

EMMANUEL PELAEZ, PETITIONER, VS. THE AUDITOR GENERAL, RESPONDENT.

G. R. No. 23825. December 24, 1965

Ponente: CONCEPCION, J.

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CONCEPCION, J.:

During the period from September 4 to October 29, 1964 the President of the Philippines, purporting to act pursuant to Section 68 of the Revised Administrative Code, issued Executive Orders Nos, 93 to 121, 124 and 126 to 129, creating thirty-three (33) municipalities enumerated in the margin.[1] Soon after the date last mentioned, or on

1 Executive

Municipality

Province

Date of

Annex

Order No.

Promulgation

93

Nilo

Zamboanga del Sur

Sept. 4, 1964

A (original

94

Midsalip

Zaraboanga del Sur

Sept. 4, 1964

B Petition)

95

Pitog-o

Zamboanga del Sur

Sept. 4, 1964

C"

96

Maruing

Zamboanga del Sur

Sept. 4, 1964

D"

97

Naga

Zamboanga del Sur

Sept. 4, 1964

E"

99

Sebaste

Antique

Sept. 26, 1964

F"

100

Molugan

Misamis Oriental

Sept. 26, 1964

G"

H"

101

Malixi

Surigao del Sur

Sept. 28, 1964

H"

November 10, 1964, petitioner Emmanuel Pelaez, as Vice-President of the Philippines and as taxpayer, instituted the present special civil action, for a writ of prohibition with preliminary injunction, against the Auditor General, to restrain him, as well as his representatives and agents,

102

Roxas

Davao

Sept. 28, 1964

I

103

Magsaysay

Davao

Sept. 28, 1964

J

104

Sta. Maria

Davao

Sept. 28, 1964

K

105

Badiangan

Iloilo

Sept. 28, 1964

106

Mina

Iloilo

Oct. 1, 1964

M

107

Andong

Lanao del Sur

Oct. 1, 1964

N

108

Sultan Alonto

Lanao del Sur

Oct. 1, 1964

O

109

Maguing

Lanao del Sur

Oct. 1, 1964

P

110

Dianaton

Lanao del Sur

Oct. 1, 1964

Q

111

Elpidio Quirino

Mt. Province

Oct. 1, 1964

E

112

Bayog

Zamboanga del Sur

Oct. 1, 1964

S

113

Gloria

Oriental Mindoro

Oct. 1, 1964

GG

T (Attached hereto)

114

Maasin

Cotabato

Oct. 1, 1964

115

Siayan

Zamboanga del Norte

Oct. 1, 1964

U

116

Roxas

Zamboanga del Norte

Oct. 1, 1964

V

117

Panganuran

Zamboanga del

Oct. 1, 1964

W

118

Kalilangan

Bukidnon

Oct. 1, 1964

X

119

Lantapan

Bukidnon

Oct. 1, 1964

Y

120

Libertad

Zamboanga del Sur

Oct. 1, 1964

Z

121

General Aguinaldo

Zamboanga del Sur

Oct. 1, 1964

AA

124

Rizal

Surigao del Norte

Oct. 3, 1964

BB

126

Tigao

Surigao del Sur

Oct. 23, 1964

CC

127

Tampakan

Cotabato

Oct. 26, 1964

PD

128

Maco

Davao

Oct. 29, 1964

BE

129

New Corella

Davao

Oct. 29, 1964

FF

from passing in audit any expenditure of public funds in implementation of said executive orders and/or any disbursement by said municipalities.

Petitioner alleges that said executive orders are null and void, upon the ground that said Section 68 has been impliedly repealed by Republic Act 2370 and constitutes an undue delegation of legislative power. Respondent maintains the contrary view and avers that the present action is premature and that not all proper parties—referring to the officials of the new political subdivisions in question— have been impleaded. Subsequently, the mayors of several municipalities adversely affected by the aforementioned executive orders—because the latter have taken away from the former the barrios composing the new political subdivision—intervened in the case. Moreover, Attorneys Enrique M. Fernando and Emma Quisunibing-Fernando were allowed to and did appear as amici curiae.

