G.R. No. 230642 – OSCAR B. PIMENTEL, ERROL B. COMAFAY, JR., RENE B. GOROSPE, EDWIN R. SANDOVAL, VICTORIA B. LOANZON, ELGIN MICHAEL C. PEREZ, ARNOLD E. CACHO, AL CONRAD B. ESPALDON, ED VINCENT S. ALBANO, LEIGHTON R. SIAZON, ARIANNE C. ARTUGUE, CLARABEL ANNE R. LACSINA, KRISTINE JANE R. LIU, ALYANNA MARI C. BUENVIAJE, IANA PATRICIA DULA T. NICOLAS, IRENE A. TOLENTINO and AUREA I. GRUYAL, *Petitioners* v. LEGAL EDUCATION BOARD, as represented by its Chairperson, HON. EMERSON B. AQUENDE, and LEB Member HON. ZENAIDA N. ELEPAÑO, *Respondents*; ATTYS. ANTHONY D. BENGZON, FERDINAND M. NEGRE, MICHAEL Z. UNTALAN, JONATHAN Q. PEREZ, SAMANTHA WESLEY K. ROSALES, ERIKA M. ALFONSO, KRYS VALEN O. MARTINEZ, RYAN CEAZAR P. ROMANO, and KENNETH C. VARONA, *Respondents-in-Intervention*; APRIL D. CABALLERO, JEREY C. CASTARDO, MC WELLROE P. BRINGAS, RHUFFY D. FEDERE, CONRAD THEODORE A. MATUTINO and numerous others similarly situated, ST. THOMAS MORE SCHOOL OF LAW AND BUSINESS, represented by its President RODOLFO C. RAPISTA, for himself and as Founder, Dean and Professor, of the College of Law, JUDY MARIE RAPISTA-TAN, LYNNART WALFORD A. TAN, IAN M. ENTERINA, NEIL JOHN VILLARICO as law professors and as concerned citizens, *Petitioners-in-Intervention*.

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G.R. No. 242954 – FRANCIS JOSE LEAN L. ABAYATA, GRETCHEN M. VASQUEZ, SHEENAH S. ILUSTRISMO, RALPH LOUIE SALAÑO, AIREEN MONICA B. GUZMAN, DELFINO ODIAS, DARYL DELA CRUZ, CLAIRE SUICO, AIVIE S. PESCADERO, NIÑA CHRISTINE DELA PAZ, SHEMARK K. QUENIAHAN, AL JAY T. MEJOS, ROCELLYN L. DAÑO, MICHAEL ADOLFO, RONALD A. ATIG, LYNNETTE C. LUMAYAG, MARY CHRIS LAGERA, TIMOTHY B. FRANCISCO, SHEILA MARIE C. DANDAN, MADELINE C. DELA PEÑA, DARLIN R. VILLAMOR, LORENZANA L. LLORICO, and JAN IVAN M. SANTAMARIA, *Petitioners* v. HON. SALVADOR MEDIALDEA, Executive Secretary, and LEGAL EDUCATION BOARD, herein represented by its Chairperson, EMERSON B. AQUENDE, *Respondents*.

Promulgated:

September 10, 2019

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CONCURRING AND DISSENTING OPINION

JARDELEZA, *J.*:

Petitioners in the present consolidated cases[1] seek the Court's issuance of a writ of prohibition and a writ of preliminary injunction or temporary restraining order to keep the Legal Education Board (herein after referred to as the "LEB Law") from holding the Nationwide Uniform Law School Admission Test (PhilSAT) for, among others, its violation of academic freedom. They also ultimately pray that Republic Act No. 7662,[2] the LEB Law be stricken down as unconstitutional, for its encroachment on the exclusive jurisdiction of the Supreme Court in promulgating rules concerning the admission to the practice of law, as provided for in Article VIII, Section 5(5) of the 1987 Constitution.

I concur with the *ponencia* insofar as it holds that the Court has no jurisdiction over legal education.[3] Both statutory history and legislative intent contemplate a separation between legal education and the law profession; and the regulation and supervision of legal education, including admissions thereto, fall within the scope of the State's police power. However, and for reasons I shall hereinafter set out, I must dissent from the majority's ruling to partially nullify Legal Education Board Memorandum Order (LEBMO) No. 7-2015 "insofar as it absolutely prescribes the passing of the PhiLSAT x x x as a pre-requisite for admission to any law school which, on its face, run directly counter to institutional academic freedom."[4]

With respect, I submit that: (I) the invocation of academic freedom as a ground for the partial nullification of the challenged LEBMO is misplaced; (II) the provision by the State of a standardized *exclusionary* exam for purposes of admission to a law school is a valid exercise of police power; and (III) the resolution of the challenge against the State regulation's reasonableness involve underlying questions of fact which cannot be resolved by this Court at the first instance.

My above reservation is heightened by my own research which yields a conclusion different from the conclusion of fact reached by the *ponencia*[5] that the National Medical Admission Test (NMAT) upheld in *Tablarin v. Gutierrez*[6] does not have a cut-off or passing score requirement. As I shall also hereinafter show, the NMAT is no different from the PhiLSAT insofar as it also employs an exclusionary (or, in the words of the *ponencia*,

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[1] *Abayata, et al. v. Hon. Salvador Medialdea, et al.* (G.R. No. 242954) and *Pimentel, et al. v. Legal Education Board* (G.R. No. 230642).

[2] Otherwise known as the Legal Education Reform Act of 1993, hereinafter referred to as "LEB Law"

[3] *Ponencia*, pp. 37-53.

[4] *Id.* at 88.

[5] *Id.* at 86.

[6] G.R. No. 78164, July 31, 1987, 152 SCRA 730.

"totalitarian") scheme in terms of student admissions.[7] I see no reason why both tests should merit different treatment.

I

A

My survey of its venerable history and application in Philippine jurisprudence convince me that the concept of academic freedom has different applications, depending on the character of the party invoking it as a right. And, in instances when academic freedom has been invoked as a personal right–that is, one in favor of individuals (whether an educator or a student), the same has been always been inextricably linked (or discussed in relation) to said individual's *broader* freedom of expression.

