EN BANC

G.R. No. 245981 (*Neri J. Colmenares, et al. v. Rodrigo R. Duterte, President of the Republic of the Philippines, et al.*)

G.R. No. 246594 (*Neri J. Colmenares, et al. v. Rodrigo R. Duterte, President of the Republic of the Philippines, et al.*)

Promulgated:

August 9, 2022

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CONCURRENCE

LAZARO-JAVIER, *J*:

I concur.

Antecedents

On October 20, 2016, the **Government of the Republic of the Philippines (GRP)**, represented by the **Department of Finance (DOF)**, and the **Export-Import Bank of China (EXIM Bank)** entered into a **Memorandum of Understanding on Financing Cooperation (MOU)**. The MOU was intended as a precursor to more binding and detailed loan agreements for GRP-nominated infrastructure projects.

Thereafter, the **Department of Foreign Affairs (DFA)** transmitted various *Notes Verbale* to the **Embassy of the People's Republic of China (PRC Embassy)**, proposing the process for activating and utilizing the financing arrangement. The **Chinese Ministry of Commerce (MOFCOM)** sent out a Reply Note agreeing to the following procedure:

- *first*, the DOF will submit a request for preferential/concessional loan financing for priority projects to the Chinese Government, through the PRC Embassy;

- *second*, the Chinese Government would proffer its considerations and provide a list of at least three qualified, legitimate, and reputable Chinese contractors for the project;

- *third*, the relevant **implementing agency (IA)** would conduct **Limited Competitive Bidding (LCB)** among the recommended Chinese

contractors, and finalize the procurement by signing the relevant commercial contract; and,

- *fourth*, the DOF would submit the required documents to EXIM Bank which will conduct its due diligence; and *finally*, the DOF, on behalf of the GRP and EXIM Bank would sign the loan agreement and any guarantee agreement.

Chico River Pump Irrigation Project

The **Chico River Pump Irrigation Project (CRPIP)**, with the National Irrigation Authority as IA, was nominated for financing assistance. Consequently, the MOFCOM recommended Chinese contractors, which the DOF relayed to the NIA for vetting. The NIA conducted a background check by inquiring from various government agencies regarding ongoing transactions with the recommended contractors. Then, the NIA Bids and Awards Committee adopted Resolution No. CW-LCB 2018-1 recording the conduct of the requisite LCB, declaring China CAMC Engineering Co., Ltd. as the bidder with the lower calculated and responsive bid, recommending the approval of the award and issuance of a notice to that effect and urging the execution of a contract between NIA and China CAMC.

Consequently, the **Bangko Sentral ng Pilipinas (BSP) Monetary Board (MB)** adopted Resolution No. 305 dated February 22, 2018 approving-in-principle the proposed loan of up to $70 Million for CRPIP conditioned on certain documentary submissions, deposit arrangements, parameters for subsequent negotiations and approvals and compliance with applicable laws. Thereafter, the **CRPIP Loan Agreement** was executed on April 10, 2018 between EXIM Bank as lender and the GRP as borrower. The MB gave its Final Approval to the CRPIP Loan Agreement worth $62,086,837.82 on May 17, 2018.

New Centennial Water Source-Kaliwa Dam Project

The **New Centennial Water Source-Kaliwa Dam Project (NCWS)** to be implemented by the **Metropolitan Waterworks and Sewerage System (MWSS)** was also nominated for financing assistance. The DOF and the **National Economic Development Authority (NEDA)** instructed the MWSS to review the project's financing strategy in light of the MOU. The MWSS Board of Trustees confirmed the project cost to be ₱10.857 Billion. Subsequently, the DOF forwarded the shortlist of MOFCOM-endorsed Chinese contractors to MWSS and urged the MWSS to vet the recommended firms. Thereafter, the MWSS conducted the LCB where China Energy Engineering Corporation Limited emerged with the lowest calculated bid. The MWSS then approved the proposed contract, authorizing its administrator to sign and submit the same to the DOF for loan processing.

The DOF endorsed MWSS's proposed loan to the MB for approval-in-principle. On September 28, 2018, the MB approved the loan in principle through Resolution No. 1581, imposing conditions necessary for final approval. Eventually, the **NCWS Loan Agreement** was entered into on November 20, 2018 between EXIM Bank as lender and the GRP as borrower. The MB gave its Final Approval to the NCWS Loan Agreement worth $211,214,646.54 on June 6, 2019.

The CRPIP Loan Agreement and the NCWS Loan Agreement (collectively, Loan Agreements) contain identical stipulations. Petitioners in G.R. Nos. 245981 and 246594 filed their respective petitions to assail the validity of the Loan Agreements, enjoin their enforcement, and seek the disclosure of relevant documents. Ultimately, petitioners pray that the Loan Agreements and the implementation thereof be declared unconstitutional and illegal.