The third paragraph of Section 3 of Republic Act No. 2370, reads:

"Barrios shall not be created or their boundaries altered nor their names changed except under the provisions of this Act or by Act of Congress."

Pursuant to the first two (2) paragraphs of the same Section 3:

"All barrios existing at the time of the passage of this Act shall come under the provisions hereof.

"Upon petition of a majority of the voters in the areas affected, a new barrio may be created or the name of an existing one may be changed by the provincial board of the province, upon recommendation of the council of the municipality or municipalities in which the proposed, barrio is situated. The recommendation of the municipal council shall be embodied in a resolution approved by at least two-thirds of the entire membership of the said council: Provided, however, That no new barrio may be created if its population is less than five hundred persons.

Hence, since January 1, 1960, when Republic Act No. 2370 became effective, barrios may "not be created or their boundaries altered nor their names changed" except by Act of Congress or of the corresponding provincial board "upon petition of a majority of the voters in the areas affected" and the "recommendation of the council of the

municipality or municipalities in which the proposed barrio is situated." Petitioner argues, accordingly: "If the President, under this new law, cannot even create a barrio, can he create a municipality which is composed of several barrios, since barrios are units of municipalities?"

Respondent answers in the affirmative, upon the theory that a new municipality can be created without creating new barrios, such as, by placing old barrios under the jurisdiction of the new municipality. This theory overlooks, however, the main import of the petitioner's argument, which is that the statutory denial of the presidential authority to create a new barrio implies a negation of the bigger power to create municipalities, each of which consists of several barrios. The cogency and force of this argument is too obvious to be denied or even questioned. Founded upon logic and experience, it cannot be offset except by a clear manifestation of the intent of Congress to the contrary, and no such manifestation, subsequent to the passage of Republic Act No. 2370, has been brought to our attention.

Moreover, section 68 of the Revised Administrative Code, upon which the disputed executive orders are based, provides :

"The (Governor-General) President of the Philippines may by executive order define the boundary, or boundaries, of any province, sub-province, municipality, [township] municipal district or other political subdivision, and increase or diminish the territory comprised therein, may divide any province into one or more subprovinces, separate any political division other than a province, into such portions as may be required, merge any of such subdivisions or portions with another, name any new subdivision so created, and may change the seat of government within any subdivision to such place therein as the public welfare may require: Provided, That the authorization of the (Philippine Legislature) Congress of the Philippines shall first be obtained whenever the boundary of any province or subprovince is to be defined or any province is to be divided into one or more subprovinces. When action by the (Governor-General) President of the Philippines in accordance herewith makes necessary a change of the territory under the jurisdiction of any administrative officer or any judicial officer, the (Governor-General) President of the Philippines, with the recommendation and advice of the head of the Department having executive control of such officer, shall redistrict the territory of the several officers affected and assign such officers to the new districts so formed.

"Upon the changing of the limits of political divisions in pursuance of the foregoing authority, an equitable distribution of the funds, and obligations of the divisions thereby affected shall be made in such manner as may be recommended by the (Insular Auditor) Auditor General and approved by the (Governor-General) President of the Philippines."

Respondent alleges that the power of the President to create municipalities under this section does not amount to an undue delegation of legislative power, relying upon *Municipality of Cardona vs. Municipality of Binangonan* (36 Phil. 547), which, he claims, has settled it. Such claim is untenable, for said case involved, not the creation of a new municipality, but a mere transfer of territory— from an already existing municipality (Cardona) to another municipality (Binangonan), likewise, existing at the time of and prior to said transfer (See *Gov't of the P.I. ex rel. Municipality of Cardona vs. Municipality of Binangonan* [34 Phil. 518, 519-520],—in consequence of the fixing and definition, pursuant to Act No. 1748, of the common boundaries of two municipalities.