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The concept of academic freedom began in medieval Europe, where it was used as to protect universities as a community of scholars against ecclesiastical and political intrusion. It was then carried over to Latin America, where it was used to create sanctuaries out of universities for people who were under political persecution.[8] Academic freedom thereafter developed as a legal right consisting of three key concepts: (1) the philosophy of intellectual freedom for teachers and scholars; (2) the idea of autonomy for the university as a community of scholars; and (3) the guarantee of free expression in the Constitution.[9]

Similarly, the conceptualization of academic freedom in the United States (U.S.) is that it exists to protect scholarship in higher education from untoward political intrusions, mainly through allowing universities to enjoy autonomy over policies of education.[10] Furthermore, while it is conceded to overlap with *civic free speech*, academic freedom is delineated from the former by limiting it as professional speech within higher education, rather than the rights of expression granted to citizens against broader governmental interference.[11]

The first mention of academic freedom in a U.S. Supreme Court case came with the promulgation of *Adler v. Board of Education of the City of New York*.[12] This case involved a New York State statute[13] which required

[7] *Ponencia*, p. 87.

[8] Pacifico Agabin, *Academic Freedom and the Larger Community*, Philippine Law Journal, Vol. 52, 336, 336 (1977) Phil. L.J. 336, 336 (1977).

[9] Enrique M. Fernando, *Academic Freedom as a Constitutional Right*, Philippine Law Journal, Vol. 52, 289, 290 (1977); citing Fuchs, *Academic Freedom – Its basic Philosophy, Function and History*, in BAADE (ed.).

[10] J. Peter Byrne, *Constitutional Academic Freedom After Grutter: Getting Real about the "Four Freedoms" of a University*, Georgetown University Law Center, 77 U. Colo. L. Rev. 929-953 (2006).

[11] *Id.* at 930.

[12] 342 U.S. 485 (1952).

public employees to take loyalty oaths as a condition for their continued employment, and effectively banned state employees from belonging to "subversive groups" under pains of termination. Although the statute was upheld by the Court as a valid exercise of police power,[14] Justice William Douglas,[15] in his key Dissenting Opinion, couched the discourse of academic freedom *within the context of freedom of thought and expression.* He opined:

> x x x The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it, and none needs it more than the teacher.
>
> The public school is, in most respects, the cradle of our democracy. The increasing role of the public school is seized upon by proponents of the type of legislation represented by New York's Feinberg law as proof of the importance and need for keeping the school free of "subversive influences." But that is to misconceive the effect of this type of legislation. Indeed, the impact of this kind of censorship on the public-school system illustrates the high purpose of the First Amendment in freeing speech and thought from censorship.
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> x x x x
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> **The very threat of such a procedure is certain to raise havoc with academic freedom.** Youthful indiscretions, mistaken causes, misguided enthusiasms—all long forgotten—become the ghosts of a harrowing present. Any organization committed to a liberal cause, any group organized to revolt against an (*sic*) hysterical trend, any committee launched to sponsor an unpopular program, becomes suspect. These are the organizations into which Communists often infiltrate. Their presence infects the

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[13] *Id.* at 498. The Civil Service Law of New York, Section 12(a) thereof made ineligible for employment in any public school any member of any organization advocating the overthrow of the Government by force, violence or any unlawful means.

[14] *Id.* at 493. According to the Court:

> A teacher works in a sensitive area in a school room. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate.
>
> If, under the procedure set up in the New York law, a person is found to be unfit and is disqualified from employment in the public school system because of membership in a listed organization, he is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice. Certainly such limitation is not one the state may not make in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence.

[15] As concurred in by Justice Black.

> whole, even though the project was not conceived in sin. A **teacher caught in that mesh is almost certain to stand condemned. Fearing condemnation, she will tend to shrink from any association that stirs controversy. In that manner, freedom of expression will be stifled.**[16] (Emphasis supplied.)

In the same year, the U.S. Supreme Court decided the case of *Wieman v. Updegraff,*[17] where it struck down as unconstitutional a "loyalty oath" statute[18] required of state employees, including the faculty and staff of Oklahoma Agricultural and Mechanical College, which had the effect of excluding persons from state employment solely on the basis of membership in organizations tagged as "subversive," regardless of their knowledge of the activities and purposes of said organizations.[19]

Justice Hugo Black, in his Concurring Opinion in *Wieman*, explained that test oaths were notorious tools of tyranny that inevitably stifle freedom of expression and freedom of the press, and is counter to the crucial uncompromising interpretation of the Bill of Rights.[20] In support, Justice Felix Frankfurter cautioned that statutes that unwarrantedly inhibit the free spirit of teachers will create a chilling effect on that spirit, which is what teachers "ought to especially cultivate and practice." He added that such "fundamental principles of liberty" inevitably go into the nature of the role that teachers play in any given democratic society, and that these freedoms of thought and expression importantly bear on the teachers' capacity to encourage open-mindedness and critical inquiry in the people.[21]

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[16] *Supra* note 12 at 508-509 (1952).

[17] 344 U.S. 183 (1952).

[18] The Oklahoma Stat. Ann, 1950, Tit. 51, Section 37.1-37.9 required each state officer and employee, as a condition of his employment, to take a "loyalty oath" stating, *inter alia*, that he is not, and has not been for the preceding five years, a member of any organization listed by the Attorney General of the U.S. as "communist front" or "subversive."

[19] *Wieman v. Upegraff,* 344 U.S. 485, 193 (1952); The Court, in the main, found a violation of the Due Process Clause ("Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power.") and held that the Government's efforts at countering threats of subversion must not be at the expense of democratic freedoms.

[20] *Id.* Justice Hugo elucidated thus:

> Governments need and have ample power to punish treasonable acts. But it does not follow that they must have a further power to punish thought and speech, as distinguished from acts. Our own free society should never forget that laws which stigmatize and penalize thought and speech of the unorthodox have a way of reaching, ensnaring and silencing many more people than at first intended. We must have *freedom of speech* for all or we will, in the long run, have it for none but the cringing and the craven. And I cannot too often repeat my belief that the right to speak on matters of public concern must be wholly free or eventually be wholly lost. (Italics supplied.)

