G.R. No. 252117 - IN THE MATTER OF THE URGENT PETITION FOR THE RELEASE OF PRISONERS ON HUMANITARIAN GROUNDS IN THE MIDST OF THE COVID-19 PANDEMIC, DIONISIO S. ALMONTE, represented by his wife Gloria P. Almonte, IRENEO O. ATADERO, JR., represented by his daughter Aprille Joy A. Atadero, ALEXANDER RAMONITA K. BIRONDO, represented by his sister Jeanette B. Goddard, WINONA MARIE O. BIRONDO, represented by her sister-in-law Jeanette B. Goddard, REY CLARO CASAMBRE, represented by his daughter Xandra Liza C. Bisenion, FERDINAND T. CASTILLO, represented by his wife Nona Andaya-Castillo, FRANCISCO FERNANDEZ Jr., represented by his son Francis IB Lagtapon, RENANTE GAMARA, represented by his son Krisanto Miguel B. Gamara, VICENTE P. LADLAD, represented by his wife Fides M. Lim, EDIESEL R. LEGASPI, represented by his wife Evelyn C. Legaspi, CLEOFE LAGTAPON, represented by her son Francis IB Lagtapon, GEANN PEREZ represented by her mother Erlinda C. Perez, ADELBERTO A. SILVA, represented by his son Frederick Carlos J. Silva, ALBERTO L. VILLAMOR, represented by his son Alberto L. Villamor, Jr., VIRGINIA B. VILLAMOR, represented by her daughter Jocelyn V. Pascual, OSCAR BELLEZA, represented by his brother Leonardo P. Belleza, NORBERTO A. MURILLO, represented by his daughter Nally Murillo, REINA MAE NASINO, represented by her aunt Veronica Vidal, DARIO TOMADA, represented by his wife Amelita Y. Tomada, EMMANUEL BACARRA, represented by his wife Rosalia Bacarra, OLIVER B. ROSALES, represented by his daughter Kalayaan Rosales, LILIA BUCATCAT, represented by her grandchild Lelian A. Pecoro, Petitioners v. PEOPLE OF THE PHILIPPINES, EDUARDO AÑO, in his capacity as Secretary of the Interior and Local Government, MENARDO GUEVARRA, in his capacity as Secretary of Justice, J/DIRECTOR ALLAN SULLANO IRAL in his capacity as the Chief of the Bureau of Jail Management and Penology, USEC. GERALD Q. BANTAG, in his capacity as the Director General of the Bureau of Corrections, J/CINSP. MICHELLE NG- BONTO in her capacity as the Warden of the Metro Manila District Jail 4, J/CINSP. ELLEN B. BARRIOS, in her capacity as the Warden of the Taguig City Jail Female Dorm, J/SUPT. RANDEL H. LATOZA in his capacity as the Warden of the Manila City Jail, J/CSUPT. CATHERINCE L. ABUEVA, in her capacity as the Warden of the Manila City Jail – Female Dorm, J/CSUPT. JHAERON L. LACABEN, in his capacity as the Correction Superintendent New

Bilibid Prison-West, CTSUPT. VIRGINIA S. MANGAWIT, in her capacity as the Acting Superintendent of the Correctional Institution of Women, Respondents.

Promulgated:

July 28, 2020

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SEPARATE OPINION

LAZARO-JAVIER, *J.*:

Prefatory

Petitioners allege a **common denominator** – they are **most vulnerable** to catching the SARS-COV-2 and getting infected with COVID-19.[1] They are detention prisoners or pre-judgment persons deprived of liberty (PDLs) who fall into two (2) categories, either **sickly older people** (afflicted with severe medical conditions) or **pregnant women**, who because of the crimes charged have **no access to bail as a matter of right**.

They seek **provisional liberty** either on bail for a specified amount or on recognizance for themselves and others similarly situated as may be determined by a Prisoner Release Committee.

Petitioners approach their grievance in a rather **novel** fashion. They claim that their plea **does not fall** into any of the **remedies in the ordinary course of law**. While they assert **rights** which they say they **should already be enjoying as PDLs**, an allegation that in **ordinary times** would **found a cause of action** for an **action**, they make the assertion in this case **only** in support of their call for the exercise of our **equity** jurisdiction, *specifically humanitarian considerations in light of our current state of public health emergency*.[2]

They invoke the ruling in ***Enrile v. Sandiganbayan***[3] and the **relief** or **remedy** for the **infringement** of **petitioners' rights** as **PDLs** that **increases** the **risks** they each face as detainees from COVID-19.

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1 World Health Organization at https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it (last accessed April 9, 2020). I refer to both SARS-COV-2 and COVID-19 as COVID-19.

2 Proclamation No. 922, series of March 8, 2020 at https://www.officialgazette.gov.ph/downloads/2020/02feb/20200308-PROC-922-RRD-1.pdf (last accessed April 9, 2020).

3 G.R. No. 213847, August 18, 2015.

Petitioners are **not alone** in their quest for remedial measures in this time of the pandemic.

As they assert, justice systems of **other** countries have **re-engineered** their **approach to detaining persons** accused of committing offenses because of the present pandemic.[4]

Respondents, through the Office of the Solicitor General (OSG), reduce the issue here to "whether the State can provide medical care to the petitioners while maintaining their confinement *vis-à-vis* the threat of COVID-19." They then enumerate the collective efforts of the justice sector at curbing the threat of COVID-19 among PDLs, which according to the OSG eliminate the need to grant temporary liberty to petitioners on bail for a specified amount or under recognizance.

Indeed, the world has undergone a **swift transformation** through the rise of COVID-19. The **criminal justice system** is **not immune** from the changes being forced upon everyone living through this time. The **electronic filing** of the present petition and the physical closure of our courts nationwide, for example, were just months ago **unimaginable**. Since then, prospects of our return to normalcy has inevitably been prefaced with the cautious caveat of a **new normal**. How this **new normal** would evolve and ultimately impact on the **administration of justice** and the **practice of law** remains to be seen.

Equity jurisdiction – what is it and is it necessary?

The **history** of our court system is **alien** to the **distinction** between a **court of common law** and **court of equity**. In a manner of speaking, we simply woke up one day having a court system that **did not have** these two sides of the same coin. Nonetheless, our *Civil Code* **has demanded of us judges** that *"[n]o judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the laws,"* and *"[i]n case of doubt in the interpretation or application of laws, it is presumed that the lawmaking body intended right and justice to prevail."*[5]

The history of the court of common law and the court of equity began with the legal reforms of King Henry II after 1154.[6] Administration of local courts became more centralized.[7] Thus:

> Henry II created a unified system of law "common" to the country as whole. This was in part the result of his practice of sending judges from his own central court to hear disputes throughout the country. Disputes

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4 See pp. 17-19.

5 Civil Code, Articles 9 and 10.

6 Geophysical Service Inc. v. Sable Mary Seismic Inc., 2008 NSSC 79 (CanLII), <http://canlii.ca/t/1wgvc>, retrieved on 2020-04-08.

7 *Ibid.*

> were resolved on an ad hoc basis according to what the customs were interpreted to be. The king's judges then returned to the court, discussed their cases with other judges in a manner that permitted and required them to be used for the interpretation and application of the law in future cases. **In this way, the laws of England developed as "common-law" - the collection of judge-made decisions based on tradition, custom and precedent, as opposed to laws derived from statutes, a civil code or equity.**[8]

By 1215, a court system was created:

> The Court of Exchequer was developed to hear disputes where the Crown sought money it claimed it was owed and answered claims for money said to be owed by the Crown. The Court of Common Plea developed as a local court for civil trials between individuals. The Court of King's Bench developed as a court for more serious disputes and for the hearing of criminal cases....[9]

Over time, procedure in the courts of common-law became **convoluted** and **ossified.**[10] Litigants who felt they had been **cheated** or **had not been given justice** by courts of common-law petitioned the King in person.[11] **From this developed** a **system of equity**, administered by the Lord Chancellor, in the Court of Chancery.[12]

It was observed that:

> [51] The **basis for decision-making** in the Court of Chancery was **equity**. It was a **court of conscience** and **not a court of rules or laws**. An important distinction between court of equity (Chancery) and courts of law was that a jury had no role in interpreting the law or in matters of conscience. Only a judge could dispense equity."
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> [52] In courts of law, the opposite was the case. The jury answered questions of fact, originally by its own investigation and later solely from the evidence produced during a trial. **Equity and law were frequently in conflict**, and **litigation could continue for years as courts of law countermanded courts of equity** and **vice versa**. This was so even though, by the 17th century, it was established that equity should prevail over the common law.
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> [53] By the mid-19th century, **disputes between**, and **conflicting orders issued by, the courts of law** and **the courts of equity** had **led to** a **breakdown of the English legal system** - as reflected in Charles Dickens' Bleak House - and the **merger of the courts of law** and **the courts of equity by legislation** in 1873 and 1875. While the **principles of law and of equity remained distinct** for a time after merger, **legislation created** a **unified court system**.

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8 *Ibid.*
9 *Ibid.*
10 *Ibid.*
11 *Ibid.*
12 *Ibid.*

> [54] Various statutes, both in England and in those common-law countries which derive their legal system from England, have **modified the practices and procedures by which courts determine matters of law and of equity**. For the most part they are based on the practices that pre-existed the English Judicature Act of 1873.[13]

The legislation that merged courts of law and court of equity **conferred no new rights** but they **confirmed the rights** that previously existed in these courts. The law **merely gave** to the courts the **jurisdiction** previously exercised by both the courts of common law and the Court of Chancery.[14] Thereafter, there was the **complete consolidation** of *equitable* and *legal* **jurisdiction** and **practice and procedure** for both *equitable* and *legal* remedies in the courts.[15]

Equitable and **legal remedies differ from each other.** Successful litigants are **entitled** to **legal remedies.**[16] The principal legal remedy is damages.[17] There is however **no entitlement** to **equitable remedies.**[18] By the **very nature of equity**, they are **granted by** the **discretion** of the court and are **unlimited**.