It is obvious, however, that, whereas the power to fix such common boundary, in order to avoid Or settle conflicts of jurisdiction between adjoining municipalities, may partake of an administrative nature—involving, as it does, the adoption of means and ways to carry into effect the law creating said municipalities—the authority to create municipal corporations is essentially legislative in nature. In the language of other courts, it is "strictly a legislative function" (*State ex rel. Higgins vs. Aicklen*, 119 S. 425, January 2, 1959) or "solely and exclusively the exercise of legislative power" (*Udall vs. Severn*, May 29, 1938, 79 P. 2d. 347-349). As the Supreme Court of Washington has put it (*Territory ex rel. Kelly vs. Stewart*, February 13, 1890, 23 Pac. 405, 409), "municipal

corporations are purely the creatures of statutes."

Although [1-a] 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 [2]—and fix a standard—the limits of which are sufficiently determinate or determinate—to which the delegate must conform in the performance of his functions.[2-a] Indeed, without 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.[2-b] 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.

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. In this connection, we do not overlook the fact that, under the last clause of the first sentence of Section 68, the President—

"* * * may change the seat of the government within any subdivision to such place therein as the public welfare may require."

It is apparent, however, from the language of this clause, that the phrase "as the public welfare may require" qualifies, not the clauses preceding the one just quoted, but only the place to which the seat of the government may be transferred. This fact becomes more apparent when we consider that said Section 68 was originally Section 1 of Act No. 1748,[3] which provided, that "whenever in the judgment of the Governor-General the public welfare requires, he may, by executive order", effect the changes enumerated therein (as well as in said Section 68), including the change of the seat of the government "to such place * * * as the public interest requires". The opening statement of said Section 1 of Act No. 1748—which was not included in Section 68 of the Revised Administrative Code—governed the time at which, or the conditions under which, the powers therein conferred could be exercised; whereas the last part of the first sentence of said section referred exclusively to the place to which the seat of the government was to be transferred.

At any rate, the conclusion would be the same, insofar as the case at bar is concerned, even if we assumed that the phrase "as the public welfare may require", in said Section 68, qualifies all other clauses thereof. It is true that in *Calalang vs. William* (70 Phil. 726) and *People vs. Rosenthal* (68 Phil. 328), this Court had upheld "public welfare" and "public interest", respectively, as sufficient standards for a valid delegation of the authority to execute the law. But, the doctrine laid down in these cases—as all judicial pronouncements—must be construed in relation to the specific facts and issues involved therein, outside of which they do not constitute precedents and have no binding effect.[4] The law construed in the *Calalang* case conferred upon the Director of Public Works, with the approval of the Secretary of Public Works and Communications, the power to issue rules and regulations to promote safe transit upon national roads and streets. Upon the other hand, the *Rosenthal* case referred to the authority of the Insular Treasurer, under Act No. 2581, to issue and cancel certificates or permits for the sale of speculative securities. Both cases involved grants to administrative officers of powers related to the exercise of their administrative functions, calling for the determination of questions of fact.

Such is not the nature of the powers dealt with in section 68. As above indicated, the creation of municipalities, is

not an administrative function, but one which is essentially and eminently legislative in character. The question whether or not "public interest" demands the exercise of such power is not one of fact. It is purely a legislative question" (*Carolina-Virginia Coastal Highway vs. Coastal Turnpike Authority*, 74 S.E. 2d., 310-313, 315-318), or a political question (*Udall vs. Severn*, 79 P. 2d. 347-349). As the Supreme Court of Wisconsin has aptly characterized it, "the question as to whether incorporation is for the best interest of the community in any case is emphatically a question of public policy and statecraft" (*In re Village of North Milwaukee*, 67 N. W. 1033, 1035-1037).