[21] *Wieman v. Upegraff, supra* note 19 at 196.; Justice Frankfurter explained:

> To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective *public opinion.* Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the *freedom of responsible inquiry, by thought and action,* into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure

Four years after *Adler* and *Wieman*,[22] the U.S. Supreme Court, in the case of *Sweezy v. New Hampshire*,[23] gave a landmark pronouncement in its recognition and acceptance of academic freedom and its grounding in the Constitution. This case involved a New Hampshire statute, pursuant to which Paul Sweezy (Sweezy), then a professor at the University of New Hampshire, was interrogated by the New Hampshire Attorney General about his suspected affiliations with communism. Sweezy refused to answer a number of questions about his lectures in class, on the ground that they were unrelated to the purpose of the investigation and that the questions infringed upon an area protected by the First Amendment. The U.S. Supreme Court ruled in Sweezy's favor and, echoing Justice Frankfurter's concurring opinion in *Wieman*, held that academic inquiries must be left "as unfettered as possible" where "political power must abstain from intrusion into this activity of freedom."[24]

Two years after *Sweezy*, the U.S. Supreme Court, in the case of *Barenblatt v. United States*,[25] a case involving alleged infringement of First Amendment rights,[26] had occasion to qualify the liberal approach on

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which the *freedoms of thought, of speech*, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government. (Italics supplied.)

[22] *Supra* note 12.

[23] 354 U.S. 234, 262 (1957).

[24] *Id.* at 262-263, Justice Frankfurter's opinion further added:

> x x x This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor. x x x

To further emphasize the nature and design of a university and the import of its academic freedom as rooted in freedom of expression and thought, Justice Frankfurter quoted a statement from a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand, to wit:

> "In a university, knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates—'to follow the argument where it leads.' This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university. The concern of its scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself.
>
> Freedom to reason and freedom for disputation on the basis of observation and experiment are the necessary conditions for the advancement of scientific knowledge. A sense of freedom is also necessary for creative work in the arts which, equally with scientific research, is the concern of the university.
>
> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study. (Emphasis supplied.)"

[25] 360 U.S. 109 (1959).

[26] *Id.* at 114-115, 130. Here, petitioner, a former graduate student and teaching fellow at the University of Michigan, refused to answer questions posed to him in an investigation being conducted by a Congressional Subcommittee into alleged Communist infiltration into the field of education. For his refusal, he was fined and sentenced to imprisonment for six months. The Court, after balancing the competing public and private interests involved, found that petitioner's claim that the "investigation was aimed not at the revolutionary aspects, but at the theoretical classroom discussion of communism x x x rests on a too constricted view of the nature of the investigatory process, and is not supported by a fair assessment of the record x x x."

academic freedom. Speaking through Justice John Marshall Harlan, the Court moderated the safeguarding of academic freedom, and held that it was not immune to warranted interrogation by the legislature, to wit:

> x x x Of course, broadly viewed, inquiries cannot be made into the teaching that is pursued in any of our educational institutions. When academic teaching – freedom and its corollary, learning—,freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain. But this does not mean that the Congress is precluded from interrogating a witness merely because he is a teacher. An educational institution is not a constitutional sanctuary from inquiry into matters that may otherwise be within the constitutional legislative domain merely for the reason that inquiry is made of someone within its walls.[27]

Finally, in the 1967 case of *Keyishian v. Board of Regents*,[28] the Supreme Court overturned its decision in *Adler*, and extended First Amendment protection to academic freedom. *Keyishian* involved faculty members and a non-teaching employee of the State University of New York whose employment contracts were terminated or not renewed when they refused (or failed) to submit a "Feinberg Certificate"[29] required under Section 3021 of the New York Education Law. Under such document, the individual certifies that he is not a Communist and that he has never advocated or been a member of a group which advocated forceful overthrow of the Government.[30] In striking down the statute as unconstitutional, the Supreme Court, citing *Shelton v. Tucker*,[31] held that though the governmental purpose may have been legitimate and substantial, that purpose could not be undertaken too broadly as to "stifle fundamental personal liberties."[32]

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[27] *Id.* at 113.

[28] 385 U.S. 589 (1967).

[29] *Id.* at 595-596; taken from the Feinberg Law which required the measure.

[30] *Id.*

[31] *Keyishan v. Board of Regents of Univ. of State of NY, id.* at 602; citing *Shelton v. Tucker*, 364 U.S. 479; *United States v. Associated Press*, 52 F. Sup. 362, 372 (1943).

[32] *Id.* Affirming the significance of academic freedom, and it rationalized:

"x x x The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." (*De Jonge v. Oregon*, 299 U.S. 353, 365 [1937])

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us, and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." (*Keyishan v. Board of Regents of Univ. of State of NY, supra* note 28 at 603. Underscoring supplied.)

2

In the Philippines, the term "academic freedom" first appeared in the 1935 Constitution, under Article XIV, Section 5, as a liberty to be enjoyed by state universities:

> Sec. 5. All educational institutions shall be under the supervision of and subject to regulation by the State. The Government shall establish and maintain a complete and adequate system of public education, and shall provide at least free public primary instruction, and citizenship training to adult citizens. All schools shall aim to develop moral character, personal discipline, civic conscience, and vocational efficiency, and to teach the duties of citizenship. Optional religious instruction shall be maintained in the public schools as now authorized by law. Universities established by the State shall enjoy **academic freedom**. The State shall create scholarships in arts, science, and letters for specially gifted citizens. (Emphasis supplied.)

It was restated in the 1973 Constitution in Article XV, Section 8(2) and was expanded in application to cover both private and public institutions of higher learning, to wit:

> Sec. 8. x x x
>
> x x x x
>
> (2) All institutions of higher learning shall enjoy **academic freedom**. (Emphasis supplied.)