Equitable remedies are called ***such*** because they ***originated*** *from* the **court of equity**. However, through time, these once flexible **equitable remedies have** *themselves* **ossified into distinct rules** *like the common law remedies* they had meant to correct for being inflexible. Among the principal equitable remedies are declaratory judgments, injunctions, specific performance or contract modification, accounting, rescission, estoppel, proprietary remedies such as constructive trusts and tracing, subrogation, and equitable liens.

In the Philippines, it **does not make sense** to distinguish between common law and equitable jurisdictions and remedies except for historical purposes. This is because our jurisprudence has evolved and developed remedies fairly independently of their historical roots and has treated remedies **without** such distinctions. Thus, the Court does **not** have to refer to its supposed equity jurisdiction when it provides purportedly equitable remedies, and neither does the Court dispense supposed equitable remedies only through its purported equity jurisdiction.

The **evolution** of equitable remedies into **distinct rules** themselves demonstrates that **equity** is **far from** being a **willy-nilly** justice system. **Flexible principles** arising from the **exercise of equitable jurisdiction** and

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13 *Ibid.*
14 *Ibid.*
15 *Ibid.*
16 *Ibid.*
17 *Ibid.*
18 *Ibid.*

their constant application have developed a **juridical experience** that **crystallized** these **principles** into **defined rules.** In the words of a North American judge:

> In recent years, there has been a **marked trend away from strict rules and towards flexibility** and **importing into the law** what can be described as **broad moral principles of reasonableness, fair dealing** and **good conscience**. These **principles point the judge deciding a case in a certain way, but they lack the precision** and **certainty of black letter rules** of law. Most of these doctrines **spring from** the tradition of **equity**. Historically, the **common law** was **characterized by its relatively rigid rule-based approach**, while **equity, the "court of conscience"**, came along to **relieve against the rigours** of the common law. But it was **never quite as simple** as that because the **common law method of developing rules in a case by case fashion has an inherent flexibility**. The **common law has gone through periods** characterized by **strict adherence to black letter doctrine and rigid application of rules**, while **at other times**, it has **emphasized** the need for **flexibility, growth** and renewal. **Equity** as well has **moved back and forth along the continuum**. In its **origins, equity** was based on **broad principles of morality and good conscience, but as experience was gained with the application** of those principles, they **tended to crystallize into rules** and **equity** itself **became rigid**. By the late nineteenth century and early twentieth century, both the common law and equity appear to have reached this point . . . In the latter part of the twentieth century, there has been something of a resurgence of the spirit of equity.... **Reliance on broad statements of principle** rather than strict rules arises not only from the desire for **flexibility** and the **need to ensure justice** in the particular case. It is **also characteristic of the first step in a fundamental change in the law**. When a **new doctrine** emerges, it may only be possible to sketch out in **general terms**. **Over time, cases are decided, gaps are filled and there develops a body of doctrine.** The good neighbour duty of care principle in negligence law pronounced by Lord Atkin in Donohue v. Stephenson provides an example of common law rule which began as a broad statement of principle . . . I would suggest that the modern principles relating to fiduciary, unjust enrichment and constructive trust fall into a similar category.[19]

In this sense, it may be said that petitioners **have loosely used** the **concept of equity** to found their plea to be released on bail or recognizance when **allegedly** they are otherwise not allowed to. As we have said, we **never had that division** between a court of common law and a court of equity, and in reality, our legal system is **a hybrid** or **a cross** between the common and the civil law jurisdictions. As well, our jurisprudence **does not allow** equity to supplant and contravene the provision of law clearly applicable to a case, and conversely, **cannot give** validity to an act that is prohibited by law or one that is against public policy.

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[19] *Ibid*, quoting Ontario Court of Appeal Justice Robert J. Sharpe's address on October 1st, 1997 to a National Judicial Institute conference of Justices of the Ontario Superior Court of Justice on the application and impact of judicial discretion in commercial litigation.

In this light, **respondents' objection** to the use of the word **"humanitarian"** in their Comment's prefatory may **appear to be justified** since petitioners **could have grounded** their prayer upon **established law** or **jurisprudence** without having to summon the **amorphous** and **value-laden adjectives** *humanitarian* or *equitable*.

Verily, it is **not necessary** to invoke **equity** or **humanitarianism** so courts could have the **needed flexibility to do justice** in a particular case under specifically unique circumstances, or to be able to rely upon broad moral principles of reasonableness, fair dealing and good conscience in resolving issues. **Articles 9**[20] and **10**[21] of our ***Civil Code*** already provide the **legal bases** for doing so. And, as regards bail, our **jurisprudence** has already allowed **inroads** of **flexibility** and **broad moral principles** to justify what others have believed to be a **just outcome**.

Bail rules – is it feasible to navigate through and accommodate flexibility and broad moral principles?

Bail is **not a matter of right** for an accused charged with a crime punishable by death, *reclusion perpetua*, or life imprisonment. This rule has been **interpreted** and **practiced** as requiring the detention of an accused until he or she has sought a bail hearing **and** the prosecution is **not** able to prove that the evidence of his or her guilt is strong.[22]

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20 Article 9. No judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the laws. (6)

21 Article 10. In case of doubt in the interpretation or application of laws, it is presumed that the lawmaking body intended right and justice to prevail.

22 By way of an aside, I see this interpretation and practice to be skewed for being clearly inconsistent with texts of the constitutional provision and the Rules of Court and the effect of the allocation of the burden of proof. As written:
Constitution, Article III, Section 13. All persons, **except those charged with offenses punishable by reclusion perpetua when evidence of guilt is strong**, shall, before conviction, be bailable by sufficient sureties, or be released on recognizance as may be provided by law....
Rules of Court, Rule 114, Section 7. Capital offense or an offense punishable by reclusion perpetua or life imprisonment, not bailable. — **No person** charged with a capital offense, or an offense punishable by reclusion perpetua or life imprisonment, **shall be admitted to bail when evidence of guilt is strong**, regardless of the stage of the criminal prosecution.
The texts say that bail is to be denied when the evidence of guilt is strong. There is a precursor to the denial of bail. More, the burden is on the prosecution to establish that precursor. The burden signifies that a court is not to presume that the evidence of guilt is strong. The prosecution has to actually discharge its burden by proving that the evidence of guilt is strong. Prior to satisfying this standard of proof, it cannot be the case that bail is already denied, because bail can be denied only after the prosecution has already discharged its burden by proving that the evidence of guilt is strong. Prior to satisfying this standard of proof, the default is the availability of bail as a matter of right. This, however, is just my irreverent opinion about this aside.

The Enrile two-step test for provisional liberty.

The **availability of bail** to an accused charged with crimes punishable by death, life imprisonment or *reclusion perpetua*, however, has been **modified** to significant extents by our ruling in ***Enrile v. Sandiganbayan***.[23]

In ***Enrile***, despite the absence of a bail hearing where the prosecution could have proved that the evidence of guilt is strong, the Court allowed Senator Enrile to post bail on account of his **exceptional circumstances** (*i.e.*, advanced age and ill health requiring special medical attention) and the bottom line that **he was not a flight risk**. Despite the vigorous and well-reasoned **Opinion** of Justice Leonen, the Court made room for **flexibility** and **broad moral principles**, as we **re-stated** the rule from ***Dela Rama v. The People's Court***[24] as follows:

> Bail for the provisional liberty of the accused, regardless of the crime charged, should be allowed independently of the merits of the charge, **provided his continued incarceration is clearly shown to be injurious to his health or to endanger his life**. Indeed, **denying him bail despite imperiling his health and life would not serve the true objective of preventive incarceration** during the trial.... It is relevant to observe that granting provisional liberty to Enrile will then **enable him to have his medical condition be properly addressed and better attended to by competent physicians in the hospitals of his choice**. This will not only aid in his adequate preparation of his defense but, more importantly, will **guarantee his appearance in court for the trial**.

Enrile has ingrained in jurisprudence a **two-step test** to authorize the grant of bail when it is **discretionary** to do so: **(a)** the detainee will not be a flight risk or a danger to the community; and **(b)** there exist special, humanitarian and compelling circumstances. This **test** involves the **balancing of factual and legal factors** before resolving to grant or deny the application for bail.

Through ***Enrile***, our jurisprudence **has thus incorporated** the **degree of flexibility** and the **broad moral principles** to the **black-letter law on bail as a matter of discretion** to the **extent necessary** to serve complete justice in particular situations, first, in ***Dela Rama***, and later, in ***Enrile***.

Rather than an exercise of equitable jurisdiction in its strict historical sense, the **reasoning** and **disposition** in *Enrile* is an **illustration** of the *Civil Code* provisions that *"[n]o judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the laws,"* and *"[i]n case of doubt in the interpretation or application of laws, it is presumed that the lawmaking body intended right and justice to prevail."*

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[23] G.R. No. 213847, August 18, 2015.
[24] 77 Phil. 461 (October 2, 1946).

In ***Enrile***, the Court **did not reference** equitable principles in the **strict historical sense** of a body of rules as a counterpoint to those established among courts of common law. Perhaps in the **loose sense** of equity being the equivalent of flexibility and broad moral principles, ***Enrile*** stands for this proposition **and more**.

Enrile was **expressly conscious to build on earlier case law** to serve complete justice to Senator Enrile's circumstances. It is **not** a **random** or a **cowboy sense of justice** that it was serving, but one **anchored on rules founded a long time ago**.

Enrile thus represents what has been said about **common law being itself flexible** and **accommodating of broad moral principles** without having to distinguish it from and summoning **equity**. We were able to **navigate through the established rules** on bail as a matter of discretion to **arrive at** a conclusion that we thought would **not** have been possible under established rules **but nonetheless consistent** with the **stability** and **predictability** valued in every legal system.

The learned Justice Leonen reiterates his **principled stand** to dissent from the doctrine set forth in ***Enrile*** and therefore to refuse applying its ruling in subsequent cases. I deeply admire his consistency in this regard. But we have to ask ourselves, what are we to do with this En Banc *Decision*?

Article 8 of the *Civil Code* states that "[j]udicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines."

Enrile is a clear and categorical statement of **positive law** pursuant to the Court's constitutional and inherent power to "settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government,"[25] and "to promulgate rules and procedures for the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts."

