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PITFALLS OF AN OVERPROTECTIVE COURT:
Probing the Supreme Court's Role in Marriage Legislation in the Philippines

CLARICE ANGELINE V. QUESTIN[1]

"As members of the Court, ours is a duty to interpret the law; this duty does not carry with it the power to determine what the law should be in the face of changing times, which power, in turn lies solely within the province of Congress."
- Justice Alfredo Benjamin S. Caguioa[2]

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[1] Editor-in-Chief, Vol. 63, UST Law Review; J.D. (2019), *cum laude*, Faculty of Civil Law, University of Santo Tomas; A.B. in Legal Management (2015), *cum laude*, Faculty of Arts and Letters, University of Santo Tomas. The author would like to acknowledge the help provided by Mr. Gabriel D. Adora and Ms. Ma. Clarissa M. Dela Cruz.

[2] Dissenting opinion, *Republic v. Manalo,* G.R. No. 221029, April 24, 2018.

I. INTRODUCTION

Marriage is a perpetual commitment made by a man and a woman in view of their love, respect, trust, and fidelity for each other. The 1987 Constitution provides that "marriage, as an inviolable social institution, is the foundation of the family and shall be protected by the State."[3] The Family Code, on the other hand, defines marriage as "a special contract of permanent union between a man and a woman entered into in accordance with law for the establishment of conjugal and family life."[4] The Family Code further states that marriage is "the foundation of the family and an inviolable social institution whose nature, consequences, and incidents are governed by law and not subject to stipulation, except that marriage settlements may fix the property relations during the marriage within the limits provided by the Code."[5]

The fundamental law itself mandates that marriage be protected by the State. Thus, the Court, citing the Supreme Court of the United States, held that it is "an institution in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there could be neither civilization nor progress."[6]

The substantive law on marriage and family is enshrined in the Family Code and in the judicial pronouncements of the Supreme Court. As a supplement, the Supreme Court has promulgated several rules to prescribe the procedure for the enforcement of rights and claims under the Family Code.

The Supreme Court has consistently declared its role in preserving marriage. In *Republic v. Court of Appeals,* the Court stated that "both our Constitution and our laws cherish the validity of marriage and unity of the family."[7] As the defender of the fundamental law, the Court took it upon itself to prevent dissolution of marriages when the same is unfounded.

A survey of jurisprudence would show that the Supreme Court, at times, tend to be overprotective. The Supreme Court is seen to have expanded the interpretation of the law on marriage, often transcending its plain meaning, in order to uphold the integrity of marriage, or even to afford protection to a Filipino spouse when he stands at a disadvantage in a case of a mixed marriage.

This article examines the Supreme Court's role in marriage legislation in the Philippines – how it exercises its duty to protect the sanctity of marriage – in light of the decisions the Court has rendered on marriage and the rules the Court has promulgated in relation to it. Ultimately, this article seeks to answer the question: In exercising its mandate to preserve the inviolability of marriage, is the Supreme Court venturing into the forbidden sphere of judicial legislation?

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[3] CONST., art. XV, sec. 2.
[4] FAMILY CODE, art. 1.
[5] *Ibid.*
[6] *Ramirez v. Gmur,* 42 Phil. 855 (1918), citing *Maynard v. Hill.*
[7] *Republic v. Court of Appeals,* 268 SCRA 198 (1997).

II. DEMARCATING BOUNDARIES: INTERPRETATION OR LEGISLATION

The Philippine government is composed of three branches, namely: the Executive, the Legislative, and the Judicial. Each branch is vested with a particular power. The Constitution vests judicial power in the Supreme Court and in such other lower courts as may be established by law.[8] Interpretation or construction of statutes and of the Constitution is a judicial function.

In the interpretation and construction of laws, the Supreme Court is guided by the principles of statutory construction. One of the fundamental and basic principles in statutory construction is *verba legis,* which provides that the Court may not construe a statute when it is clear. The Court may neither enlarge nor restrict statutes. Thus, when the law is clear, there is no room for interpretation but only its application.

While the Supreme Court has the duty to interpret the law, the 1987 Constitution has also vested it with its rule-making power. Paragraph 5 of Section 5 of Article VIII of the Constitution provides:

> Sec. 5. The Supreme Court shall have the following powers:
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> x x x
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> (5) Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court.[9]

As opposed to its mandate to interpret statutes and its rule-making power, the Judicial branch is prohibited from overreaching into the functions of the Legislative branch. Hence, the doctrine of separation of powers and the system of checks and balances proscribe judicial legislation.

Judicial legislation is the judicial act of engrafting upon a law something that has been omitted which someone believes ought to have been embraced.[10] It is prohibited by the tripartite division of powers among the three branches of government.[11] The Constitution vests legislative power to Congress, except that which is reserved to the people by the

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[8] CONST., art. VIII, sec. 1.
[9] CONST., art. VIII, sec. 5.
[10] *Tañada vs. Yulo*, 61 Phil. 515 (1935).
[11] *Id.* at 519.

provision on initiative and referendum.[12] As such, resort to judicial legislation is a usurpation of legislative function.

The Supreme Court commits judicial legislation when:

(a) In making judicial pronouncements, it chooses to interpret a law which is plain and clear as day, rather than to apply it directly;
(b) In interpreting a statute, it goes astray from its true legislative intent;
(c) In construing a law, it expands and provides remedies not within its scope ; or
(d) In promulgating rules, it diminishes, increases, or modifies substantive rights.

III. DECONSTRUCTING SUPREME COURT PRONOUNCEMENTS ON MARRIAGE

Article 8 of the Civil Code provides that "judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines."[13] Thus, decisions of the Supreme Court form part of the law of the land. Likewise, as earlier stated, the Constitution gives the Supreme Court its rule-making power concerning the protection and enforcement of constitutional rights.[14] Since the Constitution provides for a state policy for the protection of marriage and family, the rule-making power extends to the enforcement of marital rights. Therefore, this article will review five cases decided and one Rule promulgated by the Supreme Court.

A. Santos v. Court of Appeals

The first case decided by the Supreme Court interpreting Article 36 of the Family Code was *Santos v. Court of Appeals,*[15] involving Leouel Santos and Julia Rosario Bedia-Santos.

Leouel first met Julia in Iloilo City. Leouel, at the time, held the rank of First Lieutenant in the Philippine Army. Their meeting later proved to be an eventful day since they eventually exchanged their vows. About a year after their child's birth, Julia left for the United States to work as a nurse despite Leouel's pleas to so dissuade her. Seven months after her departure, Julia called up Leouel for the first time by long distance telephone. She promised to return home upon the expiration of her contract but she never returned. Leouel got the chance to visit the United States and took the opportunity to desperately locate or at least get in touch with Julia, but all his efforts were futile. As a consequence of Leouel's failure to get Julia to come home, Leouel filed a complaint for "voiding of marriage under Article 36 of the Family Code." Julia opposed the complaint and denied the allegations therein, claiming that it was Leouel who had been irresponsible and incompetent.[16]

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[12] CONST., art. VI, sec. 1.
[13] CIVIL CODE, art 8.
[14] *Ibid.*
[15] 240 SCRA 20 (1995).
[16] *Id.* at 24-25.

The Regional Trial Court dismissed the complaint for lack of merit. On appeal, the Court of Appeals affirmed the decision of the trial court. Leouel elevated the matter to the Supreme Court, arguing that Julia's failure to return home, or at the very least to communicate with him for more than five years are circumstances that clearly show her being psychologically incapacitated to enter into married life.[17]

In denying Leouel's petition, the Court ruled that the factual setting of the case does not come close to the standards required to decree a nullity of marriage.[18] Admittedly, the Court held that the Family Code did not define the term "psychological incapacity."[19] Thus, the Court referred to "psychological incapacity" as "no less than a mental (not physical) incapacity that causes a party to be truly incognitive of the basic marital covenants that concomitantly must be assumed and discharged by the parties to the marriage which, as so expressed by Article 68 of the Family Code, include their mutual obligations to live together, observe love, respect and fidelity and render help and support," following the deliberations of the Family Code Revision Committee.[20]

The Court further held that the true intent of the law has been "to confine the meaning of 'psychological incapacity' to the most serious cases of personality disorders clearly demonstrative of an utter insensitivity or inability to give meaning and significance to the marriage."[21] As such, the Court adopted the opinion of Dr. Gerardo Veloso, a former Presiding Judge of the Metropolitan Marriage Tribunal of the Catholic Archdiocese of Manila, that psychological incapacity must be characterized by (a) gravity, (b) juridical antecedence, and (c) incurability.[22]

Since *Santos* was the first case to ever be decided regarding Article 36 of the Family Code, it was acceptable for the Court to characterize psychological incapacity. It is worthy to note that in doing so, the Court kept in mind the deliberations of the Family Code Revision Committee so as not to disregard the true intent of the framers. In *Santos*, what the Court did was merely to interpret the term "psychological incapacity" since the framers refused to give it a precise definition, so as not to make it inflexible to circumstances.

B. Republic v. Court of Appeals and Molina

The next case is *Republic v. Court of Appeals and Molina*[23] which laid down the guidelines in the interpretation and application of Article 36 of the Family Code, in addition to what has been declared in *Santos*.

