

EDUARDO M. COJUANGCO, JR., PETITIONER, VS. PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT (PCGG) AND HON. FRANCISCO I. CHAVEZ IN HIS CAPACITY AS SOLICITOR GENERAL, AND THE HON. OMBU...

G.R. Nos. 92319-20. October 02, 1990

Ponente: GANCAYCO, J.

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GANCAYCO, J.:

In these petitions the issues raised are: (1) whether or not the Presidential Commission on Good Government (PCGG) has the power to conduct a preliminary investigation of the anti-graft and corruption cases filed by the Solicitor General against Eduardo Cojuangco, Jr. and other respondents for the alleged misuse of coconut levy funds; and (2) on the assumption that it has jurisdiction to conduct such a preliminary investigation, whether or not its conduct constitutes a violation of petitioner's rights to due process and equal protection of the law.

On November 28, 1989, President Corazon C. Aquino directed the Solicitor General to prosecute all persons involved in the misuse of coconut levy funds. Pursuant to the above directive the Solicitor General created a task force to conduct a thorough study of the possible involvement of all persons in the anomalous use of coconut levy funds.

On January 12, 1990, the Solicitor General filed two criminal complaints with respondent PCGG docketed under I.S. Nos. 74 and 75.[1]

The PCGG assigned both complaints to prosecutor Cesario del Rosario for preliminary investigation. The latter scheduled both cases for hearing.

Del Rosario prepared a subpoena dated January 16, 1990 setting the preliminary investigation on January 29, 1990 at 2:00 o'clock in the afternoon as to respondents Maria Clara Lobregat, Jose Eleazar, Felix Dueñas, Jr., and Salvador Escudero, III, and on January 31, 1990 at 2:00 o'clock in the afternoon as to petitioner Eduardo M. Cojuangco, Jr., Rolando de la Cuesta, and Hermenegildo Zayco.

At the scheduled preliminary investigation on January 31, 1990 petitioner appeared through counsel. Instead of filing a counter-affidavit, as required in the subpoena, he filed two motions addressed to the PCGG, namely: (1) a motion to disqualify/inhibit PCGG; alternatively, a motion to dismiss; and (2) motion to have the PCGG itself hear or resolve Cojuangco's motion to disqualify/inhibit PCGG alternatively, motion to dismiss.

Prosecutor del Rosario denied both motions and declared the proceedings closed and the cases submitted for resolution. Thereafter, petitioner requested the PCGG to resolve directly his aforesaid motions.

On February 27, 1990, the PCGG issued an order denying petitioner's motions and required him, together with all the respondents in I.S. Nos. 74 and 75 to submit counter-affidavits within five (5) days from receipt thereof. Petitioner did not submit the required counter-affidavit.

Instead, he filed in this Court on March 12, 1990 the herein petitions for prohibition with prayer for a temporary restraining order/writ of preliminary injunction.

He alleges that the PCGG may not conduct a preliminary investigation of the complaints filed by the Solicitor General without violating petitioner's rights to due process and equal protection of the law, and that the PCGG has no right to conduct such preliminary investigation. It is prayed that a temporary restraining order be issued enjoining the respondents and any or all persons acting under their orders or in their behalf from continuing with the preliminary investigation of I.S. Nos. 74 and 75 and enjoining as well the PCGG from taking any further action on said cases; and after hearing on the merits, to issue a writ of preliminary injunction prohibiting respondent PCGG from conducting a preliminary investigation of said criminal complaints and to order that the records of I.S. Nos. 74 and 75 be forwarded to the Ombudsman for such action he may consider appropriate and to pay the costs of the suits.

In a resolution dated March 13, 1990, this Court, without giving due course to the petition, resolved to require respondents to comment thereon within ten (10) days from notice.

On the same date, the PCGG issued an order that reads as follows:

"Considering that none of the respondents have filed their counter-affidavits and supporting evidence, except respondent Hermenegildo Zayco, the complaints filed against them may now be considered submitted for resolution by this Commission.

Since the respondents, except Hermenegildo Zayco, have not submitted counter-affidavits and controverting evidence, the evidence submitted by the complainants stands uncontradicted. And this Commission finds the findings and conclusions of fact of the investigating prosecutor, that a prima facie case has been established against all the respondents, including Hermenegildo Zayco, to warrant the filing of an information for a violation of Section 3(1) in relation to Section 3(i) thus making them liable under Section 3(a) of RA 3019, to be well-founded.

Wherefore, let the corresponding information be filed."[2]

On March 14, 1990, two informations[3] were filed by the PCGG with the Sandiganbayan against petitioner and all other respondents named in I.S. Nos. 74 and 75 which were docketed as Criminal Cases Nos. 14398 and 14399.

Meanwhile, the Solicitor General filed with the PCGG several other complaints against petitioner and several others bearing on the misuse of the coconut levy funds. Two of these complaints were docketed as I.S. Nos. 79 and 82. A panel of prosecutors designated by the PCGG issued a subpoena to petitioner in order to compel him to appear in the investigation of said cases.

On March 20, 1990, petitioner filed a supplemental petition informing the Court of the filing of said informations and the additional complaints aforesaid. He prays that a temporary restraining order be issued enjoining respondents and other persons acting under their orders or in their behalf from continuing with the preliminary investigation of as well as taking further action in I.S. Nos. 79 and 82 and similar cases filed with the PCGG. Petitioner also prays that, after hearing, the PCGG be prohibited from continuing with the preliminary investigation of I. S. Nos. 79 and 82 and that it be ordered to forward the records of the case to the Ombudsman for appropriate action, and to pay the costs of the suit.

On the same date, petitioner filed a motion reiterating the petition for the issuance of a temporary restraining order/writ of preliminary injunction and alternatively seeking that the case be set for hearing.

On March 22, 1990, the Court admitted the supplemental pleading of the petitioner; required respondents to comment thereon within a non-extendible period of ten (10) days from notice; and issued a status quo order prevailing at the time this petition was filed on March 12, 1990.

On April 2, 1990, a consolidated comment was submitted by the respondents attaching as annex thereto the letters of the Executive Secretary dated February 9, 1990 and February 21, 1990, respectively, addressed to the Chairman, PCGG, conveying the instructions of the President of the Philippines that the complaints involving coconut levy funds be filed with the PCGG, to conduct the necessary investigation and if warranted to file and prosecute the cases before the Sandiganbayan; and it confirmed the earlier instructions of the President dated November 28, 1989 to the same effect.[4]

On May 4, 1990 petitioner filed a reply to the consolidated comment as required by the Court. In a resolution dated June 5, 1990, the Solicitor General was required to file a rejoinder. On May 31, 1990, a motion for hearing of said cases was filed by petitioner and this was granted by the Court on June 21, 1990. It was directed that the Ombudsman be impleaded as party-respondent. The Court required the Ombudsman to comment on the petition within ten (10) days from notice. The case was set for hearing on Tuesday, July 17, 1990 at 10:00 in the morning.

The Ombudsman submitted his comment on July 3, 1990 and the Court required petitioner to file a reply to the same.

On July 6, 1990, Maria Clara Lobregat and Jose R. Eleazar, Jr. filed a Motion for Leave to Intervene and a Motion to Admit Petition to Intervene wherein they ask that the PCGG desist from further proceeding with the preliminary investigation of I.S. Nos. 74, 75, 77, 79, 80, 81, 82, 83, and 84 charging the intervenors and other respondents, including petitioner, with violations of the Anti-Graft and Corrupt Practices Act (Republic Act No. 3019) in connection with the coconut levy funds. The intervenors question the authority of the PCGG to conduct a preliminary investigation of the said cases. They maintain that even assuming that the PCGG has such authority, the same cannot be delegated to a prosecutor or his assistants.

On July 10, 1990, the Court granted the motion for leave to intervene and admitted the petition for intervention. The PCGG was required to comment on said petition within ten (10) days from notice.

On July 13, 1990, respondents filed their rejoinder to the reply of petitioner to their consolidated comments. The Ombudsman filed his comment to the petition for intervention, while petitioner filed his reply to the comment of the Ombudsman on July 16, 1990.

