

**ORLANDO L. SALVADOR, FOR AND IN BEHALF OF THE
PRESIDENTIAL AD HOC FACT-FINDING COMMITTEE ON BEHEST
LOANS, PETITIONER, VS. PLACIDO L. MAPA, JR., RAFAEL A. SISON,
ROLANDO M. ZOSA,...**

G.R. No. 135080. November 28, 2007

Ponente: NACHURA, J.

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NACHURA, J.:

The Presidential Ad Hoc Fact-Finding Committee on Behest Loans, (the Committee), through Atty. Orlando L. Salvador (Atty. Salvador), filed this Petition for Review on Certiorari seeking to nullify the October 9, 1997 Resolution[1] of the Office of the Ombudsman in OMB-0-96-2428, dismissing the criminal complaint against respondents on ground of prescription, and the July 27, 1998 Order[2] denying petitioner's motion for reconsideration.

On October 8, 1992 then President Fidel V. Ramos issued Administrative Order No. 13 creating the Presidential Ad Hoc Fact-Finding Committee on Behest Loans, which reads:

WHEREAS, Sec. 28, Article II of the 1987 Constitution provides that "Subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transactions involving public interest";

WHEREAS, Sec. 15, Article XI of the 1987 Constitution provides that "The right of the state to recover properties unlawfully acquired by public officials or employees, from them or from their nominees or transferees, shall not be barred by prescription, laches or estoppel";

WHEREAS, there have been allegations of loans, guarantees, and other forms of financial accommodations granted, directly or indirectly, by government-owned and controlled bank or financial institutions, at the behest, command, or urging by previous government officials to the disadvantage and detriment of the Philippines government and the Filipino people;

ACCORDINGLY, an "Ad-Hoc FACT FINDING COMMITTEE ON BEHEST LOANS" is hereby created to be composed of the following:

Chairman of the Presidential

Commission on Good Government - Chairman

The Solicitor General - Vice-Chairman

Representative from the

Office of the Executive Secretary - Member

Representative from the

Department of Finance - Member

Representative from the

Department of Justice - Member

Representative from the

Development Bank of the Philippines -Member

Representative from the

Philippine National Bank - Member

Representative from the

Asset Privatization Trust - Member

Government Corporate Counsel - Member

Representative from the

Philippine Export and Foreign

Loan Guarantee Corporation - Member

The Ad Hoc Committee shall perform the following functions:

- Inventory all behest loans; identify the lenders and borrowers, including the principal officers and stockholders of the borrowing firms, as well as the persons responsible for granting the loans or who influenced the grant thereof;
- Identify the borrowers who were granted “friendly waivers,” as well as the government officials who granted these waivers; determine the validity of these waivers;
- Determine the courses of action that the government should take to recover those loans, and to recommend appropriate actions to the Office of the President within sixty (60) days from the date hereof.

The Committee is hereby empowered to call upon any department, bureau, office, agency, instrumentality or corporation of the government, or any officer or employee thereof, for such assistance as it may need in the discharge of its functions.[3]

By Memorandum Order No. 61 dated November 9, 1992, the functions of the Committee were subsequently expanded, viz.:

WHEREAS, among the underlying purposes for the creation of the Ad Hoc Fact-Finding Committee on Behest Loans is to facilitate the collection and recovery of defaulted loans owing government-owned and controlled banking and/or financing institutions;

WHEREAS, this end may be better served by broadening the scope of the fact-finding mission of the Committee to include all non-performing loans which shall embrace behest and non-behest loans;

NOW THEREFORE, I, FIDEL V. RAMOS, President of the Republic of the Philippines, by virtue of the power vested in me by law, do hereby order:

Sec. 1. The Ad Hoc Fact-Finding Committee on Behest Loans shall include in its investigation, inventory, and study, all non-performing loans which shall embrace both behest and non-behest loans:

The following criteria may be utilized as a frame of reference in determining a behest loan:

- It is under-collateralized;
- The borrower corporation is undercapitalized;
- Direct or indirect endorsement by high government officials like presence of marginal notes;
- Stockholders, officers or agents of the borrower corporation are identified as cronies;
- Deviation of use of loan proceeds from the purpose intended;
- Use of corporate layering;
- Non-feasibility of the project for which financing is being sought; and
- Extraordinary speed in which the loan release was made.

