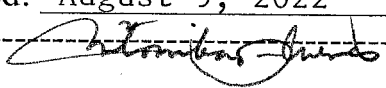


G.R. No. 245981 – Neri J. Colmenares, Bayan Muna Partylist Representative Carlos Isagani T. Zarate, Anakpawis Partylist Representative Ariel B. Casilao, ACT Teachers Partylist Representative Antonio L. Tinio, ACT Teachers Partylist Representative Francisca L. Castro, Kabataan Partylist Representative Sarah Jane I. Elago, Kilusang Magbubukid ng Pilipinas Chairperson Danilo H. Ramos, and Elma A. Tuazon, *petitioners*, v. Rodrigo R. Duterte, President of the Republic of the Philippines, Executive Secretary Salvador C. Medialdea, Department of Finance Secretary Carlos G. Dominguez III, National Economic and Development Authority Secretary Ernesto M. Pernia, Department of Justice Secretary Menardo I. Guevarra, National Irrigation Administrator Ricardo R. Visaya, *respondents*.

G.R. No. 246594 – Neri J. Colmenares, Bayan Muna Partylist Representative Carlos Isagani T. Zarate, Anakpawis Partylist Representative Ariel B. Casilao, Gabriela Women’s Partylist Representative Arlene D. Brosas, ACT Teachers Partylist Representative Francisca L. Castro, Kabataan Partylist Representative Sarah Jane I. Elago, Casey Anne Cruz, Francisca Tolentino, April Porteria, Jose De Leon A. Dulce, Maria Fineza Cosico, and Fr. Alex Bercasio, CSSR, *petitioners*, v. Rodrigo R. Duterte, President of the Republic of the Philippines, Executive Secretary Salvador C. Medialdea, Metropolitan Waterworks and Sewerage System Administrator Reynaldo V. Velasco, Department of Finance Secretary Carlos G. Dominguez III, National Economic and Development Authority Secretary Ernesto M. Pernia, Office of the Government Corporate Counsel Elpidio J. Vega, and Department of Justice Secretary Menardo I. Guevarra, *respondents*.

Promulgated: August 9, 2022

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CONCURRING OPINION

GAERLAN, J.:

I concur in the well-written *ponencia* of our esteemed colleague, Justice Jhosep Y. Lopez. I write separately to express my thoughts on the legal foundations of the sovereign borrowing power.

*Nature and allocation of the
sovereign borrowing power in
Philippine law*

The sovereign borrowing power is but one manifestation of the state's power to incur obligations and enter into contracts, which is in turn an inherent component of state sovereignty.¹ The sovereign borrowing power is normally deployed as a tool of fiscal policy, alongside taxation and money printing;² and is therefore often vested in the legislature, which is generally vested with the "power of the purse." In *Perry v. United States*:³

[T]he right to make binding obligations is a competence attaching to sovereignty. In the United States, sovereignty resides in the people, who act through the organs established by the Constitution. x x x The Congress as the instrumentality of sovereignty is endowed with certain powers to be exerted on behalf of the people in the manner and with the effect the Constitution ordains. The Congress cannot invoke the sovereign power of the people to override their will as thus declared. The powers conferred upon the Congress are harmonious. The Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power vital to the Government, — upon which in an extremity its very life may depend. The binding quality of the promise of the United States is of the essence of the credit which is so pledged. x x x⁴

Thus, the United States Constitution, portions of which were in force in this jurisdiction⁵ until November 15, 1935, expressly provides that "the Congress shall have power to borrow money on the credit of the United States."⁶ Likewise, under Title XII of the 1899 Malolos Constitution, the government can borrow money on the "credit of the Nation"⁷ only "in accordance with the provisions of this Constitution,"⁸ and when it is "authorized by special law";⁹ with the further limitation that "no debt shall be contracted unless the means of paying the same are also voted upon."¹⁰

As applied to the Philippines under the American regime, the United States Congress, through Sections 66 and 70 of the Philippine Bill of 1902,¹¹ authorized the then Government of the Philippine Islands to permit municipalities, including the City of Manila, to "incur indebtedness, borrow

¹ *Perry v. United States*, infra note 3.

² "The traditional channels through which a sovereign State raises financial resources are taxation, money printing, and borrowing." Mauro Megliani, SOVEREIGN DEBT: GENESIS - RESTRUCTURING - LITIGATION (2015), p. 3.

³ 294 U.S. 330 (1935).

⁴ Id. at 353.

⁵ See *United States v. Dorr*, 2 Phil. 269 (1903), affirmed in *Dorr v. United States*, 195 U.S. 138 (1904); *Smith, Bell & Co. (Ltd.) v. Natividad*, 40 Phil. 136 (1919); *31st Infantry Post Exchange v. Posadas, Jr.*, 54 Phil. 866 (1930); *Yu Cong Eng v. Trinidad*, 47 Phil. 385 (1925); *Rubi v. Provincial Board of Mindoro*, 39 Phil. 660 (1919).