For this reason, courts of justice have annulled, as constituting undue delegation of legislative powers, state laws granting the judicial department the power to determine whether certain territories should be annexed to a particular municipality (*Udall vs. Severn*, supra, 358-359); or vesting in a Commission the right to determine the plan and frame of government of proposed villages and what functions shall be exercised by the same, although the powers and functions of the village are specifically limited by statute (*In re Municipal Charters*, 86 Atl. 307-308) or conferring upon courts the authority to declare a given town or village incorporated, and designate its meter and bounds, upon petition of a majority of the taxable inhabitants thereof, setting forth the area desired to be included in such village (*Territory ex rel Kelly vs. Stewart*, 23 Pac. 405-409); or authorizing the territory of a town, containing a given area and population, to be incorporated as a town, on certain steps being taken by the inhabitants thereof and on certain determination by a court and subsequent vote of the inhabitants in favor thereof, insofar as the court is allowed to determine whether the lands embraced in the petition "ought justly" to be included in the village, and whether the interest of the inhabitants will be promoted by such incorporation, and to enlarge and diminish the boundaries of the proposed village "as justice may require" (*In re Villages of North Milwaukee*, 67 N.W. 1035-1037); or creating a Municipal Board of Control which shall determine whether or not the laying out, construction or operation of a toll road is in the "public interest" and whether the requirements of the law had been complied with, in which case the Board shall enter an order creating a municipal corporation and fixing the name of the same (*Carolina-Virginia Coastal Highway vs. Coastal Turnpike Authority*, 74 S. E. 2d. 310).

Insofar as the validity of a delegation of power by Congress to the President is concerned, the case of *Schechter Poultry Corporation vs. U. S.* (79 L. ed. 1570) is quite relevant to the one at bar. The *Schechter* case involved the constitutionality of Section 3 of the National Industrial Recovery Act authorizing the President of the United States to approve "codes of fair competition" submitted to him by one or more trade or industrial associations or corporations (which "impose no inequitable restrictions on admission to membership therein and are truly representative," provided that such codes are not designed "to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy" of said Act. The Federal Supreme Court held:

"To summarize and conclude upon this point: Sec. 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of proscribing [rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, Sec. 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in Sec. 1. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country,, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

If the term "unfair competition" is so broad as to vest in the President a discretion that is "virtually unfettered", and, consequently, tantamount to a delegation of legislative power, it is obvious that "public welfare", which has

even a broader connotation, leads to the same result. In fact, if the validity of the delegation of powers made in Section 68 were upheld, there would no longer be any legal impediment to a statutory grant of authority to the President to do anything which, in his opinion, may be required by public welfare or public interest. Such grant of authority would be a virtual abdication of the powers of Congress in favor of the Executive, and would bring about a total collapse of the democratic system established by our Constitution, which it is the special duty and privilege of this Court to uphold.

It may not be amiss to note that the executive orders in question were issued after the legislative bills for the creation of the municipalities involved in this case had failed to pass Congress. A better proof of the fact that the issuance of said executive orders entails the exercise of purely legislative functions can hardly be given.

Again, Section 10 (1) of Article VII of our fundamental law ordains:

"The President shall have control of all executive departments, bureaus or offices, exercise general supervision over all local governments as may be provided by law, and take care that the laws be faithfully executed."

The power of control under this provision implies the right of the President to interfere in the exercise of such discretion as may be vested by law in the officers of the executive departments, bureaus, or offices of the national government, as well as to act in lieu of such officers. This power is denied by the Constitution to the Executive, insofar as local governments are concerned. With respect to the latter, the fundamental law permits him to wield no more authority than that of checking whether said local governments or the officers thereof perform their duties as provided by statutory enactments. Hence, the President cannot interfere with local governments, so long as the same or its officers act within the scope of their authority. He may not enact an ordinance which the municipal council has failed or refused to pass, even if it had thereby violated a duty imposed thereto by law, although he may see to it that the corresponding provincial officials take appropriate disciplinary action therefor. Neither may he veto, set aside or annul an ordinance passed by said council within the scope of its jurisdiction, no matter how patently unwise it may be. He may not even suspend an elective official of a regular municipality or take any disciplinary action against him, except on appeal from a decision of the corresponding provincial board.[5]

Upon the other hand, if the President could create a municipality, he could, in effect, remove any of its officials, by creating a new municipality and including therein the barrio in which the official concerned resides, for his office would thereby become vacant.[6] Thus, by merely brandishing the power to create a new municipality (if he had it), without actually creating it, he could compel local officials to submit to his dictation, thereby, in effect, exercising over them the power of control denied to him by the Constitution.