The hearing was held as scheduled on July 17, 1990 where all the parties including the Ombudsman appeared and/or were duly represented by counsels. After the hearing, the parties were required to submit their simultaneous memoranda within fifteen (15) days from the date of the hearing.

On July 21, 1990, the Solicitor General asked for an extension of time within which to file his comment to the petition for intervention. He filed said comment within the period of extension asked for on July 31, 1990.

The memoranda of all the parties having been submitted, the petitions were deemed submitted for resolution.

On the first issue wherein petitioner and intervenors question the authority of the PCGG to conduct a preliminary investigation of the criminal complaints filed against them by the Solicitor General, the Court finds and so holds the same to be devoid of merit.

Under Section 2, Rule 112 of the 1985 Rules on Criminal Procedure the officers authorized to conduct a preliminary investigation are the following:

"SEC. 2. Officers authorized to conduct preliminary investigation. -

The following may conduct a preliminary investigation:

- (a) Provincial or city fiscals and their assistants;
- (b) Judges of the Municipal Trial Courts and Municipal Circuit Trial Court;
- (c) National and Regional state prosecutors; and
- (d) Such other officers as may be authorized by law.

Their authority to conduct preliminary investigation shall include all crimes cognizable by the proper court in their respective territorial jurisdictions."

Under Section 2 likewise of Rule 112 of the Rules of Court before its present amendment, the officers authorized to conduct preliminary investigation are as follows:

"SEC. 2. - Officers authorized to conduct preliminary examination. - Every justice of the peace, municipal judge, city or provincial fiscal, shall have authority to conduct preliminary examination or investigation in accordance with these rules of all offenses alleged to have been committed within his municipality, city or province, cognizable by the Court of First Instance.

The justice of the peace of the provincial capital or of the municipality in which the provincial jail is located when directed by an order of the Court of First Instance, shall have authority to conduct such preliminary examination or investigation of any offense committed anywhere within his province at the expense of the municipality wherein the same was committed."

Under Section 3 thereof in case of temporary absence of the justice of the peace or his auxiliary, the municipal mayor may conduct the preliminary investigation. For complaints filed directly with the Court of First Instance, the judge of the said court may refer the case to the justice of the peace or he may himself conduct both the preliminary examination and investigation simultaneously, under Section 13 of the same rule.

Upon the enactment of the Anti-Graft and Corrupt Practices Act on August 17, 1960,[5] and Republic Act No. 1379 (covering unexplained wealth cases) on August 18, 1955, the preliminary investigation of cases involving the Anti-Graft and Corrupt Practices Act and/or unexplained wealth cases was vested on the aforestated officers.

However, on July 17, 1979, Presidential Decree No. 1630 was promulgated whereby the Tanodbayan was vested with the "exclusive authority to conduct preliminary investigation of all cases cognizable by the Sandiganbayan." [6] Under Presidential Decree No. 1486 which was approved on June 11, 1978, the Sandiganbayan was created and vested with exclusive jurisdiction over all offenses committed by public officers enumerated therein. This was amended by Presidential Decree No. 1606 dated December 10, 1978 and further amended by Presidential Decree No. 1861 issued on March 23, 1983 wherein the jurisdiction of the Sandiganbayan was defined as follows:

"SECTION 1. Section 4 of Presidential Decree No. 1606 is hereby amended to read as follows:

"SEC. 4. Jurisdiction. - The Sandiganbayan shall exercise:

"(a) Exclusive original jurisdiction in all cases involving:

- (1) Violations of Republic Act No. 3019, as amended, otherwise known as the Anti-Graft and Corrupt Practices Act, Republic Act No. 1379, and Chapter II, Section 2, Title VII of the Revised Penal Code;
- (2) Other offenses or felonies committed by public officers and employees in relation to their office, including those employed in government-owned or controlled corporations, whether simple or complexed with other

crimes, where the penalty prescribed by law is higher than prison correctional or imprisonment for six (6) years, or a fine of P6,000.00: PROVIDED, HOWEVER, that offenses or felonies mentioned in this paragraph where the penalty prescribed by law does not exceed prison correctional or imprisonment for six (6) years or a fine of P6,000.00 shall be tried by the proper Regional Trial Court, Metropolitan Trial Court, Municipal Trial Court and Municipal Circuit Trial Court.

"(b) Exclusive appellate jurisdiction:

(2) On appeal, from the final judgments, resolutions or orders of the Regional Trial Courts in cases originally decided by them in their respective territorial jurisdiction.

(2) By petition for review, from the final judgments, resolutions or orders of the Regional Trial Courts in the exercise of their appellate jurisdiction over cases originally decided by the Metropolitan Trial Courts, Municipal Trial Courts and Municipal Circuit Trial Courts, in their respective jurisdiction.

The procedure prescribed in Batas Pambansa Blg. 129, as well as the implementing rules the Supreme Court has promulgated and may hereinafter promulgate, relative to appeals/petitions for review to the Intermediate Appellate Court shall apply to appeals and petition for review filed with the Sandiganbayan. In all cases elevated to the Sandiganbayan, the Office of the Tanodbayan shall represent the People of the Philippines.

In case private individuals are charged as co-principals, accomplices or accessories with the public officers or employees, including those employed in government-owned or controlled corporations, they shall be tried jointly with said public officers and employees.

Any provision of law or the Rules of Court to the contrary notwithstanding, the criminal action and the corresponding civil action for the recovery of civil liability arising from the offense charged shall at all times be simultaneously instituted with and jointly determined in the same proceeding by the Sandiganbayan or the appropriate courts, the filing of the criminal action being deemed to necessarily carry with it the filing of the civil action, and no right to reserve the filing of such civil action separately from the criminal action shall be recognized: PROVIDED, HOWEVER, that where the civil action had heretofore been filed separately but judgment therein has not yet been rendered, and the criminal case is hereafter filed with the Sandiganbayan or the appropriate court, said civil action shall be transferred to the Sandiganbayan or the appropriate court, as the case maybe, for consolidation and joint determination with the criminal action, otherwise the separate civil action shall be considered abandoned."

SECTION 2. All cases pending in the Sandiganbayan or in the appropriate courts as of the date of the effectivity of this Decree shall remain with and be disposed of by the courts where they are pending.

SECTION 3. The provisions of this Decree notwithstanding, the office of the Tanodbayan shall continue to have the exclusive authority to conduct preliminary investigation, file the necessary information, and direct and control the prosecution of all cases enumerated in Section 4 of Presidential Decree No. 1606, whether such cases be within the exclusive original/appellate jurisdiction of the Sandiganbayan or the appropriate courts in accordance with the provisions of Presidential Decree No. 1630." (Underscoring supplied.)

However, this exclusive jurisdiction of the Tanodbayan to conduct preliminary investigation of said cases was modified by Executive Order No. 1 signed by President Corazon C. Aquino on February 28, 1986 creating the PCGG and constituting its membership to assist the President in the recovery of ill gotten wealth accumulated by the former President, his relatives and cronies. Therein it is provided, among others:

"SECTION 2. - The Commission shall be charged with the task of assisting the President in regard to the following matters:

(a) The recovery of all ill-gotten wealth accumulated by former President Ferdinand E. Marcos, his immediate family, relatives, subordinates and close associates, whether located in the Philippines or abroad, including the takeover or sequestration of all business enterprises and entities owned or controlled by them, during his administration, directly or through nominees, by taking undue advantage of their public office and/or using their powers, authority, influence, connections or relationship.

(b) The investigation of such cases of graft and corruption as the President may assign to Commission from time to time.

(c) The adoption of safeguards to ensure that the above practices shall not be repeated in any manner under the new government, and the institution of adequate measures to prevent the occurrence of corruption.

SECTION 3. The Commission shall have the power and authority:

(a) To conduct investigations as may be necessary in order to accomplish and carry out the purposes of this order. (Underscoring supplied.)"