Moreover, a behest loan may be distinguished from a non-behest loan in that while both may involve civil liability for non-payment or non-recovery, the former may likewise entail criminal liability.[4]

Several loan accounts were referred to the Committee for investigation, including the loan transactions between Metals Exploration Asia, Inc. (MEA), now Philippine Eagle Mines, Inc. (PEMI) and the Development Bank of the Philippines (DBP).

After examining and studying the documents relative to the loan transactions, the Committee determined that they bore the characteristics of behest loans, as defined under Memorandum Order No. 61 because the stockholders and officers of PEMI were known cronies of then President Ferdinand Marcos; the loan was under-collateralized; and PEMI was undercapitalized at the time the loan was granted.

Specifically, the investigation revealed that in 1978, PEMI applied for a foreign currency loan and bank investment on its preferred shares with DBP. The loan application was approved on April 25, 1979 per Board Resolution (B/R) No. 1297, but the loan was never released because PEMI failed to comply with the conditions imposed by DBP. To accommodate PEMI, DBP subsequently adopted B/R No. 2315 dated June 1980, amending B/R No. 1297, authorizing the release of PEMI's foreign currency loan proceeds, and even increasing the same. Per B/R No. 95 dated October 16, 1980, PEMI was granted a foreign currency loan of \$19,680,267.00 or P146,601,979.00, and it was released despite non-compliance with the conditions imposed by DBP. The Committee claimed that the loan had no sufficient collaterals and PEMI had no sufficient capital at that time because its acquired assets were only valued at P72,045,700.00, and its paid up capital was only P46,488,834.00.

Consequently, Atty. Orlando L. Salvador, Consultant of the Fact-Finding Committee, and representing the Presidential Commission on Good Government (PCGG), filed with the Office of the Ombudsman (Ombudsman) a sworn complaint for violation of Sections 3(e) and (g) of Republic Act No. 3019, or the Anti-Graft and Corrupt Practices Act, against the respondents Placido I. Mapa, Jr., Rafael A. Sison; Rolando M. Zosa; Cesar C. Zalamea; Benjamin Barot, Casimiro Tanedo, J.V. de Ocampo, Bienvenido R. Tantoco, Jr., Francis B. Banes, Ernesto M. Caringal, Romeo V. Jacinto, Manuel D. Tanglao and Alicia Ll. Reyes.[5]

After considering the Committee's allegation, the Ombudsman handed down the assailed Resolution,[6] dismissing the complaint. The Ombudsman conceded that there was ground to proceed with the conduct of preliminary investigation. Nonetheless, it dismissed the complaint holding that the offenses charged had already prescribed, viz.:

[W]hile apparently, PEMI was undercapitalized at the time the subject loans were entered into; the financial accommodations were undercollateralized at the time they were granted; the stockholders and officers of the borrower corporation are identified cronies of then President Marcos; and the release of the said loans was

made despite non-compliance by PEMI of the conditions attached therewith, which consequently give a semblance that the subject Foreign Currency Loans are indeed Behest Loans, the prosecution of the offenses charged cannot, at this point, prosper on grounds of prescription.

It bears to stress that Section 11 of R.A. No. 3019 as originally enacted, provides that the prescriptive period for violations of the said Act (R.A. 3019) is ten (10) years. Subsequently, BP 195, enacted on March 16, 1982, amended the period of prescription from ten (10) years to fifteen (15) years

Moreover as enunciated in [the] case of *People vs. Sandiganbayan*, 211 SCRA 241, the computation of the prescriptive period of a crime violating a special law like R.A. 3019 is governed by Act No. 3326 which provides, thus:

x x x x

Section 2. Prescription shall begin to run from the day of the commission of the violation of law, and if the same be not known at the time, from the discovery thereof and the institution of the judicial proceedings for its investigation and punishment.

The prescription shall be interrupted when the proceedings are instituted against the guilty person, and shall begin to run again if the proceedings are dismissed for reasons not constituting jeopardy.