For better or for worse, until overturned, our jurisprudence has to reckon with ***Enrile*** as a rule that may be invoked and should be applied whenever the circumstances of a case call for it.

As judges, we are "the visible representation of the law, and more importantly, of justice. It is from [the judge] that the people draw their will and awareness to obey the law. For the judge to return that regard, [the judge] must be the first to abide by the law and weave an example for others to

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[25] Constitution, Article VIII, Section 1 and Section 5 (5).

follow. Consequently, the last person to refuse to adhere to the directives of the Court … is the judge himself."[26]

On the other hand, my learned senior brethren, Justice Caguioa, specifically referred to my opinion on ***Enrile*** as follows:

> xxx. For the same reason above, I disagree with the position that *Enrile* has ingrained in jurisprudence a two-step test to authorize the grant of bail when it is discretionary to do so: (a) the detainee will not be a flight risk or a danger to the community; and (b) there exist special, humanitarian and compelling circumstances. **The ruling in *Enrile* deviates from entrenched legal principles concerning bail and it cannot be used to create doctrine for subsequent cases.** To reiterate, petitioner therein was allowed to post bail even though he was charged with an offense punishable by *reclusion perpetua,* without any showing through a hearing that the evidence of his guilt is not strong. **Having skirted the minimum requirements under the Constitution regarding bail, the ruling in *Enrile* should not be used to set precedent for cases involving discretionary bail.**
>
> Moreover, **the grant of bail in *Enrile* on the basis of petitioner's age and health rests on shaky ground** as the circumstances therein were quite peculiar. As illustrated in Justice Leonen's Dissenting Opinion therein:
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> > Neither was there grave abuse of discretion by the Sandiganbayan when it failed to release accused on bail for medical or humanitarian reasons. His release for medical and humanitarian reasons was not the basis for his prayer in his Motion to Fix Bail filed before the Sandiganbayan. Neither did he base his prayer for the grant of bail in this Petition on his medical condition.
> >
> > **The grant of bail, therefore, by the majority is a special accommodation for petitioner.** It is **based on a ground never raised before the Sandiganbayan or in the pleadings filed before this court.** The Sandiganbayan should not be faulted for not shedding their neutrality and impartiality. It is **not the duty of an impartial court to find what it deems a better argument for the accused at the expense of the prosecution and the people** they represent.
> >
> > The allegation that petitioner suffers from medical conditions that require very special treatment is a question of fact. We cannot take judicial notice of the truth contained in a certification coming from one doctor. This doctor has to be presented as an expert witness who will be subjected to both direct and cross examination so that he can properly manifest to the court the physical basis for his inferences as well as the nature of the medical condition of petitioner. Rebutting evidence that may be presented by the prosecution should also be considered. All this would be proper before the Sandiganbayan. Again, none of this was considered by the Sandiganbayan because petitioner insisted that he was entitled to bail as a matter of right on grounds other than his medical condition.

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[26] *Imbang v. Del Rosario*, A.M. No. MTJ-03-1515, February 3, 2004.

> Furthermore, **the majority's opinion** -- other than the invocation of a general human rights principle -- **does not provide clear legal basis for the grant of bail on humanitarian grounds.** Bail for humanitarian considerations is neither presently provided in our Rules of Court nor found in any statute or provision of the Constitution.
>
> This case **leaves this court open** to a **justifiable criticism** of granting a **privilege ad hoc: only for one person** -- petitioner in this case.
>
> **Worse, it puts pressure on all trial courts and the Sandiganbayan that will predictably be deluged with motions to fix bail on the basis of humanitarian considerations. The lower courts will have to decide, without guidance, whether bail should be granted because of advanced age, hypertension, pneumonia, or dreaded diseases.** They will have to decide whether this is applicable only to Senators and former Presidents charged with plunder and not to those accused of drug trafficking, multiple incestuous rape, serious illegal detention, and other crimes punishable by *reclusion perpetua* or life imprisonment. They will have to decide whether this is applicable only to those who are in special detention facilities and not to the aging or sick detainees in overcrowded detention facilities all over this country.
>
> **Our trial courts and the Sandiganbayan will decide on the basis of personal discretion** causing petitions for *certiorari* to be filed before this court. This will usher in **an era of truly selective justice not based on clear legal provisions, but one that is unpredictable, partial, and solely grounded on** the presence or absence of **human compassion on the day** that justices of this court deliberate and vote.

Ergo, a **reading of the ruling in *Enrile* shows that there is no discernible standard** for the courts to decide cases involving discretionary bail on the basis of humanitarian considerations. The ineluctable conclusion, as opined by Justice Leonen, is that **the grant of bail by the majority in *Enrile* was a special accommodation for petitioner therein.** Thus, at the risk of being repetitious, **the ruling in *Enrile* should be considered as a stray decision** and, echoing Justice Bernabe, must likewise be **considered as *pro hac vice*.** It **should not be used as the benchmark in deciding cases involving the question on whether bail may be allowed on the basis of humanitarian considerations.** Notably, **under the Rules of Court, humanitarian considerations** such as age and health **are only taken into account in fixing the bail amount** after a determination that evidence of guilt against the accused is not strong.

However, petitioners are not left without any other recourse that is legally permissible. Despite the inapplicability of *Enrile* and in view of the novel nature of this case, the Court should not be precluded from affording petitioners the appropriate reliefs within the bounds of law.

In this regard, a proper bail hearing before the trial court should first be conducted to determine whether the evidence of guilt against the petitioners is strong. This Court, not being a trier of facts, cannot receive and weigh petitioners' evidence at the first instance. Factual and evidentiary matters must first be threshed out in a proper bail hearing, which may only be done in the lower courts. Trial courts are better equipped to assess

> petitioners' entitlement to bail or recognizance based on the provisions of the Constitution, the relevant laws, and the Rules of Court.
>
> Thus, instead of dismissing the petition outright, I join Justice Bernabe's recommendation **to refer or remand this petition to the concerned trial courts.**
>
> Exigency is better served if the trial courts **where the criminal cases of petitioners are respectively pending will hear their bail petitions and receive their evidence.**

With all due respect, I truly cannot read ***Enrile*** through Justice Leonen's eagle eyes because his reading is simply **not** the Supreme Court's decision. Justice Leonen was very emphatic about the Court's favorable treatment of Senator Enrile, but the Majority chose **not** to side with him and **to** believe otherwise.

The Majority did **not** describe ***Enrile*** as a ruling for the **sole** and **exclusive benefit** of Senator Enrile. The Majority **could not** have said that ***Enrile*** was ***pro hac vice*** because that would have **only validated** what Justice Leonen has long been articulating about the decision – **that we have a justice system for the powerful and another justice system for the powerless.** Any reading of ***Enrile*** will **never** elicit that admission.

The Majority, I am sure, especially then Chief Justice Lucas P. Bersamin, will **never** admit enunciating a **ground-breaking doctrine** only to favor and pander to "Senators and former Presidents charged with plunder and not to those accused of drug trafficking, multiple incestuous rape, serious illegal detention, and other crimes punishable by *reclusion perpetua* or life imprisonment.... those who are in special detention facilities and not to the aging or sick detainees in overcrowded detention facilities all over this country."

Admittedly, the present En Banc has the authority to reject and set aside the doctrine laid down by the Court En Banc in ***Enrile***[27] by characterizing it as ***pro hac vice.*** **But** this ruling will just be a **euphemism** for what Justice Leonen has been dissenting about – that the Court lays down doctrines to pamper the powerful, to grant a "privilege ad hoc: only for one person," that ***Enrile*** applies only to Senator Enrile because of who and what he is.

Another **unfortunate** consequence of characterizing Senator Enrile's eponymous hit ruling as ***pro hac vice*** is **to apply** the **rejection** of the

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[27] Article VIII, Section 4 (3) of the 1987 Constitution provides: "(3) Cases or matters heard by a division shall be decided or resolved with the concurrence of a majority of the Members who actually took part in the deliberations on the issues in the case and voted thereon, and in no case, without the concurrence of at least three of such Members. When the required number is not obtained, the case shall be decided en banc: Provided, that no doctrine or principle of law laid down by the court in a decision rendered en banc or in division may be modified or reversed except by the court sitting en banc."

Enrile doctrine **retroactively.**[28] **During this pandemic,** an **exceptional** circumstance, it **at once** denies petitioners at least their **right to invoke** the ***Enrile*** doctrine to their cause, for the simple reason that it was crafted and **especially tailored-fit solely** for Senator Enrile's benefit.

I am **not** willing to travel this extent of unfairness. It **was the Court** that put the doctrine out there. If the Court is to pull it back, at least **allow those who have already invoked it** the benefit of the doubt no matter how marginalized and uninfluential they are. And only thereafter, may the Court set the doctrine aside because the Court supposedly just wants to favor Senator Enrile.

Going forward, I **completely disagree** with the opinions expressed that ***Enrile*** does *not* provide for clear-cut standards to justify release on bail for a specified amount or on recognizance. As stated, ***Enrile*** enunciates a **two-step test** that is more than clear and determinable. The ***Enrile*** test **can even accommodate** Senior Justice Perlas-Bernabe's reference to the **"deliberate indifference" test** as a standard for justifying other forms of custodial arrangements.

Provisional liberty as a relief or remedy for the infringement of every PDL's right against jail congestion.

Ruminations on Justice Leonen's Separate Opinion

A true scholar, Justice Leonen carefully dissects the international and local laws to determine the rights of PDLs as PDLs, and the problematic implementation of these rights. He then narrows down the problem areas among the plethora of these rights to that specific matter which is of public knowledge, or is capable of unquestionable demonstration, or ought to be known to judges because of their judicial functions – the problem of congestion in our holding centers. Thus:

> The Court may take judicial notice of the nature of COVID-19 and the long standing jail congestion which has plagued the Philippine jails and how this unresolved crisis is a significant threat to the right to life, health, and security of persons detained in such conditions.

I agree with Justice Leonen that the Court may take judicial notice of jail congestion. This problem has long hounded our holding centers that the Court has once mandated judges to conduct jail visitations in an effort to

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[28] *Chavez v. National Housing Authority*, G.R. No. 164527, August 15, 2007 ruled "It is a settled precept that decisions of the Supreme Court can only be applied prospectively as they may prejudice vested rights if applied retroactively."

decrease inmate population and proffer suggestions for better management of these facilities.