Then, also, the power of control of the President over executive departments, bureaus or offices implies no more than the authority to assume directly the functions thereof or to interfere in the exercise of discretion by its officials. Manifestly, such control does not include the authority either to abolish an executive department or bureaus, or to create a new one. As a consequence, the alleged power of the President to create municipal corporations would necessarily connote the exercise by him of an authority even greater than that of control which he has over the executive departments, bureaus or offices. In other words, Section 68 of the Revised Administrative Code does not merely fail to comply with the constitutional mandate above quoted. Instead of giving the President less power over local governments than that vested in him over the executive departments, bureaus or offices, it reverses the process and does the exact opposite, by conferring upon him more power over municipal corporations than that which he has over said executive departments, bureaus or offices.

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.[7]

There are only two (2) other points left for consideration, namely, respondent's claim (a) that "not all the proper parties"—referring to the officers of the newly created municipalities—"have been impleaded in this case", and (b) that "the present petition is premature".

As regards the first point, suffice it to say that the records do not show, and the parties do not claim, that the officers of any of said municipalities have been appointed or elected and assumed office. At any rate, the Solicitor-General, who has appeared on behalf of respondent Auditor General, is the officer authorized by law "to act and represent the Government of the Philippines, Its offices and agents, in any official investigation, proceeding or matter requiring the services of a lawyer" (Section 1661, Revised Administrative Code), and, in connection with the creation of the aforementioned municipalities, which involves a political, not proprietary, function, said local officials, if any, are mere agents or representatives of the national government. Their interest in the case at bar has, accordingly, been, in effect, duly represented.[8]

With respect to the second point, respondent alleges that he has not as yet acted on any of the executive order in question and has not intimated how he would act in connection therewith. It is however, a matter of common, public knowledge, subject to judicial cognizance, that the President has, for many years, issued executive orders creating" municipal corporations and that the same have "been organized and in actual operation, thus indicating, without peradventure of doubt, that the expenditures incidental thereto have been sanctioned, approved or passed in audit by the General Auditing Office and its officials. There is no reason to believe, therefore, that respondent would adopt a different policy as regards the new municipalities involved in this case, in the absence of an allegation to such effect, and none has been made by him.

Wherefore the Executive Orders in question are hereby declared null and void ab initio and the respondent permanently restrained from passing in audit any expenditure of public funds in implementation of said Executive Orders or any disbursement by the municipalities above referred to. It is so ordered.

Bengzon, C. J., Bautista Angelo, Reyes, J. B. L., Barrera, and Dizon, JJ., concur.

[1-a] Except to local governments, to which legislative powers, with respect to matters of local concern, may be delegated.

[2] *Calalang vs. Williams*, 70 Phil., 726; *Pangasinan Trans. Co. vs. Public Service Commission*, 70 Phil., 221; *Cruz vs. Youngberg*, 56 Phil., 234; *Alegre vs. Collector of Customs*, 53 Phil., 394; *Mulford vs. Smith*, 307 U.S., 38.

[2-a] *People vs. Lim Ho*, L-12091-2, January 28, 1960; *People vs. Jolliffe*, L-9553, May 13, 1959; *People vs. Vera*, 65 Phil., 56; *U.S. vs. Ang Tang Ho*, 43 Phil., 1; *Compañía. General de Tabacos vs. Board of Public Utility*, 34 Phil., 136; *Mutual Film Co. vs. Industrial Commission*, 236 U.S. 247, 59 L. ed. 561, *Mutual Film Corp. vs. Industrial Commission*, 236 U.S. 230, 59 L. ed. 552; *Pamana Refining Co. vs. Ryan*, 293 U.S. 383; 79 L. ed. 446; *A.L.A. Schechter Poultry Corp. vs. U.S.* 295 U.S. 495, 79 L. ed. 1570; *U.S. vs. Rock Royal Coop.*, 307 U.S. 533, 83 L. ed. 1448; *Bowles vs. Willingham*, 321 U.S. 503, 8S L. ed. 892; *Araneta vs. Gatmaitan*, L-8895, April 30, 1957; *Cervantes vs. Auditor General*, L-4043, May 26, 1952; *Phil. Association of Colleges vs. Sec. of Education*, 51 Off. Gaz., 6230; *People vs. Arnault*, 48 Off. Gaz., 4805; *Antamok Gold Fields vs. CIR*, 68 Phil. 340; *U.S. vs.*

Barrias, 11 Phil., 327; Yakus vs. White, 321 U.S. 414; Ammann vs. Mailonce, 332 U.S., 245.