Corollary thereto, the Supreme Court in the case of *People vs. Dinsay*, C.A. 40 O.G. 12th Supp., 50, ruled that when there is nothing which was concealed or needed to be discovered because the entire series of transactions were by public instruments, the period of prescription commenced to run from the date the said instrument were executed.

The aforesaid principle was further elucidated in the cases of *People vs. Sandiganbayan*, 211 SCRA 241, 1992, and *People vs. Villalon*, 192 SCRA 521, 1990, where the Supreme Court pronounced that when the transactions are contained in public documents and the execution thereof gave rise to unlawful acts, the violation of the law commences therefrom. Thus, the reckoning period for purposes of prescription shall begin to run from the time the public instruments came into existence.

In the case at bar, the subject financial accommodations were entered into by virtue of public documents (e.g., notarized contracts, board resolutions, approved letter-request) during the period of 1978 to 1981 and for purposes of computing the prescriptive period, the aforementioned principles in the *Dinsay*, *Villalon* and *Sandiganbayan* cases will apply. Records show that the complaint was referred and filed with this Office on October 4, 1996 or after the lapse of more than fifteen (15) years from the violation of the law. [Deductibly] therefore, the offenses charged had already prescribed or forever barred by Statute of Limitations.

It bears mention that the acts complained of were committed before the issuance of BP 195 on March 2, 1982. Hence, the prescriptive period in the instant case is ten (10) years as provided in the (sic) Section 11 of R.A. 3019, as originally enacted.

Equally important to stress is that the subject financial transactions between 1978 and 1981 transpired at the time when there was yet no Presidential Order or Directive naming, classifying or categorizing them as Behest or Non-Behest Loans.

To reiterate, the Presidential Ad Hoc Committee on Behest Loans was created on October 8, 1992 under Administrative Order No. 13. Subsequently, Memorandum Order No. 61, dated November 9, 1992, was issued defining the criteria to be utilized as a frame of reference in determining behest loans. Accordingly, if these Orders are to be considered the bases of charging respondents for alleged offenses committed, they become ex-post facto laws which are proscribed by the Constitution. The Supreme Court in the case of *People v.*

Sandiganbayan, supra, citing *Wilensky V. Fields*, Fla, 267 So 2dl, 5, held that “an ex-post facto law is defined as a law which provides for infliction of punishment upon a person for an act done which when it was committed, was innocent.”[7]

Thus, the Ombudsman disposed:

WHEREFORE, premises considered, it is hereby respectfully recommended that the instant case be DISMISSED.

SO RESOLVED.[8]

The Committee filed a Motion for Reconsideration, but the Ombudsman denied it on July 27, 1998.

Hence, this petition positing these issues:

- WHETHER OR NOT THE CRIME DEFINED BY SEC. 3(e) AND (g) OF R.A. 3019 HAS ALREADY PRESCRIBED AT THE TIME THE PETITIONER FILED ITS COMPLAINT.

- WHETHER OR NOT ADMINISTRATIVE ORDER NO. 13 AND MEMORANDUM ORDER NO. 61 ARE EX-POST FACTO LAW[S].[9]

The Court shall deal first with the procedural issue.

Commenting on the petition, Tantoco, Reyes, Mapa, Zalamea and Caringal argued that the petition suffers from a procedural infirmity which warrants its dismissal. They claimed that the PCGG availed of the wrong remedy in elevating the case to this Court.

Indeed, what was filed before this Court is a petition captioned as Petition for Review on Certiorari. We have ruled, time and again, that a petition for review on certiorari is not the proper mode by which resolutions of the Ombudsman in preliminary investigations of criminal cases are reviewed by this Court. The remedy from the adverse resolution of the Ombudsman is a petition for certiorari under Rule 65,[10] not a petition for review on certiorari under Rule 45.

However, though captioned as a Petition for Review on Certiorari, we will treat this petition as one filed under Rule 65 since a reading of its contents reveals that petitioner imputes grave abuse of discretion to the Ombudsman for dismissing the complaint. The averments in the complaint, not the nomenclature given by the parties, determine the nature of the action.[11] In previous rulings, we have treated differently labeled actions as special civil actions for certiorari under Rule 65 for reasons such as justice, equity, and fair play.[12]

Having resolved the procedural issue, we proceed to the merits of the case.