The above provision on academic freedom as a constitutional right was further refined and developed through its amendment in the 1987 Constitution in Article XIV, Section 5(2):

> Sec. 5. x x x
>
> x x x x
>
> (2) **Academic freedom** shall be enjoyed in all institutions of higher learning. (Emphasis supplied.)

This amendment in the academic freedom clause was explained as a categorical shift from the previous conception that academic freedom was solely institutional in nature, to be enjoyed only by the institutions themselves, to the present belief that said grant is given not only to the institutions themselves, but to the individual stakeholders (teachers, researchers and students) within said institution as well.[33]

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[33] Delegate Adolf Azcuna's explanation, in sponsoring said amendment, as cited in Pacifico Agabin's *Comparative Developments in the Law of Academic Freedom*, Philippine Law Journal, Vol. 64, 139-140 (1989):

Among others, the critical import of academic freedom has been seen in the dynamics of Philippine national life, where it became a necessary tool used by faculty members and students of an institution to "re-examine existing knowledge and reweigh the prevailing values so dearly cherished by the majority."[34] During the period of Martial Law, for instance, especially during the rise of student activism during the First Quarter Storm, universities served as refuge for those who were politically targeted by the ruling regime, under the protection of the academic freedom that the universities enjoyed. The nature of academic freedom as a right has been seen as a furtherance of the right to freedom of expression, that is, faculty members and students, as stakeholders of the institutions of higher learning, enjoy the freedom of expression even if they are within the university.[35] The general perception, in fact, appears to be that academic freedom is not only enshrined in the Constitution, but is part and parcel of one's freedom of expression.[36]

In the case of *Garcia v. The Faculty Admission Committee, Loyola School of Theology*,[37] the Court, in discussing the concept of academic freedom, held:

> 2. Nor is this all. There is, as previously noted, the recognition in the Constitution of institutions of higher learning enjoying academic freedom. It is more often identified with the right of a faculty member to pursue his studies in his particular specialty and thereafter to make known or publish the result of his endeavors without fear that retribution would be visited on him in the event that his conclusions are found distasteful or objectionable to the powers that be, whether in the political, economic, or

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MR. AZCUNA: In the 1973 Constitution, this freedom is given to the institution itself. All institutions of higher learning shall enjoy academic freedom. So, with this proposal, we will provide academic freedom in the institutions—enjoyed by students, by the teachers, by the researchers and we will not freeze the meaning and the limits of this freedom. Since academic freedom is a dynamic concept and we want to expand the frontiers of freedom, especially in education, therefore we will leave it to the courts to develop further the parameters of academic freedom. We just say that it shall be enjoyed in all institutions of higher learning.

[34] *Supra* note 8 at 338.

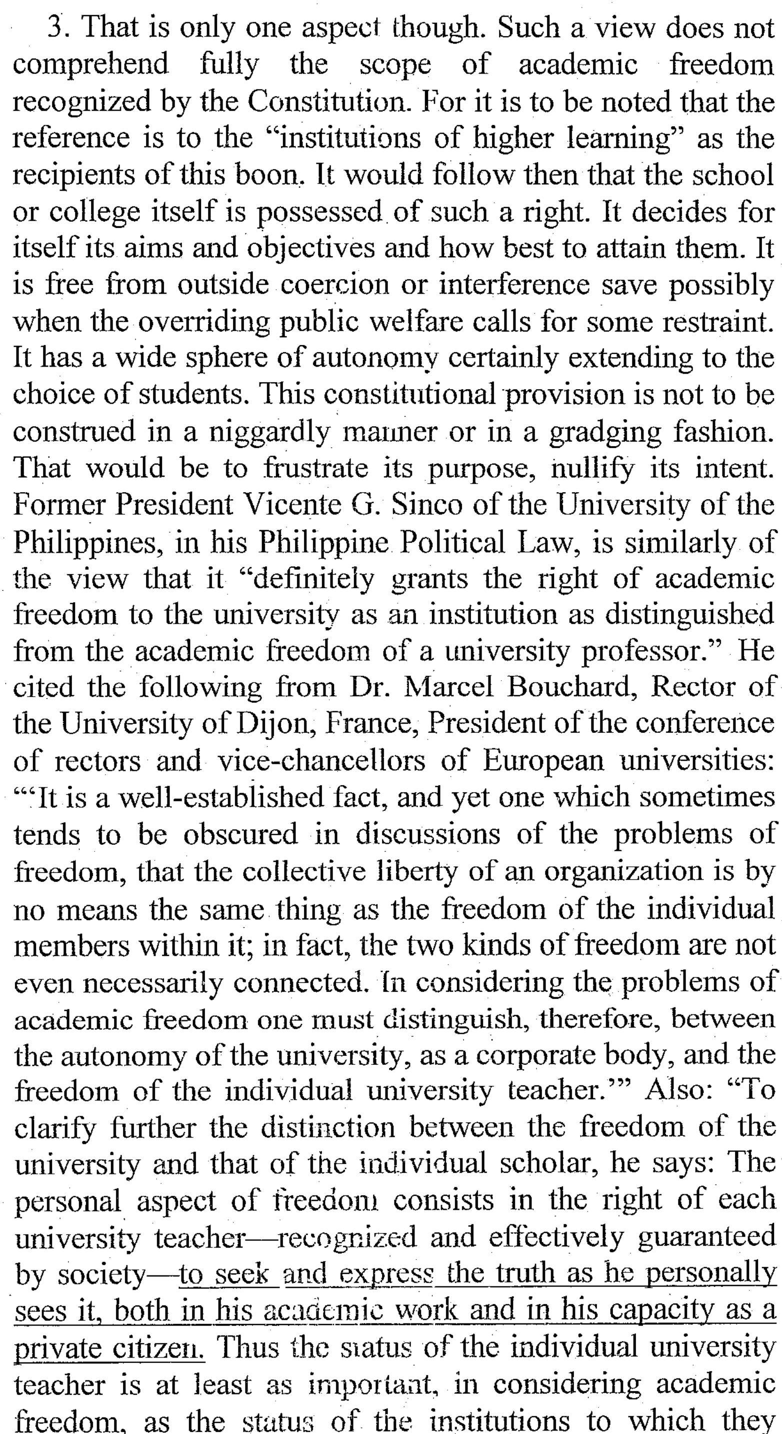
[35] *Id.* at 339, citing Emerson & Haber, *Academic Freedom of the Faculty Member as Citizen*, 28 Law and Contemp. Prob. 525 (1968); Dean Pacifico Agabin posited:

> Expression if it is to be free, is not limited to the trivial and the inconsequential. It may strike deep at our most cherished beliefs or speak up for the most unorthodox doctrines. Expression cannot be subjected to prior censorship for fear of serious injury or controversy.
>
> x x x x
>
> This does not mean that freedom of expression is confined to the four walls of the classroom. This would be a very parochial view of free speech. The spirit of free inquiry cannot be cut off, like a water tap, once the student steps out of his classes. It is therefore important that the University encourage discussion and debate outside the classroom, for "an atmosphere and ferment in the academic community at large may be more meaningful to the student than freedom of discussions within the confines of the class.

[36] Agabin's *Comparative Developments in the Law of Academic Freedom, supra* note 1; see also Onofre D. Corpuz's *Academic Freedom and Higher Education: The Philippine Setting*, Vol. 52, 1977, at 273.

[37] G.R. No. L-40779, November 28, 1975, 68 SCRA 277. This case involved a mandamus proceeding where the student prayed that the Faculty Admission Committee of the Loyola School of Theology be ordered to allow her to continue pursuing her Master of Arts in Theology. The Court, in the name of academic freedom, would go on to uphold the school's "wide sphere of autonomy certainly extending to the choice of students."

academic establishments. For the sociologist, Robert McIver it is "a right claimed by the accredited educator, as teacher and as investigator, to interpret his findings and to communicate his conclusions without being subjected to any interference, molestation, or penalization because these conclusions are unacceptable to some constituted authority within or beyond the institution." As for the educator and philosopher Sidney Hook, this is his version: "What is academic freedom? Briefly put, it is the freedom of professionally qualified persons to inquire, discover, publish and teach the truth as they see it in the field of their competence. It is subject to no control or authority except the control or authority of the rational methods by which truths or conclusions are sought and established in these disciplines."



3. That is only one aspect though. Such a view does not comprehend fully the scope of academic freedom recognized by the Constitution. For it is to be noted that the reference is to the "institutions of higher learning" as the recipients of this boon. It would follow then that the school or college itself is possessed of such a right. It decides for itself its aims and objectives and how best to attain them. It is free from outside coercion or interference save possibly when the overriding public welfare calls for some restraint. It has a wide sphere of autonomy certainly extending to the choice of students. This constitutional provision is not to be construed in a niggardly manner or in a gradging fashion. That would be to frustrate its purpose, nullify its intent. Former President Vicente G. Sinco of the University of the Philippines, in his Philippine Political Law, is similarly of the view that it "definitely grants the right of academic freedom to the university as an institution as distinguished from the academic freedom of a university professor." He cited the following from Dr. Marcel Bouchard, Rector of the University of Dijon, France, President of the conference of rectors and vice-chancellors of European universities: "'It is a well-established fact, and yet one which sometimes tends to be obscured in discussions of the problems of freedom, that the collective liberty of an organization is by no means the same thing as the freedom of the individual members within it; in fact, the two kinds of freedom are not even necessarily connected. In considering the problems of academic freedom one must distinguish, therefore, between the autonomy of the university, as a corporate body, and the freedom of the individual university teacher.'" Also: "To clarify further the distinction between the freedom of the university and that of the individual scholar, he says: The personal aspect of freedom consists in the right of each university teacher—recognized and effectively guaranteed by society—to seek and express the truth as he personally sees it, both in his academic work and in his capacity as a private citizen. Thus the status of the individual university teacher is at least as important, in considering academic freedom, as the status of the institutions to which they

> belong and through which they disseminate their learning.'" x x x[38] (Underscoring supplied.)

Garcia and subsequent cases would show the Court's attempts to outline the distinction between academic freedom as a right enjoyed by the educational institution,[39] or its individual stakeholders such as the teacher/researcher/educator[40] or student.[41]

B

In this case, and save for petitioner-intervenor St. Thomas More School of Law and Business (St. Thomas More), all petitioners appear to be *individual* educators and students. There is no assertion (much less proof) from any of them that the challenged LEB Law, in general, and the imposition of the PhiLSAT passing requirement, in particular, infringes on their *personal* rights to freedom of expression. This, to my mind, is precisely the reason why the *ponencia* itself focused on the concept of academic freedom *as enjoyed by an educational institution*, specifically, the "freedom of law schools to determine for itself who may be admitted to legal education x x x."[42]

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[38] *Id.* at 283-284.

[39] The Court in *Garcia*, iterated the "four essential freedoms" of a university to determine for itself on academic grounds (1) who may teach, (2) what may be taught, (3) how it shall be taught, and (4) who may be admitted to study, and ultimately found that the Faculty Admission Committee had sufficient grounds to deny the student's admission. *Id.* at 293.

[40] In the case of *Montemayor v. Araneta University Foundation*, G.R. No. L-44251, May 31, 1977, 77 SCRA 321, 327, the Court, speaking through Chief Justice Fernando, quoted Robert MacIver, and echoed the *Sweezy* definition of academic freedom as "a right claimed by the accredited educator, as teacher and as investigator, to interpret his findings and to communicate his conclusions without being subjected to any interference, molestation or penalization because these conclusions are unacceptable to some constituted authority within or beyond the institution."