[2-b] Vigan Electric Light Company, Inc., vs. The Public Service Commission, L-19850, January 30, 1964.

[3] Whenever in the judgment of the Governor-General the public welfare requires, he may, by executive order, enlarge, contract, or otherwise change the boundary of any province, subprovince, municipality, or township or other political subdivision, or separate any such subdivision into such portions as may be required as aforesaid, merge any of such subdivisions or portions with another divide any province into one or more subprovinces as may be required as aforesaid, name any new subdivision so created, change the seat of government within any subdivision, existing or created hereunder, to such place therein as the public interests require, and shall fix in such executive order the date when the change, merger, separation, or other action shall take effect. Whenever such action as aforesaid creates a new political subdivision the Governor-General shall appoint such officers for the new subdivision with such powers and duties as may be required by the existing provisions of law applicable to the case and fix their salaries; such appointees shall hold office until their successors are elected or appointed and qualified. Successors to the elective offices shall be elected at the next general elections following such appointment. Such equitable distribution of the funds of changed subdivisions between the subdivisions affected shall be made as is recommended by the Insular Auditor and approved by the Governor-General.

[4] McGirr vs. Hamilton, 30 Phil. 563; Hebron vs. Reyes, L-9124, July 28, 1958; U.S. vs. More, 3 Cranch 159, 172; U.S. vs. Sanges, U.S. 310, 319; Cross vs. Burke, 146 U.S. 82; Louisville Trust vs. Knott, 191 U.S. 225. See, also, 15 C.J. 929-940; 21 C.J.S., 299; 14 Am. Jur. 345.

[5] Hebron vs. Reyes, L-9124, July 28, 1958; Mondano vs. Silvosa, 51 Off. Gaz., 2884; Rodriguez vs. Montinola, 50 Off. Gaz., 4820; Querubin vs. Castro, L-9779, July 31, 1958.

[6] Pursuant to section 2179 of the Revised Administrative Code:

"When a part of a barrio is detached from a municipality to a new municipality or to be added to an existing municipality, officer of the old municipality living in the detached territory continue to hold this office and exert the functions thereof or the remainder of his term; but if he is resident of a barrio the whole of which is detached, his office shall be deemed to be vacated."

[7] De los Santos vs. Mallare, 87 Phil., 289, 298-299.

[8] Mangubat vs. Osmena, Jr., L-12837, April 30, 1959; City of Cebu vs. Judge Piccio, L-13012 & L-14876, December 31, 1960.

CONCURRING AND DISSENTING

BENGZON, J. P. J,

A sign of progress in a developing nation is the rise of new municipalities. Fostering their rapid growth has long been the aim pursued by all three branches of our Government.

So it was that the Governor-General during the time of the Jones Law was given authority by the legislature (Act

No. 1748) to act upon certain details with respect to said local governments, such as fixing of boundaries, subdivisions and mergers. And the Supreme Court, within the framework of the Jones Law, ruled in 1917 that the execution or implementation of such details, did not entail abdication of legislative power (*Government vs. Municipality of Binangonan*, 34 Phil. 518; *Municipality of Cardona vs. Municipality of Binangonan*, 36 Phil. 547). Subsequently, Act No. 1748's aforesaid statutory authorization was embodied in Section 68 of the Revised Administrative Code. And Chief Executives since then up to the present continued to avail of said provision, time and again invoking it to issue executive orders providing for the creation of municipalities.

From September 4, 1964 to October 29, 1964 the President of the Philippines issued executive orders to create thirty-three municipalities pursuant to Section 68 of the Revised Administrative Code. Public funds thereby stood to be disbursed in implementation of said executive orders.

Suing as private citizen and taxpayer, Vice-President Emmanuel Pelaez filed in this Court a petition for prohibition with preliminary injunction against the Auditor General. It seeks to restrain the respondent or any person acting in his behalf, from passing in audit any expenditure of public funds in implementation of the executive orders aforementioned.