The Ruling

The *ponencia* ruled on the following issues:

1. On the procedural aspects: (a) President Rodrigo Duterte must be dropped as a respondent because he enjoys the presidential immunity from suit; (b) except as to the issues concerning access to documents and the Waiver of Immunity Clauses, the other substantive issues raised by the petitions may be the subject of judicial review; and (c) prohibition is a proper remedy in this case.

2. On the substantive aspects: (a) the Loan Agreements were executed with the necessary MB concurrence; (b) the Loan Agreements are exempt from our procurement laws pursuant to Republic Act No. 9184 (RA 9184), and the constitutional policy to give preference to qualified Filipinos in the grant of rights, privileges, and concessions covering the national economy and patrimony does not mean monopoly only for Filipino nationals; and (c) the constitutional policy on the pursuit of independent foreign relations is a motherhood statement that cannot be used to nullify the Loan Agreements' arbitration clauses.

The *ponencia* upheld the following provisions in the Loan Agreements:

> 8.4 Governing Law This Agreement as well as the rights and obligations of the Parties hereunder shall be **governed by and construed in accordance with the laws of China**.
>
> 8.5 **Any dispute arising out of or in connection with this Agreement shall be resolved through friendly consultation. If no**

> **settlement can be reached through such consultation, each party shall have the right to submit such dispute to the China International Economic and Trade Arbitration Commission (CIETAC) [Hong Kong International Arbitration Centre (HKIAC)] for arbitration.** The arbitration shall be conducted in accordance with the CIETAC's [HKIAC] arbitration rules in effect at the time of applying for arbitration. The arbitral award shall be final and binding upon both parties. The arbitration shall take place in Beijing. [The seat of arbitration shall be in Hong Kong. The arbitration shall be conducted in English. The Arbitral Tribunal shall consist of three (3) Arbitrators which shall be appointed pursuant to the arbitration rules of HKIAC.]
>
> 8.6 The arbitral award obtained in accordance with this Article against the Borrower will be recognized and be enforceable in the Republic of the Philippines provided that: (a) the arbitral tribunal had jurisdiction over the subject matter of the action in accordance with the jurisdictional rules; (b) the Republic of the Philippines had notice [Borrower had prompt notice] of the proceedings; (c) the arbitral award was not obtained through collusion or fraud, and such award was not based on a clear mistake of fact or law; and (d) the arbitral award is not contrary to public policy in the Republic of the Philippines.

It recognized party autonomy as being impervious to the State Policy of an *independent and national interest-based foreign policy* under Article II, Section 7 of the *Constitution*.

The *ponencia,* too, upheld and applied Section 4, Republic Act No. (RA) 9184, *Government Procurement Reform Act*, which immunizes the provisions of any treaty, international or executive agreements from RA 9184's coverage:

> Scope and Application. — This Act shall apply to the Procurement of Infrastructure Projects, Goods and Consulting Services, regardless of source of funds, whether local or foreign, by all branches and instrumentalities of government, its departments, offices and agencies, including government-owned and/or -controlled corporations and local government units, subject to the provisions of Commonwealth Act No. 138. Any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed.

It ruled that the hallmarks of RA 9184 of *transparency*, *competitiveness,* and *public monitoring* can be trumped by contrary provisions in any treaty or international or executive agreement.

What is clear from the *ponencia* is the **sovereign immunity** accorded to the Loan Agreements that is **auto-limited**[1] to some degree **solely** by the provisions of the Loan Agreements themselves.

As it was, petitioners utterly failed to muster and adduce evidence-based facts of the **egregious** impact and consequences of the Loan Agreements and the projects they intend to fund, if and when they are implemented. The benefits of establishing evidence-based facts in determining the relevance of our State Policies in relation to international loan agreements in general cannot be overemphasized. It is **through these facts** that we would be able to witness the social evils that the State Policies are meant to combat and *overcome*.[2] When these facts are available, and they show concretely why the State Policies were enacted and what they were enacted to *undo*, for being anathema to our core existence as a country and nation, I am sure that the Court will be the first to grab on to the State Policies to nullify **egregious** governmental acts.