Under Executive Order No.14 signed by President Aquino on May 7,1986, it is also provided:

"SECTION 1, Any provision of the law to the contrary notwithstanding, the Presidential Commission on Good Government with the assistance of the Office of the Solicitor General and other government agencies, is hereby empowered to file and prosecute all cases investigated by it under Executive Order No. 1, dated February 28, 1986 and Executive Order No. 2, dated March 12, 1986, as may be warranted by its findings.

SECTION 2. The Presidential Commission on Good Government shall file all such cases, whether civil or criminal, with the Sandiganbayan, which shall have exclusive and original jurisdiction thereof.

SECTION 3. Civil suits for restitution, reparation of damages, or indemnification for consequential damages, forfeiture proceedings provided for under Republic Act No. 1379, or any other civil actions under the Civil Code or other existing laws, in connection with Executive Order No.1 dated February 28, 1986 and Executive Order No. 2 dated March 12, 1986, may be filed separately from and proceed independently of any criminal proceedings and may be proved by preponderance of evidence. (Underscoring supplied.)"

From the foregoing provisions of law, particularly Sections 2(b) and 3(a) of Executive Order No. 1 and Sections 1 and 2 of Executive Order No. 14, is clear that the PCGG has the power to investigate and prosecute such ill-gotten wealth cases of the former President, his relatives and associates, and graft and corrupt practices cases that may be assigned by the President to the PCGG to be filed with the Sandiganbayan. No doubt, the authority to investigate extended to the PCGG includes the authority conduct a preliminary investigation.[7]

Thus, the Tanodbayan lost the exclusive authority to conduct the preliminary investigation of these types of cases by the promulgation of the said Executive Order Nos. 1 and 14 whereby the PCGG was vested concurrent jurisdiction with the Tanodbayan to conduct such preliminary investigation and to prosecute said cases before the Sandiganbayan.[8] The power of the PCGG to conduct a preliminary investigation of the aforementioned types of cases has been recognized by this Court in *Bataan Shipyard and Engineering Co. Inc. (BASECO) vs. PCGG*. [9]

Upon the adoption of the 1987 Constitution, the Office of the Ombudsman was created under Article XI, as follows:

"SEC. 13. The Office of the Ombudsman shall have the following powers, functions, and duties:

(1) Investigate on its own, or on complaint by any person, any act or omission of any public official, employee, office or agency, when such act or omission appears to be illegal, unjust, improper, or inefficient.

(2) Direct, upon complaint or at its own instance, any public official or employee of the Government, or any

subdivision, agency or instrumentality thereof, as well as of any government-owned or controlled corporation with original charter, to perform and expedite any act or duty required by law, or to stop, prevent, and correct any abuse or impropriety in the performance of duties.

(3) Direct the officer concerned to take appropriate action against a public official or employee at fault, and recommend his removal, suspension, demotion, fine, censure, or prosecution, and ensure compliance therewith.

(4) Direct the officer concerned, in any appropriate case and subject to such limitations as may be provided by law, to furnish it with copies of documents relating to contracts or transactions entered into by his office involving the disbursement or use of public funds or properties, and report any irregularity to the Commission on Audit for appropriate action.

(5) Request any government agency for assistance and information necessary in the discharge of its responsibilities, and to examine, if necessary, pertinent records and documents.

(6) Publicize matters covered by its investigation when circumstances so warrant and with due prudence.

(7) Determine the causes of inefficiency, red tape, mismanagement, fraud, and corruption in the Government and make recommendations for their elimination and the observance of high standards of ethics and efficiency.

(8) Promulgate its rules of procedure and exercise such other powers or perform such functions or duties as may be provided by law." (Underscoring supplied)

This Court, in *Zaldivar*,^[10] interpreting the aforesaid provision of the Constitution, particularly Section 13(1) thereof vesting on the Ombudsman the right and the power to investigate on its own or on complaint, any act or omission of any public official, employee, office or agency which appears "to be illegal, unjust, improper, or inefficient", held that the general power of investigation covers the lesser power to conduct a preliminary investigation. Thus, as the power of investigation vested on the Ombudsman under the Constitution includes the power to conduct a preliminary investigation, then the special prosecutor (former Tanodbayan) may no longer conduct such a preliminary investigation unless duly authorized by the Ombudsman.^[11]

A reading of the foregoing provision of the Constitution does not show that the power of investigation including preliminary investigation vested on the Ombudsman is exclusive. Hence, the said provision of the Constitution did not repeal or remove the power to conduct an investigation, including the authority to conduct a preliminary investigation, vested on the PCGG by Executive Orders Nos.1 and 14.

Although under Section 26 of Article XVIII of the Constitution the authority of the PCGG to issue sequestration or freeze orders was maintained for not more than eighteen months after the ratification of the Constitution, it cannot be construed thereby that its power of investigation had thereby been revoked by the failure to reiterate said power in the Constitution.

Indeed, upon the passage of Republic Act No. 6770, otherwise known as the "Ombudsman Act of 1989," it is therein specifically provided in Section 15 as follows:

"SEC. 15. Powers, Functions and Duties. – The Office of the Ombudsman shall have the following powers, functions and duties:

(1) Investigate and prosecute on its own or on complaint by any person, any act or omission of any public officer or employee, office or agency, when such act or omission appears to be illegal, unjust, improper or inefficient. It has primary jurisdiction over cases cognizable by the Sandiganbayan and, in the exercise of this primary jurisdiction, it may take over, at any stage, from any investigatory agency of Government, the investigation of such cases;

x x x

(11) Investigate and initiate the proper action for the recovery of ill-gotten and/or unexplained wealth amassed after February 25, 1986 and the prosecution of the parties involved therein.

The Ombudsman shall give priority to complaints filed against high ranking government officials and/or those occupying supervisory positions, complaints involving grave offenses as well as complaints involving large sums of money and/or properties."

Under Section 15(1) of Republic Act No. 6770 aforesaid, the Ombudsman has primary jurisdiction over cases cognizable by the Sandiganbayan so that it may take over at any stage from any investigatory agency of the government, the investigation of such cases. The authority of the Ombudsman to investigate offenses involving public officers or employees is not exclusive but is concurrent with other similarly authorized agencies of the government. Such investigatory agencies referred to include the PCGG and the provincial and city prosecutors and their assistants, the state prosecutors and the judges of the municipal trial courts and municipal circuit trial courts.[12]

In other words, the aforesaid provision of the law has opened up the authority to conduct preliminary investigation of offenses cognizable by the Sandiganbayan to all investigatory agencies of the government duly authorized to conduct a preliminary investigation under Section 2, Rule 112 of the 1985 Rules Of Criminal Procedure with the only qualification that the Ombudsman may take over at any stage of such investigation in the exercise of his primary jurisdiction.

It is also noted that under Section 15(11) of the aforesaid Republic Act No. 6770, among the powers vested on the Ombudsman is to investigate and to initiate the proper action for recovery of ill-gotten wealth and/or unexplained wealth amassed after February 25, 1986 and the prosecution of the parties involved therein. The Court agrees with the contention of the public respondent PCGG that this provision is a tacit recognition that the authority of the PCGG to conduct preliminary investigation of ill-gotten wealth and/or unexplained wealth amassed before February 25, 1986 is maintained.

However, the Court finds and so holds that the aforesaid provision of the law cannot in any manner dilute or diminish the primary jurisdiction of the Ombudsman over all such types of cases committed by public officers or employees as provided in Section 13, Article XI of the Constitution. Thus, notwithstanding the provision of Section 15(11) of Republic Act No. 6770, the primary jurisdiction of the Ombudsman to investigate covers ill-gotten wealth and/or unexplained wealth cases that occurred even before February 25, 1986.

The second issue raised that the preliminary investigation by the PCGG of the aforesaid complaints violates the right of petitioner to due process and to equal protection of law is impressed with merit.

Under Section 1, Rule 112 of the 1985 Rules on Criminal Procedure, preliminary investigation is defined as "an inquiry or proceeding for the purpose of determining whether there is sufficient ground to engender a well-founded belief that a crime cognizable by the Regional Trial Court has been committed and that the respondent is probably guilty thereof, and should be held for trial."