Petitioner contends that the President has no power to create a municipality by executive order. It is argued that Section 68 of the Revised Administrative Code of 1917, so far as it purports to grant any such power, is invalid or, at least, already repealed in the light of the Philippine Constitution and Republic Act 2370 (The Barrio Charter).

Section 68 is again reproduced hereunder for convenience:

"Sec. 68.—General authority of [Governor-General] President of the Philippines to fix boundaries and make new subdivisions.— The [Governor-General] President of the Philippines may by executive order define the boundary, or boundaries, of any province, subprovince, municipality, [township] municipal district, or other political subdivision, and increase or diminish the territory comprised therein, may divide any province into one or more subprovinces, separate any political division, other than a province, into such portions as may be required, merge any of such subdivisions or portions with another, name any new subdivision so created, and may change the seat of government within any subdivision to such place therein as the public welfare may require: Provided, That the authorization of the [Philippine Legislature] Congress of the Philippines shall first be obtained whenever the boundary of any province or subprovince is to be defined or any province is to be divided into one or more subprovinces. When action by the [Governor-General] President of the Philippines in accordance herewith makes necessary a change of the territory under the jurisdiction of any administrative officer or any judicial officer, the [Governor-General] President of the Philippines, with the recommendation and advice of the head of the Department having executive control of such officer, shall redistrict the territory of the several officers affected and assign such officers to the new districts so formed.

"Upon the changing of the limits of political divisions in pursuance of the foregoing authority, an equitable distribution of the funds and obligations of the division thereby affected shall be made in such manner as may be recommended by the [Insular Auditor] Auditor General and approved by the [Governor-General] President of the Philippines."

From such wording I believe that power to create a municipality is included: to "separate any political division other than a province, Into such portions as may be required, merge any of such subdivisions or portions with another, name any new subdivision so created". The issue, however, is whether the Legislature can validly delegate to the Executive such power.

The power to create a municipality is legislative in character. American authorities have therefore favored the view that it cannot be delegated; that what is delegable is not the power to create municipalities but only the power to determine the existence of facts under which creation of a municipality will result (37 Am. Jur. 628).

The test is said to lie in whether the statute allows any discretion on the delegate as to whether the municipal corporation should be created. If so, there is an attempted delegation of legislative power and the statute is invalid (Ibid). Now Section 68 no doubt gives the President such discretion, since it says that the President "may by executive order" exercise the powers therein granted. Furthermore, Section 5 of the same Code states:

"SEC. 5. Exercise of administrative discretion.— The exercise of the permissive powers of all executive or administrative officers and bodies is based upon discretion, and when such officer or body is given authority to do any act but not required to do such act, the doing of the same shall be dependent on a sound discretion to be exercised for the good of the service and benefit of the public, whether so expressed in the statute giving the authority or not."

Under the prevailing rule in the United States—and Section 68 is of American origin—the provision in question would be an invalid attempt to delegate purely legislative powers, contrary to the principle of separation of powers.

It is very pertinent that Section 68 should be considered with the stream of history in mind. A proper knowledge of the past is the only adequate background for the present. Section 68 was adopted half a century ago. Political change, two world wars, the recognition of our independence and rightful place in the family of nations, have since taken place. In 1917 the Philippines had for its Organic Act the Jones Law. And under the set-up ordained therein no strict separation of powers was adhered to. Consequently, Section 63 was not constitutionally objectionable at the time of its enactment.

The advent of the Philippine Constitution in 1935 however altered the situation. For not only was separation of power strictly ordained, except only in specific instances therein provided, but the power of the Chief Executive over local governments suffered an explicit reduction.

Formerly, Section 21 of the Jones Law provided that the Governor-General "shall have general supervision and control of all the departments and bureaus of the government in the Philippine Islands". Now Section 10 (1), Article VII of the Philippine Constitution provides: "The president shall have control of all the executive departments, bureaus, or offices, exercise general supervision over all local governments as may be provided by law, and take care that the laws be faithfully executed."

In short, the power of control over local governments had now been taken away from the Chief Executive. Again, to fully understand the significance of this provision, one must trace its development and growth.