Roridel Molina and Reynaldo Molina were married in 1985. After a year of marriage, Reynaldo showed signs of immaturity and irresponsibility as a husband and as a father since he preferred to spend more time with his peers and friends with whom he squandered his

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[17] *Id.* at 25.
[18] *Santos,* 240 SCRA 20, at 36 (1995).
[19] *Id.* at 26.
[20] *Id.* at 34.
[21] *Ibid.*
[22] *Santos,* 240 SCRA 20, at 33 (1995), citing ALICIA SEMPIO-DIY, HANDBOOK ON THE FAMILY CODE (1st ed. 1988).
[23] 268 SCRA 198 (1997).

money. Furthermore, he depended on his parents for aid and assistance, and was never honest with Roridel with regard to their finances which resulted in frequent quarrels. Reynaldo also got fired from his job. Since then, Roridel had been the sole breadwinner of the family. Sometime in 1986, Roridel and Reynaldo had an intense quarrel which left their relationship estranged. In 1987, Roridel resigned from her job in `Manila and went to live with her parents in Baguio City. A few weeks later, Reynaldo left Roridel and their child, and had since abandoned them.[24]

In 1990, Roridel commenced a petition for declaration of nullity of their marriage under Article 36 of the Family Code on the ground of Reynaldo's psychological incapacity. Roridel alleged that Reynaldo has shown that he was psychologically incapable of complying with the essential marital obligations and was a highly immature and habitually quarrelsome individual who thought of himself as a king to be served. Thus, it would be to the couple's best interest to have their marriage declared null and void in order to free them from what appeared to be an incompatible marriage from the start.[25]

The Regional Trial Court declared their marriage void *ab initio*. On appeal, the Court of Appeals affirmed *in toto* the trial court's decision. The Solicitor General elevated the case on appeal to the Supreme Court and insisted that "the Court of Appeals made an erroneous and incorrect interpretation of the phrase 'psychological incapacity' and made an incorrect application thereof to the facts of the case."[26]

In granting the appeal, the Court held that there was no showing that the psychological defect spoken of by Roridel in her petition is an incapacity.[27] Rather, it was more of a "difficulty," if not outright "refusal" or "neglect" in the performance of some marital obligations.[28] The Court added that a mere showing of "irreconcilable differences" and "conflicting personalities" in no wise constitutes psychological incapacity.[29] It is not enough to prove that the parties failed to meet their responsibilities and duties as married persons; it is essential that they must be shown to be incapable of doing so, owing to some psychological (not physical) illness.[30]

In view of the novelty of Article 36 of the Family Code and the difficulty experienced by many trial courts in interpreting and applying it, the Court decided to invite two *amici curiae*—Most Reverend Oscar V. Cruz who was then the Presiding Judge of the National Appellate Matrimonial Tribunal of the Catholic Church of the Philippines and Justice Ricardo C. Puno, a member of the Family Code Revision Committee.[31] Following the submissions of the two *amici curiae* and deliberations of the Court, the following guidelines in the interpretation and application of Article 36 of the Family Code were laid down by the Court for the guidance of the bench and the bar:

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[24] *Id.* at 203.
[25] *Ibid.*
[26] *Molina,* 268 SCRA 198, at 204-205 (1997).
[27] *Id.* at 207.
[28] *Ibid.*
[29] *Supra* note 32.
[30] *Id.* at 205.
[31] *Id.* at 208-209.

(1) The burden of proof to show the nullity of the marriage belongs to the plaintiff. Any doubt should be resolved in favor of the existence and continuation of the marriage and against its dissolution and nullity.

(2) The root cause of the psychological incapacity must be (a) medically or clinically identified, (b) alleged in the complaint, (c) sufficiently proven by experts and (d) clearly explained in the decision. Article 36 of the Family Code requires that the incapacity must be psychological — not physical — although its manifestations and/or symptoms may be physical. The evidence must convince the court that the parties, or one of them, was mentally or physically ill to such an extent that the person could not have known the obligations he was assuming, or knowing them, could not have given valid assumption thereof. Expert evidence may be given qualified psychiatrist and clinical psychologists.

(3) The incapacity must be proven to be existing at "the time of the celebration" of the marriage. The evidence must show that the illness was existing when the parties exchanged their "I do's." The manifestation of the illness need not be perceivable at such time, but the illness itself must have attached at such moment, or prior thereto.

(4) Such incapacity must also be shown to be medically or clinically permanent or incurable. Such incurability may be absolute or even relative only in regard to the other spouse, not necessarily absolutely against every one of the same sex. Furthermore, such incapacity must be relevant to the assumption of marriage obligations, not necessarily to those not related to marriage, like the exercise of a profession or employment in a job. Hence, a pediatrician may be effective in diagnosing illnesses of children and prescribing medicine to cure them but may not be psychologically capacitated to procreate, bear and raise his/her own children as an essential obligation of marriage.

(5) Such illness must be grave enough to bring about the disability of the party to assume the essential obligations of marriage. Thus, "mild characterological peculiarities, mood changes, occasional emotional outbursts" cannot be accepted as root causes. The illness must be shown as downright incapacity or inability, not a refusal, neglect or difficulty, much less ill will. In other words, there is a natal or supervening disabling factor in the person, an adverse integral element in the personality structure that effectively incapacitates the person from really accepting and thereby complying with the obligations essential to marriage.

(6) The essential marital obligations must be those embraced by Articles 68 up to 71 of the Family Code as regards the husband and wife as well as Articles 220, 221 and 225 of the same Code in regard to parents and their children. Such non-complied marital obligation(s) must also be stated in the petition, proven by evidence and included in the text of the decision.

(7) Interpretations given by the National Appellate Matrimonial Tribunal of the Catholic Church in the Philippines, while not controlling or decisive, should be given great respect by our courts. It is clear that Article 36 was taken by the Family Code Revision Committee from Canon 1095 of the

New Code of Canon Law, which became effective in 1983 and which provides:

> "The following are incapable of contracting marriage: Those who are unable to assume the essential obligations of marriage due to causes of psychological nature."

(8) The trial court must order the prosecuting attorney or fiscal and the Solicitor General to appear as counsel for the state. No decision shall he handed down unless the Solicitor General issues a certification, which will be quoted in the decision, briefly staring therein his reasons for his agreement or opposition, as the case may be, to the petition. The Solicitor General, along with the prosecuting attorney, shall submit to the court such certification within fifteen (15) days from the date the case is deemed submitted for resolution of the court. The Solicitor General shall discharge the equivalent function of the *defensor vinculi* contemplated under Canon 1095.[32]

In promulgating the guidelines for the application of Article 36 of the Family Code, the Court not only meticulously reviewed the deliberations of the Family Code Revision Committee, but also sought the assistance of a member of the National Appellate Matrimonial Tribunal of the Catholic Church. Indeed, this is staying true to the legislative intent behind Article 36 of the Family Code.

Molina is a landmark case which supplemented the doctrine in *Santos*. The jurisprudential doctrine in *Molina* served as a guide not only to the bench and bar, but also to law students in their study of the Family Code.

C. Van Dorn v. Romillo, Jr.

Next is the case of *Van Dorn v. Romillo, Jr.*[33] which was decided in 1985 prior to the effectivity of the Family Code in 1988 when only Article 15 of the Civil Code was in place.

Alice Van Dorn, a citizen of the Philippines married Richard Upton, a U.S. citizen, in Hong Kong in 1972. After they established their residence in the Philippines, Alice gave birth to two children born in 1973 and in 1975. In 1982, Alice and Richard were divorced in Nevada, United States. In turn, Alice remarried a man in the name of Theodore Van Dorn.[34]

Richard then filed a suit against Alice in the Regional Trial Court of Pasay City stating that Alice's business in Ermita, Manila is conjugal property of the parties, thereby praying that Alice be ordered to render an accounting of such business. Richard also asked to be declared with the right to manage the conjugal property. Alice moved to dismiss the case on the ground that the cause of action is barred by previous judgment in the divorce proceedings before the Nevada Court, wherein Richard had acknowledged that he and Alice had "no community property" as of June 11, 1982. The Regional Trial Court denied the

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[32] *Molina,* 268 SCRA 198, at 209-213 (1997).
[33] 139 SCRA 139 (1985).
[34] *Id.* at 141.

motion to dismiss on the ground that the property involved is located in the Philippines so that the Divorce Decree has no bearing in the case. Alice filed a *certiorari* proceeding before the Supreme Court.[35]

In ruling in favor of Alice, the Court applied the Nationality Principle embodied in Article 15 of our Civil Code against Richard. The Court held that only Filipino citizens are proscribed from obtaining divorce, following the policy against absolute divorces enshrined in Article 15 of the Civil Code, public policy, and public morality.[36] Nevertheless, an alien may obtain a divorce abroad, provided it is allowed by his national law; and the same may be recognized in the Philippines.[37] Therefore, the divorce decree issued by the Nevada court dissolved the marriage between Alice and Richard.[38] Hence, pursuant to his national law, Richard was no longer the husband of Alice.[39] As such, Richard had no standing to sue as Alice's husband, and was estopped from asserting his right over the alleged conjugal property.[40]

Here, the Court duly recognized the divorce decree in Alice's favor, notwithstanding the policy against absolute divorces under Philippine law. The Court maintained that Alice should not be discriminated against in her own country if the ends of justice are to be served.[41] Indeed, Richard cannot have the best of both worlds.