The purpose of a preliminary investigation is to secure the innocent against hasty, malicious and oppressive prosecution, and to protect him from an open and public accusation of a crime, from the trouble, expense, anxiety of a public trial, and also to protect the state from useless and expensive trials.[13]

The conduct of a preliminary investigation is the initial step towards the criminal prosecution of a person. After such preliminary investigation, if the investigating officer finds that there is sufficient ground to engender a well-founded belief that a crime has been committed and that the respondent is probably guilty thereof and should

be held for trial, then the corresponding complaint or information shall be filed in the competent court. It is the filing of said complaint or information that initiates the criminal prosecution of the accused when he is brought to court for trial.

Such a preliminary investigation is required for offenses cognizable by the Regional Trial Court and the Sandiganbayan.[14] It must be undertaken in accordance with the procedure provided in Section 3, Rule 112 of the 1985 Rules of Criminal Procedure. This procedure is to be observed in order to assure that a person undergoing such preliminary investigation will be afforded due process.

As correctly pointed out by petitioner, an indispensable requisite of due process is that the person who presides and decides over a proceeding, including a preliminary investigation, must possess the cold neutrality of an impartial judge.[15]

Although such a preliminary investigation is not a trial and is not intended to usurp the function of the trial court, it is not a casual affair. The officer conducting the same investigates or inquires into the facts concerning the commission of the crime with the end in view of determining whether or not an information may be prepared against the accused. Indeed, a preliminary investigation is in effect a realistic judicial appraisal of the merits of the case. Sufficient proof of the guilt of the accused must be adduced so that when the case is tried, the trial court may not be bound as a matter of law to order an acquittal. A preliminary investigation has then been called a judicial inquiry. It is a judicial proceeding. An act becomes judicial when there is opportunity to be heard and for, the production and weighing of evidence, and a decision is rendered thereon.

The authority of a prosecutor or investigating officer duly empowered to preside or to conduct a preliminary investigation is no less than that of a municipal judge or even a regional trial court judge.[16] While the investigating officer, strictly speaking is not a "judge," by the nature of his functions he is and must be considered to be a quasi judicial officer.

Soon after the creation of the PCGG under Executive Order No. 1, the PCGG sequestered and froze all the properties of petitioner Cojuangco in accordance with the powers vested in it by law.

On July 31, 1987, said petitioner was sued by the PCGG before the Sandiganbayan by way of a complaint entitled "Republic of the Philippines vs. Eduardo M. Cojuangco, Jr.," et al. docketed as Civil Case No. 0033. Among the allegations of the complaint are as follows:

"This is a civil action against Defendants Eduardo Cojuangco, Jr., Ferdinand E. Marcos, Imelda R. Marcos and the rest of the Defendants in the above-entitled case to recover from them ill-gotten wealth consisting of funds and other property which they, in unlawful concert with one another, had acquired and accumulated in flagrant breach of trust and of their fiduciary obligations as public officers with, grave abuse of right and power and in brazen violation of the Constitution and laws of the Republic of the Philippines, thus resulting in their unjust enrichment during Defendant Ferdinand E. Marcos' 20 years of rule from December 30, 1965 to February 25, 1986, first as President of the Philippines under the 1935 Constitution and, thereafter, as one-man ruler under martial law and Dictator under the 1973 Marcos-promulgated Constitution.

2. The wrongs committed by Defendant acting singly or collectively and in unlawful concert with one another, include the misappropriation and theft of public funds, plunder of the nation's wealth, extortion, blackmail, bribery, embezzlement and other acts of corruption, betrayal of public trust and brazen abuse of power as more fully described below, all at the expense and to the grave and irreparable damage of Plaintiff and the Filipino people. (Underscoring supplied.)"[17]

The complaint was filed by the PCGG through its Chairman, Ramon A. Diaz, who verified the complaint, and

Solicitor General Francisco I. Chavez and Assistant Solicitor General Ramon S. Desuasido.

Petitioner in turn filed a counterclaim against the PCGG for the sequestration of his properties and the institution of the suit. He also questioned the acts of the PCGG in several special civil actions before the court.[18]

On November 27, 1989, the first working day after petitioner Cojuangco returned to the Philippines, the PCGG filed with the Sandiganbayan an information against said petitioner for violation of Republic Act No. 3019 entitled "People of the Philippines vs. Eduardo M. Cojuangco, Jr." docketed as Criminal Case No. 14161. However, the Sandiganbayan found no probable cause for the issuance of a warrant of arrest so a petition for certiorari was filed by the Solicitor General in this Court docketed as G.R. No. 91741. On March 29, 1990 this Court denied the petition.

On November 28, 1989, President Aquino directed the Solicitor General to prosecute all persons involved in the misuse of the coconut levy funds. The Solicitor General created a task force for the purpose.

On January 12, 1990, the Solicitor General filed with the PCGG the first two criminal complaints for violation of the Anti-Graft and Corrupt Practices Act, bearing on the anomalous use and/or misuse of the coconut levy funds docketed as I.S. Nos. 74 and 75. Among the respondents were the petitioner and intervenors Lobregat and Eleazar. The PCGG assigned assistant prosecutor Cesario del Rosario to conduct the preliminary investigation.

As hereinabove related, a subpoena was issued by the said prosecutor for the preliminary investigation on January 29, 1989 insofar as intervenors are concerned while that of petitioner, de la Cuesta and Herminigildo Zayco was scheduled on January 31, 1990. In the same subpoena, respondents were required to submit their counter-affidavits and other supporting documents to controvert the complaint within ten (10) days from notice.

On the scheduled investigation dated January 29, 1990, intervenors appeared through counsel and moved to dismiss the complaints for lack of jurisdiction of the PCGG to conduct the preliminary investigation but this was denied by said prosecutor. They were asked by the prosecutor if they will submit their counter-affidavits but intervenors' counsel replied that they were not yet ready to file the same because of their pending motion. Thus, the cases were considered closed insofar as they are concerned.

The intervenors contested the prosecutor's action before the Sandiganbayan through a petition for certiorari and prohibition docketed as Criminal Case No. 0093. On March 13, 1990, the Sandiganbayan promulgated its decision wherein it declared the preliminary investigation conducted by del Rosario null and void, enjoined the PCGG from filing an information on the basis thereof and directed the PCGG to conduct another preliminary investigation of I.S. Nos. 74 and 75 as to the intervenors and to assign another investigating prosecutor.

Earlier however, that is, on February 27, 1990, the PCGG, overruling prosecutor del Rosario's order, gave the intervenors in I.S. Nos. 74 and 75 another period of five (5) days from notice within which to submit their counter-affidavits and supporting evidence. Based on this action the PCGG filed a motion for reconsideration of the aforesaid decision of the Sandiganbayan which had not been resolved.

As to petitioner, on the day of the preliminary investigation dated January 31, 1990, his counsel filed a motion to disqualify or inhibit the PCGG, an alternative motion to dismiss, and a motion to have the PCGG itself hear and/or resolve the motion to disqualify or inhibit itself alternatively a motion to dismiss. The preliminary investigation presided by prosecutor del Rosario started at 2:00 o'clock P.M. with eight other respondents duly represented by their counsel. The said motion was denied and the preliminary investigation was adjourned.

Immediately thereafter petitioner brought the matter to Chairman Mateo A.T. Caparas of the PCGG and in several communications sought resolution of the motion by the PCGG. On February 27, 1990, the PCGG issued an order

denying petitioner's motion to dismiss for lack of jurisdiction but did not resolve the motion to disqualify. Therein, the PCGG directed petitioner to submit his counter-affidavits within five (5) days from receipt of notice.

On March 12, 1990, the same day this petition was filed in this Court, the petitioner, instead of filing the counter-affidavit, filed with the PCGG an urgent motion to defer proceedings in I.S. Nos. 74 and 75 for at least until March 22, 1990 within which to seek judicial relief from the order of February 27, 1990. Upon the filing of this petition, petitioner filed a supplemental urgent motion to defer proceedings with the PCGG informing it of the filing of this petition.