⁶ United States Constitution, Article I, Section 8.

⁷ 1899 MALOLOS CONSTITUTION, Title XII, Article 85, as translated into English in Sulpicio Guevara, THE LAWS OF THE FIRST PHILIPPINE REPUBLIC (THE LAWS OF MALOLOS) 1898-1899 (1998), p. 116.

⁸ Id., Article 86.

⁹ Id., Article 85, id.

¹⁰ Id., Article 86, id.

¹¹ United States: An Act Temporarily to provide for the administration of the affairs of the civil government in the Philippine Islands, and for other purposes, 32 Stat. 6912 (1902).

money, and to issue and sell x x x, upon such terms and conditions as it may deem best, registered or coupon bonds x x x,” for the purpose of providing “all kinds of municipal betterments and improvements in municipalities,” subject to the “consent and approval of the President and the Congress of the United States,” in the case of municipalities, and the approval of the President of the United States alone, in the case of the City of Manila. Section 64 of the same law authorized the Government of the Philippine Islands to incur indebtedness and issue bonds for the purpose of acquiring the friar lands. Later, Section 2(a)(6) of the Philippine Independence Act¹² provided that “[t]he public debt of the Philippine Islands and its subordinate branches shall not exceed limits now or hereafter fixed by the Congress of the United States; and no loans shall be contracted in foreign countries without the approval of the President of the United States.” This provision was retained as Section 1(6) of the Ordinance Appended to the original version of the 1935 Constitution.

Upon the full realization of Philippine independence in 1946, the sovereign borrowing power reverted to the Philippine legislature.¹³ Under the fiscal regime provided in the amended¹⁴ Article VI, Sections 18 and 19 of the 1935 Constitution, *bills authorizing the increase of the public debt*, among other economic measures, must emanate from the House of Representatives, leading contemporary commentators to assert that the 1935 Constitution, as amended, made the House of Representatives “*responsible for the direction of the financial policy of the government and the economic life of the country.*”¹⁵ Furthermore, Article XVII, Section 1(3) thereof recognizes the effectivity of bonds “issued under authority of an Act of Congress of the United States by the Philippine Islands, or any province, city or municipality therein” and mandates the provision of funds for the payment thereof.

In 1948, through Republic Act (R.A.) No. 245,¹⁶ Congress delegated a portion of the sovereign borrowing power to the Secretary of Finance. Section 1 of said law provides in part:

SECTION 1. In order to meet public expenditures authorized by law or to provide for the purchase, redemption, or refunding of any obligations, either direct or guaranteed, of the Philippine Government, the

¹² United States: Pub. L. 73-127, 48 Stat. 456 (1934). More popularly known as the Tydings-McDuffie Act.

¹³ Vicente G. Sinco, PHILIPPINE POLITICAL LAW, (1950), pp. 211-212.

¹⁴ In 1940, the 1935 Constitution was amended to provide for a bicameral legislature. See *Philippine Constitution Association, Inc. v. Gimenez*, 122 Phil. 894 (1965); *Philippine Constitution Association, Inc. v. Mathay*, 124 Phil. 890 (1966), and concurring opinion of Zaldivar, J.; Brion, J., concurring in *Intellectual Property Association of the Philippines v. Ochoa*, 790 Phil. 276 (2016).

¹⁵ Vicente G. Sinco, supra note 12 at 209; 1 Lorenzo M. Tañada and Francisco Carreon, POLITICAL LAW OF THE PHILIPPINES, (1961), pp. 247-248.

¹⁶ AN ACT AUTHORIZING THE SECRETARY OF FINANCE TO BORROW TO MEET PUBLIC EXPENDITURES AUTHORIZED BY LAW, AND FOR OTHER PURPOSES.

Secretary of Finance, with the approval of the President, after consultation with the Monetary Board, is authorized to borrow from time to time on the credit of the Republic of the Philippines such sum or sums as in his judgment may be necessary, and to issue therefor evidences of indebtedness of the Philippine Government. Such evidences of indebtedness may be of the following types:

(a) Treasury bills issued on a discount basis and payable at maturity without interest. Treasury bills may be offered for sale either on a competitive basis or at a fixed rate of discount and may be made payable at any date not later than one year from the date of issue.

(b) Interest-bearing certificates of indebtedness having maturities not exceeding eighteen months from the date of issue.

(c) Interest-bearing notes having maturities of not less than one or more than five years from the date of issue.

