carried out or implemented by the delegate - and (b) fix a standard the limits of which are sufficiently determinate or determinable - to which the delegate must conform in the performance of his functions. Indeed, with-out a statutory declaration of policy, the delegate would, in effect, make or formulate such policy, which is the essence of every law; and without the aforementioned standard, there would be no means to determine, with reasonable certainty, whether the delegate has acted within or beyond the scope of his authority. Hence, he could thereby arrogate upon himself the power, not only to make the law, but also - and this is worse - to unmake it, by adopting measures inconsistent with the end sought to be attained by the Act of Congress, thus nullifying the principle of separation of powers and the system of checks and balances, and, consequently, undermining the very foundation of our Republican system."[6]

From which, it would follow, in the language of the opinion: "Section 68 of the Revised Administrative Code does not meet these well-settled requirements for a valid delegation of the power to fix the details in the enforcement of a law. It does not enunciate any policy to be carried out or implemented by the President. Neither does it give a standard sufficiently precise to avoid the evil effects above referred to."[7]

It is thus clear that while it might not be strictly accurate to advance the view that there was a finding of unconstitutionality of a challenged statutory norm, there could be no objection to the view that the holding was one of unconstitutional application.

Nor is this all. If there be admission of the force of the assertion that the Pelaez opinion went no further than to locate in the challenged Executive orders creating municipal corporations an act in excess of statutory authority, then our decision in this case is all the more noteworthy for the more hospitable scope accorded the Chicot doctrine. For as originally formulated, it would merely recognize that during its existence, prior to its being declared violative of the constitution, the statute must be deemed an operative fact. Today we decide that such a doctrine extends to a Presidential act held void not only on the ground of unconstitutional infirmity but also because in excess of the statutory power conferred. That to me is the more significant aspect of this decision. To repeat, to that point of view I yield full concurrence.

I do so because it appears to me a Logical corollary to the principle of separation of powers. Once we accept the basic doctrine that each department as a coordinate agency of government is entitled to the respect of the other two, it would seem to follow that at the very least, there is a presumption of the validity of the act performed by it, unless subsequently declared void in accordance with legally accepted principles. The rule of law cannot be satisfied with anything less.

Since under our Constitution, judicial review exists precisely to test the validity of executive or legislative acts in an appropriate legal proceeding, there is always the possibility of their being declared inoperative and void. Realism compels the acceptance of the thought that there could be a time-lag between the initiation of such Presidential or congressional exercise of power and the final declaration of nullity. In the meanwhile, it would be productive of confusion, perhaps at times even of chaos, if the parties affected were left free to speculate as to its fate being one of doom, thus leaving them free to disobey it in the meanwhile. Since, however, the orderly processes of government, to mention common sense, requires that the presumption of validity be accorded an act of Congress or an order of the President, it would be less than fair, and it may be productive of injustice, is no notice of its existence as a fact be paid to it, even if thereafter, it is stricken down as contrary, in the case of Presidential act, either to the Constitution or a controlling statute.

The far-reaching import in the above sense of the decision we now render calls, to my mind, for an articulation of

further reflection on its varied implications. We have here an illustration, to paraphrase Dean Pound, of the law being stable and yet far from standing still. That is as it ought to be; that is how law grows. It is in that sense that the judicial process is impressed with creativity, admittedly within limits rather narrowly confined. That in itself is to hold fast to the appropriate role of the judiciary, far from insignificant as our decision discloses. Hence this separate concurring opinion, which, I trust, will make manifest why my agreement with what Justice Castro had so ably expressed in the opinion of the Court is whole-hearted and entire.

[1] 308 US 371 (1940).

[2] Manila Motor Co., Inc. v. Flores, 99 Phil. 738, 739 (1956).

[3] Fernandez v. Cuerva & Co., 21 SCRA 1095, 1102 (1967).

[4] Pelaez v. Auditor General, L-28825, Dec. 24, 1965.

[5] Section 68.

[6] Pelaez v. Auditor General, L-3825, Dec. 24, 1965.

[7] Ibid.

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