I also agree with Justice Leonen that the Philippines has incorporated the minimum standards on the treatment of PDLs in international law into our local laws, and as a result, the minimum standards may be judicially enforced.

I respectfully disagree, however, with the argument that an infringement of these minimum standards, such as the overcrowding in jails, is tantamount to cruel and inhuman punishment, because these minimum standards "operationalize the right against cruel and inhuman punishment."

Our jurisprudence has taken a conservative approach to the constitutional proscription against cruel and inhuman punishment.

Maturan v. Commission on Elections[29] reiterated its conceptualization as extending only to situations of **extreme** corporal or psychological **form** or **character** of the **punishment** rather than its **severity** in respect of its *duration* or *amount*, and –

> … applies to punishments which never existed in America or which public sentiment regards as cruel or obsolete. This refers, for instance, to those inflicted at the whipping post or in the pillory, to burning at the stake, breaking on the wheel, disemboweling and the like. The fact that the penalty is severe provides insufficient basis to declare a law unconstitutional and does not, by that circumstance alone, make it cruel and inhuman.

Echegaray v. Secretary of Justice[30] *excluded* from the meaning of cruel and inhuman punishment the infliction of pain or distress that is **merely incidental** in **carrying out** the punishment. It *rejected* cruelty as the mere infliction of pain or suffering, because if it were, no one would ever be punished at all. ***Echegaray*** held that "[t]he cruelty against which the Constitution protects a convicted man is **cruelty inherent in the method** of punishment, **not the necessary suffering involved in any method** employed to extinguish life humanely."

While the **minimum standards on the treatment of PDLs** are no doubt part and parcel of protecting, defending and promoting the dignity of PDLs, **their infringement** does **not** rise to the level of **what we have conceived** to be **cruel and inhuman punishment**. The minimum standards have **nothing to do** with the **form**, **character,** or **method** of punishment, and though subpar PDL conditions may affect the **severity** of the punishment meted out, this is just **incidental** to the implementation of the punishment.

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29 G.R. No. 227155, March 28, 2017.
30 G.R. No. 132601, October 12, 1998.

It is true that **jail congestion** impacts more on the PDLs' right to life and its cognate rights under Section 1, Article III of the *Constitution* **amidst the pandemic** than during ordinary times.

It is **equally true**, however, that if the right to life contemplates the existence only of **negative rights** or **rights of non-interference**, in order **to establish a breach of the right to life**, a claimant **must first show** that he or she **was deprived** of his or her right to life and its cognate rights, and **then must establish** that **the State caused such deprivation** without due process of law. **Active State interference** with one's life, security or health by way of some **affirmative, positive,** or **definitive** act will be **necessary** in order to engage the protection of this right. There will **also** be a **need to establish a causal link** between State action and harm alleged to have been suffered. This **requires** searching for a **causal nexus** tying the State to petitioners' inability to exercise their right to life. Such a **nexus** could only ever be established by pointing to a **positive state action giving rise to the aggrieved condition**.

The Court has thus held:

> The legitimacy of a government is established and its functions delineated in the Constitution. From the Constitution flows all the powers of government in the same manner that it sets the limits for their proper exercise. In particular, **the Bill of Rights functions primarily as a deterrent to any display of arbitrariness on the part of the government or any of its instrumentalities.** It serves as the general safeguard, as is apparent in its first section which states, "No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws." Specifically, **due process is a requirement for the validity of any governmental action amounting to deprivation** of liberty or property. It is a **restraint on state action** not only in terms of what it amounts to but how it is accomplished. Its range thus covers both the ends sought to be achieved by officialdom as well as the means for their realization.[31]

Here, we **cannot fault respondents** for the **increased risks** to life, security and health brought about by COVID-19 **even among the inmates**, including petitioners, of our **overcrowded** jail facilities. In a manner of speaking, paraphrasing one classic song, respondents *did not light the fire* as it seemed *to have always been burning since the world has been turning*. They **have not engaged** in any **definitive, affirmative** or **positive State action** to cause such increased risks of deprivation.

Nevertheless, **even if** the right to life does **not** contemplate the existence **only** of **negative rights** (*i.e.*, to identify some **definitive, affirmative** or **positive** act, **in contrast** to **mere inaction**, on the part of the State which could be said to constitute an interference with this right and consequently ground the claim of a violation) and has **positive rights dimension** (*i.e.*, whether the right to life **imposes on the State a duty to act**

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[31] *Serrano v. National Labor Relations Commission*, G.R. No. 117040, January 27, 2000.

where it has not done so), I would have **reached the same conclusion** that respondents **did not breach** petitioners' or any other PDL's right to life **amidst the increased dangers** to life, security and health **caused by** the **pandemic**.

If the right to life includes a **positive dimension**, such that it is **not merely** a **right of non-interference but also** a **right of performance**, then it is **violable** even by **mere inaction** or **failure** by the State **to actively provide the conditions necessary** for its fulfilment, or to **alleviate petitioners' condition**, and **not** on whether the State can be **held causally responsible** for the aggrieved's condition in the first place.

Here, respondents **have taken positive measures** to minimize the spread of COVID-19 within holding centers and the infection of petitioners and other PDLs of this disease. They have **not** remained idle and inactive to simply let the PDLs be afflicted. They have **actively endeavoured to block** the conditions necessary for the virus' contagion and to **alleviate petitioners' increased risks** to this viral infection.

While these measures may **not** be enough, their **inadequacy** is **attributable** to so **many varied factors**. These **factors** are **beyond respondents' control** and **levels of authority and responsibility**, and include the **unpredictable** nature of the pandemic and, should there be finger-pointing at this time, the **collective and systemic inadequacies not only** of **all** the institutions and stakeholders in our criminal justice system, **but also** of the entire State machinery responsible for the allocation of limited resources.

We may take **judicial notice** of the **pitfalls** in complying with the minimum standards of the treatment of PDLs. It is **factual** and **accurate** that there is **overcrowding** in most of our jails.

However, **attributing** this setback **solely** to respondents is both unfair and inaccurate. We may take **judicial notice** of the publicly known fact that respondents **do not also want** this dire situation happening in their facilities. But what can they do? The **population** and **facilities** in their holding centers are the **outcomes of so many variables** outside their control and competence.

Neither will it be **correct** to **remediate** this concern by directing the **release of such number of PDLs** as would match the holding centers' respective capacities.

To begin with, there is **no law** which **requires** this type of relief or remedy for an **innocent slip-up** or **non-compliance** with the minimum standards. **Neither** is it **beneficial**, **desirable** nor **practicable**. In fact, granting **this type** of relief or remedy will put the Court on the spot and in a **compromising slippery slope position** where **we would have to order the**

release of a PDL each time a minimum standard is **not** met, simply because of the theory that these minimum standards as to safety, sanitary, and sufficient provisions and facilities *operationalize the right against cruel and inhuman punishment*.

More, the present case is **not about** vindicating the rights of **all PDLs** to the minimum standards of treatment. The petition is about petitioners' concerns, and while petitioners and some of us may **want to extend** its beneficial effects **to other PDLs**, this **only rests on** and is **only due to** the **impact of the pandemic**.

In any event, since the case here is **not per se** about the enforcement of the minimum standards, it would **not** be fair and wise **to deal with** the forms of **relief** or **remedy** for the alleged infringement thereof **without** hearing from respondents. **Before crafting the relief or remedy**, respondents **must first be heard to shed light** on the infringement, if any, and its nature and impact, and their justifications for such state of affairs.

Ruminations on Senior Associate Justice Perlas-Bernabe's Separate Opinion

A rock of integrity and competence, Senior Associate Justice Perlas-Bernabe provides a solid legal anchor to the views I have expressed above. While it has not been shown that respondents are responsible for any infringement of the minimum standards, petitioners must have the opportunity to prove their claims against respondents. Senior Associate Justice Perlas-Bernabe has outlined the framework of the **deliberate indifference test** by which petitioners could proceed for this purpose.

Bail in the time of COVID-19 – quo vadis, whither goest thou?

Petitioners seek bail for a designated amount or upon recognizance as a counter-measure to prevent their COVID-19 infection.

Prisons and justice officials worldwide respond... – an overview.

Petitioners are **not** the only ones seeking urgent ameliorative measures at detention facilities.

As the petition has poignantly stressed, which the Court can take judicial notice of, **several other countries** have reacted **swiftly** to beat, or at least so their leaders thought, COVID-19 to the draw. We rely on **online news feeds** to validate petitioners' claims that detainees or prisoners **have indeed been released** in other countries as one of the countermeasures against the virus and its disease. We **cannot vouch** however for the **circumstances** of their detainees' or prisoners' release and the **issues** and the **decision-making process** that went with this **countermeasure**, if it were the result of a **political**, **administrative**, or **judicial** decision.

The **World Health Organization (WHO)** has published an interim guidance on how to deal with the virus and its disease in prisons and other places of detention, entitled "Preparedness, prevention and control of COVID-19 in prisons and other places of detention." **WHO** describes the material and its rationale, as follows:

> The guidance **provides useful information** to staff and health care providers working in prisons, and to prison authorities. It **explains how to prevent and address a potential disease outbreak** and stresses important human rights elements that must be respected in the response to COVID-19 in prisons and other places of detention. Access to information and adequate health care provision, including for mental disorders, are essential aspects in preserving human rights in such places.
>
> **Controlling the spread of infection in these settings is essential for preventing large outbreaks** of COVID-19. The guidance aims **to protect the health and well-being of all those who live, work in and visit these settings** and **the general population at large**. People deprived of their liberty, and those living or working in enclosed environments in their close proximity, are likely to be more vulnerable to the COVID-19 disease than the general population. Moreover, **correctional facilities may amplify and enhance COVID-19 transmission beyond their walls.** According to the newly published WHO guidance, the global effort to tackle the spread of disease may fail without proper attention to infection control measures within prisons.[32]

Indonesia has released nearly 23,000 prisoners out of the projected release of 30,000 prisoners who have served two-thirds of their respective sentences.[33] This is meant to reduce inmate population and prevent the rapid spread of the virus.[34]

In the **United States**, prisoners serving sentences have been targeted for early release, subject to certain criteria:

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32 Preventing COVID-19 outbreak in prisons: a challenging but essential task for authorities, at http://www.euro.who.int/en/health-topics/health-determinants/prisons-and-health/news/news/2020/3/preventing-covid-19-outbreak-in-prisons-a-challenging-but-essential-task-for-authorities (last accessed April 10, 2020).