[41] The Court's holding in *Garcia*, was subject of a strong dissent from Justice Felix Makasiar who argued that academic freedom, although at the time textually granted only to the academic institutions, should be deemed to have been granted to the students themselves as well, as the students constitute part of the institution itself, without whom the institution can neither exist nor operate. According to Justice Makasiar:

> What is involved here is not merely academic freedom of the higher institutions of learning as guaranteed by Section 8(2) of Article [V] of the 1973 Constitution. The issue here strikes at the broader freedom of expression of the individual—the very core of human liberty.
>
> Even if the term "academic freedom" were to be limited to institutions of higher learning—which to the mind of Dr. Vicente Sinco, an eminent authority in Constitutional Law, is the right of the university as an institution, not the academic freedom of the university professor (Sinco, Phil. Political Law, 1962 ed., 489)—the term "institutions of higher learning" contained in the aforecited provision of our New Constitution comprehends not only the faculty and the college administrators but also the members of the student body. While it is true that the university professor may have the initiative and resourcefulness to pursue his own research and formulate his conclusions concerning the problem of his own science or subject, the motivation therefor may be provoked by questions addressed to him by his students. In this respect, the student—specially a graduate student—must not be restrained from raising questions or from challenging the validity of dogmas whether theological or not. The true scholar never avoids, but on the contrary welcomes and encourages, such searching questions even if the same will have the tendency to uncover his own ignorance. It is not the happiness and self-fulfillment of the professor alone that are guaranteed. The happiness and full development of the curious intellect of the student are protected by the narrow guarantee of academic freedom and more so by the broader right of free expression, which includes free speech and press, and academic freedom. (Emphasis and underscoring supplied.) *Garcia v. The Faculty Admission Committee, Loyola School of Theology*, *supra* note 37 at 295.

[42] *Ponencia*, pp. 59-64, 71.

On this score, I have examined the petition-in-intervention filed by St. Thomas More, which raised the following causes of action and arguments:

(1) The imposition of the PHILSAT passing requirement would inevitably lead to a decrease in law student enrollees which will, in turn, "result to an increase in tuition fees x x x to recover lost revenue x x x" and "in effect puts law schools away from the reach of the poor students in the provinces;"[43]

(2) The imposition of the PHILSAT passing requirement "arbitrarily encroaches on the academic freedom of the Dean of St. Thomas More to choose its students" on the basis of "values, character, sense of honesty, ethics, and sense of service to others and to society;"[44]

(3) The imposition of the PHILSAT passing requirement is unfair and unreasonable;[45]

(4) The LEB Law clearly provides that the intent was to improve legal education, not regulate access thereto;[46]

(5) The ruling of the Court in *Tablarin v. Judge Gutierrez*[47] sustaining the constitutionality of the National Medical Admissions Test (NMAT) is inapplicable;[48] and

(6) The LEB Law is an undue delegation of legislative power.[49]

Of the six foregoing issues, only one (issue No. 2) *textually* references the concept of academic freedom. Indeed, the freedom to determine who may be admitted to study is among the "four essential freedoms" accorded an educational institution. This freedom, however, is by no means absolute; it must be balanced with important state interests "which cannot also be ignored for they serve the interest of the greater majority."[50] It is beyond cavil that the State has an interest in prescribing regulations to promote the education and the general welfare of the people.[51]

In this case, the *ponencia* itself declares that "the PhiLSAT, when administered as an aptitude test, is reasonably related to the State's unimpeachable interest in improving the quality of legal education."[52] I find that, in addition to the avowed policy to improve legal education, the

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[43] *Rollo*, p. 304. G.R. No. 230642 Vol. I.
[44] *Id.* at 304-305.
[45] *Id.* at 305-306.
[46] *Id.* at 307.
[47] *Supra* note 6.
[48] *Rollo*, p. 309. G.R. No. 230642 Vol. I.
[49] *Id.* at 310-313.
[50] *Secretary of Justice v. Lantion*, G.R. No. 139465, October 17, 2000, 343 SCRA 377, 390.
[51] *Council of Teachers and Staff of Colleges and Universities of the Philippines, et al. v. Secretary of Education*, G.R. No. 216930, October 9, 2018.
[52] *Ponencia*, p. 88.

provision of the PhiLSAT Passing Requirement may also serve to discourage the proliferation of the "great evil" sought to be corrected by the "permit system."[53] As the *ponencia* cites, Act No. 3162, back in 1924, created the Board of Educational Survey which made "factual findings" that "a great majority of schools from primary grade to the university are money-making devices of persons who organize and administer them."[54] Dean Sedfrey M. Candelaria, in his report to the Legal Education Summit on July 31, 2019, representing the Legal Education Board Charter Cluster, admitted to the continued existence of "non-performing" law schools. Thus, it is my view that the Court should carefully weigh casting in stone a rule leaving to a law school the unbridled discretion to determine for itself the PhilSAT passing score for purposes of admission to legal education. In fact, I would argue that the provision of minimum standards (such as a minimum PhiLSAT passing score) for admission to law schools is, in principle, no different from the provision of standards on matters such as the maximum rates of tuition fee increases,[55] the location and construction of school buildings, the adequacy of library, laboratory and classroom facilities, the maximum number of students per teacher, and qualifications of teachers, among others. Such standards, which are also police power measures instituted in furtherance of the public interest, arguably have some effect on an educational institution's "essential freedoms."

II

While the *ponencia* would hold that the PhiLSAT, as an aptitude test, passes the test of reasonableness, it declares the challenged LEB Law issuance unreasonable to the extent that it is exclusionary, that is, it provides a cut-off score which effectively forces law schools, under pain of administrative sanctions, to choose students only from a "[s]tate-determined pool of applicants x x x."[56]

I disagree.

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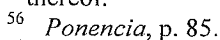
[53] See *Philippine Association of Colleges and Universities v. Secretary of Education*, 97 Phil. 806, 812-813 (1955), a case involving challenges to Act No. 2706, as amended by Act No. 3075 and Commonwealth Act No. 180 which provides for a "previous permit system" before a school or any other educational institution can operate. There, the Court, quoting a report commissioned by the Philippine Legislature at the time, upheld the challenged Acts as a valid exercise of police power to correct a "great evil," thus:

> x x x An unprejudiced consideration of the fact presented under the caption Private Adventure Schools leads but to one conclusion, viz.: the great majority of them from primary grade to university are money-making devices for the profit of those who organize and administer them. The people whose children and youth attend them are not getting what they pay for. It is obvious that the system constitutes a great evil. That it should be permitted to exist with almost no supervision is indefensible. x x x

[54] *Ponencia*, p. 39.