As the Committee puts it, the issues to be resolved are: (i) whether or not the offenses subject of its criminal complaint have prescribed, and (ii) whether Administrative Order No. 13 and Memorandum Order No. 61 are ex post facto laws.

The issue of prescription has long been settled by this Court in *Presidential Ad Hoc Fact-Finding Committee on Behest Loans v. Desierto*,[13] thus:

[I]t is well-nigh impossible for the State, the aggrieved party, to have known the violations of R.A. No. 3019 at the time the questioned transactions were made because, as alleged, the public officials concerned connived or conspired with the “beneficiaries of the loans.” Thus, we agree with the COMMITTEE that the prescriptive period for the offenses with which the respondents in OMB-0-96-0968 were charged should be computed from the discovery of the commission thereof and not from the day of such commission.[14]

The ruling was reiterated in Presidential Ad Hoc Fact-Finding Committee on Behest Loans v. Ombudsman Desierto,[15] wherein the Court explained:

In cases involving violations of R.A. No. 3019 committed prior to the February 1986 EDSA Revolution that ousted President Ferdinand E. Marcos, we ruled that the government as the aggrieved party could not have known of the violations at the time the questioned transactions were made. Moreover, no person would have dared to question the legality of those transactions. Thus, the counting of the prescriptive period commenced from the date of discovery of the offense in 1992 after an exhaustive investigation by the Presidential Ad Hoc Committee on Behest Loans.[16]

This is now a well-settled doctrine which the Court has applied in subsequent cases involving the PCGG and the Ombudsman.[17]

Since the prescriptive period commenced to run on the date of the discovery of the offenses, and since discovery could not have been made earlier than October 8, 1992, the date when the Committee was created, the criminal offenses allegedly committed by the respondents had not yet prescribed when the complaint was filed on October 4, 1996.

Even the Ombudsman, in its Manifestation & Motion (In Lieu of Comment),[18] conceded that the prescriptive period commenced from the date the Committee discovered the crime, and not from the date the loan documents were registered with the Register of Deeds. As a matter of fact, it requested that the record of the case be referred back to the Ombudsman for a proper evaluation of its merit.

Likewise, we cannot sustain the Ombudsman's declaration that Administrative Order No. 13 and Memorandum Order No. 61 violate the prohibition against ex post facto laws for ostensibly inflicting punishment upon a person for an act done prior to their issuance and which was innocent when done.

The constitutionality of laws is presumed. To justify nullification of a law, there must be a clear and unequivocal breach of the Constitution, not a doubtful or arguable implication; a law shall not be declared invalid unless the conflict with the Constitution is clear beyond reasonable doubt. The presumption is always in favor of constitutionality. To doubt is to sustain.[19] Even this Court does not decide a question of constitutional dimension, unless that question is properly raised and presented in an appropriate case and is necessary to a determination of the case, i.e., the issue of constitutionality must be the very *lis mota* presented.[20]

Furthermore, in *Estarija v. Ranada*,[21] where the petitioner raised the issue of constitutionality of Republic Act No. 6770 in his motion for reconsideration of the Ombudsman's decision, we had occasion to state that the Ombudsman had no jurisdiction to entertain questions on the constitutionality of a law. The Ombudsman, therefore, acted in excess of its jurisdiction in declaring unconstitutional the subject administrative and memorandum orders.

In any event, we hold that Administrative Order No. 13 and Memorandum Order No. 61 are not ex post facto laws.