Interestingly, *Van Dorn* never discussed a Filipino citizen's capacity to remarry pursuant to a valid divorce decree obtained by his alien spouse. Nevertheless, it was later on legislated in the form of an amendment to Article 26 of the Family Code. By virtue of Executive Order 227[42], a second paragraph was added to Article 26 of the Family Code which presently reads:

> Art. 26. All marriages solemnized outside the Philippines in accordance, with the laws in force in the country where they were solemnized, and valid there as such, shall also be valid in this country, except those prohibited under Articles 35(1), (4), (5) and (6), 36, 37 and 38.
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> **Where a marriage between a Filipino citizen and a foreigner is validly celebrated and a divorce is thereafter validly obtained abroad by the alien spouse capacitating him or her to remarry, the Filipino spouse shall likewise have capacity to remarry under Philippine law.** (emphasis supplied)[43]

Van Dorn is one of the many cases where a jurisprudential doctrine is enacted to a law. Whatever misgivings concerning *Van Dorn* being an instance of judicial overreach has already been cured by Executive Order 227.

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[35] *Ibid.*
[36] *Van Dorn,* 139 SCRA 139, at 143 (1985).
[37] *Ibid.*
[38] *Ibid.*
[39] *Van Dorn,* 139 SCRA 139, at 144 (1985).
[40] *Ibid.*
[41] *Ibid.*
[42] Amending Executive Order no. 209, otherwise known as the "Family Code of the Philippines," July 17, 1987.
[43] FAMILY CODE, art. 26.

D. Republic v. Orbecido

Following the amendment of Article 26 of the Family Code, the Court was called to interpret its second paragraph in *Republic v. Orbecido.*[44] Here, there was a valid marriage between two Filipino citizens, but the wife became a naturalized foreign citizen and obtained a valid divorce decree capacitating her to remarry. The question before the Court was, can the Filipino spouse likewise remarry under Philippine law?[45]

Cipriano Orbecido III married Lady Myros Villanueva in the Philippines. In 1986, Lady Myros left for the United States, bringing along their son Kristoffer. A few years later, Cipriano discovered that his wife had been naturalized as an American citizen. Sometime in 2000, Cipriano learned from his son that Lady Myros had obtained a divorce decree and then married a certain Innocent Stanley. She, Stanley, and their child lived in California.[46]

Cipriano thereafter filed with the Regional Trial Court a petition for authority to remarry invoking Paragraph 2 of Article 26 of the Family Code. No opposition was filed. Finding merit in the petition, the trial court granted the same. The Republic, through the Office of the Solicitor General, sought reconsideration but was denied. The Solicitor General elevated the matter to the Supreme Court raising pure questions of law.[47]

The Court, speaking through Justice Quisumbing, declared that Cipriano can validly remarry under Philippine law. The Court held that "Paragraph 2 of Article 26 should be interpreted to include cases involving parties who, at the time of the celebration of the marriage were Filipino citizens, but later on, one of them becomes naturalized as a foreign citizen and obtains a divorce decree."[48]

The Court, citing Judge Sempio-Diy during the proceedings of the Family Code deliberations, ruled that the intent of Paragraph 2 of Article 26 is "to avoid the absurd situation where the Filipino spouse remains married to the alien spouse who, after obtaining a divorce, is no longer married to the Filipino spouse."[49] Thus, in order to avoid absurdity and injustice, "the Filipino spouse should likewise be allowed to remarry as if the other party were a foreigner at the time of the solemnization of the marriage."[50]

It is worth noting, however, that Judge Sempio-Diy in her book *Handbook on the Family Code of the Philippines*[51] stated that Paragraph 2 of Article 26 does not apply "to a divorce obtained by a former Filipino who had been naturalized in another country after his naturalization, as it might open the door to rich Filipinos' obtaining naturalization abroad for no other reason than to be able to divorce their Filipino spouses."[52]

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[44] 472 SCRA 114 (2005).
[45] *Id.* at 116.
[46] *Id.* at 116-117.
[47] *Orbecido,* 472 SCRA 114, at 117 (2005).
[48] *Id.* at 121.
[49] *Ibid.*
[50] *Orbecido,* 472 SCRA 114, at 121 (2005).
[51] ALICIA SEMPIO-DIY, HANDBOOK ON THE FAMILY CODE OF THE PHILIPPINES (1995).
[52] *Id.* at 30.

How the Court in *Orbecido,* which was promulgated in 2005, could have missed Judge Sempio-Diy's statements in her book is baffling, considering that the Court cited Judge Sempio-Diy in its decision. It may be true that Paragraph 2 of Article 26 was enacted to avert discrimination against a Filipino spouse in his own country. Still, the legislative intent could not have envisioned a situation such as *Orbecido* to fall within the ambit of Paragraph 2 of Article 26, following the statements of Judge Sempio-Diy, who was a member of the Family Code Revision Committee.

Nevertheless, the Court in *Orbecido* invoked *Van Dorn* in order to further justify its ruling. It held that "The *Van Dorn* case involved a marriage between a Filipino citizen and a foreigner. The Court held therein that a divorce decree validly obtained by the alien spouse is valid in the Philippines, and consequently, the Filipino spouse is capacitated to remarry under Philippine law."[53]

As previously discussed, *Van Dorn* did not, in any way, dwell on a Filipino citizen's capacity to remarry pursuant to a valid divorce decree obtained by his alien spouse. The Court in *Van Dorn* merely applied the nationality principle against the alien spouse, and ruled that he had no standing to sue as the Filipina's wife in Philippine courts pursuant to a divorce decree obtained in his country which dissolved their marriage. The Court in *Orbecido* may have erroneously cited *Van Dorn* in order to rationalize the way it expanded the scope of Paragraph 2 of Article 26 of the Family Code.

Even so, the Court declared in *Orbecido* the twin elements for the application of the said article, namely:

> (1) there is a valid marriage that has been celebrated between a Filipino citizen and a foreigner; and
>
> (2) a valid divorce is obtained abroad by the alien spouse capacitating him or her to remarry.[54]

The Court pronounced that "the reckoning point is not the citizenship of the parties at the time of the celebration of the marriage, but their citizenship at the time a valid divorce is obtained abroad by the alien spouse capacitating the latter to remarry."[55]

While the Court in *Orbecido* sought to protect a Filipino citizen, divorced by his naturalized alien spouse, from being discriminated in his own country, it may not be denied that in doing so, the Court went beyond the bounds of its judicial functions. A plain reading of Paragraph 2 of Article 26 clearly shows that the law envisions a situation of a mixed marriage between a Filipino citizen and a foreigner. Thus, at the time of the celebration of the marriage, the parties must be a Filipino and an alien. Nowhere in the law can it be read that Paragraph 2 of Article 26 applies when the marriage is between two Filipino citizens.

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[53] *Supra* note 56.
[54] *Orbecido,* 472 SCRA 114, at 122 (2005).
[55] *Ibid.*

Hence, contrary to the Court's ruling in *Orbecido,* the application of Paragraph 2 of Article 26 is determined by the citizenship of the parties at the time of the celebration of the marriage. A contrary interpretation "might open the door to rich Filipinos obtaining naturalization abroad for no other reason than to be able to divorce their Filipino spouses."[56]

E. Republic v. Manalo

The recent case of *Republic v. Manalo*[57] cannot escape scrutiny. *Manalo* is a 2018 *En Banc* decision of the Supreme Court recognizing as valid the divorce decree initiated and obtained by a Filipina in Japan which thereby dissolved her marriage to a Japanese national.

Marelyn Manalo married a Japanese national, Yoshino Minoro, in the Philippines. Manalo then filed a case for divorce in Japan. In 2011, a divorce decree was rendered by the Japanese Court. As such, Marelyn and Yoshino no longer lived together, with Marelyn living with their daughter. By virtue of the divorce decree, Marelyn filed a petition for cancellation of entry of marriage in the Civil Registry of San Juan, Metro Manila where her marriage with Yoshino was registered. In her petition, Marelyn asserted that in the event that she decides to be remarried, she shall no longer be bothered and disturbed by said entry of marriage. She also prayed that she be allowed to return and use her maiden surname, MANALO.[58]

The Regional Trial Court denied the petition, stating that the divorce obtained by Marelyn in Japan should not be recognized based on Article 15 of the Civil Code, maintaining that "laws relating to x x x the status x x x of persons are binding upon citizens of the Philippines, even though living abroad."

On appeal, the Court of Appeals reversed the trial court stating that Article 26 of the Family Code is applicable even if it was Marelyn who filed for divorce since the divorce decree makes Yoshino no longer married to Marelyn, thus capacitating her to remarry. Furthermore, the appellate court stated that in view of the legislative intent behind Article 26, it would be the height of injustice to consider Marelyn as still married to Yoshino who is no longer married to her. Thus, the Office of the Solicitor General appealed to the Supreme Court.[59]

The issue presented before the Supreme Court was whether a Filipino citizen has the capacity to remarry under Philippine law after initiating a divorce proceeding abroad and obtaining a favorable judgment against his or her alien spouse who is capacitated to remarry. The Court ruled in the affirmative.