33 Indonesia releases 22,000 prisoners over COVID-19 fears: Government set to release total of 30,000 prisoners over a week, official says, at https://www.aa.com.tr/en/asia-pacific/indonesia-releases-22-000-prisoners-over-covid-19-fears/1791209 (last accessed April 10, 2020).

34 *Ibid.*

> In response, officials have begun to take action. On the federal level, Attorney General William Barr released a memo last week that ordered the Federal Bureau of Prisons to identify "at-risk inmates who are non-violent and pose minimal likelihood of recidivism and who might be safer serving their sentences in home confinement." His plan, however, has been criticized because these inmates will be identified by an algorithm that the Marshall Project reports is biased toward white people.
>
> And realistically, it's state officials that need to take bolder action: There are only about 226,000 people locked up in federal facilities compared to the nearly 1.3 million in state prisons, according to the Prison Policy Institute. Some have begun to release the incarcerated. Most recently, California announced that it would let out 3,500 nonviolent inmates in the next 60 days — the most drastic measure taken by states so far. New York City Mayor Bill de Blasio also announced the city had released 900 people as of March 31.[35]

In the **Islamic Republic of Iran**, some 85,000 inmates have been temporarily freed, mostly non-violent offenders serving short sentences and some political prisoners.[36]

Afghanistan has taken the same precautionary measure, involving mostly women, young offenders and sickly inmates.[37]

In **Canada**, there has been a clarion call to limit the number of people in detention facilities, encourage the attorneys-general and the provinces, territories, and federally, to persuade police officers, prosecutors, and judges to exercise their discretion and not jail people **if it is not required by public safety**.[38] As a result, it has been observed that "[a] flurry of court decisions suggest that even those accused of violent crimes are winning release. As one judge wrote, the pandemic had '**reordered** the **usual calculus**."[39]

Indeed, COVID-19 has **taken its toll** on the **normative**, *what we must or ought to do*, and have **altered the narrative** to a **passive reactive new normal**, *what has been done to us, and in response, what must be done by us*.

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35 Why people are being released from jails and prisons during the pandemic, https://www.vox.com/2020/4/3/21200832/jail-prison-early-release-coronavirus-covid-19-incarcerated (last accessed April 10, 2020); see also US jails begin releasing prisoners to stem Covid-19 infections, https://www.bbc.com/news/world-us-canada-51947802 (last accessed April 10, 2020).

36 Iran has released 85,000 prisoners in an emergency bid to stop the spread of the coronavirus, https://www.businessinsider.com/coronavirus-covid-19-iran-releases-eighty-five-thousand-prisoners-2020-3 (last accessed April 10, 2020).

37 Afghanistan to release up to 10,000 prisoners to slow coronavirus spread, https://www.thejakartapost.com/news/2020/03/26/afghanistan-to-release-up-to-10000-prisoners-to-slow-coronavirus-spread.html (last accessed April 10, 2020).

38 Release or isolate: The debate on how to help people inside Canada's prisons and jails during COVID-19, https://aptnnews.ca/2020/04/07/release-or-isolate-the-debate-on-how-to-help-people-inside-canadas-prisons-and-jails-during-covid-19/ (last accessed April 10, 2020).

39 Judges release growing number accused of violent crimes due to COVID-19 fears, https://globalnews.ca/news/6788223/coronavirus-prisons-inmates-released/ (last accessed April 10, 2020).

Our reply… – balancing varied interests.

Here, I take petitioners' assertions **very seriously**. Not only for their sakes, but for the sake of the general population, including us. This is because as **WHO** has confirmed, "correctional facilities may amplify and enhance COVID-19 transmission beyond their walls."

We **can take judicial notice** of **materials suggesting** that the COVID-19 situation is **under control in our jails**, and that **prison officials have established isolation facilities** for PDLs who may exhibit even the mildest symptoms of the virus[40] infection as well as **procedures restricting family visits and strict querying protocols** upon admission for signs of this virus.

We may **accept as evidence** the laudable efforts of our jail wardens to curtail or even withdraw altogether the few niceties that pre-judgment PDLs had available to them previously, such as religious services. Viewed strictly in the context of COVID-19, that is welcome news.

We may even **take judicial notice** of respondents' **concrete earnest efforts** to **prevent** the **transmission of the SARS-CoV-2 virus** and the **infection of PDLs**, including petitioners, **with COVID-19**, as painstakingly specified in their Comment. We may further **accept** as evidence respondents' claim that MMDJ-4 at Camp Bagong Diwa, Taguig City, the Taguig City Jail-Female Dormitory, Manila City Jail-Female Dorm, and the Manila City Jail-Male Dormitory have **no confirmed cases** of COVID-19.

But we do **not** live in a bubble. We, too, may **take judicial notice** of the fact that this virus is **contagious** even before a person demonstrates signs of infection. Persons can be asymptomatic yet be highly contagious. These **facts are well known in the community** given the proliferation of formal and informal media coverage on COVID-19. We note **how rapidly events have changed** from day to day, with a corresponding rise in the numbers of individuals who are infected, who die, and fortunately, who are cured of this abominable menace.

We may likewise **take judicial notice** of the fact that **recommended physical distancing** and **frequent hand washing** which are required as protection against COVID-19 are **not readily available** while a person is in custody at our facilities. This is **not a criticism** of our facilities much less their administrators. It is **merely a statement of the fact** that our pre-judgment PDLs **cannot adequately physically isolate** or **wash their hands** with frequency in the facilities.

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[40] BJMP puts up coronavirus isolation facility for inmates, at https://news.abs-cbn.com/news/04/09/20/bjmp-puts-up-coronavirus-isolation-facrility-for-inmates (last accessed April 9, 2020).

Just **because petitioners have been deprived of their liberty** and **are stuck in jails** in Luzon, they are **already vulnerable** to an **increased risk** of contracting the disease brought about by the virus. We need **not require** petitioners to satisfy the Court that they have **some subjective personal characteristics** for us to accept that each of them is at an **increased** risk of infection. We **do not need evidence** to accept this proposition.

At most, petitioners' alleged **pre-existing medical conditions** render each of them just **even more prone** to infection by this virus and contracting its disease. Their pre-existing medical conditions **make the risk of infection riskier**. *But the absence of these conditions does not remove altogether the risk* that have been heightened as a result of their being in jails. At any rate, from my end, I can **accept as fact** that they each have **pre-existing medical conditions** that put each of them at a **higher than normal risk of infections** generally. I have **no evidence to contradict** their assertions on this point, and I **accept** them.

In view of the **life-changing impact** of COVID-19 upon the totality of our social and economic well-being, the administration of our government, the dispensation of justice, and our individual lifestyles, I am of the view that this **pandemic** constitutes **exceptional and material change of circumstances** that permits us **to look closely** and **with urgency** into petitioners' plea.

The reasoning in ***Enrile*** will **help us resolve** this case.

In ***Enrile***, the Court found that the **greatly elevated health risk** posed to Senator Enrile as a PDL than when he is on bail or under another form of custodial arrangement, is **a factor that must be considered** in evaluating whether to grant discretionary bail. ***Enrile*** posed a **two-step test**: (a) that the detainee will **not be a flight risk** or **a danger** to the community; and (b) that **there exist special, humanitarian** and **compelling circumstances**.

Here, in the same manner, the **threat** that the **virus** poses to every PDL is **one factor** to be considered in the **balancing of the interests** attending the pre-judgment detention of an accused. It is a **special**, **humanitarian** and **compelling** circumstance that fulfils the **second step** of the test.

It **bears emphasis though** that the existence **and** contagious nature of COVID-19 while **highly relevant** is **not solely determinative**. It is **just one of the factors** that the Court must assess. There are **other concerns**, which specifically deal with **first step**.

As in ***Enrile***, a **factor** in the **first step** is the **flight risk of** the pre-judgment PDL, or in this case, the **PDLs** – *will he or she or they attend court hearings?* Note that there are **so many of them directly seeking the Court's intervention**, which **makes a whole lot of a difference** than when

the Court is **dealing with only a single individual** whose court attendance must be secured.

I also articulate **some of the other factors** we must consider:

(i) Is there a **substantial likelihood** or **substantial risk** that the pre-judgment PDL or PDLs would be **committing the same or another crime**, using as contexts the circumstances of the offense with which the pre-judgment PDL or the PDLs is or are charged and their individual personality or personalities?

(ii) Will the grant of bail for a specified amount or upon recognizance **maintain the peoples' trust and confidence in our system of administering justice**, having regard to the pre-judgment PDLs' respective situations, including the apparent strength of the prosecution's case, the gravity of the crime per se, the hideous or attenuating circumstances surrounding its commission and the potential for a lengthy term of imprisonment and other criminal penalties?

(iii) Are there **custodial arrangements** by which respondents **could reduce** the **greatly elevated health risk** posed to petitioners as pre-judgment PDLs with pre-existing medical conditions by the COVID-19 disease?

(iv) Will petitioners' **release on bail** be **actually beneficial to them**, that is, will each of them be **actually inoculated** from COVID-19 through such means as physically distancing, protective gears, frequent handwashing, and others that may be required hereafter?

(v) With the **enactment of RA 11469 (2020)**, *Bayanihan To Heal As One Act*, will the Court **not trudge on questions of policy** that are **better left to** the Executive Branch, specifically the *Inter-Agency Task Force for the Management of Emerging Infectious Diseases in the Philippines (IATF)* under EO 168 (2014) as amended, **to address** under the **doctrines of authentic political question and primary jurisdiction**?

As respondents have clarified, **petitioners' respective offenses** are **serious** and **violent**. Respondents also emphasized that a number of them **failed to report** to their respective courts **after their safe conduct passes** to attend the peace talks abroad were revoked by the Philippine Government. Petitioners were **subsequently arrested** on the basis of warrants of arrest issued against each of them. Respondents also **detailed** each of the detention center's **efforts to combat** the spread and transmission of COVID-19 not only among petitioners but the other PDLs as well.