An ex post facto law has been defined as one — (a) which makes an action done before the passing of the law and which was innocent when done criminal, and punishes such action; or (b) which aggravates a crime or makes it greater than it was when committed; or (c) which changes the punishment and inflicts a greater punishment than the law annexed to the crime when it was committed; or (d) which alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the defendant.[22] This Court added two (2) more to the list, namely: (e) that which assumes to regulate civil rights and remedies only but in effect imposes a penalty or deprivation of a right which when done was lawful; or

(f) that which deprives a person accused of a crime of some lawful protection to which he has become entitled, such as the protection of a former conviction or acquittal, or a proclamation of amnesty.[23]

The constitutional doctrine that outlaws an ex post facto law generally prohibits the retrospectivity of penal laws. Penal laws are those acts of the legislature which prohibit certain acts and establish penalties for their violations; or those that define crimes, treat of their nature, and provide for their punishment.[24] The subject administrative and memorandum orders clearly do not come within the shadow of this definition. Administrative Order No. 13 creates the Presidential Ad Hoc Fact-Finding Committee on Behest Loans, and provides for its composition and functions. It does not mete out penalty for the act of granting behest loans. Memorandum Order No. 61 merely provides a frame of reference for determining behest loans. Not being penal laws, Administrative Order No. 13 and Memorandum Order No. 61 cannot be characterized as ex post facto laws. There is, therefore, no basis for the Ombudsman to rule that the subject administrative and memorandum orders are ex post facto.

One final note. Respondents Mapa and Zalamea, in their respective comments, moved for the dismissal of the case against them. Mapa claims that he was granted transactional immunity from all PCGG-initiated cases,[25] while Zalamea denied participation in the approval of the subject loans.[26] The arguments advanced by Mapa and Zalamea are matters of defense which should be raised in their respective counter-affidavits. Since the Ombudsman erroneously dismissed the complaint on ground of prescription, respondents' respective defenses were never passed upon during the preliminary investigation. Thus, the complaint should be referred back to the Ombudsman for proper evaluation of its merit.

WHEREFORE, the petition is GRANTED. The assailed Resolution and Order of the Office of Ombudsman in OMB-0-96-2428, are SET ASIDE. The Office of the Ombudsman is directed to conduct with dispatch an evaluation of the merits of the complaint against the herein respondents.

SO ORDERED.

Ynares-Santiago, (Chairperson), Austria-Martinez, Chico-Nazario, and Reyes, JJ., concur.

[1] Annex "A," rollo, pp. 46-54.

[2] Annex "B," id. at 55-66.

[3] Annex "C," id. at 67-68.

[4] Annex "D," id. at 69-70.

[5] Annex "E," id. at 71-75.

[6] Supra note 1.

[7] Id. at 51-52.

[8] Id. at 53.

[9] Id. at 16.

[10] *Cabrera v. Lapid*, G.R. No. 129098, December 6, 2006, 510 SCRA 55, 64.

[11] *Partido ng Manggagawa v. Commission of Elections*, G.R. No. 164702, March 15, 2006, 484 SCRA 671, 684-685.

[12] Id. at 685.

[13] 375 Phil. 697 (1999).

[14] Id. at 724.

[15] 415 Phil. 723 (2001).

[16] Id. at 729-730.

[17] Presidential Ad Hoc Fact-Finding Committee on Behest Loans v. Ombudsman, G.R. No. 138142, September 19, 2007; Presidential Ad Hoc Fact-Finding Committee on Behest Loans v. Hon. Ombudsman Aniano Desierto, G.R. No. 135687, July 24, 2007; Presidential Commission on Good Government v. Desierto, G.R. No. 139675, July 21, 2006, 496 SCRA 112; Presidential Ad Hoc Fact-Finding Committee on Behest Loans v. Ombudsman, G.R. No. 135350, March 3, 2006, 484 SCRA 16; Atty. Salvador v. Hon. Desierto, 464 Phil. 988 (2004); PAFFC on Behest Loans v. Ombudsman Desierto, 418 Phil. 715 (2001).

[18] Rollo, pp. 209-212.

[19] Virata v. Sandiganbayan, G.R. Nos. 86926 and 86949, October 15, 1991, 202 SCRA 680, 698-699.

[20] Caleon v. Agus Development Corporation, G.R. No. 77365, April 7, 1992, 207 SCRA 748, 751.

[21] G.R. No. 159314, June 26, 2006, 492 SCRA 652, 665.

[22] Chavez v. Romulo, G.R. No. 157036, June 9, 2004, 431 SCRA 534, 565.

[23] Lacson v. The Executive Secretary, 361 Phil. 251, 275 (1999).

[24] Id.

[25] Rollo, pp. 276-283.

[26] Id. at 334-338.

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