Nevertheless, on March 14, 1990, the PCGG filed two informations corresponding to the complaints in I.S. Nos. 74 and 75 which are docketed as Criminal Cases Nos. 14398 and 14399, respectively, at the Sandiganbayan. The PCGG recommended bail as P100,000.00 for each case.

Meanwhile, the Solicitor General filed two other complaints against the petitioner with the PCGG accusing the petitioner of violation of Republic Act No. 3019 and other penal laws in connection with the coconut levy funds, namely, I.S. No. 79 which concerns an alleged arbitration award in favor of Agricultural Investors Inc., and I.S. No. 82 which concerns the acquisition of coconut oil mills.

Several other complaints were filed by the Solicitor General with the PCGG against petitioner for preliminary investigation, to wit:

(a) I.S. No. 80 which concerns the acquisition of the First United Bank, now United Coconut Planters' Bank; (b) I.S. No. 81 concerning shares of the United Coconut Oil Mills Inc.; (c) I.S. No. 83 regarding the acquisition of coconut oil mills and certain indebtedness thereof; and (d) I.S. No. 84 regarding settlement of an Anti-Graft suit in the United States. All of these complaints were for alleged violation of Republic Act No. 3019.

The question that arises, therefore, is whether under the circumstances of this case, it would be fair and just for the PCGG to conduct the preliminary investigation of the said complaint instead of the Ombudsman or any other duly authorized investigating agency.

Upon the creation of the PCGG under Executive Order No. 1 issued by President Aquino, the PCGG was charged with the task of assisting the President not only in the recovery of ill-gotten wealth or unexplained wealth accumulated by the former President, his immediate family, relatives subordinates and close associates but also in the investigation of such cases of graft and corruption as the President may assign to the Commission from time to time and to prevent a repetition of the same in the future.

Section 3 of Executive Order No. 1 provides as follows:

"SECTION 3.- The Commission shall have the power and authority:

- (a) To conduct investigation as may be necessary in order to accomplish and carry out the purposes of this order.
- (b) To sequester or place or cause to be placed under its control or possession any building or office wherein any ill-gotten wealth or properties may be found, and any records pertaining thereto, in order to prevent their destruction, concealment or disappearance which would frustrate or hamper the investigation or otherwise prevent the Commission from accomplishing its task.
- (c) To provisionally take over in the public interest or to prevent its disposal or dissipation, business enterprises and properties taken over by the government of the Marcos administration or by entities or persons close to former President Marcos, until the transactions leading to such acquisition by the latter can be disposed of by the appropriate authorities.

(d) To enjoin or restrain any actual or threatened commission of acts by any person or entity that may render moot and academic, or frustrate, or otherwise make ineffectual the efforts of the Commission to carry out its tasks under this order.

(e) To administer oaths, and issue subpoenas requiring the attendance and testimony of witnesses and/or the production of such books, papers, contracts, records, statement of accounts and other documents as may be material to the investigation conducted by the Commission.

(f) To hold any person in direct or indirect contempt and impose the appropriate penalties, following the same procedures and penalties provided in the Rules of Court.

(g) To seek and secure the assistance of any office, agency or instrumentality of the government.

(h) To promulgate such rules and regulations as may be necessary to carry out the purposes of this order."

From the foregoing provisions of law, it is clear that the PCGG has the following powers and authority:

1. To conduct an investigation including the preliminary investigation and prosecution of the ill-gotten wealth cases of former President Marcos, relatives and associates, and graft and corruption cases assigned by the President to it;
2. Issue sequestration orders in relation to property claimed to be ill-gotten;
3. Issue "freeze orders" prohibiting persons in possession of property alleged to be ill-gotten from transferring or otherwise disposing of the same;
4. Issue provisional takeover orders of the said property;
5. Administer oaths and issue subpoenas in the conduct of its investigation;
6. Hold any person in direct or indirect contempt and impose the appropriate penalties as provided by the rules.

Considering that the PCGG, like the courts, is vested with the authority to grant provisional remedies of (1) sequestration, (2) freezing assets, and (3) provisional takeover, it is indispensable that, as in the case of attachment and receivership, there exists a prima facie factual foundation, at least, for the sequestration order, freeze order or takeover order, an adequate and fair opportunity to contest it and endeavor to cause its negation or nullification. Both are assured under the foregoing executive orders and the rules and regulations promulgated by the PCGG.[19]

Thus, in *Baseco*, this Court held, as follows:

"Executive Order No. 14 enjoins that there be 'due regard to the requirements of fairness and due process.' Executive Order No. 2 declares that with respect to claims on allegedly 'ill-gotten' assets and properties, 'it is the position of the new democratic government that President Marcos * * (and other parties affected) be afforded fair opportunity to contest these claims before appropriate Philippine authorities.' Section 7 of the Commission's Rules and Regulations provides that sequestration or freeze (and takeover) orders issue upon the authority of at least two commissioners, based on the affirmation or complaint of an interested party, or *motu proprio* when the Commission has reasonable grounds to believe that the issuance thereof is warranted. A similar requirement is now found in Section 26, Art. XVIII of the 1987 Constitution, which requires that a 'sequestration or freeze order shall be issued only upon showing of a prima facie case.'"[20]

Insofar as the general power of investigation vested in the PCGG is concerned, it may be divided into two stages. The first stage of investigation which is called the criminal investigation stage is the fact-finding inquiring which is usually conducted by the law enforcement agents whereby they gather evidence and interview witnesses after

which they assess the evidence and if they find sufficient basis, file the complaint for the purpose of preliminary investigation. The second stage is the preliminary investigation stage of the said complaint. It is at this stage, as above discussed, where it is ascertained if there is sufficient evidence to bring a person to trial.

In the petition before this Court, it is not denied that the PCGG conducted the appropriate criminal investigation of petitioner and intervenors as a law enforcer. In the process it sequestered all the properties of the petitioner after a prima facie finding that the same amount to ill-gotten wealth and/or were acquired in relation to allegedly anomalous disposition or misuse of the coconut levy funds.

The PCGG then filed on July 31, 1987 a complaint docketed as Civil Case No. 0033 against petitioner and intervenors not only for alleged ill-gotten wealth as associates of former President Marcos but for the unlawful concert with the former President and his wife to unjustly enrich themselves at the expense of the Filipino people through the alleged misuse, misappropriation and dissipation of the coconut levy funds, as enumerated in the complaint. This complaint was verified and filed by the then Chairman of the PCGG and also signed by the Solicitor General and the Assistant Solicitor General.

Among the allegations in the civil complaint, are the very transactions now subject of the criminal complaints filed by the Solicitor General against petitioner to wit:

"13. Defendant Eduardo Cojuangco, Jr., taking undue advantage of his association, influence and connection, acting in unlawful concert with Defendants Ferdinand E. Marcos and Imelda R. Marcos, embarked upon devices, schemes and stratagems to unjustly enrich themselves at the expense of Plaintiff and the Filipino people, such as, when he -

13(a) manipulated, beginning the year 1975, with the active collaboration of Defendants Juan Ponce Enrile, Maria Clara Lobregat, Danilo Ursua, Jose R. Eleazar, Jr. and Herminigildo C. Zayco, the purchase by Philippine Coconut Authority (PCA) of 72.2% of the outstanding capital stock of the First (sic) (FUB) which was subsequently converted into a universal bank named United Coconut Planters Bank (UCPB) through the use of the Coconut Consumers Stabilization-Fund (CCSF) levy initially in the amount of P85,773,100.00 in a manner contrary to law and to the specific purposes for which said coconut levy funds were imposed and collected under P.D. 276, and under anomalous and sinister designs and circumstances, to wit: . .

x x x

At pp. 22 to 22-A, Expanded Complaint, Civil Case No. 0033)

[I.S. No. 080]