The Supreme Court *En Banc,* speaking through Justice Peralta, ruled that a plain reading of Paragraph 2 of Article 26 shows that what is required is that there be a divorce validly obtained abroad.[60] To support its conclusion, the Court explained that "the letter of the law does not demand that the alien spouse should be the one who initiated the proceeding wherein the divorce decree was granted," since "it does not distinguish whether

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[56] *Supra* note 50, at 30-31.
[57] G.R. No. 221029, April 24, 2018.
[58] *Id.* at 3.
[59] *Id.* at 4.
[60] *Manalo,* G.R. No. 221029, April 24, 2018, at 11.

the Filipino spouse is the petitioner or the respondent in the foreign divorce proceeding."[61] The Court went on to rule in this wise:

> Assuming, for the sake of argument, that the word 'obtained' should be interpreted to mean that the divorce proceeding must be actually initiated by the alien spouse, still, the Court will not follow the letter of the statute when to do so would depart from the true intent of the legislature or would otherwise yield conclusions inconsistent with the general purpose of the act. x x x[62]

Unfortunately, the foregoing shows a disregard of the principle of *verba legis* in statutory construction. Paragraph 2 of Article 26 of the Family Code is clear: the divorce decree should be one which was "thereafter validly obtained abroad by the alien spouse capacitating him or her to remarry."[63] How the Court could ever expressly declare that "it will not follow the letter of the statute when to do so would depart from the true intent of the legislature" is something unfathomable.

As in *Orbecido,* the Court held that "the purpose of Paragraph 2 of Article 26 is to avoid the absurd situation where the Filipino spouse remains married to the alien spouse who, after a foreign divorce decree that is effective in the country where it was rendered, is no longer married to the Filipino spouse."[64]

The Court correctly declared in *Manalo* that Paragraph 2 of Article 26 "is a corrective measure to address the anomaly where the Filipino spouse is tied to the marriage while the foreign spouse is free to marry under the laws of his or her country."[65] It must be emphasized, however, that Article 15 of the Civil Code remains in force along with Paragraph 2 of Article 26 of the Family Code. Paragraph 2 of Article 26 of the Family Code is merely an exception to the nationality principle provided under Article 15 of the Civil Code.[66] Article 15 of the Civil Code states:

> ART. 15. Laws relating to family rights and duties, or to the status, condition and legal capacity if persons are binding upon citizens of the Philippines, even though living abroad.[67]

As if to rebut the submission in this article, the *ponencia* further held in *Manalo*:

> Conveniently invoking the nationality principle is erroneous. Such principle, found under Article 15 of the City Code, is not an absolute and unbending rule. In fact, the mere existence of Paragraph 2 of Article 26 is a testament that the State may provide for an exception thereto. Moreover, blind adherence to the nationality principle must be disallowed if it would cause unjust discrimination and oppression to certain classes of individuals whose rights are equally protected by law. The

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[61] *Ibid.*
[62] *Id.* at 12.
[63] FAMILY CODE, art. 26.
[64] *Manalo,* G.R. No. 221029, April 24, 2018, at 12.
[65] *Ibid.*
[66] CAGUIOA, *J.*, Dissenting Opinion, *Republic v. Manalo,* at 2.
[67] CIVIL CODE, art. 15.

> courts have the duty to enforce the laws of divorce as written by the Legislature only if they are constitutional.[68]

What is problematic in the foregoing declaration is that it turns a blind eye to the policy against absolute divorce in the Philippines. The law on marriage, as it presently reads, prohibits divorce. It must be stressed that Article 15 is the rule, rather than the exception. Article 15 of the Civil Code is a curse which follows a Filipino wherever he goes. As an exception to the rule, Paragraph 2 of Article 26 must be strictly construed and applied.

Nevertheless, the Court further explained:

> A prohibitive view of Paragraph 2 of Article 26 would do more harm than good. If We disallow a Filipino citizen who initiated and obtained a foreign divorce from the coverage of Paragraph 2 of Article 26 and still require him or her to first avail of the existing 'mechanisms' under the Family Code, any subsequent relationship that he or she would enter in the meantime shall be considered as illicit in the eyes of the Philippine law.

The foregoing pronouncement is quite off-tangent. Actually, it is the expanded view of Paragraph 2 of Article 26 which would do more harm than good. The Court's progressive interpretation of Paragraph 2 of Article 26 in *Manalo* allows a Filipino citizen to circumvent the laws of his own country. To reiterate, there is a long-standing policy against absolute divorce in this jurisdiction.

The fear of the Supreme Court that the subsequent relationships of a Filipino citizen who initiated and obtained a foreign divorce shall be considered illicit in the eyes of the Philippine law if he will not be allowed find refuge under Paragraph 2 of Article 26 is more apparent than real. No amount of urgency can ever excuse a Filipino from going through the existing mechanisms. In fact, in a case such as in *Manalo*, the remedies available to Filipino citizens under the Family Code are a petition for declaration of nullity of marriage, or a petition for annulment of marriage.

In its concern that a Filipino citizen may stand at a disadvantage if it disallows him from the coverage of Paragraph 2 of Article 26, the Court "essentially rewrites Article 26(2) and gives it a new meaning completely divergent from the framers' intention."[69]

F. A. M. NO. 02-11-11-SC – Rule on Legal Separation

Finally, pursuant to its rule-making power, the Court has promulgated procedural rules governing petitions for declaration of nullity of marriage, annulment, and legal separation. However, only the Rule on Legal Separation shall be reviewed since only the Rule on Legal Separation contains provisions which are dissimilar to the substantive provisions of the Family Code.

Articles 55 to 67 of the Family Code govern legal separation. Legal separation does not dissolve the marriage, nor does it sever the marital bond.[70] Sometimes referred to as

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[68] *Manalo, supra* note 58.
[69] *Supra* note 65, at 14.

relative divorce, it entails only a separation from bed and board but the parties remain married.[71]

In order to give life to the said Family Code provisions on legal separation, the Supreme Court promulgated A.M. No. 02-11-12 or the Rule on Legal Separation which took effect on March 15, 2003. It tacitly provides that it shall govern petitions on legal separation under the Family Code, while the Rules of Court shall apply suppletorily.[72]

In line with the state policy to protect marriages, the law recognizes the possibility that the spouses who previously filed a petition for legal separation may later on reconcile. Hence, Article 65 of the Family Code is in place. It provides that "If the spouses should reconcile, a corresponding joint manifestation under oath duly signed by them shall be filed with the court in the same proceeding for legal separation."[73]

The Family Code also enumerates the consequences of the reconciliation of the spouses, *to wit:*

> Art. 66. The reconciliation referred to in the preceding Articles shall have the following consequences:
>
> 1. The legal separation proceedings, if still pending, shall thereby be terminated at whatever stage; and
>
> 2. The final decree of legal separation shall be set aside, but the separation of property and any forfeiture of the share of the guilty spouse already effected shall subsist, unless the spouses agree to revive their former property regime.
>
> The court's order containing the foregoing shall be recorded in the proper civil registries.[74]
>
> Art. 67. The agreement to revive the former property regime referred to in the preceding Article shall be executed under oath and shall specify:
>
> 1. The properties to be contributed anew to the restored regime;
> 2. Those to be retained as separated properties of each spouse; and
> 3. The names of all their known creditors, their addresses and the amounts owing to each.
>
> The agreement of revival and the motion for its approval shall be filed with the court in the same proceeding for legal separation, with copies of both furnished to the creditors named therein. After due hearing, the court shall, in its order, take measure to protect the interest of creditors and such order shall be recorded in the proper registries of properties.

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[70] MELENCIO STA. MARIA, PERSONS AND FAMILY RELATIONS LAW, 353 (2010).
[71] SEMPIO-DIY, *supra* note 50.
[72] RULE ON LEGAL SEPARATION, sec. 1.
[73] FAMILY CODE, art. 65.
[74] FAMILY CODE, art. 66.

> The recording of the ordering in the registries of property shall not prejudice any creditor not listed or not notified, unless the debtor-spouse has sufficient separate properties to satisfy the creditor's claim.[75]

Under the Family Code, the reconciling spouses may opt to revive their former property regime notwithstanding the separation of their property pursuant to the finality of the decree of legal separation.