The Secretary of Finance, in consultation with the Monetary Board, shall prescribe the form or forms, the interest and discount rates, the denominations, maturities, negotiability, convertibility, call and redemption features, and all other terms and conditions of issuance, placement, sale, servicing, redemption, and payment of all evidences of indebtedness issued under the authority of this Act: Provided, however, That with respect to treasury bills, certificates of indebtedness, and notes, such terms and conditions shall be within the limitations prescribed in subsections (a) through (c) of the preceding paragraph: And provided, further, That the actual issue, placement, servicing, and redemption of such securities shall be done through the Central Bank of the Philippines, as provided in sections one hundred and twenty-two, one hundred and twenty-three and one hundred and twenty-four of the Central Bank Act. The evidences of indebtedness issued under the authority of this section may be made payable, both as to principal and interest, in any readily convertible foreign currency. x x x

In *Spouses Constantino v. Cuisia*,¹⁷ the Supreme Court held that R.A. No. 245 expressly authorizes the Secretary of Finance to enter into foreign borrowing contracts.¹⁸

In 1966, through R.A. No. 4860,¹⁹ Congress again delegated a portion of the sovereign borrowing power, particularly the power to obtain and

¹⁷ 509 Phil. 486 (2005).

¹⁸ Id. at 520.

¹⁹ AN ACT AUTHORIZING THE PRESIDENT OF THE PHILIPPINES TO OBTAIN SUCH FOREIGN LOANS AND CREDITS, OR TO INCUR SUCH FOREIGN INDEBTEDNESS, AS MAY BE NECESSARY TO FINANCE APPROVED ECONOMIC DEVELOPMENT PURPOSES OR PROJECTS, AND TO GUARANTEE, IN BEHALF OF THE REPUBLIC OF THE PHILIPPINES, FOREIGN LOANS OBTAINED OR BONDS ISSUED BY CORPORATIONS OWNED OR CONTROLLED BY THE GOVERNMENT OF THE PHILIPPINES FOR ECONOMIC DEVELOPMENT PURPOSES INCLUDING THOSE INCURRED FOR PURPOSES OF RE-LENDING TO THE PRIVATE SECTOR, APPROPRIATING THE NECESSARY FUNDS THEREFOR, AND FOR OTHER PURPOSES.

guarantee loans and other forms of indebtedness from **foreign sources**, this time to the President. The pertinent portions of the statute provide:

SECTION 1. The President of the Philippines is hereby authorized in behalf of the Republic of the Philippines to contract such loans, credits and indebtedness with foreign governments, agencies or instrumentalities of such foreign governments, foreign financial institutions, or other international organizations, with whom, or belonging to countries with which, the Philippines has diplomatic relations, as may be necessary and upon such terms and conditions as may be agreed upon, to enable the Government of the Republic of the Philippines to finance, either directly or through any government office, agency or instrumentality or any government-owned or controlled corporation, industrial, agricultural or other economic development purposes or projects authorized by law x x x. The authority of the President of the Philippines as herein provided shall include the power to issue, for the purposes hereinbefore stated, bonds for sale in the international markets the income from which shall be fully tax-exempt in the Philippines.

x x x x

SECTION 3. The President of the Philippines is, likewise, hereby authorized, in behalf of the Republic of the Philippines, to guarantee, upon such terms and conditions as may be agreed upon, foreign loans extended directly to, or bonds for sale in international markets issued by, corporations owned or controlled by the Government of the Philippines for industrial, agricultural or other economic development purposes or projects authorized by law x x x.

In the 1973 Constitution, as amended, this delegated authority was transformed into a direct vestiture of sovereign borrowing power in the executive. Article IX, Section 15 thereof provides that “[t]he Prime Minister²⁰ may contract and guarantee foreign and domestic loans on behalf of the Republic of the Philippines, subject to such limitations as may be provided by law.” The change was justified as “being necessitated by the imperatives of sophisticated modern economics”;²¹ since the President is the official best-supplied with information and assistance to determine not only the advisability of obtaining loans but also the country’s capacity to utilize such credit.²²

The transfer of sovereign borrowing prerogatives from the legislature to the executive was confirmed in the present Constitution, Article VII, Section 20 of which authorizes the President to contract foreign loans

²⁰ Under the 1973 CONSTITUTION, Article IX, Section 1, executive power was vested in the Prime Minister.

²¹ Miriam Defensor Santiago, *THE 1972 CONSTITUTION: A GUIDE FOR STUDY AND REFERENCE*, (1973), p. 105.

²² II Hector S. De Leon and Hector M. De Leon, Jr., *PHILIPPINE CONSTITUTIONAL LAW: PRINCIPLES AND CASES*, (2017), p. 439, citing Miguel P. Cuaderno, Sr., “The Cabinet Government,” in Cirilo Roy Montejó, *On the 1973 Constitution*, p. 151.

without legislative approval.²³ The implications of this transformation were first explored in *Spouses Constantino v. Cuisia*,²⁴ where the Supreme Court rejected the assertion that the sovereign borrowing power must be exercised personally by the President. The Court explained that the sovereign borrowing power, as vested in the President by the Constitution, is now subject to the doctrine of qualified political agency, for two reasons: 1) having the President personally exercise every aspect of the power “would negate the very existence of cabinet positions and the respective expertise which the holders thereof are accorded and would unduly hamper the President’s effectivity in running the government”;²⁵ and 2) the sovereign borrowing power, as already mentioned, is but a consequence of the state’s power to enter into binding obligations, and thus arises not from extraordinary or exceptional circumstances, but from the “established functions of governance.”²⁶ Moreover, any exercise of the power by the President’s delegates remains subject to the President’s consent, ratification, or repudiation.²⁷

Nevertheless, the President’s sovereign borrowing power remains subject to the following controls: 1) limitations provided by law; 2) regular reporting to Congress; 3) **prior concurrence** and **regulation** by the Monetary Board; and 4) scrutiny by the public. These controls fall into three categories: legislative, administrative, and popular.