Beyond the factors which the Court are competent to weigh in, we must consider as well that COVID-19 is *also a* **national health concern,** the **response** to which **impacts** on the **whole fabric** and **every strand** of our polity. Ultimately, it was for this reason that Congress passed RA 11469 (2020), *Bayanihan To Heal As One Act*, so that there will be a **united front** against this **common invisible enemy**.

In this context, there will be **consequences to the plans** already laid down by the IATF if we are to release petitioners, and later, others similarly situated, on bail. **Resources** of the **Executive Branch** will be **diverted** and **used** simply **to monitor** petitioners' whereabouts and activities during the period of national health emergency. If granted, their release could become an **unnecessary distraction** to the current efforts to fight the virus and its disease. As respondents seem to assert in their Comment, petitioners are **better quarantined** at their present detention centers.

The doctrine of political question states:

> Baker v. Cart remains the starting point for analysis under the political question doctrine. There the US Supreme Court explained that:
>
> . . . Prominent on the surface of any case held to involve a political question is found **a textually demonstrable constitutional commitment of the issue to a coordinate political department** or a **lack of judicially discoverable and manageable standards for resolving it**, or the **impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion**; or the **impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government**; or an **unusual need for unquestioning adherence to a political decision already made**; or the **potentiality of embarrassment from multifarious pronouncements by various departments on question.**
>
> In Tañada v. Cuenco, we held that **political questions refer** "to **those questions which, under the Constitution, are to be decided by the people in their sovereign capacity**, or in regard to which **full discretionary authority has been delegated to the legislative or executive branch of the government.** It is concerned with **issues dependent upon the wisdom, not legality of a particular measure.**"[41]

I am of the view that RA 11469 has **exclusively committed** to the Executive Branch **actions** and **decisions** pertaining to the **courses of action** to meet the perils brought by COVID-19.

The **release on bail** of pre-judgment PDLs not otherwise qualified for release **but for the perils** of the virus and the disease, **involves an act of discretion** falling under RA 11469. The country is in **actual standstill** because of COIVD-19. Necessarily, **if the Court is to act because of the virus and its disease**, the Court **has to defer** to the **wisdom of the Executive**

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41 *Vinuya v. Romulo*, G.R. No. 162230, April 28, 2010.

Branch, because our legal order **has exclusively tasked it** to combat the **very cause of and reason for** the action prayed for by petitioners.

In the ultimate analysis, even the **issues that we can decide on our own** as an institution, *i.e.*, whether petitioners would again commit a crime or would be available for the next court date or their release would bring our administration of justice into disrepute, are also **intricately connected to** the over-all response to the pandemic.

This is **because** once petitioners are released, the courts **will have to rely on the Executive Branch and its officers** to monitor and enforce compliance with the bail plan. This will be **especially complicated** during this period of national health emergency when everyone in the Executive Branch is focused on fighting the virus and the disease it brings. Further, it is the **Executive Branch** that **has the resources** to commit and spend for **alternative custodial arrangements** to keep petitioners safe from COVID-19.

The **doctrine of primary jurisdiction** articulates that "courts will **hold off from determining** a controversy involving a **question** within the jurisdiction of an administrative agency, particularly when **its resolution demands the special knowledge, experience, and services** of the administrative tribunal to determine technical and intricate matters of fact."[42] The country's law has **now entrusted to the Executive Branch, especially the IATF**, the authority to decide upon how to go about **combatting** the spread of the virus and its disease **everywhere**, ***including our courts, penitentiaries and detention or holding facilities***. **Full discretionary authority** has been **delegated** to this administrative office as regards this broad matter, by virtue of its **expertise** and **specialized knowledge**.

I say with a great deal of confidence that there would **potentially** be a **great deal of embarrassment and confusion** should there be **multifarious pronouncements** by various departments on this pressing concern. More, these pronouncements could be **deadly** and **costly** if made **unilaterally without coordination** or **consultation with** the Executive Branch.

Balancing varied interests – a summary.

Of all **the issues I have canvassed** vis-à-vis petitioners' plea to be released on bail for a specified amount or upon recognizance, the **things that have been established** are:

- the **extremely contagious nature** of **COVID-19**,

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42 *Cordillera Global Network v. Paje*, G.R. No. 215988, April 10, 2019.

- the **likelihood of transmission** of the virus and the disease **inside detention facilities among PDLs**, *unless intervention measures are put in place*,
- the **difficulties in achieving physical distancing, providing protective gears**, and **accessing frequent handwashing**,
- the **increased risk to petitioners** as a result of their **detention** and **pre-existing medical conditions**,
- respondents' **concrete earnest efforts** to **prevent** the **transmission of** and the **infection with COVID-19** of **PDLs** including petitioners, and
- the **absence of confirmed cases** of COVID-19 at MMDJ-4 at Camp Bagong Diwa, Taguig City, the Taguig City Jail-Female Dormitory, Manila City Jail-Female Dorm, and the Manila City Jail-Male Dormitory.

While the facts about the **extreme contagious nature** of COVID-19 are real, and **existing concerns about the state of our detention facilities** are **highly relevant**, they are **not** the only factors **determinative** or **dispositive** of petitioners' plea.

We also **have to take into account** respondents' and other jail wardens' **concrete efforts to put into place protective measures** against the virus.

Further, there is a **host of other issues I believe petitioners have to address**, for which **they provided no answers**, and to date **have not suggested** any.

In **summary**, in these very challenging times, even as we **fully recognize** the potential **harmful health impact on detained persons** of the virus, the Court **must balance** *what respondents in particular have been doing and will do to keep PDLs healthy and alive* as well as the *legal requirements* of, one, **adhering** to the **legislated policy** of having *just the compass of the Executive Branch as the single baton* in the united fight against COVID-19 for our common collective protection, and two, **sustaining** *our role* in the **proper functioning** of our **legal system** and the **administration of justice**.

Separate Opinion of Justice Delos Santos – some points to ponder upon…

For the most part, I concur in the ***Separate Opinion*** of my esteemed colleague, Justice Delos Santos. May I however respectfully forward some of my thoughts on a very few items that in my humble opinion could be subject to unintended interpretations.

18

One. I disagree with the reasoning that:

> First, the general import of the terms in Section 4 (a) of the Bureau of Corrections Act in relation to the Nelson Mandela Rules clearly show that such provision is not judicially-enforceable.
>
> ....
>
> The phrase "in compliance with established United Nations standards" in Section 4 (a) of the Bureau of Corrections Act is **so generic** that it clearly appears to be **silent regarding the manner of its implementation**....
>
> ....
>
> As to the issue of specific implementation, the following phrases of the afore-cited Nelson Mandela Rules stand out: (a) "reasonable accommodation and adjustments;" (b) "full and effective access to prison life on an equitable basis;" (c) "shall meet all requirements of health;" (d) "cubic content of air, minimum floor space, lighting, heating and ventilation;" (e) "special accommodation;" and (f) "[a]rrangements shall be made." All of these phrases do not provide specific details as to the manner of implementation...
>
> Second, the implementation of the Bureau of Corrections Act is dependent on the available funds of the Bureau. (emphases supplied)

To begin with, primary and subordinate legislations would almost always be couched in general terms that understandably would lack details. Such terms as "reasonable," "equitable," "circumstances" and others are so common among public and private legal instruments, **but it does not mean** that these otherwise binding documents would **not be judicially enforceable**.

To illustrate, the definitions of "probable cause" and the various other standards of proof (e.g., beyond a reasonable doubt, preponderant evidence, substantial evidence) use the same words as "reasonable," "circumstances," etc., **yet we never ever complained** that we cannot enforce them.

Indeed, such ambiguous terms are meant to be **questions of fact** whose **resolution** must be grounded in the specific facts and circumstances established by evidence or supporting allegations. Their ambiguity is **clarified** by the process of receiving evidence or submissions, and in the end, a court is able to define what "reasonable" and "equitable" concretely signify.

Hence, in one case, this Court was confronted with the issue of "whether there is a 'counteraction' of forces between the union and the company and whether each of the parties exerted 'reasonable effort at good faith bargaining'"[43] **but we did not decline to rule on this issue because of the ambiguity of the standard**. Instead, we said "whether there was already deadlock between the union and the company is likewise a question of fact. It requires the determination of evidence to find..."

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[43] *Tabangao Shell Refinery Employees Association v. Pilipines Shell Petroleum Corporation*, G.R. No. 170007, April 7, 2014.

I also **disagree** with the thought that **budgetary restrictions and considerations** are factors in determining the **existence** of a right and its **enforceability**. I will of course be the first to **concede** that in the **"implementation"** of a statutory program, **budget becomes a critical factor**. But this weighing does **not** happen at the **initial stage** where the **existence** of a right and its **enforceability** are being determined. **Budget** could be a **factor** in **fashioning** the **appropriate remedy** or **relief**, and **assessing** the **reasonableness** of the **compliance** with the **remedy** or **relief**, but this occurs only *after* a **right** has been determined to **exist** and to be **enforceable**.