However, a reading of Sections 23 and 24 of the Rule on Legal Separation shows that the parties to a Petition of Legal Separation who later reconciles may choose not only to revive their previous property regime, but also to adopt a property regime different from the original. Thus:

> **Section 23.** *Decree of Reconciliation.* –
>
> x x x
>
> (a) If the spouses had reconciled, a joint manifestation under oath, duly signed by the spouses, may be filed in the same proceeding for legal separation.
>
> (b) If the reconciliation occurred while the proceeding for legal separation is pending, the court shall immediately issue an order terminating the proceeding.
>
> (c) If the reconciliation occurred after the rendition of the judgment granting the petition for legal separation but before the issuance of the Decree, the spouses shall express in their manifestation whether or not they agree to revive the former regime of their property relations or choose a new regime.
>
> (d) The court shall immediately issue a Decree of Reconciliation declaring that the legal separation proceeding is set aside and specifying the regime of property relations under which the spouses shall be covered.
>
> (e) If the spouses reconciled after the issuance of the Decree, the court, upon proper motion, shall issue a decree of reconciliation declaring therein that the Decree is set aside but the separation of property and any forfeiture of the share of the guilty spouse already effected subsists, unless the spouses have agreed to revive their former regime of property relations or adopt a new regime.
>
> **(f) <u>In case of paragraphs (b), (c), and (d), if the reconciled spouses choose to adopt a regime of property relations different from that which they had prior to the filing of the petition for legal separation, the spouses shall comply with Section 24 hereof.</u>**
>
> (g) The decree of reconciliation shall be recorded in the Civil Registries where the marriage and the Decree had been registered.[76]
>
> **Section 24.** *Revival of property regime or adoption of another.* –

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[75] FAMILY CODE, art. 67.
[76] RULE ON LEGAL SEPARATION, sec. 23.

(a) In case of reconciliation under Section 23, paragraph (c) above, the parties shall file a verified motion for revival of regime of property relations or the adoption of another regime of property relations in the same proceeding for legal separation attaching to said motion their agreement for the approval of the court.

xxx

xxx

xxx

(emphasis supplied).[77]

The rule allowing the adoption of a new property regime upon the spouses' reconciliation has no basis in law. Article 67 of the Family Code explicitly provides that the spouses may only revive their former property regime. Nowhere in the law on legal separation does it provide that the parties may adopt a property regime different than what they had prior to the filing of the petition.

The Rules of Court were promulgated pursuant to the Court's rule-making power under the Constitution. As the Rules do not originate from the legislature, they cannot be called laws in the strictest sense.[78] However, since they are promulgated by the Supreme Court, the Rules have the force and effect of law if not in conflict with positive law.[79] Thus, the Rules of Court are subordinate to statute, and in case of conflict, the statute will prevail.[80]

Since the Rule on Legal Separation was likewise promulgated by virtue of the Court's rule-making power, the foregoing doctrines pertaining to the Rules of Court may be applied by analogy to the Rule on Legal Separation. In view of Sections 23 and 24 of the Rule on Legal Separation, the Supreme Court unduly expanded the substantive provisions of the Family Code. In harmonizing the two conflicting sets of rules, the one mandated by the Family Code must prevail.

Finally, it must be emphasized that the limitation on the rule-making power of the Supreme Court is that it shall not diminish, increase, or modify substantive rights.[81]

IV. IMPLICATION ON THE LEGAL SYSTEM

The Supreme Court may be said to be the primary agent of the State in protecting the sanctity of marriage. While the prosecuting attorney or fiscal is mandated by the Family Code to ensure that there is no collusion between the parties in all actions for declaration of nullity of marriage, annulment[82], and legal separation[83], it is the Supreme Court which has the final say whether the said petitions may be granted or not.

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[77] RULE ON LEGAL SEPARATION, sec. 24.
[78] RIANO, I CIVIL PROCEDURE: THE BAR LECTURE SERIES (2014), at 26.
[79] *Ibid.,* citing *Alvero v. De la Rosa.*
[80] *Id.*, citing *Shioji v. Harvey.*
[81] RIANO, at 37.
[82] FAMILY CODE, art. 48.
[83] FAMILY CODE, art. 60.

Moreover, since judicial decisions form part of the legal system of the Philippines[84], the Court's pronouncements form part of the law on marriage in addition to the Family Code. Likewise, the procedural rules promulgated by the Supreme Court supplement the substantive law on marriage.

Throughout our judicial history, the Court has become more active in fulfilling its mandate to preserve the concept marriage – even to the point of being overprotective. Its overprotectiveness has both positive and negative implications in our legal system.

On a positive note, the Court, through the decisions it has rendered on marriage, has actually improved marriage legislation. We have the case *Van Dorn* as an example.

Further, the Court has put light into doubtful provisions of the Family Code. We have the cases of *Santos* and *Molina* as illustrations. Through *Molina,* the Court has given emphasis on the duty of the lower courts, the prosecuting attorney or fiscal, and even the Office of the Solicitor General to guarantee that no marriage will be dissolved on the ground of psychological incapacity, except for the most serious cases.

The Court has also promulgated procedural rules in order to give life to the remedies provided under the Family Code when grounds exist to declare a marriage null and void, to annul it, and even to declare the parties as legally separated.

On the other hand, the pitfall of the Court's overprotectiveness is that it sometimes loses sight of its true judicial mandate. The Court tends to forget that it is mandated by the fundamental law to merely interpret statutes and apply them, not to rewrite them as it sees fit.

In its progressive interpretation of Paragraph 2 of Article 26 of the Family Code, the Supreme Court has provided solutions for the troubled and apparently disadvantaged Filipino spouse which solutions are neither written in the law nor intended by its lawmakers.

However, this interpretation poses serious problems. Filipinos might erroneously think that the Court carries the power to modify statutes for their benefit. In turn, they may run to the succor of courts of law whenever they experience every little inconvenience in their married lives. This may further clog the court dockets, and ultimately destroy the inviolability of marriage in the Philippines. Finally, this runs counter to the principle of checks and balances. Undue wielding of government authority is dangerous for it destabilizes the institutions of the State.

V. CONCLUSION

Given the proactive stance of the Supreme Court, its overprotectiveness becomes manifest when marital rights of Filipino citizens are considered, and when the sanctity of marriage is taken into account. Cases decided by the Supreme Court interpreting and applying statutes either enrich jurisprudence or exhibit judicial overreach.

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[84] *Supra* note 18.

The cases of *Santos* and *Molina* has enriched jurisprudence. The Court's rulings therein have long served as standards for the bench, the bar, and the academe in the application of Article 36 of the Family Code.

Van Dorn illustrates that a judicial precedent may be converted into a law. The ruling of the Court therein became the basis of the enactment of Executive Order 227, which amended Article 26 of the Family Code. Clearly, jurisprudence was not only enriched but legislation was also augmented.

On the other hand, *Orbecido* and *Manalo* may be instances of judicial legislation.

In *Orbecido,* the Court ruled that what determines the application of Paragraph 2 of Article 26 of the Family Code is not the citizenship of the parties at the time of the marriage but their citizenship at the time the divorce decree was obtained. Thus, Paragraph 2 of Article 26 now covers a marriage between a Filipino citizen and a Filipino who was later naturalized as an alien, notwithstanding that on its face, it applies solely to cases when the parties are a Filipino citizen and a foreigner at the time of the marriage.

Manalo established the rule that a Filipino married to a foreigner may initiate and obtain a divorce and that the divorce decree may be recognized as valid in the Philippines, albeit the policy against absolute divorce which follows a Filipino citizen wherever he goes.

The domineering position by the Court is emphasized after a thorough review of some of its decisions interpreting controversial provisions of the Family Code. Undeniably, the law is expanded over time when interpreted by the Court.

Upon analysis, it is shown that there are times when the Court takes a passive attitude on matters before it – stepping back and refusing to rule on a matter within the business of Congress. Often, however, the Court assumes a more dynamic role – so dynamic to the point of overstepping boundaries.

Expressing his opposition to judicial legislation, Justice Caguioa stated, "To wield judicial power in this manner is to arrogate unto the Court a power which it does not possess; it is to forget that this State, is foremost governed by the rule of law and not of men, however wise such men are or purport to be."[85]

The failure of the Court to set a distinct line between interpreting and applying statutes on the one hand, and indulging in judicial legislation on the other hand, may after all be a pitfall of an overprotective court.

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[85] CAGUIOA, *J.*, Dissenting Opinion, *Republic v. Manalo,* 15.

INTER ARMA ENIM SILENT LEGES:
Silencing the Rule of Law and Due Process vis-a-vis Improving Drug Control Policies

STEFFI NICOLE P. FLORES[1]

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[1] Associate Managing Editor, Vol. 62, UST Law Review; J.D. (2019), Faculty of Civil Law, University of Santo Tomas; B.S. in Nursing (2012), College of Nursing, University of Santo Tomas. The author would like to acknowledge the invaluable efforts of Mr. Gabriel Adora and Ms. Ruth Mae Sanvictores.

I. INTRODUCTION

The earliest record of the existence of drugs dates back to 5,000 B.C. when the Sumerians made reference to opium which they called Hul Gil or the "plant of joy". From then on, drugs were utilized for various purposes such as treating illnesses, altering a person's mental state, and dulling a person's senses to gather courage for war.[2]

In the 19th century, opium, cocaine, and cannabis were legal and were made components of medicines. Because of the widespread use of opium, combined with an increase in the number of Chinese immigrating to the United States (US), the US government enacted an anti-opium law. A similar discriminatory legislation was created when the US declared marijuana illegal at a time when marijuana was associated with Mexican immigrants.

In 1912, the increasing use of opium in China prompted twelve (12) countries to create the International Opium Convention. While it imposed restrictions in trading cocaine, cannabis and opiates, it did not provide criminal sanctions for their use or production.[3] This was later revised in 1925. Various treaties were entered into by States to respond to the growing concern about illegal drugs. It was only in 1961 when the United Nations (UN) created the Single Convention on Narcotic Drugs replacing all the treaties before it and creating a universal drug control system. This convention is one of three conventions crafted which embody the prohibitionist policies that member countries were to follow.