Legislative controls: Legislation and reporting

Section 20, Article VII of the 1987 Constitution explicitly states that the President’s sovereign borrowing powers are *subject to such limitations as may be provided by law*. This legislative control over the sovereign borrowing power is reiterated in Article XII, Section 21, with respect to foreign loans. Being an inherent component of sovereignty and an indispensable tool of fiscal policy, the sovereign borrowing power has traditionally been lodged in the legislature, which is the body elected directly by the people to represent them in matters of *policymaking*. As already mentioned, the transfer of the sovereign borrowing power to the executive was primarily motivated by reasons of economics and expediency, to enhance the State’s speed and flexibility in conducting international credit operations. Thus, the 1986 Constitutional Commission recognized that “Congress will enact — they already have — a Foreign Borrowings Act,”²⁸

²³ Id. Legislative approval was done away with for reasons of expediency and to prevent the use of such approval as a political bargaining tool. De Leon and De Leon Jr., id. at 440. See also 2 RECORD OF THE CONSTITUTIONAL COMMISSION (1990), p. 393.

²⁴ Supra note 16.

²⁵ Id. at 516.

²⁶ Id. at 518.

²⁷ Id. at 519.

²⁸ REPUBLIC ACT NO. 4860.

and put all the conditions under which loans may be incurred.”²⁹ By empowering Congress to control the President’s sovereign borrowing power through legislation, the Constitution balances the primacy of the legislature in the realm of fiscal policy and the primacy of the executive in the realms of diplomacy and policy implementation.

Thus, the Supreme Court has held that the limitations set by Congress when it initially delegated the sovereign borrowing power to the executive remain applicable even after the power has been vested directly in the President. In *Spouses Constantino v. Cuisia*,³⁰ the Supreme Court held that the parameters provided in R.A. No. 245 remain applicable to the current constitutional iteration of the sovereign borrowing power. While the sovereign borrowing power may be exercised by the Secretary of Finance, such exercise of power must be made with the approval of the President and **after** consultation with the Monetary Board.³¹ Similarly, the *ponencia* correctly rules that the current iteration of the sovereign borrowing power remains circumscribed by the parameters set forth not only in the original delegation laws, *i.e.*, R.A. No. 245 and R.A. No. 4860, but also in subsequent laws such as the New Central Bank Act, as amended.³²

The second form of legislative control over the sovereign borrowing power is found in the second sentence of Article VII, Section 20 of the Constitution:

The Monetary Board shall, within thirty days from the end of every quarter of the calendar year, submit to the Congress a complete report of its decisions on applications for loans to be contracted or guaranteed by the Government or government-owned and controlled corporations which would have the effect of increasing the foreign debt, and containing other matters as may be provided by law.

This provision is another manifestation of the constitutional effort to balance traditional legislative fiscal prerogatives with the expediency-based vestiture of the sovereign borrowing power in the executive. As explained by Commissioner Regalado, the legislature, as the representatives of the people who ultimately bear the burden of the sovereign debt, must be apprised of the Monetary Board’s sovereign debt decisions.³³ As the branch of the government traditionally entrusted with the state’s fiscal prerogatives, particularly the increase of the public debt, Congress is entitled to information on **all components** of the State’s fiscal operations, even when prerogatives over such particular components have been reallocated to the

²⁹ 3 RECORD OF THE CONSTITUTIONAL COMMISSION (1990), p. 639.

³⁰ Supra note 15.

³¹ Id. at 519.

³² REPUBLIC ACT NO. 7653, as amended by REPUBLIC ACT NO. 11211.

³³ 2 RECORD OF THE CONSTITUTIONAL COMMISSION (1990), pp. 396-397.

other branches of government. Furthermore, Congress can use the reports submitted by the Monetary Board as basis to exercise its investigatory powers if needed.³⁴

Popular controls: Public scrutiny

Article XII, Section 21 of the Constitution, as worded, was a compromise which omitted proposals to enshrine certain limitations on the sovereign borrowing power such as: 1) limiting the State's resort to foreign loans to "vital undertakings in line with the national development program"; and 2) empowering Congress to fix a determinate foreign debt ceiling.³⁵ These limitations were deemed too far into the realm of economic policy to be enshrined as constitutional fiat.³⁶ As an alternative, the Commission agreed to retain a third proposed limitation: making the terms and conditions of foreign loans obtained by the government available to the public, while vesting in Congress and in the Monetary Board the prerogative to set the conditions and the criteria under which the sovereign borrowing power shall be exercised. In accepting the compromise proposal which ultimately became Article XII, Section 21, Commissioner Garcia explained that:

It can be observed that the committee's proposal takes into account two things: the regulation of foreign loans and public information — that the information regarding foreign loans be made public.