In any event, please **recall** that in one of the Court's more celebrated decisions, we decreed:

> WHEREFORE, the petition is DENIED. The September 28, 2005 Decision of the CA in CA-G.R. CV No. 76528 and SP No. 74944 and the September 13, 2002 Decision of the RTC in Civil Case No. 1851-99 are AFFIRMED but with MODIFICATIONS in view of subsequent developments or supervening events in the case. The *fallo* of the RTC Decision shall now read:
>
> WHEREFORE, judgment is hereby rendered ordering the abovenamed defendant-government agencies to clean up, rehabilitate, and preserve Manila Bay, and restore and maintain its waters to SB level (Class B sea waters per Water Classification Tables under DENR Administrative Order No. 34 [1990]) to make them fit for swimming, skin-diving, and other forms of contact recreation.
>
> In particular:
>
> (1) Pursuant to Sec. 4 of EO 192, assigning the DENR as the primary agency responsible for the conservation, management, development, and proper use of the country's environment and natural resources, and Sec. 19 of RA 9275, designating the DENR as the primary government agency responsible for its enforcement and implementation, the DENR is directed to fully implement its Operational Plan for the Manila Bay Coastal Strategy for the rehabilitation, restoration, and conservation of the Manila Bay at the earliest possible time. It is ordered to call regular coordination meetings with concerned government departments and agencies to ensure the successful implementation of the aforesaid plan of action in accordance with its indicated completion schedules.
>
> (2) Pursuant to Title XII (Local Government) of the Administrative Code of 1987 and Sec. 25 of the Local Government Code of 1991, 42 the DILG, in exercising the President's power of general supervision and its duty to promulgate guidelines in establishing waste management programs under Sec. 43 of the Philippine Environment Code (PD 1152), shall direct all LGUs in Metro Manila, Rizal, Laguna, Cavite, Bulacan, Pampanga, and Bataan to inspect all factories, commercial establishments, and private homes along the banks of the major river systems in their respective areas of jurisdiction, such as but not limited to the Pasig-Marikina-San Juan Rivers, the NCR (Parañaque-Zapote, Las Piñas) Rivers, the Navotas-Malabon-Tullahan-Tenejeros Rivers, the Meycauayan-Marilao-Obando (Bulacan) Rivers, the Talisay (Bataan) River, the Imus (Cavite) River, the Laguna De Bay, and other minor rivers

and waterways that eventually discharge water into the Manila Bay; and the lands abutting the bay, to determine whether they have wastewater treatment facilities or hygienic septic tanks as prescribed by existing laws, ordinances, and rules and regulations. If none be found, these LGUs shall be ordered to require non-complying establishments and homes to set up said facilities or septic tanks within a reasonable time to prevent industrial wastes, sewage water, and human wastes from flowing into these rivers, waterways, esteros, and the Manila Bay, under pain of closure or imposition of fines and other sanctions.

(3) As mandated by Sec. 8 of RA 9275, 43 the MWSS is directed to provide, install, operate, and maintain the necessary adequate waste water treatment facilities in Metro Manila, Rizal, and Cavite where needed at the earliest possible time.

(4) Pursuant to RA 9275, 44 the LWUA, through the local water districts and in coordination with the DENR, is ordered to provide, install, operate, and maintain sewerage and sanitation facilities and the efficient and safe collection, treatment, and disposal of sewage in the provinces of Laguna, Cavite, Bulacan, Pampanga, and Bataan where needed at the earliest possible time.

(5) Pursuant to Sec. 65 of RA 8550, 45 the DA, through the BFAR, is ordered to improve and restore the marine life of the Manila Bay. It is also directed to assist the LGUs in Metro Manila, Rizal, Cavite, Laguna, Bulacan, Pampanga, and Bataan in developing, using recognized methods, the fisheries and aquatic resources in the Manila Bay.

(6) The PCG, pursuant to Secs. 4 and 6 of PD 979, and the PNP Maritime Group, in accordance with Sec. 124 of RA 8550, in coordination with each other, shall apprehend violators of PD 979, RA 8550, and other existing laws and regulations designed to prevent marine pollution in the Manila Bay.

(7) Pursuant to Secs. 2 and 6-c of EO 513 and the International Convention for the Prevention of Pollution from Ships, the PPA is ordered to immediately adopt such measures to prevent the discharge and dumping of solid and liquid wastes and other ship-generated wastes into the Manila Bay waters from vessels docked at ports and apprehend the violators.

(8) The MMDA, as the lead agency and implementor of programs and projects for flood control projects and drainage services in Metro Manila, in coordination with the DPWH, DILG, affected LGUs, PNP Maritime Group, Housing and Urban Development Coordinating Council (HUDCC), and other agencies, shall dismantle and remove all structures, constructions, and other encroachments established or built in violation of RA 7279, and other applicable laws along the Pasig-Marikina-San Juan Rivers, the NCR (Parañaque-Zapote, Las Piñas) Rivers, the Navotas-Malabon-Tullahan-Tenejeros Rivers, and connecting waterways and esteros in Metro Manila. The DPWH, as the principal implementor of programs and projects for flood control services in the rest of the country more particularly in Bulacan, Bataan, Pampanga, Cavite, and Laguna, in coordination with the DILG, affected LGUs, PNP Maritime Group, HUDCC, and other concerned government agencies, shall remove and

demolish all structures, constructions, and other encroachments built in breach of RA 7279 and other applicable laws along the Meycauayan-Marilao-Obando (Bulacan) Rivers, the Talisay (Bataan) River, the Imus (Cavite) River, the Laguna De Bay, and other rivers, connecting waterways, and esteros that discharge wastewater into the Manila Bay.

In addition, the MMDA is ordered to establish, operate, and maintain a sanitary landfill, as prescribed by RA 9003, within a period of one (1) year from finality of this Decision. On matters within its territorial jurisdiction and in connection with the discharge of its duties on the maintenance of sanitary landfills and like undertakings, it is also ordered to cause the apprehension and filing of the appropriate criminal cases against violators of the respective penal provisions of RA 9003, Sec. 27 of RA 9275 (the Clean Water Act), and other existing laws on pollution.

(9) The DOH shall, as directed by Art. 76 of PD 1067 and Sec. 8 of RA 9275, within one (1) year from finality of this Decision, determine if all licensed septic and sludge companies have the proper facilities for the treatment and disposal of fecal sludge and sewage coming from septic tanks. The DOH shall give the companies, if found to be non-complying, a reasonable time within which to set up the necessary facilities under pain of cancellation of its environmental sanitation clearance.

(10) Pursuant to Sec. 53 of PD 1152, 48 Sec. 118 of RA 8550, and Sec. 56 of RA 9003, 49 the DepEd shall integrate lessons on pollution prevention, waste management, environmental protection, and like subjects in the school curricula of all levels to inculcate in the minds and hearts of students and, through them, their parents and friends, the importance of their duty toward achieving and maintaining a balanced and healthful ecosystem in the Manila Bay and the entire Philippine archipelago.

(11) The DBM shall consider incorporating an adequate budget in the General Appropriations Act of 2010 and succeeding years to cover the expenses relating to the cleanup, restoration, and preservation of the water quality of the Manila Bay, in line with the country's development objective to attain economic growth in a manner consistent with the protection, preservation, and revival of our marine waters.

(12) The heads of petitioners-agencies MMDA, DENR, DepEd, DOH, DA, DPWH, DBM, PCG, PNP Maritime Group, DILG, and also of MWSS, LWUA, and PPA, in line with the principle of "continuing mandamus", shall, from finality of this Decision, each submit to the Court a quarterly progressive report of the activities undertaken in accordance with this Decision.

No costs.[44]

The kilometric dispositive portion **will at once tell us** that the concerned entities will **have to spend some money**, which calls for a budget, to be able to comply with what the Court has ruled to be the **rightful entitlements** of the claimants therein. It was **never an issue to the Court** that

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[44] *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay*, G.R. Nos. 171947-48, December 18, 2008.

in determining the existence of a right and in enforcing it, we may be requiring some government agencies to spend some resources to promote, protect and defend the right.

In truth, nothing ought to **restrict** the Court from **adjudicating** the **existence** of a right and its **enforceability** on the **basis** of the **availability** of **budget** for the **implementation** of a right. We should be able to **distinguish** one from the other and to **keep sacred** this **dichotomy**.

Second. I disagree with the rationale that:

> Presently, there is ***no*** constitutional provision or law which ***automatically*** grants bail, releases on recognizance or allows other modes of temporary liberty to all accused or inmates who are clinically-vulnerable (i.e. sickly, elderly or pregnant). As it stands, courts concerned will still have to consider the following guidelines for bail in Sections 5 and 9, Rule 114 of the Revised Rules of Criminal Procedure....
>
> The above-mentioned enumeration clearly pertain to **purely factual questions** that trial courts are equipped to pass upon. Moreover, the consideration of these factors which includes others not mentioned but are analogous to the ones provided means that such guidelines **do not work in isolation**. (emphases supplied)

The cited rule pertains to the **determination** of the **amount of bail** where bail is a **matter of right**. It has no application where **bail is a matter of discretion** as a result of the imposable penalties upon the crime charged where evidence of guilt is strong.

I **do not wish to impart** the idea that Section 9, Rule 114 **per se** is a **list of factors** to be weighed **every time** a **petition for bail** is filed. Section 9 becomes relevant **only when** the ruling in ***Enrile*** is **applicable** *in the sense* of being **the standard for resolving the case**, particularly, in determining whether the ***Enrile*** **two-step test** is complied with: (a) that the detainee will not be a flight risk or a danger to the community; and (b) that there exist special, humanitarian and compelling circumstances. The **Section 9 factors** are good indicators, among others, of the existence of these elements in the ***Enrile*** **test**.

In this connection, I disagree with the statement that:

> ***Fourth***, the Court's ruling in ***Enrile v. Sandiganbayan, et al.*** is inapplicable in the instant case.
>
> ....
>
> In Enrile, the Court emphasized that while the Philippines honors its "commitment to uphold the fundamental human rights as well as value the worth and dignity of every person," the grant of bail to those charged in criminal proceedings as well as extraditees must be based upon a clear and convincing showing: (a) that the detainee will ***not*** be a **flight risk** or a

> **danger** to the **community**; ***and*** (b) that there exist special, humanitarian and compelling circumstances....
>
> Here, the petitioners do not deny the allegations of the OSG that they are indeed charged with heinous crimes related to national security and are also valuable members of the CPP-NPA-NDF and its affiliates. Even if the alleged facts underlying humanitarian reasons were to be accepted without question, they still have to be weighed against the fact that the charges against the petitioners involve serious matters of national security and public safety.... As a consequence, the petitioners' reliance on this ruling is patently misguided....
>
> Even assuming for the sake of argument that the petitioners had managed to attach documents proving the foregoing pieces of information, the determination of whether or not guilt is strong should still be lodged with the trial courts who are well-equipped to handle them.... (emphases and underscoring supplied)

As submitted earlier, Enrile applies here, **not in the sense** that herein petitioners would also be entitled to be released on a bail plan, **but in the sense** that ***Enrile*** is a legally binding decision, a law, that must **apply equally to all** who are able to meet the standards that ***Enrile*** espouses. To conclude *otherwise* is to **institutionalize** the **forbidden thought** that ***some people are better treated in and under the law than others upon dubious grounds.***

Thus, herein petitioners are **correct in invoking *Enrile*** but **may still be not released** on bail for a specified amount or on recognizance **unless they are able to muster** the **two-step test** in ***Enrile***: (a) the detainee will **not be a flight risk** or **a danger** to the community; and (b) **there exist special, humanitarian and compelling circumstances**. The **test** in ***Enrile*** has **nothing** to do with **assessing** whether or not the **evidence** of **petitioners' guilt** is **strong**, but on **other factors** as mentioned above.