But despite such policies enforced in accordance with the UN conventions, the demand for illegal drugs grew. In response, then US President Richard Nixon declared drug abuse as public enemy number one during a press conference in 1971. His goal was to curb the production, distribution and consumption of illegal drugs. This started the so-called "War on Drugs" defined as "a series of actions tending toward a prohibition of illegal drug trade". Since then, other countries have followed suit having one goal in mind: to create laws prohibiting the production, use, possession, and trafficking of illegal drugs and to penalize those violators.

Unfortunately, this global drug prohibition triggered unprecedented consequences that even the UN Office on Drugs and Crime (UNODC) had not foreseen; it created a lucrative and violent criminal market, diverted resources which could have been better allocated for health concerns, and marginalized drug users thus preventing them from receiving medical treatment.[4]

States and international organizations have acknowledged the futility in maintaining their prohibitionist policies. Due to the worsening global drug situation, there have been calls to change the people's perception of drugs and accordingly to reform drug control laws/policies.

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[2] Ricarardo M. Zarco, *A Short History of Narcotic Drug Addiction in the Philippines, 1521-1959*, 43 Philippine Sociological Review, 1 & 3 (1995).
[3] Amira Armenta & Martin Jelsma, *The UN Drug Control Conventions A Primer*, Transnational Institute (October 8, 2015), https://www.tni.org/en/publication/the-un-drug-control-conventions
[4] 2008 World Drug Report, https://www.unodc.org/documents/wdr/WDR_2008/WDR_2008_eng_web.pdf (last accessed February 12, 2019).

In the Philippines, our ancestors initially used "masticatory stimulants" like the betel leaf and alcoholic beverages which were considered as intoxicants before 1521. The first recorded use of opium dates back to 1638 when Moros allegedly used opium to dull their senses and gather courage for war against the Spaniards. The number of those addicted to opium grew and peaked during the latter years of the 18th century.[5] It was only in 1972 when Congress enacted Republic Act (RA) No. 6425, also known as the Dangerous Drugs Act of 1972, to respond to the 20,000 drug users in the country. This law was later repealed by RA 9165, or the Comprehensive Dangerous Drugs Act of 2002, which is enforced to this day.

The Philippine drug problem has existed for many years but had not been the focus of past administrations. This has changed during the administration of the incumbent chief executive, President Rodrigo Roa Duterte, whose focus is the eradication of illegal drugs in the Philippines. Within the first few months after he assumed office, numerous extrajudicial killings of alleged drug users and persons involved in drugs were reported. In some instances, law enforcers were accused of having a hand in these killings. All these beg the question of whether our current drug laws/policies and our government's response to the increasing drug problem are effective and responsive to the needs of our country. To answer this question, we need to review our existing policies. This article will prescribe potential alternative drug control policies that can be adopted in the Philippines based on the policies implemented in other countries and recommendations from international organizations.

II. INTERNATIONAL DRUG PROHIBITION

A. UN International Drug Control Conventions

The three (3) UN international drug control conventions, namely the Single Convention on Narcotic Drugs of 1961 (as amended by the 1972 Protocol), the Convention on Psychotropic Substances of 1971, and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, were created as control measures to ensure that listed substances would be made accessible only for medical and scientific purposes. The 1988 Convention obliged countries to impose criminal sanctions for the production, possession, and trafficking of illegal drugs. And it was the circumstances (e.g. rise in the demand and increase in the production of illegal drugs) surrounding the creation of the 1988 Convention that triggered some countries to declare war against drugs.[6]

B. Revisiting the Past

1. United States

During his first term as President of the United States, Richard Nixon's main thrust with respect to the drug war was treatment, or more specifically, harm reduction. The objectives of harm reduction were to prevent complications of drug use, discourage drug users from getting involved in crimes, and ensure that they remain productive members of the society. But this was not maintained by President

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[5] ZARCO, *supra* note 2, at 1.

[6] Amira Armenta & Martin Jelsma, *The UN Drug Control Conventions: A Primer*, Transnational Institute (October 8, 2015), https://www.tni.org/en/publication/the-un-drug-control-conventions

Nixon during his second term as subsequent legislation focused more on penalizing drug users. This is best embodied by the Rockefeller Drug Laws which penalized the offenders based on the amount of "drug sold or possessed" without taking into consideration the participation/role of the offender in the drug industry.[7] From the passage of the Rockefeller Drug Laws until after the enactment of the Anti-Drug Abuse Act of 1986, many of those incarcerated for drug offenses were those coming from minority groups such as the Latinos and African Americans. There was also discrimination of female offenders.[8]

Majority of the drug policies in the United States is characterized as punitive in character. However, despite these laws use of illegal drugs remained high. [9]

2. Latin America

Colombia is recognized as one of the top producers of cocaine in the world. In the 1960's, the conflict between the Colombian government and paramilitary groups and guerrillas, both of which were involved in drug trafficking started. The government's stance on drugs and its consequent aggressive tactics to eliminate drugs and drug-related crimes has cost the lives of many citizens mostly involved in drug cartels. In Mexico, prisoners who were arbitrarily arrested and detained cried foul over their alleged torture and ill-treatment by law enforcers.[10]

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[7] LISA ANNE ZILNEY, DRUGS: POLICY, SOCIAL COSTS, CRIME AND JUSTICE, 152-157 (1st ed. 2011).
[8] *Ibid.*
[9] ERICH GOODE, DRUGS IN AMERICAN SOCIETY, 349-350 (4th ed. 1993).
[10] *Out of Control: Torture and Other Ill-treatment in Mexico*, Amnesty International (Sept. 14, 2014), https://www.amnesty.org/en/documents/AMR41/020/2014/en/

3. Asia

Asia includes some of the countries which enforce strict drug prohibition and impose even stricter punishments with China, Malaysia and Indonesia enforcing death penalty for drug-related offenses. Chinese President Xi Jinping has expressed his view regarding the drug problem describing it as a "menace for society and a significant issue concerning public security" which "severely harm health, corrupt will, destroy families, consume wealth, poison society, pollute the social environment, and lead others to crime."[11] From 2012 to 2016 alone, Chinese courts have found 543,000 people guilty of drug crimes, 120,000 of those were sentenced to imprisonment for more than 5 years. It was, however, not specified who among them were drug users and/or drug dealers.[12]

In Vietnam, the death penalty is imposed on persons who possess or smuggle at least 100 grams of heroin, and 5 kilograms for cannabis and opiates. The same penalty is imposed for murder and rape.[13] Moreover, Act 1952 of Malaysia contains provisions on presumptions such that a person found with a particular amount of drugs is presumed to be involved in drug trafficking.[14] This shifts the burden to the accused to prove his innocence, contrary to the legal principle that a person is presumed innocent until proven guilty.

Perhaps, the Asian country with which the Philippines is most similarly situated is Thailand. When then Prime Minister Thaksin Shinawatra rose to power, one of his principal advocacies was to provide for the treatment and rehabilitation of drug users. This promise was not kept. In January 28, 2003, Prime Minister Shinawatra issued Order No. 29/2546 which aimed to "quickly, consistently and permanently eradicate the spread of narcotic drugs and to overcome narcotic problems, which threaten the nation." Thus, the war on drugs ensued.

The government itself encouraged the harsh treatment of the supposed drug users and traffickers. Thai policemen were prescribed a quota to eradicate drug dealers and were given incentives in the form of cash bonuses. Reports showed that this resulted in more than 2,000 extrajudicial killings (supposedly done by gangs involved in drugs), various human rights violations, and arbitrary arrests by the Thai police.[15] Moreover, the Thai government created a "blacklist" or "watch list" containing the names of suspected drug users and traffickers. Interior Minister Wan Mohamad Noor Matha defended the government's course of action saying, "They (drug dealers) will be put behind bars or even vanish without a trace. Who cares? They are destroying our country."[16]

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[11] *No rest until sweeping victory against drugs, Xi says*, China Daily (June 26, 2015), http://www.chinadaily.com.cn/china/2015-06/26/content_21106881.htm

[12] *Around 120,000 given over five years in prison for drug crimes since 2012*, Global Times (June 20, 2017), http://www.globaltimes.cn/content/1052598.shtml

[13] David Hutt, *Beware Vietnam's Death Machine*, The Diplomat (April 20, 2017), https://thediplomat.com/2017/04/beware-vietnams-death-machine/

[14] Dangerous Drugs Act 1952, Act 234 (Revised 1980), sec. 37 (1980).

[15] *Thailand Not Enough Graves: The War on Drugs, HIV/AIDS, and Violations of Human Rights*, Human Rights Watch (July 8, 2004), https://www.refworld.org/docid/412efec42.html

[16] Alex M. Mutebi, *Thailand in 2003: Riding High Again*, 44(1) Asian Survey, 78 & 80 (2004).

C. Admitting Defeat

Although some countries have remained steadfast in their belief that prohibitionist policies are effective deterrents to drugs or drug-related crimes, others have raised their white flags acknowledging that the drug war is one fight they cannot win.