I will accept this proposal with the understanding that **the section would treat as serious matters the nation's ability to pay and the fact that foreign borrowings are matters of interest to the majority, many of whom have to shoulder the actual payment.** And, therefore, ceilings are being imposed on interest and principal payments so that the priority will be placed on economic development, unlike economies in the Third World which very often have to sacrifice the benefits, the goods, the productive growth of the economy for the sake of repayment and debt servicing.³⁷ (Emphasis and underscoring supplied)

Thus, in its final form, Article XII, Section 21 enshrines a popular control on the sovereign borrowing power, by which the government is explicitly obliged to make information on the terms and conditions of foreign loans available to the public. Since the sovereign borrowing power is an inherent component of state sovereignty, it is only fitting that the people — who comprise an essential element of the State and are the ultimate bearers of the sovereign debt — be given the right to inquire into and be informed of the details of the exercise of this power. On this note, the Supreme Court has

³⁴ 5 RECORD OF THE CONSTITUTIONAL COMMISSION (1990), 937.

³⁵ 3 RECORD OF THE CONSTITUTIONAL COMMISSION (1990), 639.

³⁶ Id. at 617.

³⁷ Id. at 639.

consistently upheld the enforceability of the constitutional right to information on matters of public interest, subject only to limitations that may be imposed by Congress which must nevertheless be in line with the constitutional policy of full public disclosure.³⁸ In this particular case, the full disclosure is directly and explicitly ordered by the Constitution.

*Administrative controls: Regulation
and prior concurrence of the
Monetary Board*

One of the innovations introduced by the 1973 Constitution is the constitutional establishment of a central monetary authority with policymaking, supervisory, and regulatory powers in the areas of money, banking, and credit. Section 14, Article XV of the 1973 Constitution, as amended, states:

SEC. 14. The Batasang Pambansa shall establish a central monetary authority which shall provide policy direction in the areas of money, banking, and credit. It shall have supervisory authority over the operations of banks and exercise such regulatory authority as may be provided by law over the operations of finance companies and other institutions performing similar functions. Until the Batasang Pambansa shall otherwise provide, the Central Bank of the Philippines, operating under existing laws, shall function as the central monetary authority.

The “existing laws” referred to in the provision are primarily R.A. Nos. 245 and 265. R.A. No. 265³⁹ established the Central Bank of the Philippines as a corporate⁴⁰ governmental entity with the responsibility of “administer[ing] the monetary and banking system of the Republic.”⁴¹ As a corporate entity, the powers and functions of the Central Bank of the Philippines were exercised through a Monetary Board.⁴² As already mentioned, R.A. No. 245, which was enacted a mere three days before R.A. No. 265, gave the Monetary Board a consultative role in the exercise of the borrowing power delegated therein.

³⁸ *Pambansang Koalisyon ng mga Samahang Magsasaka at Manggagawa sa Niyugan v. Executive Secretary*, 685 Phil. 295 (2012); *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain*, 589 Phil. 387 (2008); *Valmonte v. Belmonte, Jr.*, 252 Phil. 264 (1989); *Legaspi v. Civil Service Commission*, 234 Phil. 521 (1987).

³⁹ AN ACT ESTABLISHING THE CENTRAL BANK OF THE PHILIPPINES, DEFINING ITS POWERS IN THE ADMINISTRATION OF THE MONETARY AND BANKING SYSTEM, AMENDING THE PERTINENT PROVISIONS OF THE ADMINISTRATIVE CODE WITH RESPECT TO THE CURRENCY AND THE BUREAU OF BANKING, AND FOR OTHER PURPOSES.

⁴⁰ REPUBLIC ACT NO. 265, Section 4.

⁴¹ Id., Section 2.

⁴² Id., Section 5.

Section 20, Article XII of the present Constitution retains and reiterates the establishment of the central monetary authority:

Section 20. The Congress shall establish an independent central monetary authority, the members of whose governing board must be natural-born Filipino citizens, of known probity, integrity, and patriotism, the majority of whom shall come from the private sector. They shall also be subject to such other qualifications and disabilities as may be prescribed by law. The authority shall provide policy direction in the areas of money, banking, and credit. It shall have supervision over the operations of banks and exercise such regulatory powers as may be provided by law over the operations of finance companies and other institutions performing similar functions.

Until the Congress otherwise provides, the Central Bank of the Philippines operating under existing laws, shall function as the central monetary authority.