[55] For example, Republic Act No. 6139, otherwise known as An Act To Regulate Tuition And Other School Fees Of Private Educational Institution, Providing For The Settlement Of Controversies Thereon And For Other Purposes. See also *Lina, Jr. v. Carino*, G.R. No. 100127, April 23, 1993, 221 SCRA 515, where this Court sustained the legal authority of respondent DECS Secretary to set maximum permissible rates or levels of tuition and other school fees and to issue guidelines for the imposition and collection thereof.

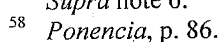
[56] *Ponencia*, p. 85.



There is nothing constitutionally abhorrent with the provision by the State of a standardized *exclusionary* exam. This has long been settled in the case of *Tablarin v. Gutierrez*.[57] There, the Court upheld the taking and passing of the National Medical Admission Test (NMAT) as a national prerequisite for admission to all medical schools in the Philippines since academic year 1986-1987, pursuant to the Republic Act No. 2382, otherwise known as the "Medical Act of 1959," and under Department of Education, Culture and Sports (DECS) Order No. 52 series of 1985:

> x x x MECS Order No. 52, s. 1985, as noted earlier, articulates the rationale of regulation of this type: the improvement of the professional and technical quality of the graduates of medical schools, by upgrading the quality of those admitted to the student body of the medical schools. That upgrading is sought by selectivity in the process of admission, selectivity consisting, among other things, of limiting admission to those who exhibit in the required degree the aptitude for medical studies and eventually for medical practice. The need to maintain, and the difficultics of maintaining, high standards in our professional schools in general, and medical schools in particular, in the current stage of our social and economic development, are widely known.
>
> **We believe that the government is entitled to prescribe an admission test like the NMAT as a means for achieving its stated objective of "upgrading the selection of applicants into [our] medical schools" and of "improv[ing] the quality of medical education in the country."** Given the widespread use today of such admission tests in, for instance, medical schools in the United States of America (the Medical College Admission Test [MCAT] and quite probably in other countries with far more developed educational resources than our own, and taking into account the failure or inability of the petitioners to even attempt to prove otherwise, we are entitled to hold **that the NMAT is reasonably related to the securing of the ultimate end of legislation and regulation in this area. That end, it is useful to recall, is the protection of the public from the potentially deadly effects of incompetence and ignorance in those who would undertake to treat our bodies and minds for disease or trauma**. (Emphasis supplied.)

Furthermore, contrary to the *ponencia's* findings, I do not see any difference in how the NMAT and the PhiLSAT are *meant* to (or even actually) operate.[58] Both are, in fact, exclusionary exams. Permit me to explain.



[57] *Supra* note 6.
[58] *Ponencia*, p. 86.

Under Department of Education (DepEd) Department Order (DO) No. 52, Series of 1985, the NMAT, as a uniform admission test, was required to be "successfully hurdled by all college graduates seeking admission into medical schools in the Philippines, beginning the school year 1986-1987." Although the same DO provides that the NMAT rating of an applicant will be considered "with other admission requirements" as basis for the issuance of a Certificate of Eligibility, it also provides that no such Certificate will be issued without the required NMAT qualification (that is, meeting the **cut-off score**—which shall be determined by the Board of Medical Education on a yearly basis). **That the NMAT, similar to the PhiLSAT, was meant to be exclusionary in nature is clear from DepEd DO No. 11, issued subsequently in 1987, which provides that the cut-off score of 45th percentile shall be followed for the December 6, 1987 and April 24, 1988 NMAT examinations.**

In fact, this exclusionary nature appears to subsist to this day. Memorandum Order No. 18, Series of 2016[59] issued by the Commission on Higher Education[60] provides, to wit:

> 17.3 Minimum Standards for Admission
>
> Applicants seeking admission to the medical education program must have the following qualifications:
>
> a. Holder of at least a baccalaureate degree;
> b. Must have taken the National Medical Admission Test **(NMAT) not more than two (2) years from the time of admission, <u>with a percentile score equivalent to or higher than that currently prescribed by the school or the [CHED], whichever is higher</u>;**
> c. The applicant shall submit the following documents to the medical schools:
>   - x x x
>   - x x x
>   - **Certified true copy of NMAT score**
>
> 17.4 Certificate of Eligibility for Admission to Medical School
>
> a. **On the basis of foregoing documents**, the medical school is responsible for and accountable for the issuance of the Certificate of Eligibility for Admission to medical school.
> b. x x x
> c. Likewise, it is also the responsibility of the medical school to verify the **authenticity of the NMAT score** against the master list provided by the recognized testing center.

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[59] Also known as the "Policies, Standards and Guidelines for the Doctor of Medicine (M.D.) Program.

[60] Which now regulates the study of medicine, among others, pursuant to Republic Act No. 7722, otherwise known as the Higher Education Act of 1994.

17.5 NMAT Score cut off

a. **An NMAT score cut-off of at least 40th percentile will be implemented by all higher educational institutions offering medical program**.
b. Medical schools are hereby required to declare their NMAT cut-off score as part of their Annual Report (electronic and hard copy) to be submitted to CHED.

x x x x (Emphasis and underscoring supplied.)

Thus, even under the present rule, students who fail to get an NMAT score of 40th percentile (or the declared cut-off score of their chosen medical school, whichever is higher) will not be issued a Certificate of Eligibility and therefore cannot be admitted to medical school. Clearly, the NMAT is no different from the PhiLSAT insofar as it also employs an exclusionary (or, in the words of the *ponencia*, "totalitarian") scheme in terms of student admissions.[61] I therefore see no reason why both tests should merit different treatment. The principle behind this Court's ruling in *Tablarin* should be applied here.