Third. I disagree with the rationale that:

> In the case of the petitioners' continued confinement in their respective detention facilities, **the Court cannot issue an order for the creation of a "Prisoner Release Committee" in the absence of any law and in the absence of any concluded bail hearing which resulted in the grant of provisional liberty**. As it stands, **only the political branches of government (Executive and Legislative) have the power to determine for themselves if such recourse is warranted**. The only act that the Court may do under the circumstances is to order the conduct bail hearings before the trial courts with dispatch....

I have my **misgivings** if the **political** branches of government have the **authority to order the release of PDLs**, or for that matter, **their continued detention**, if, **in the former**, the evidence of guilt is strong for a crime punishable by death, *reclusion perpetua* or life imprisonment or there has been **yet no determination** thereof in a hearing, or if, **in the latter**, it has been **decided after a hearing** that the evidence of guilt is **not** strong for a

crime punishable by death, *reclusion perpetua* or life imprisonment. **The determination in this regard exclusively belongs to the courts.**

Fourth. I also disagree with this statement:

> Besides, whenever a conundrum arises **in times of emergency** when police power collides with constitutionally-protected freedoms or fundamental rights, the political questions doctrine will often tip the balance in favor of general welfare acts or policies in view of the State's duty to primarily protect general interests... *However*, while public safety is the paramount and overriding concern of the State and while it is also true that laws should be interpreted in favor of the greatest good of the greatest number during emergencies, *individual freedoms also have to be respected*... (Emphases supplied)

I **do not want** to give the **misimpression** that **petitioners will remain in detention** because *"whenever a conundrum arises in times of emergency when police power collides with constitutionally-protected freedoms or fundamental rights, the political questions doctrine* **will often tip the balance** *in favor of general welfare acts or policies in view of the State's duty to primarily protect general interests."* This is farthest from the truth. They will **stay under detention** because they **failed to satisfy the requirements** that would have otherwise qualified them to be released.

More, I am not comfortable with the idea that **during emergencies**, the Court will already desist from acting in favour of individual rights since *the political question doctrine* **will often tip the balance**. This is a recipe for authoritarianism which I am sure even respondents and the OSG are not advocating at present.

Fifth. I disagree with the references to the following conclusions which may have an impact on the trial of petitioners' criminal cases below:

> Here, the petitioners do not deny the allegations of the OSG that they are indeed charged with heinous crimes related to **national security** and are also valuable members of the CPP-NPA-NDF and its affiliates…
>
> ….
>
> …As earlier discussed, the government cannot afford to gamble its chances and resources by allowing the petitioners who are allegedly key members of the CPP-NPA-NDF to roam free while the COVID-19 pandemic remains an imminent and grave threat…

I would **not** have wanted us to give so much thought and weight to petitioners' status as rebels when as the Separate Opinion itself states this matter as being **merely an allegation** (i.e., the Separate Opinion uses the descriptor "alleged") and more importantly when this is an issue being litigated at the trial courts below. It would have **sufficed to focus** on **petitioners' collective inability to provide concrete circumstances and bail plan** to prove the first-prong of the ***Enrile*** test.

No one left behind, healing as one – fashioning the appropriate relief.

We are **not in ordinary times**. Also, **time** is **not on anyone's side**. The reason lies in the **nature of the enemy** we are all facing. The spread or transmission rate of COVID-19, to use lay language, is "**less than a week** and that **more than 10 percent of patients are infected by somebody** who has the virus but **does not yet have symptoms.**"[45] As further explained by **WHO**:

> Q. How are COVID-19 and influenza viruses different?
>
> The speed of transmission is an important point of difference between the two viruses. Influenza has a shorter median incubation period (the time from infection to appearance of symptoms) and a shorter serial interval (the time between successive cases) than COVID-19 virus. **The serial interval for COVID-19 virus is estimated to be 5-6 days**, while for influenza virus, the serial interval is 3 days. This means that **influenza can spread faster than COVID19**. Further, transmission in the first 3-5 days of illness, or potentially pre-symptomatic transmission –transmission of the virus before the appearance of symptoms – is a major driver of transmission for influenza. In contrast, while we are learning that **there are people who can shed COVID-19 virus 24-48 hours prior to symptom onset, at present, this does not appear to be a major driver of transmission. The reproductive number – the number of secondary infections generated from one infected individual – is understood to be between 2 and 2.5 for COVID-19 virus**, higher than for influenza.... **Children are important drivers of influenza virus transmission in the community.** For COVID-19 virus, initial data indicates that **children are less affected than adults and that clinical attack rates in the 0-19 age group are low. Further preliminary data from household transmission studies in China suggest that children are infected from adults, rather than vice versa....** For COVID-19, data to date suggest that 80% of infections are mild or asymptomatic, 15% are severe infection, requiring oxygen and 5% are critical infections, requiring ventilation. These fractions of severe and critical infection would be higher than what is observed for influenza infection. Those most at risk for severe influenza infection are children, pregnant women, elderly, those with underlying chronic medical conditions and those who are immunosuppressed. **For COVID-19, our current understanding is that older age and underlying conditions increase the risk for severe infection.**[46]

The **ubiquitous advice** about this pandemic is that, *unlike in other situations where time heals*, **time** is **not** our **best ally**. **Transmission** is **rapid** and **easy**. The **host and carrier** does **not** carry a badge for easy identification. Those who **look healthy** can be just that, mere appearance of health.

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[45] Coronavirus spreads quickly and sometimes before people have symptoms, study finds, at https://www.sciencedaily.com/releases/2020/03/200316143313.htm (last accessed April 10, 2020).

[46] SUBJECT IN FOCUS: Q&A: Similarities and differences – COVID-19 and influenza, at https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200306-sitrep-46-covid-19.pdf?sfvrsn=96b04adf_2 (last accessed April 10, 2020).

I therefore **do not criticize** petitioners for resorting directly to this Court. As correctly held by the *ponencia*, the **doctrine of the hierarchy of courts** does **not apply** to the present circumstances.

Fortunately, respondents have responded well to the call for **preventive measures** against COVID-19 at our detention centers. From all indications, and in the absence of evidence to the contrary, respondents **have acquitted** themselves well in this regard. It is my hope that they **remain aggressive against** the virus and **continue keeping** the PDLs safe from the disease. Their **timely response answers petitioners' rightful concerns** against this invisible enemy.

It is my understanding from the petition that at the time of filing, **petitioner Reina Mae Nasino** was **five-months pregnant**. She must have given birth by now. I do not know if her baby now stays with her. But if the baby does, it is **entitled to separate protection** apart from its mother, petitioner Nasino, would be entitled to.

Hence, while I **recognize** and **adhere to** the **primordial if not exclusive** role of the Executive Branch in the fight against COVID-19, I believe that we have **a role to play in protecting the baby** from adverse consequences that are **not of the baby's own doing**. After all, **her mother** is in this state of panic **because** the **lower court** has **issued processes** for her preventive detention; further, she and her **co-petitioners** are invoking their entitlement to **bail under the circumstances**; and, lastly, the **health** of the **baby** is exposed to a **greater** risk of infection than those who are staying with their mothers outside the detention facilities. To use the hyperbole of **Human Rights Watch**, the baby's situation is **akin to** having a **death sentence** imposed upon it **by mere accident** or **as an innocent by-stander**.[47]

In ***Echegaray v. Secretary of Justice***,[48] the Court **affirmed** that the **power to save the life of a human being** is **not exclusive** to any of the three branches of government. The Court said poignantly: *"The powers of the Executive, the Legislative and the Judiciary to save the life of a death convict do not exclude each other for the simple reason that there is no higher right than the right to life."*

Our jurisprudence has also **confirmed** that "the Court is, under the Constitution, empowered to promulgate rules for the protection and enforcement of constitutional rights,"[49] the most prominent being the **right to life**. With the Court's authority to promulgate formal rules for this purpose, with more reason **the Court can exercise** *and not resile from* the **jurisdiction** to put its two cents' worth whenever a **person's life** or **health** – in this case,

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47 COVID-19 Shouldn't Be a Death Sentence for People in US Prisons, at https://www.hrw.org/news/2020/04/03/covid-19-shouldnt-be-death-sentence-people-us-prisons (last accessed April 11, 2020).

48 G.R. No. 132601. January 19, 1999.

49 *Castillo v. Cruz*, G.R. No. 182165, November 25, 2009.

that of the **baby** of a pre-judgment PDL – is **also at stake** from **circumstances not of her own making**.

The **greater risks** that the present pandemic have caused are the **actual facts** that **fuel** the **present controversy** which makes it **justiciable**. Let me stress. There is **nothing advisory, nothing philosophical, nothing dreamy** about the COVID-19. We have been quarantined for almost half of this year already, our courts and others have lost the equivalent of about six-months of man-hours, **all because of the REAL dangers** to life, health and overall well-being of the entire population of the Philippines and the entire world. I would like the Court to give relief to petitioner Nasino's baby **not because** of the ineptitude of respondents, but as a result of the **reality** of the **greater risks** facing **petitioner Nasino's baby** coming from **facts** about this **pandemic**.

ACCORDINGLY, I vote to **TREAT** the present petition as petitioners' applications for bail or recognizance as well as their motions for other confinement arrangements, and **REFER** the same to the respective trial courts where their criminal cases are pending, which courts should be **DIRECTED** to conduct the necessary proceedings and consequently, resolve these incidents with utmost dispatch.

AMY C. LAZARO-JAVIER
Associate Justice