In voting to approve on third reading the draft provisions of Article XII, Section 20 and Article VII, Section 20 which eventually became part of the present Constitution, Commissioner Lorenzo Sumulong explained the need to reiterate the independence of the central monetary authority:

Regarding the power of the President to contract and guarantee foreign loans, the one-man rule of President Marcos contracted and guaranteed foreign loans without any check. And there could be no check at all because he exercised not only executive power but also legislative power. Because of this absence of any check he was able to incur in the name of our Republic a foreign debt amounting to \$26 billion and if the interests are to be added it will exceed \$30 billion. That is why in this new Constitution, the President in exercising the power to contract or guarantee foreign loans, concurrence on the part of the monetary board is required. We are providing that the majority of the members of the monetary board shall come from the private sector; they shall not be subject to influence or dictation by the President so that there is an effective check now. x x x⁴³

In 1993, pursuant to the constitutional mandate, Congress established the Bangko Sentral ng Pilipinas (BSP) to serve as the independent central monetary authority.⁴⁴ Like its predecessor, the BSP is also a corporate governmental entity whose powers and functions are exercised by a Monetary Board.⁴⁵

As the body which discharges the powers and functions of the constitutionally designated central monetary authority, the Monetary Board has long been given certain prerogatives in the realm of sovereign

⁴³ 5 RECORD OF THE CONSTITUTIONAL COMMISSION (1990), p. 937.

⁴⁴ REPUBLIC ACT NO. 7653 (as amended), Section 2.

⁴⁵ Id. (as amended), Sections 5 and 6.

borrowing. In 1948, during the era of legislative supremacy in sovereign borrowing, Chapter V, Article III of R.A. No. 265 ordained the Monetary Board as the “financial advisor of the government.” In this capacity, Section 128 of said law mandated the Government, through the Secretary of Finance, to request the written opinion of the Monetary Board **before** undertaking **any credit operation abroad**. Likewise, Section 1 of the earlier-cited R.A. No. 245 provides for a consultative role for the Monetary Board in the formulation of terms and conditions governing the forms of indebtedness sanctioned under said law. Under R.A. No. 4860, the Monetary Board was tasked with recommending the projects which will be funded through foreign loans. Section 4 of R.A. No. 4860 further subjects sovereign borrowing operations to the provisions of Executive Order No. 236, series of 1957;⁴⁶ Section 4 of which authorizes the Monetary Board, among others, to “establish maximum limits governing aggregate disbursements from the proceeds of government securities which may be permitted in the ensuing fiscal year or other planning period.”

The present Constitution strengthens the Monetary Board’s financial advisory functions by giving it two prerogatives with respect to the sovereign borrowing power: **regulation** and **prior concurrence**.

Section 21, Article XII of the Constitution decrees in part that “[f]oreign loans may only be incurred in accordance with law and the regulation of the monetary authority.” The intent was to subject the President’s sovereign borrowing power to **both** legislative and administrative controls:

MR. MONSOD. We agree completely with the Commissioner’s sentiment on this and, as a matter of fact, the present government is already implementing this kind of strategy and approach, as he well knows. We are only trying to say here that Congress will enact — they already have — a Foreign Borrowings Act, and put all the conditions under which loans may be incurred. We also added regulations of the monetary authority because this is the authority that imposes the economic criteria, the terms and conditions, and so on, on the loans.

With respect to linking it to the capacity to pay, that is the very essence of the regulations and the law on foreign borrowings, and we just wanted to say that there are many alternatives to implement that. We do not want to preempt Congress or the monetary authority on these alternatives, but we agree with the principles and we make it of record.⁴⁷

⁴⁶ “Prescribing Procedures for the Planning of Development Finances, the Issuance of Government Securities, and the Disbursement of Proceeds.”

⁴⁷ 3 RECORD OF THE CONSTITUTIONAL COMMISSION (1990), p. 639.

The BSP has three unique attributes: 1) its creation, functions, and powers are particularly mandated in the Constitution but subjected to further delineation through statute; 2) it is a corporate governmental entity; and 3) it is an administrative agency which performs quasi-judicial, supervisory, and regulatory functions. In *Bank of Commerce v. Planters Development Bank*:⁴⁸

In *United Coconut Planters Bank v. E. Ganzon, Inc.*, the Court considered the BSP as an administrative agency, exercising quasi-judicial functions through its Monetary Board. It held:

A quasi-judicial agency or body is an organ of government other than a court and other than a legislature, which affects the rights of private parties through either adjudication or rule-making. The very definition of an administrative agency includes its being vested with quasi-judicial powers. The ever-increasing variety of powers and functions given to administrative agencies recognizes the need for the active intervention of administrative agencies in matters calling for technical knowledge and speed in countless controversies which cannot possibly be handled by regular courts. A "quasi-judicial function" is a term which applies to the action, discretion, etc., of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them, as a basis for their official action and to exercise discretion of a judicial nature.