(c) misappropriated, misused and dissipated P840 million of the Coconut Industry Development Fund (CIDF) levy funds deposited with the National Investment Development Corporation (NIDC) as administrator-trustee of said funds and later with UCPB, of which Defendant Eduardo Cojuangco, Jr. was the Chief Executive Officer in connection with the (i) development, improvement, operation and maintenance of the Bugsuk Island Seed Garden ("BUGSUK) by Agricultural Investors, Inc. ("AII") as developer (both Bugsuk and AII are beneficially held and controlled by Defendant Eduardo Cojuangco, Jr.) pursuant to a highly oppressive, anomalous and one-sided memorandum agreement, dated November 20, 1974, (ii) sale by AII to PCA of the seed nuts produced at Bugsuk Seed Garden at exorbitant prices pursuant to a very onerous, oppressive and disadvantageous agreement, dated August 2, 1985 and (iii) payment of liquidated damages in the amount of P640,856,879.67 and arbitration fee of P150,000.00 pursuant to a decision rendered by a Board of Arbitrators against UCPB for alleged breach of contract.;

x x x

(At pp. 26 - 27)

[I.S. No. 079]

(d) established and caused to be funded with coconut levy funds, with the active collaboration of Defendant Ferdinand E. Marcos through the issuance of LOI 926, and of defendants, Juan Ponce Enrile, Jose R. Eleazar, Jr., Maria Clara Lobregat, Jose C. Concepcion, Inaki Mendezona, Douglas Lu Ym, Teodoro D. Regala Emmanuel Almeda, Eduardo Escueta, Leo Palma, and Rolando de la Cuesta, the United Coconut Oil Mills, Inc. (UNICOM) a corporation beneficially held and controlled by Defendant Eduardo Cojuangco, Jr. and bought sixteen (16) competing and/or non-operating oil mills at exorbitant prices in the total amount of P184,935 million, then mothballed them in order to control the prices of copra and other coconut products, and assumed and paid the outstanding loan obligations of seven (7) of those purchased oil mills in the total amount of P805,984 million with the express consent and approval of Defendant Ferdinand E. Marcos, thereby establishing a coconut monopoly for their own benefit and unjust enrichment and to the grave damage of Plaintiff and the Filipino people;

(e) manipulated, with the active collaboration of Defendants Mohammad Ali Dimaporo and Teodoro D. Regala, the sale of the Mindanao Coconut Oil Mills (MINCOCO) to UNICOM through the issuance of LOI 926 by Defendant Ferdinand E. Marcos, in violation of the Guaranty Agreement dated July 23, 1976, which prohibited the sale, among others, of the MINCOCO assets/properties without the prior written consent of NIDC, under terms and conditions grossly disadvantageous to Plaintiff and the Filipino people;

(f) drew up a scheme of payment to settle the accounts of MINCOCO and other UNICOM-acquired mills with their respective creditors: namely, The National Investment Development Corporation (NIDC), Development Bank of the Philippines (DBP), Philippine Veterans Bank (PVB), under terms grossly disadvantageous to Plaintiff;

x x x

At pp. 27-28)

[I.S. Nos. 81, 82 and 83]

(g) misappropriated and dissipated the coconut levy funds by withdrawing therefrom tens of millions of pesos in order to pay damages adjudged against UNICOM, headed and controlled by Defendant Eduardo Cojuangco, Jr., in an anti-trust suit in California, U.S.A.;

x x x

(At p. 29)

[I.S. No. 84]

(h) misused, dissipated and unlawfully disbursed coconut levy funds with the active collaboration and participation of defendants Maria Clara Lobregat, Juan Ponce Enrile, Jose Eleazar, Jr., Rolando de la Cuesta and Herminigildo Zayco as members of the PCA governing board for projects and purposes completely alien to those for which the fund was collected and donations made by PCA such as ... P6 million to COCOFED; and other similar unlawful disbursements, which all remain unaccounted for to date;

x x x

(At pp. 28 to 28-A underscoring supplied)

[I.S. No. 74 and 75]"

Thereafter, as aforestated, the Solicitor General filed the first two complaints against petitioner and intervenors among others, under I.S. Nos. 74 and 75 for alleged violation of the Anti-Graft and Corrupt Practices Act for donations allegedly made out of coconut levy funds to the Philippine Coconut Producers Federation (COCOFED).

Petitioner and intervenors questioned not only the authority of the PCGG to conduct the preliminary investigation but asserted a denial of due process and equal protection of the law. There is cogent basis for their plea.

The PCGG, as a law enforcer, gathered evidence as to the alleged ill-gotten wealth of petitioner and intervenors and, after satisfying itself that there is a prima facie case, sequestered and issued a freeze order for all the properties of petitioner. Based also on the said finding of a prima facie case, the PCGG filed a civil complaint docketed as Civil Case No. 0033 against petitioner and intervenors for alleged ill-gotten wealth including the alleged misuse, misappropriation, and diversion of coconut levy funds.

As hereinabove discussed the criminal complaints under I. S. Nos. 74, 79, 80, 81, 82, 83 and 84 filed by the Solicitor General all for alleged violation of Republic Act No. 3019, are covered and alleged in the aforesaid civil complaint docketed as Civil Case No. 0033.

The PCGG conducted the preliminary investigation of I.S. Nos. 74 and 75 and is poised to conduct the preliminary investigation of the other aforementioned complaints for the same alleged violations of law subject of the civil complaint.

The Court cannot close its eyes to the glaring fact that in earlier instances, the PCGG had already found a prima facie case against the petitioner and intervenors when, acting like a judge, it caused the sequestration of the properties and the issuance of the freeze order of the properties of petitioner. Thereafter, acting as a law enforcer, in collaboration with the Solicitor General, the PCGG gathered the evidence and upon finding cogent basis therefor filed the aforestated civil complaint. Consequently the Solicitor General filed a series of criminal complaints.

It is difficult to imagine how in the conduct of such preliminary investigation the PCGG could ever make a turn about and take a position contradictory to its earlier findings of a prima facie case against petitioner and intervenors. This was demonstrated in the undue haste with which I.S. Nos. 74 and 75 was investigated and the informations were filed in court even as the petitioner and intervenors questioned its authority, invoked the denial of due process and promptly informed the PCGG of the filing of this petition.

In our criminal justice system, the law enforcer who conducted the criminal investigation, gathered the evidence and thereafter filed the complaint for the purpose of preliminary investigation cannot be allowed to conduct the preliminary investigation of his own complaint. It is to say the least arbitrary and unjust.

It is in such instances that We say one cannot be "a prosecutor and judge at the same time." Having gathered the evidence and filed the complaint as a law enforcer, he cannot be expected to handle with impartiality the preliminary investigation of his own complaint, this time as a public prosecutor.

The circumstances of the instant petition are even worse. To repeat, the PCGG and the Solicitor General finding a prima facie basis filed a civil complaint against petitioner and intervenors alleging substantially the same illegal or criminal acts subject of the subsequent criminal complaints the Solicitor General filed with the PCGG for preliminary investigation. While ostensibly, it is only the Solicitor General who is the complainant in the criminal cases filed with the PCGG, in reality the PCGG is an unidentified co-complainant.

Moreover, when the PCGG issued the sequestration and freeze orders against petitioner's properties, it was on the

basis of a prima facie finding that the same were ill-gotten and/or were acquired in relation to the illegal disposition of coconut levy funds. Thus, the Court finds that the PCGG cannot possibly conduct the preliminary investigation of said criminal complaints with the "cold neutrality of an impartial judge," as it has prejudged the matter. Add to this the fact that there are many suits filed by petitioner and the intervenors against the PCGG and vice versa.

For lesser grounds this Court had disqualified a fiscal or a judge from handling a case.