Former Colombian President Cesar Gaviria expressed that "*Illegal drugs are a matter of national security, but the war against them cannot be won by armed forces and law enforcement agencies alone. Throwing more soldiers and police at the drug users is not just a waste of money but also can actually make the problem worse.*"[17]

Former Australian Prime Minister Tony Abbott also stated that "It's not a war we will ever finally win. The war on drugs is a war you can lose." Instead of protecting its citizens from the effects of drugs, reports show that deaths, diseases, and the incidence of property crime, violence and corruption in Australia have risen.[18]

III. PHILIPPINE DRUG PROHIBITION

A. Republic Act No. 9165

RA 9165 (also known as the Comprehensive Dangerous Drugs Act) was enacted on June 7, 2002, repealing the Dangerous Drugs Act of 1972. This law embodies the prohibitionist drug policy in the Philippines. Its objectives are to: "to *safeguard the integrity of its territory and the well-being of its citizenry* particularly the youth, from the harmful effects of dangerous drugs on their physical and mental well-being, and to defend the same against acts or omissions detrimental to their development and preservation." The law further states that:

> Toward this end, *the government shall pursue an intensive and unrelenting campaign against the trafficking and use of dangerous drugs and other similar substances through an integrated system of planning, implementation and enforcement of anti-drug abuse policies, programs, and projects*. The government shall however aim to achieve a balance in the national drug control program so that people with legitimate medical needs are not prevented from being treated with adequate amounts of appropriate medications, which include the use of dangerous drugs.[19]

Accordingly, the law prescribes, among others, the penalty of life imprisonment to death for the importation[20], sale, trading, administration, dispensation, delivery, distribution or transportation of illegal drugs[21], and the maintenance of a den, dive,

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[17] Cesar Gaviria, *President Duterte Is Repeating My Mistakes*, The New York Times (Feb. 7, 2017), https://www.nytimes.com/2017/02/07/opinion/president-duterte-is-repeating-my-mistakes.html

[18] Alex Wodak, *The failure of drug prohibition and the future of drug law reform in Australia*, 38(5) Australian Prescriber, 148-149 (2015).

[19] An Act Instituting the Comprehensive Dangerous Drugs Act of 2002, Repealing Act No. 6425, otherwise known as the Dangerous Drugs Act of 1972, as amended, Providing Funds Therefor, and for Other Purposes, Republic Act No. 9165, sec. 2 (2002).

[20] R.A. 9165, sec. 4.

[21] R.A. 9165, sec. 5.

or resort.[22] The same penalty is imposed for persons who act as "financier" of illegal drug activities. Meanwhile, a penalty of imprisonment between twelve (12) years and one (1) day to twenty (20) years is prescribed for the same acts involving any controlled precursor and essential chemical in addition to the manufacture of these chemicals[23] and the possession with intent to deliver of equipment, apparatus, and other paraphernalia for dangerous drugs.[24]

Some have criticized this law owing to the harshness of the penalties imposed. Even the former Undersecretary of the Dangerous Drugs Board (DDB) Benjamin Reyes said that there is a "need to lower the penalties" since some drug offenders/users may still be rehabilitated to become productive members of our society.[25] For instance, Section 11 of R.A. 9165 penalizes possession of drugs depending on the quantity of the drugs involved. Although possession of large quantities of illegal drugs do call for stiffer penalties, possession of less than five (5) grams of drugs such as marijuana and shabu hardly merits the penalty of imprisonment of twelve (12) years and one (1) day to twenty (20) years, especially accused is a nonviolent offender or has not committed any other crime due or in relation to his use or possession of such drug. Section 15 of the same law also imposes imprisonment of six (6) years and one (1) day to twelve (12) years and a fine ranging from Fifty thousand pesos (P50,000.00) to Two hundred thousand pesos (P200,000.00) for those caught using illegal drugs for the second and subsequent offenses. The offender in this case no longer has the choice of opting for treatment instead of being prosecuted for the offense.

While the law provides for a program for the treatment and rehabilitation of drug dependents, its effectiveness cannot be determined owing to conflicting data. Date from the Philippine National Police (PNP) shows that from July 1, 2016 to June 30, 2018, 1,274,148 drug users[26] has surrendered for treatment. A year-end report of the Presidential Communications Operations Office, however, shows a total of 1,308,078 persons who surrendered from July 1, 2016 to November 27, 2017[27] and an additional 149,265 were arrested in drug operations. The Department of Health (DOH) has recorded 6,558 who have completed the in-patient rehabilitation program while the Department of the Interior and Local Government (DILG) recorded 159,836 who have participated in the local rehabilitation program. There is no cohesive data from both departments as to how many drug users have undergone and completed the rehabilitation program prescribed under R.A. 9165.

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[22] R.A. 9165, sec. 6.
[23] R.A. 9165, sec. 8.
[24] R.A. 9165, sec. 10.
[25] Rambo Talabong, *How an 'outdated' law is preventing PH drug war victory*, Rappler (March 25, 2018), https://www.rappler.com/newsbreak/in-depth/198892-dangerous-drugs-act-outdated-war-victory
[26] Rambo Talabong, *No 'real number' on drug rehab: Here's why*, Rappler (July 23, 2018), https://www.rappler.com/nation/207881-reason-duterte-administration-no-real-number-drug-rehabilitation.
[27] Ted Regencia, *Senator: Rodrigo Duterte's drug war has killed 20,000*, Aljazeera (February 22, 2018), https://www.aljazeera.com/news/2018/02/senator-rodrigo-duterte-drug-war-killed-20000-180221134139202.html

B. Oplan Tokhang

The drug problem has long been an issue in the Philippines but only came into focus upon the start of President Duterte's administration. He vowed to eradicate drugs in three (3) to six (6) months upon assumption into office. This lead to the issuance of Command Memorandum Circular (CMC) No. 16-2016 which set the guidelines for Project Double Barrel – a two-pronged approach composed of Project Tokhang and Project HVT.

Project Tokhang (Oplan Tokhang) was geared towards eradicating drugs in the barangay level by conducting house to house visits of persons suspected of being involved in illegal drugs. This project has five (5) stages, namely:

a. Collection and Validation of Information
b. Coordination
c. House to house Visitation
d. Processing and Documentation; and
e. Monitoring and Evaluation.

While its intentions are noble, there have been reports of police abuse in enforcing Oplan Tokhang. Between July 1, 2016 and January 31, 2017, PNP Data shows that 7,080 people have been killed as a result of the war on drugs. The Human Rights Watch, however, estimated that more than 12,000 people have already been killed.[28] This is the kind of street-level drug enforcement which has been shown to be prone to "bribery, perjured testimony, faked evidence, and abused rights".[29] Local government officials prepare a "drug watch list" which contains names of persons suspected of having committed a drug crime. This list is then shared to the police. And the problem here lies in that the list is unverified; names are included based on "hearsay and community rumour or rivalry".[30]

IV. EFFECTS ON THE RULE OF LAW AND A PERSON'S RIGHT TO DUE PROCESS

The harmful effects of illegal drugs, either to the victims of the drug offenders and their families or the drug offenders themselves, are undisputed. This, however, does not warrant the arbitrary exercise of police power by State officials and law enforcers. The rule of law and the right to due process as enshrined in our 1987 Constitution exist for a reason – to afford protection to every person from possible abuses of the government.

The Rule of Law provides that "all people and institutions are subject to and accountable to law that is fairly applied and enforced"; "it is a check or a limitation to the

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[28] *Philippines: Duterte's 'Drug War' Claims 12,000+ Lives*, Human Rights Watch (January 18, 2018), https://www.hrw.org/news/2018/01/18/philippines-dutertes-drug-war-claims-12000-lives

[29] Mark H. Moore & Mark A.R. Kleiman, The Police and Drugs, National Institute of Justice (September 1989), https://www.ncjrs.gov/pdffiles1/nij/117447.pdf

[30] *"If you are Poor you get Killed": Extrajudicial Executions in the Philippines' "War on Drugs",* https://www.amnestyusa.org/files/philippines_ejk_report_v19_final_0.pdf, (last accessed January 16, 2019).

arbitrary exercise of power." President Duterte declared when he took the oath as president that "*My adherence to due process and the rule of law is uncompromising*." Despite such declaration, some have doubted the truthfulness of his statement. The administration has made it clear that eradicating drugs is a priority.

An investigation conducted by the Human Rights Watch reveals that police were involved in shooting drug suspects and planting evidence on their bodies.[31] Others were killed by the police in the guise of self-defense; the police would make it appear that it was the drug suspect who first drew a gun[32] or that the suspect attempted to fight back when about to be arrested.[33]

There have been calls for the investigation of these police officers that they may be held accountable for their actions. However, no immediate action was taken. It seemed that the present administration's unyielding stance on drugs has led the police to take matters into their own hands without fear of punishment. A Senior Police Officer 1 from the Anti-Illegal Drugs Group (AIDG) even admitted that they were paid P8,000 to P15,000 for every drug suspect killed.[34]

One such incident was the case of Heart de Chavez (formerly known as Ronald de Chavez), a small-time drug dealer in Navotas, who admitted her drug use to authorities around October to November 2016. Months later, several men knocked on her door and dragged her out of the house while her family looked on helplessly. Heart was later found dead with a gunshot wound to her cheek. During the investigation, her sister stated that she recognized one of the partially-masked assailants as a member of the Anti-illegal Drugs Unit.[35] Another instance was the killing of Kian Loyd delos Santos, a 17 year old boy who was erroneously identified as a drug pusher. Kian was seen in the custody of three (3) police officers and was later found dead with a gunshot wound. As of this writing, the three (3) policemen involved in the killing of Kian have already been convicted of murder.