Indeed, petitioners would have better served their rightful cause had they developed more nuanced bases than what they already alleged, for resorting to **public policy** in assailing the international Loan Agreements. This is because their argument is *not* self-evident. It needs facts. It requires patterns of conduct. Petitioners have to *prove* that these Loan Agreements are *contrary to public policy*. This means they should have had an evidentiary record to *show*, not *just say*, that the Loan Agreements –

> ... [have] a tendency to injure the public, is against the public good, or contravenes some established interests of society, or is inconsistent with sound policy and good morals, or tends clearly to undermine the security of individual rights, whether of personal liability or of private property.... [t]he illegality or immorality [of these loan agreements have reached] a certain threshold such that, enforcement of the same would be against Our State's fundamental tenets of justice and morality, or would blatantly be injurious to the public, or the interests of the society.[3]

This is a mouthful of what *contrary to public policy* means which petitioners have to **prove painstakingly** vis-à-vis the challenged Loan Agreements. The standard requires facts. Facts are brought about by evidence. Taken individually or together, evidence-based facts produce proof. Only

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1 See *Tañada v. Angara*, 338 Phil. 546, 593 (1997), citing *Reagan v. Commissioner of Internal Revenue*, 141 Phil. 621, 625 (1969), where the Court discussed the concept of auto-limitation, *viz.*: "It is to be admitted that any State may by its consent, express or implied, submit to a restriction of its sovereignty rights. That is the concept of sovereignty as auto-limitation which, in the succinct language of Jellinek, 'is the property of a state-force due to which it has the exclusive capacity of legal-self determination and self-restriction.' A State then, if it chooses to, may refrain from the exercise of what otherwise is illimitable competence."

2 See, e.g., if we have facts showing that "China's loans to other countries are causing 'hidden' debt. That may be a problem," CNBC at https://www.cnbc.com/2019/06/12/chinas-loans-causing-hidden-debt-risk-to-economies.html (June 11, 2019) (last accessed on April 22, 2022), or Helmut Reisen, "Is China Actually Helping Improve Debt Sustainability in Africa?," G-24 Policy Brief No. 9 at https://www.oecd.org/dev/39628269.pdf (last accessed on April 22, 2022).

3 *Mabuhay Holdings Corporation v. Sembcorp Logistics Limited*, G.R. No. 212734, December 5, 2018.

when the facts have settled can the Court meaningfully come in. We cannot short-circuit this process without upsetting the government order. This is the rule, no matter how valid and noble the cause is. The Court has to locate itself and perform its work within *the system*. I am reminded of what a young Filipino legal luminary once observed to be *vigilante lawyering* –

> But this is the natural outcome when we constantly push institutions to bend to politics. We care only about results. We dismiss underlying legal principles as technicalities, as malleable and negotiable, at least for our side.... Are we willing to be loyal to law itself above the political fray, to rebuke legal vigilantism using outlandish cases, even the ones that suit us? If not, Sisyphus' lament is that we cannot protest how laws are never followed. Law ultimately draws strength not from intellect, but from society's conviction.[4]

The invocation of public policies, especially the State Policies in our *Constitution*, as an argument to invalidate juridical acts of the government, *necessarily requires* the **elucidation of adjudicative facts** including –

- what the alleged public policy is in relation to the claim or claims before the Court – its cause, purpose, nature, breadth, and consequences, together with the societal ills it seeks to address and how;

- what the alleged government's breach of the public policy is all about;

- what and how the breach's impact is on the public policy;

- validity of the governmental objectives;

- reasonableness and proportionality of the means used in relation to the goals the government seeks to achieve, *i.e.*, there must have been as little infringement as possible to the alleged public policy;

- remedial measures, like compensation or other incentives, to alleviate the impact of the breach to the public policy; and,

- manner and extent of consultation if any with the affected sectors.

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[4] Oscar Franklin Tan, *We must end vigilante lawyering*, Sisyphus Lament, at https://opinion.inquirer.net/111677/must-end-vigilante-lawyering#ixzz7R736sNbq (March 12, 2018) (last accessed on April 22, 2022).

In light of the importance and the impact which the *ponencia* or any similar decisions may have in the future, the Court has every right to expect and indeed to insist upon the careful preparation and presentation of a factual background. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion as to the future impact of the impugned Loan Agreements and the result of this *ponencia* pertaining to it may be of great assistance as a precedent. To underscore the importance of an evidentiary record, these facts may **prove to be the clincher** that will persuade the Court to invalidate a government act on the basis of specific public policies.

Decisions on the *Constitution* should not and must not be made in a factual vacuum. To attempt to do so would trivialize the State Policies if not the *Constitution* itself and may inevitably result in ill-considered opinions. The presentation of adjudicative facts is not a mere technicality; rather, it is essential to a proper consideration of the constitutional issues. A party cannot, by simply consenting to dispense with the factual background, require or expect the Court to deal with an issue such as this in a factual void. A decision on transcendental issues cannot be based upon the unsupported hypotheses of enthusiastic counsel.

ACCORDINGLY, I vote to dismiss the petition for failure to prove the invalidity of the assailed Loan Agreements or any portion thereof on the grounds alleged by petitioners.

AMY C. LAZARO-JAVIER
Associate Justice

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MARIA LUISA M. SANTILLA
Deputy Clerk of Court and
Executive Officer
OCC-En Banc, Supreme Court