A fiscal was disqualified from conducting a preliminary investigation because he had appeared for the prosecution when said case was pending in the municipal court.[21] In a case filed before the Commission on Elections this Court held Commissioner Opinion should not have participated in the case since he was the former lawyer of Arturo Pacificador.[22] A judge was required to inhibit himself in a case where he was a witness for the complainant.[23] A judge before whom the extrajudicial statement of one of the accused was subscribed was disqualified from hearing the case.[24] A judge who told the complainant his case was weak and it would be to his advantage to settle the case was disqualified.[25] A judge against whom an administrative complaint was filed by one of the parties was also disqualified.[26] In a case where the motion for inhibition was found to be groundless, this Court held that the judge should inhibit himself considering the seriousness of the charges.[27] A judge was asked to inhibit himself from trying a malversation case against the accused since he previously convicted the latter of arson.[28] In another case, the judge was ordered to inhibit himself because of strained relationship with the defendant.[29]

There are numerous other cases wherein the judges and fiscals were disqualified on similar grounds as those aforementioned.[30]

Where the circumstances do not inspire confidence in the objectivity and impartiality of the judge, such judge should inhibit voluntarily or if he refuses, he should be prohibited from handling the case. A judge must not only be impartial but must also appear impartial as an assurance to the parties that his decision will be just.[31] His actuation must inspire that belief. This is an instance when appearance is as important as reality.[32]

The same rule of thumb should apply to an investigating officer conducting a preliminary investigation. This is the reason why under Section 1679 of the former Revised Administrative Code, the Secretary of Justice, who has supervision over the prosecution arm of the government, is given ample power to designate another prosecutor to handle the investigation and prosecution of a case when the prosecutor handling the same is otherwise disqualified by personal interest, or is unable or fails to perform his duty.

The Court finds that under the circumstances of the case, the PCGG cannot inspire belief that it could be impartial in the conduct of the preliminary investigation of the aforesaid complaints against petitioner and intervenors. It cannot possibly preside in the said preliminary investigation with an even hand.

The Court holds that a just and fair administration of justice can be promoted if the PCGG would be prohibited from conducting the preliminary investigation of the complaints subject of this petition and the petition for intervention and that the records of the same should be forwarded to the Ombudsman, who as an independent constitutional officer has primary jurisdiction over cases of this nature, to conduct such preliminary investigation and take appropriate action.

All violators of the law must be brought before the bar of justice. However, they must be afforded due process and equal protection of the law, whoever they may be.

WHEREFORE, the petitions of Eduardo M. Cojuangco, Jr. and intervenors Maria Clara Lobregat and Jose Eleazar, Jr. are hereby GRANTED. The PCGG is directed to transmit the complaints and records thereof under

I.S. Nos. 74, 75, 79, 80, 81, 82, 83 and 84 to the Ombudsman for appropriate action. All proceedings of the preliminary investigation conducted by the PCGG of said complaints are hereby declared null and void including the informations which it filed in the Sandiganbayan against petitioner and intervenors docketed as Criminal Cases Nos. 14398 and 14399. The status quo order which this Court issued on March 12, 1990 is hereby made permanent and the PCGG is permanently prohibited from further conducting the preliminary investigation of the aforestated complaints. The Court makes no pronouncement as to costs.

SO ORDERED.

Fernan, C.J., Narvasa, Melencio-Herrera, Cruz, Feliciano, Padilla, Bidin, Sarmiento, Cortez, Griño-Aquino, Medialdea, and Regalado, JJ., concur.

Gutierrez Jr., J., see separate concurrence.

Paras, J., no part.

[1] Annexes A-1 and A-2 to the Petition.

[2] Pages 850 to 851, Rollo.

[3] Annex 3 and 4 to the Supplemental Petition, pages 178 to 180, rollo.

[4] Annexes 1 and 2; pages 203 to 204, Rollo.

[5] Amended by Batas Pambansa No. 195, March 16, 1982.

[6] Section 17, Presidential Decree No. 1630.

[7] Zaldivar vs. Sandiganbayan, 160 SCRA 843 (1988).

[8] See Balatbat vs. Sandiganbayan, G.R. No. 78314, resolution of May 21, 1987.

[9] 150 SCRA 181, 205 (1987).

[10] Supra, note 7.

[11] Section 7, Article XI of the Constitution provides as follows: "The existing Tanodbayan shall hereafter be known as the Office of Special Prosecutor. It shall continue to function and exercise its powers as now or hereafter may be provided by law, except those conferred on the Office of the Ombudsman created under this Constitution. (Underscoring supplied.)" See also Zaldivar vs. Sandiganbayan, supra, pages 846 to 847.

[12] Executive Orders Nos. 1 and 14, and Section 2, Rule 112, 1985 Rules of Criminal Procedure.

[13] Hashim vs. Boncan, 71 Phil. 216 (1941) and Trocio vs. Mantas 118 SCRA 241 (1982).

[14] Section 1, Rule 112, 1985 Rules on Criminal Procedure; Section 10, P.D. No. 1386.

[15] Javier vs. Comelec, 144 SCRA 194 (1986); Salta vs. Court of Appeals, 143 SCRA 228, 239-240 (1986); Galman vs. Sandiganbayan, 144 SCRA 43 (1986); Arula vs. Espino, 28 SCRA 540, (1969); Salonga vs. Cruz Paño, 134 SCRA 438 (1985); Andaya vs. Provincial Fiscal of Surigao del Sur, 73 SCRA 131 (1976); Nuclear Free Coalition, et al, vs. National Power Corp. et. al.; and Lorenzo M. Tañada vs. Philippine Atomic Energy Commission, et. al., 14 SCRA 307, (1986).

[16] Arula vs. Espino, 28 SCRA 540, 592 and 593, (1969).

[17] Pages 604 to 605, Rollo.

[18] Page 610, Rollo. Eduardo M. Cojuangco Jr. vs. PCGG, et al, Sandiganbayan Civil Case No. 0060, (now Republic of the Philippines [PCGG] vs. Sandiganbayan and Cojuangco Jr., G.R. No. 88809); Eduardo M. Cojuangco Jr. vs. PCGG, et al, Sandiganbayan Civil Case No. 0067 (now Republic of the Philippines [PCGG] vs. Sandiganbayan and Cojuangco Jr., G.R. No. 88858); Eduardo M. Cojuangco Jr. et al vs. Antonio J. Roxas, et al, G.R. No. 91925; Eduardo M. Cojuangco Jr. et al, vs. Adolfo Azcuna, et al, G.R. No. 93005; Eduardo M. Cojuangco Jr. et al vs. Republic of the Philippines PCGG, and the Sandiganbayan (First Division), G.R. No. 93278); Eduardo M. Cojuangco Jr. vs. People of the Philippines and Sandiganbayan (Third Division) G.R. No. 93884."

[19] Baseco vs. PCGG, *supra*, p. 215.

[20] At pages 215 to 216.

[21] Andaya vs. Provincial Fiscal of Surigao del Sur. 73 SCRA 131 (1976).

[22] Javier vs. Comelec, *supra*.

[23] Tuzon vs. Cruz, 66 SCRA 235 (1975).

[24] Mateo vs. Villaluz, 50 SCRA 18 (1973)

[25] Castillo vs. Juan, 62 SCRA 124 (1975).

[26] Paderanga vs. Azura, 136 SCRA 266 (1985).

[27] Dimacuha vs. Concepcion, 117 SCRA 630 (1982).

[28] Ignacio vs. Villaluz, 90 SCRA 16 (1979).

[29] Luque vs. Kayanan, 29 SCRA 165 (1969).

[30] Borromeo-Herrera vs. Borromeo, 152 SCRA 171 (1987); Floro Enterprises vs. Court of Appeals, 116 SCRA 479 (1982); Castro vs. Reyes, 104 SCRA 650 (1981; Bautista vs. Rebuena, 81 SCRA 535 (1978); People vs. Ocaya, 83 SCRA 218 (1977); Martinez vs. Gironella, 65 SCRA 245 (1975); Pimentel vs. Salanga, 21 SCRA 160 (1967); Paredes vs. Abad, 56 SCRA 522 (1974); Umale vs. Villaluz, 51 SCRA 84 (1973); Villapando vs. Quitain, 75 SCRA 25 (1977); Gutierrez vs. Santos, 2 SCRA 249 (1961).