Undoubtedly, the BSP Monetary Board is a quasi-judicial agency exercising quasi-judicial powers or functions. As aptly observed by the Court of Appeals, the BSP Monetary Board is an independent central monetary authority and a body corporate with fiscal and administrative autonomy, mandated to provide policy directions in the areas of money, banking and credit. It has power to issue subpoena, to sue for contempt those refusing to obey the subpoena without justifiable reason, to administer oaths and compel presentation of books, records and others, needed in its examination, to impose fines and other sanctions and to issue cease and desist order. Section 37 of Republic Act No. 7653, in particular, explicitly provides that the BSP Monetary Board shall exercise its discretion in determining whether administrative sanctions should be imposed on banks and quasi-banks, which necessarily implies that the BSP Monetary Board must conduct some form of investigation or hearing regarding the same. x x x

The BSP is not simply a corporate entity but qualifies as an administrative agency created, pursuant to constitutional mandate, to carry out a particular governmental function. To be able to perform its role as

⁴⁸ 695 Phil. 627 (2012).

central monetary authority, the Constitution granted it fiscal and administrative autonomy. In general, administrative agencies exercise powers and/or functions which may be characterized as administrative, investigatory, **regulatory**, quasi-legislative, or quasi-judicial, or a mix of these five, as may be conferred by the Constitution or by statute.

X X X X

X X X What the law grants the BSP is a continuing role to shape and carry out the country's monetary policy — not the authority to adjudicate competing claims of ownership over the securities it has issued — since this authority would not fall under the BSP's purposes under its charter.⁴⁹ (Emphasis supplied; citations omitted)

Given this background, I submit that the overarching role of the central monetary authority over the sovereign borrowing power is **regulatory** in nature. Nevertheless, the Constitution explicitly gave it another prerogative with respect to sovereign borrowing: the power of prior concurrence. This power is distinct from the BSP's regulatory power, which involves the imposition of economic parameters and administrative procedures on the exercise of the sovereign borrowing power.⁵⁰ The prior concurrence power gives the BSP the right to review and to recommend the amendment of the terms and conditions of specific exercises of the sovereign borrowing power, pursuant to the economic parameters it has set by virtue of its regulatory power thereover. Thus, when Commissioner Regalado explained that

[W]hile it is not stated here — although it says here that the prior concurrence of the Monetary Board is required — it is, of course, implicit therein that the Monetary Board shall act as may be provided by law. In fact, right now the powers of the Monetary Board are provided by law.⁵¹

this means that the Monetary Board's prior concurrence power is subject to the congressional power to: 1) fill in the details of the powers already conferred by the Constitution to the BSP, or 2) vest additional powers in the BSP.

As explained in the *ponencia*, the detailed steps for the exercise of the sovereign borrowing power with respect to foreign loans are provided in R.A. No. 4860, Letter of Instruction No. 128, series of 1974, and Administrative Order No. 99, series of 1993. These laws and issuances essentially provide for a three-stage process: 1) the borrowing agency seeks approval-in-principle from the BSP; 2) the parties to the loan negotiate the final terms and conditions thereof, subject to BSP review; and 3) after final

⁴⁹ Id. at 658-659, 666.

⁵⁰ Supra note 44.

⁵¹ 2 RECORD OF THE CONSTITUTIONAL COMMISSION (1990), p. 393.

review and negotiation, the Monetary Board issues a final approval, which will allow the borrower to draw on the loan. Likewise, the *ponencia* mentions that the BSP, pursuant to its regulatory prerogatives over the sovereign borrowing power, has synthesized the regulations on foreign exchange operations, sovereign credit, and non-sovereign borrowing into the 2021 Manual of Regulations on Foreign Exchange Transactions (FX Manual).⁵² With respect to sovereign borrowing from foreign sources, Sections 22 and 23, Chapter I, Part Three of the FX Manual retain the two-approval framework, thus:

Section 22. General Policy. The BSP shall regulate foreign/foreign currency loans/borrowings (including those in the form of bonds/notes/other debt instruments) so that these can be serviced in an orderly manner and with due regard to the economy's overall debt servicing capacity.

1. Projects/programs/purposes to be funded by the foreign/foreign currency loans/borrowings (including those in the form of bonds/notes/other debt instruments) must be legitimate and not contrary to laws, regulations, public order, public health, public safety, or public policy.

2. Foreign loans/borrowings (including those in the form of bonds/notes/other debt instruments and those covered by derivatives transactions) as well as foreign currency loans from banks operating in the Philippines to be obtained by the public sector as well as the private sector that will be publicly-guaranteed shall require prior BSP approval unless otherwise indicated in the FX Manual.

x x x x

7. To allow the BSP to determine the possible magnitude of foreign funding requirements of the economy for the succeeding year, all resident entities (public and private sectors) intending to obtain medium- and long-term foreign loans/borrowings (including offshore issuances of debt instruments) shall submit to the BSP, through the International Operations Department (IOD), their medium- and long-term foreign borrowings plan (FBP) using the prescribed form (Annex D.3) not later than end-September of each year for borrowings for the fourth quarter of the current year and the succeeding full year. Proposed onshore issuances by residents of debt instruments that require settlement in foreign currency shall likewise be reported in the FBP.