As early as April 7, 1900 President McKinley of the United States, in his Instructions to the Second Philippine Commission, laid down the policy that our municipal governments should be "subject to the least degree of supervision and control" on the part of the national government. Said supervision and control was to be confined within the "narrowest limits" or so much only as "may be necessary to secure and enforce faithful and efficient administration by local officers". And the national government "shall have no direct administration except of matters of purely general concern". (See *Hebron vs. Reyes*, L-9158, July 28, 1958.)

All this had one aim, to enable the Filipinos to acquire experience in the art of self-government, with the end in view of later allowing them to assume complete management and control of the administration of their local affairs. Such aim is the policy now embodied in Section 10(1), Article VII of the Constitution (*Rodriguez vs. Montinola*, 50 Off. Gaz., 4820).

It is the evident decree of the Constitution, therefore, that the President shall have no power of control over local governments. Accordingly, Congress cannot by law grant him such power (*Hebron vs. Reyes*, *supra*). And any such power formerly granted under the Jones Law hereby became unavoidably inconsistent with the Philippine

Constitution.

It remains to examine the relation of the power to create and the power to control local governments. Said relationship has already been passed upon by this Court in (*Hebron vs. Reyes*, *supra*). In said case, it was ruled that the power to control is an incident of the power to create or abolish municipalities. Respondent's view, therefore, that creating municipalities and controlling their local governments are "two worlds apart", is untenable. And since, as stated, the power to control local governments can no longer be conferred on or exercised by the President, it follows a fortiori that the power to create them, all the more cannot be so conferred or exercised.

I am impelled to conclude, therefore, that Section 10(1) of Article VII of the Constitution has repealed Section 68 of the Revised Administrative Code as far as the latter empowers the President to create local governments. Repeal by the Constitution of prior statutes inconsistent with it has already been sustained in *De los Santos vs. Mallare*, 87 Phil. 289; And it was there held that such repeal differs from a declaration of unconstitutionality of a posterior legislation, so much so that only a majority vote of the Court is needed to sustain a finding of repeal.

Since the Constitution repealed Section 68 as far back as 1935, it is academic to ask whether Republic Act 2370 likewise has provisions in conflict with Section 68 so as to repeal it. Suffice it to state, at any rate, that statutory prohibition on the President from creating a barrio does not, in my opinion, warrant the inference of statutory prohibition for creating a municipality. For although municipalities consist of barrios, there is nothing in the statute that would preclude creation of new municipalities out of pre-existing barrios.

It is not contrary, to the logic of local autonomy to be able to create larger political units and unable to create smaller ones. For as long ago observed in President McKinley's Instructions to the Second Philippine Commission, greater autonomy is to be imparted to the smaller of the two political units.[*] The smaller the unit of local government, the lesser is the need for the national government's intervention in its political affairs. Furthermore, for practical reasons, local autonomy cannot be given from the top downwards. The national government, in such a case, could still exercise power over the supposedly autonomous unit, e.g., municipalities, by exercising it over the smaller units that comprise them, e.g., the barrios. A realistic program of decentralization therefore calls for autonomy from the bottom upwards, so that it is not surprising for Congress to deny the national government some power over barrios without denying it over municipalities. For this reason, I disagree with the majority view that because the President could not create a barrio under Republic Act 2370, a fortiori he cannot create a municipality.

It is my view, therefore, that the Constitution, and not Republic Act 2370, repealed Section 68 of the Revised Administrative Code's provision giving the President authority to create local governments. And for this reason I agree with the ruling in the majority opinion that the executive orders in question are null and void.

In thus ruling, the Court is but sustaining the fulfillment of our historic desire to be free and independent under a republican form of government, and exercising a function derived from the very sovereignty that it upholds. .

I concur in declaring null and void the Executive Orders in questions. Petition granted.

Regala and Makalintal, JJ., concur.

Petition granted.

[1] In the distribution of power among the governments to be organized in the Philippines "the presumption is always to be in favor of the smaller subdivision." (*President McKinley's in to the Second Philippine Commission*,

April 7, 1900 Italics supplied.)

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