[31] Javier vs. Comelec, *supra*.

[32] Palang vs. Zosa, 58 SCRA 776, 778 (1974).

Cojuangco Jr vs PCGG : 92319-20 : October 2, 1990 : J. Gutierrez Jr : En Banc : Concurring Opinion Clean
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CONCURRING OPINION

GUTIERREZ, JR., J.:

I concur in the Court's decision penned by my distinguished colleague, Mr. Justice Emilio A. Gancayco. The PCGG cannot preside over these cases with an even hand, much less inspire the slightest belief in its impartiality and fairness.

Where the PCGG has sequestered properties, arrived at precise conclusions, and filed a CIVIL case for the recovery or forfeiture of those properties, it is disqualified from conducting any preliminary investigation of CRIMINAL charges pertaining to the same alleged ill gotten wealth. As an interested party in the CIVIL case, it is incapable of acting fairly in the CRIMINAL case. This is the Court's ruling.

I feel, however, that the Court should have gone further.

In the light of the unquestioned jurisdiction given to the Ombudsman by the Constitution and statute, the PCGG should no longer continue conducting preliminary investigations. It should limit itself to the preparation and filing of civil cases. Its conduct of preliminary investigations is so colored by the basic reason for its creation, its institutional structure, and its obsession to recover everything that it perceives and suspects to be ill gotten wealth that it cannot help but run roughshod over fundamental requirements of fair play in criminal cases.

Nowhere is pre-judgment so evident as in this case.

In filing the civil case against Mr. Cojuangco, the PCGG has concluded with certainty that he is guilty of "misappropriation and theft of public funds, plunder of the nation's wealth, extortion, blackmail, bribery, embezzlement, and other acts of corruption, betrayal of public trust and brazen abuse of power, as more fully described below, all at the expense and to the grave irreparable damage of Plaintiff and the Filipino people." (See complaint in CC 0033, Sandiganbayan, pp. 2 and 3) Mr. Cojuangco has been asked to pay more than P100 Billion in damages. He was placed on the "hold order" lists of PCGG and prohibited from coming home to defend himself. His wife, children, and grandchildren hold cancelled passports and are indefinitely exiled.

On January 31, 1990 when the preliminary investigation was to be conducted, a voluminous motion to inhibit the PCGG was filed by the petitioner. It took the PCGG Prosecutor exactly ten (10) minutes to deny the motion and pass upon the complex constitutional and jurisdictional issues. The Supreme Court needed several months to deliberate and resolve the same issues.

Apart from its having been created for the sole purpose of recovering the ill gotten wealth of ex-President Marcos, his relatives and cronies, the make-up of the PCGG prevents it from being independent. The Chairman and members serve at the absolute pleasure of the President. The law prescribes no qualifications for their appointment. The law does not mention future appointments.

The record is replete with incidents of non-objectivity. The petitioner has repeatedly filed motions to inspect the records of his former companies to enable him to defend himself. Motions which an ordinary Fiscal, Prosecutor, or Judge would routinely grant are denied. The Supreme Court itself in, G.R. No. 91741 has ruled that the petitioner had been singled out by the PCGG and given biased treatment. In that same case, the Sandiganbayan found no probable cause for the arrest of Mr. Cojuangco. We sustained the Sandiganbayan.

The other issue which the Court should have explored further is the constitutional right of all accused persons to equal protection of the law.

As earlier stated, the appointment, tenure, functions, and objectives of the PCGG prevent it from being fair and

objective. Its actions in this case show that indeed it cannot be fair and objective. It is a temporary office given a fixed mission. It has to accomplish that mission.

On the other hand, the Ombudsman is created by the Constitution. It is vested with "independent" powers. It enjoys fiscal autonomy. It is insulated from interference by the political departments. The qualifications for Ombudsman are found in the Constitution. They include "recognized probity and independence." He must have been a practising lawyer or Judge for at least ten (10) years. The incumbent Ombudsman has served in the Supreme Court, Court of Appeals, Court of First Instance, Department of Justice and high level fact finding committees. He was at the top of his class at the U.P. College of Law and has been a distinguished Professor of Law for decades. He was nominated and appointed Ombudsman on the record of his unquestioned competence, intellectual skills, integrity, and independence.

In the light of the above considerations, persons who appear before the PCGG and not the Ombudsman are clearly denied the equal protection guaranteed by the Constitution. There is no substantial basis for some respondents to appear before the biased and less competent PCGG while others appear before the impartial and more competent Ombudsman. The line drawn between public officials in office before February 25, 1986 and those in public office after February 25, 1986 is arbitrary and discriminatory. There are no substantial distinctions permitting a valid classification. And as stressed by the petitioner, is there a substantial distinction between those who committed graft and corruption under former President Marcos and those who are now committing (according to media and the Roman Catholic hierarchy) graft and corruption under President Aquino? The petitioner argues:

"The violation of equal protection thus becomes clear. It is not four years after EDSA. Three years after the ratification of the new Constitution. Must there be one kind of justice for the 'victors', another for the 'vanquished'? Is there not but one Filipino under the Constitution? There is no cogent reason why the liberty of those who were associated with former President Marcos should lie in the hands of PCGG and not in the Ombudsman who is independent of the President, and, of course, the Solicitor General, and is precisely mandated by the Constitution to deal with draft and corruption cases.

It is thus a denial of equal protection of the law that the petitioner has been subjected to preliminary investigation for violation of R.A. No. 3019 by PCGG rather than by the Ombudsman." (Petitioner's Memorandum, p. 41)

Impartiality and fundamental fairness are inherent rights of all persons brought before our criminal justice system. The social justice provisions of the Constitution mandate that the State must take special measures to protect these rights when the accused are the outcasts and the poor or belong to a group which is ignored, disliked, or hated by those currently in power.

During the Marcos administration, a top leader of the then opposition was ordered prosecuted in what were clearly railroaded proceedings. The Court struck down the charade of a preliminary investigation and among, other things, stated:

"The purpose of preliminary investigation is to secure the innocent against hasty, malicious and oppressive prosecution, and to protect him from an open and public accusation of crime, from the trouble, expense and anxiety of a public trial, and also to protect the state from useless and expansive trials. (Trocio v. Manta, 118 SCRA 241; citing Hashim v. Boncan, 71 Phil. 216). The right to a preliminary investigation is a statutory grant, and to withhold it would be to transgress constitutional due process. (See People v. Oandasa 25 SCRA 277) However, in order to satisfy the due process clause it is not enough that the preliminary investigation is conducted in the sense of making sure that a transgressor shall not escape with impunity. A preliminary investigation serves not only the purposes of the State. More important, it is a part of the guarantees of freedom and fair play which are birthrights of all who live in our country. It is, therefore, imperative upon the fiscal or

the judge as the case may be, to relieve the accused from the pain of going through a trial once it is ascertained that the evidence is insufficient to sustain a prima facie case or that no probable cause exists to form a sufficient belief as to the guilt of the accused. Although there is no general formula or fixed rule for the determination of probable cause since the same must be decided in the light of the conditions obtaining in given situations and its existence depends to a large degree upon the finding or opinion of the judge conducting the examination, such a finding should not disregard the facts before the judge nor run counter to the clear dictates of reason (See *La Chemise Lacoste, S.A. v. Fernandez*, 129 SCRA 391). The judge or fiscal, therefore, should not go on with the prosecution in the hope that some credible evidence might later turn up during trial for this would be a flagrant violation of a basic right which the courts are created to uphold. It bears repeating that the judiciary lives up to its mission by vitalizing and not denigrating constitutional rights. So it has been before. It should continue to be so." (*Salonga v. Cruz Paño*, 134 SCRA 438, 461-462)

The Court today can do no less. It has to apply the same yardstick to the PCGG. The same guarantees of fairness and justice in this decision of the Court rendered during the time of Mr. Marcos belong in equal measure to petitioner Cojuangco and all who appear before the PCGG during the term of President Aquino.

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