Any changes to the submitted plans shall be communicated in writing to the BSP, through the IOD, within two (2) weeks from availability of information for monitoring purposes.

x x x x

Section 23. Public Sector Loans/Borrowings –

⁵² <https://www.bsp.gov.ph/Regulations/MORFXT/MORFXT.pdf>. Accessed, March 30, 2022.

1. Prior Monetary Board approval shall be obtained for public sector foreign/foreign currency loans/borrowings, including issuances of the following except those covered by Section 23.2:

a. FX-denominated bonds/notes/other debt instruments, whether to be issued onshore or offshore; and

b. Peso-denominated bonds/notes/other debt instruments issued offshore, whether to be settled in foreign or local currency.

2. The following public sector loans shall not require prior BSP approval:

a. Short-term interbank borrowings; and

b. Short-term foreign currency loans of the following from banks operating in the Philippines that are duly reported to the BSP using the prescribed forms (Annexes E.4 and E.5):

i. Commodity and service exporters: Provided, That these loans are used to finance export-related import costs of goods and services as well as peso cost requirements.

Service exporters shall refer to Philippine residents engaged or proposing to engage in rendering technical, professional or other services which are paid for in FX.

Indirect exporters may likewise borrow in foreign currency from banks operating in the Philippines to fund export-related costs in FX and pesos. Indirect exporters shall refer to cottage/small and medium industries (producers/manufacturers) that have supply arrangements with direct exporters who are holders of an export letter of credit or a confirmed purchase order/sales contract from a foreign buyer.

ii. Producers/manufacturers, including oil companies and public utility firms: Provided, That the loans are used to finance import costs of goods and services necessary in the production of goods by the borrower concerned. Producers/manufacturers shall refer to Philippine residents that undertake the processing/conversion of raw materials into marketable form through physical, mechanical, chemical, or other means, or by special treatment, or a series of actions that result in a change in the nature or state of the products.

Public utility firms shall refer to business organizations that regularly supply the public with commodities or services such as electricity, gas, water, transportation, telegraph/telephone services and the like.

3. Applications for approval of foreign/foreign currency loans/borrowings shall be submitted using the prescribed form (Annex D.1), supported by required documents/information:

a. For approval-in-principle: Requests shall be filed before commencement of actual negotiations or issuance of mandate/commitment to foreign funders/arrangers; and

b. For final approval: Requests shall be filed after signing of the loan/borrowing documents but before drawdown/receipt of proceeds from loans and issuances of bonds/notes/other debt instruments.

Signed loan/borrowing documents/agreements submitted for final approval shall not be notarized.

4. Proceeds of foreign/foreign currency loans/borrowings (including those from issuances of bonds/notes/other debt instruments) of the National Government, its political subdivisions and instrumentalities, and GOCCs shall be deposited with the BSP pending utilization, pursuant to Section 113 of Republic Act (R.A.) No. 7653 (The New Central Bank Act) dated 14 June 1993. (Citations omitted)

As it stands, the framework for the exercise of the sovereign borrowing power is defined by a mixture of statutes and administrative issuances by the President and the BSP. It must be emphasized that these issuances derive their binding force and effect either from the sovereign borrowing power itself (as vested in the President) or the regulatory prerogatives vested by the Constitution in the legislature and in the BSP over the sovereign borrowing power. These regulatory prerogatives, although related, are distinct from the prior concurrence power particularly vested in the Monetary Board by the Constitution.

With these considerations in mind, I concur in the *ponencia*'s finding that both loans in question were compliant with the currently prevailing framework for regulating exercises of the sovereign borrowing power. With respect to the CRPIP Loan Agreement, the National Government even refrained from warranting the final approval of the loan,⁵³ precisely because such final approval can only be secured upon the BSP's independent review of the loan's final terms and conditions, as signed. Nevertheless, it must be noted that petitioners limited themselves to assailing the validity of the CRPIP and NCWS Loan Agreements. They do not question the validity or the constitutionality of the prevailing "approval-negotiation-approval" framework developed under Letter of Instruction No. 128, series of 1974, and Administrative Order No. 99, series of 1993, and reiterated in the aforementioned provisions of the BSP's FX Manual. Thus, I submit that the question of whether these issuances are compliant with the **prior concurrence** requirement of the Constitution remains open. Ultimately, the

⁵³ Draft *ponencia*, p. 22.

questions are: 1) Does the Monetary Board's power of prior concurrence include the power to *define* that very concept? 2) Is the power to define and operationalize the concept of prior concurrence vested in the BSP pursuant to its regulatory prerogatives over the sovereign borrowing power; or is it lodged in Congress, pursuant to its power to fill in the details of the BSP's constitutional powers; or is it lodged in both organs?



SAMUEL H. GAERLAN

Associate Justice

CERTIFIED TRUE COPY



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