III

A

The other allegations against the LEB Law, in general, and the PhiLSAT passing requirement, in particular, seem to be challenges against its reasonableness as a police power measure. What is "reasonable," however, is not subject to exact definition or scientific formulation. There is no all-embracing test of reasonableness;[62] its determination rests upon human judgment as *applied to the facts and circumstances* of each particular case.[63]

The consolidated petitions all sought direct recourse with this Court. As We have most recently reaffirmed in *Gios-Samar, Inc. v. Department of Transportation and Communications*,[64] direct resort to this Court is proper only to seek resolution of questions of law:

> x x x Save for the single specific instance provided by the Constitution under Section 18, Article VII of the Constitution, **cases the resolution of which depends on the determination of questions of fact cannot be brought directly before the Court because we are not a trier of**

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[61] *Ponencia*, p. 87.

[62] *Mirasol v. Department of Public Works and Highways*, G.R. No. 158793, June 8, 2006, 490 SCRA 318, citing *City of Raleigh v. Norfolk Southern Railway Co.*, 165 S.E.2d 745 (1969).

[63] *Mirasol v. Department of Public Works and Highways*, *supra*, citing *Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's Witnesses*, 117 N.E.2d 115 (1954). Cited in Concurring and Dissenting Opinion of J. Jardeleza in *Zabal v. Duterte*, G.R. No. 238467, February 12, 2019.

[64] G.R. No. 217158, March 12, 2019.

> **facts. We are not equipped, either by structure or rule, to receive and evaluate evidence in the first instance; these are the primary functions of the lower courts or regulatory agencies.** This is the *raison d'être* behind the doctrine of hierarchy of courts. It operates as a constitutional filtering mechanism designed to enable this Court to focus on the more fundamental tasks assigned to it by the Constitution. **It is a bright-line rule which cannot be brushed aside by an invocation of the transcendental importance or constitutional dimension of the issue or cause raised.**[65] (Citations omitted, emphasis supplied.)

I submit that the Court should refrain from resolving the challenges against the reasonableness of the LEB Law (and related issuances) at this time. Taking issue at reasonableness, equity or fairness of a state action, in a vacuum and divorced from the factual circumstances that suffer the same, would mean that this Court will have to adjudicate (in my view, wrongly) based on conjectures and unsupported presuppositions. As it appears, this Court will be settling controversies based on unsupported allegations[66] or, worse, grounds not even pleaded or raised by the parties.[67] Allegations and counter-allegations against the constitutionality and/or reasonableness of a challenged state action need to be proven in evidence, otherwise they may be no more than uncorroborated rhetoric.

Given this fact-based nature of the question of reasonableness of an exercise of police power, the present questions pertaining to the propriety or validity of the PhiLSAT should be dismissed at this point and given its turn in a trial, where the equipped lower court may first resolve questions of fact, such as whether the PhiLSAT as administered by the LEB meets the careful design that our legislators intended.

B

Mere invocation of a constitutional right, in this case, academic freedom, does not excuse the parties so invoking from actually proving their case through evidence. This is chiefly true in a petition that seeks the invalidation of a law that enjoys the presumption of constitutionality. The burden of proving one's cause through evidence must rise against the bar that gives the challenged law default constitutionality. As We held in the case of *Ermita-Malate Hotel and Motel Operators Association, Inc. v. City Mayor of Manila,*[68] citing *O'Gorman & Young v. Hartford Fire Insurance Co:*[69]

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[65] *Id.*

[66] Including, for example, that of PhiLSAT being pro-elite and anti-poor, or the converse but equally unverified arguments that PhiLSAT is sound and properly designed to measure the necessary aptitude of prospective law students.

[67] Including, for example, the power of the LEB to prescribe the qualifications and classifications of faculty members and deans of graduate schools of law.

[68] G.R. No. L-24693, July 31, 1967, 20 SCRA 849.

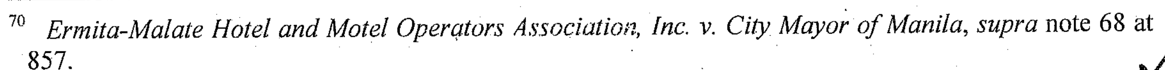
[69] 282 U.S. 251 (1931).

> It admits of no doubt therefore that there being a presumption of validity, **the necessity for evidence to rebut it is unavoidable**, unless the statute or ordinance is void on its [face,] which is not the case here. The principle has been nowhere better expressed than in the leading case of *O'Gorman & Young v. Hartford Fire Insurance Co.*, where the American Supreme Court through Justice Brandeis tersely and succinctly summed up the matter thus:
>
> > "The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the [specific] method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. **As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute.**"
>
> > **No such factual foundation being laid in the present case, the lower court deciding the matter on the pleadings and the stipulation of [facts], the presumption of validity must prevail and the judgment against the ordinance set aside.**[70] (Emphasis supplied.)

The tall order, therefore, to overturn the constitutional presumption in favor of a law must be through a conclusive "factual foundation," the absence of which must inevitably result in the upholding of the constitutionality of the challenged law.

Until the decisive factual questions are determined in the context of a trial, this Court should refrain from making an effective pronouncement as to the validity or invalidity of the PhiLSAT. The wide-ranging consequences of the issues raised in these petitions, when decided, all the more call for prudence and constitutionally-intended restraint until all the factual components that bear on these issues are ascertained and definitively settled. The Philippine legal education and the legal profession are worthy of no less.

Finally, to strike down a legislative act on the basis of unalleged or unestablished factual conclusions that essentially came nowhere near their burdens of proof is the height of disservice to the causes these parties before Us sought to protect, whether that be a student's right to education, a law school's institutional academic freedom or the State's duty to supervise and regulate education that is invested with public interest.

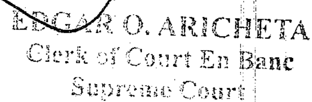


[70] *Ermita-Malate Hotel and Motel Operators Association, Inc. v. City Mayor of Manila*, *supra* note 68 at 857.

This Court will serve no other end but expediency in insisting to deem ripe the unquestionably paramount but undoubtedly premature question of whether an examination that fundamentally seeks to improve the state of the country's legal education is succeeding or failing on its promise.

For all the foregoing reasons, I vote to **DISMISS** the petition.

FRANCIS H. JARDELEZA
Associate Justice



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EDGAR O. ARICHETA
Clerk of Court En Banc
Supreme Court