Article 3 of the Universal Declaration of Human Rights states that, "Everyone has the right to life, liberty and security of person." The 1987 Constitution of the Philippines contains essentially the same, to wit: "*No person shall be deprived of life, liberty,* or property *without due process of law* xxx".[36] It further states that:

> *The right of the people to be secure in their persons, houses,* papers, and effects *against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable*, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of

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[31] Carlos H. Conde, *Duterte Vows More Bloodshed in Philippine 'Drug War'*, Human Rights Watch (July 23, 2018), https://www.hrw.org/news/2018/07/23/duterte-vows-more-bloodshed-philippine-drug-war

[32] Emily Sullivan, *3 Police Officers Found Guilty of Murder in Philippines' War on Drugs*, National Public Radio, Inc. (November 29, 2018), https://www.npr.org/2018/11/29/671795507/3-police-officers-found-guilty-of-murder-in-philippines-war-on-drugs

[33] Joy Aceron, *Extrajudicial killings: Police self-defense?*, Rappler (August 6, 2016), https://www.rappler.com/views/imho/142061-extrajudicial-killings-police-self-defense

[34] Jing Villamente, *'Killers paid per head' – Amnesty International*, The Manila Times (February 2, 2017), https://www.manilatimes.net/killers-paid-per-head-amnesty-international/310150/

[35] Patricia Evangelista, *Welcome to the End of the War*, Rappler (February 7, 2017), https://www.rappler.com/newsbreak/in-depth/158886-impunity-end-drug-war

[36] CONSTI., art. III, sec. 1.

> the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.[37]

In *People v. Verra*, the court declared that "A day in court is the touchstone of the right to due process in criminal justice. It is an aspect of the duty of the government to follow a fair process of decision-making when it acts to deprive a person of his liberty."[38] Without a formal investigation and without a proper trial, how then can we say that due process was given to a person suspected of being a drug offender? It is evident that those who were killed due to their alleged drug involvement were deprived of due process. They were summarily executed and were not even made to appear before a court which could impartially adjudge their guilt. This is contrary to Section 14, Article III of the 1987 Constitution which provides that:

> (1) *No person shall be held to answer for a criminal offense without due process of law.*
>
> (2) In all criminal prosecutions, the *accused shall be presumed innocent until the contrary is proved*, and shall enjoy the right to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy, impartial, and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf. However, after arraignment, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustifiable.

The Supreme Court has time and again expressed:

> The Court strongly supports the campaign of the government against drug addiction and commends the efforts of our law-enforcement officers against those who would inflict this malediction upon our people, especially the susceptible youth. But as demanding as this campaign may be, it cannot be more so than the compulsions of the Bill of Rights for the protection of the liberty of every individual in the realm, including the basest of criminals. *The Constitution covers with the mantle of its protection the innocent and the guilty alike against any manner of high-handedness from the authorities, however praiseworthy their intentions.*
>
> *Those who are supposed to enforce the law are not justified in disregarding the rights of the individual in the name of order. Order is too high a price for the loss of liberty.* As Justice Holmes, again, said, "I think it a less evil that some criminals should escape than that the government should play an ignoble part." It is simply not allowed in the free society to violate a law to enforce another, especially if the law violated is the Constitution itself.[39]

Law enforcers shall respect and protect human dignity and maintain and uphold the human rights of all persons.[40]

V. CURRENT TRENDS IN DRUG CONTROL POLICY

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[37] CONSTI., art. III, sec. 2.
[38] *People v. Verra*, G.R. No. 134732 (2002).
[39] *People v. Aminnudin*, 246 Phil. 424 (1988).
[40] United Nations Human Rights Code of Conduct for Law Enforcement Officials, Art. 2.

A. Patients, not Criminals

Drug use/addiction is now viewed in many countries as a health problem. For instance, the Netherlands view the drug problem in a health perspective: drug users are seen as victims, not as criminals.[41] In Portugal, it is seen as a "chronic, recurring disease". Courts are given the discretion to order community service or suspended sentencing as alternatives to imprisonment.[42] Although drug use remains illegal beyond certain thresholds/limits, their governments have recognized that treating this disease cannot be accomplished by imprisonment but by creating policies focused on the treatment and rehabilitation of drug dependents. Their governments have also recognized that people may use drugs because of personal problems and social factors like poverty and alienation and that despite their habit, they still have the right to be respected and the right to health.[43]

B. Principle of Proportionality

The Principle of Proportionality in essence provides that a penalty should be commensurate to the crime. In the Netherlands, the government has made a distinction between two (2) categories of drugs, namely soft drugs (cannabis and hallucinogenic mushrooms) and hard drugs (cocaine, amphetamine heroin, morphine, and LSD). Possessing, producing, selling, importing and exporting illegal drugs remain to be prohibited, but possession of small amounts for personal use and the sale of soft drugs are tolerated. For instance, possession of 30 grams or less of cannabis is not prosecuted and is either dismissed or deemed a misdemeanour.[44] But this policy of tolerance is best exemplified by the establishment of the "coffee shop system" which permits the sale of the soft drug cannabis, provided it complies with specific criteria, to wit: "no advertising, no sale of hard drugs, no public nuisance in and around the coffee shop, no admittance of or sale to minors, no sale of large quantities per transaction (maximum of 5 grams), maximum in-store stock for sale 500 grams, and admittance and sales limited to residents of Netherlands." The goal is to prevent users of cannabis from being exposed to hard drugs which are more harmful to a person's health compared to soft drugs.

Portugal's Law 30/2000 has also decriminalized use or possession for personal use of drugs by imposing administrative – instead of criminal – sanctions to a person caught in possession of not more than 10 daily doses of drugs. If there is no suspicion of other offenses involved (E.g. trafficking or sale), the drugs will then be seized and he/she will be referred to the Commission for Dissuasion of Drug Addiction which will evaluate him/her for possible treatment or rehabilitation. Meanwhile, the Czech Republic penalizes possession for personal use of drugs "bigger than small" but possession of amounts "smaller than bigger than small" is treated as a mere misdemeanour.

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[41] Marianne van Ooyen & E.R. Kleemans, *Drug Policy: The "Dutch Model"*, 44 Crime and Justice 172, 165-226 (2015).

[42] Czech Republic Country Drug Report 2018, http://www.emcdda.europa.eu/countries/drug-reports/2018/czech-republic/drug-laws-and-drug-law-offences_en (last accessed Jan. 9, 2019).

[43] Artur Domoslawski, *Drug Policy in Portugal: The Benefits of Decriminalizing Drug Use*, Open Society Foundations (August 2011), https://www.opensocietyfoundations.org/sites/default/files/drug-policy-in-portugal-english-20120814.pdf

[44] JEAN-PAUL G. GRUND & JOOST J. BREEKSEMA, DRUG POLICY IN THE NETHERLANDS, 130-133 (1st ed. 2017).

Even with such tolerant policies of the Netherlands, there has been no increase in drug use. The number of people who use cannabis remains lower compared to neighboring countries which have strict law enforcement measures.[45]

C. Harm Reduction

The International Harm Reduction Association (now known as Harm Reduction International), a non-governmental organization which promotes policies that recognize the human rights of illegal drug users, defined harm reduction as "policies and programs which attempt to reduce the adverse health, social and economic consequences of mood altering substances to individual drug users, their families and communities, without requiring decrease in drug use." Accordingly, these policies target the harmful effects that result from drug use rather than the use itself. Effects can take the form of HIV/AIDS infection, death due to drug overdose, or public disturbance or nuisance. Examples of this program are: the needle syringe exchange program (NSEP), methadone maintenance treatment, supervised consumption facilities, low-threshold support services, and street drug testing and early warning systems.

Countries such as Czech Republic, the Netherlands, Portugal, and Canada have implemented the NSEP which aims to reduce blood-borne diseases (HIV/AIDS) that result from sharing of needles by drug users by providing sterile equipment and collecting used syringes. The 2018 reports of the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) show positive results of the needle exchange program in countries such as Spain[46], United Kingdom[47], Portugal[48], and the Netherlands[49] exhibiting a marked decrease in HIV incidence due to drug injection from 2006-2016.

Drug consumption rooms have also gained acceptance in Australia, Mexico, and a number of countries/states in Europe and in the U.S., allowing users to inject or inhale drugs in a controlled setting. This way, the drug user may receive immediate treatment for a possible overdose. There will be a decrease in public consumption of drugs and concurrent public nuisance. These facilities also provide services such as primary medical care services, counselling, and crisis intervention while monitoring the condition of the person during drug use. By offering a safe environment for these persons, the program creates a point of contact for healthcare providers to initiate or offer treatment options especially for those considered as "hard to reach users".[50]

D. Law Enforcement

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[45] Kasia Malinowska, *For Safe and Effective Drug Policy, Look to the Dutch*, Open Society Foundations (July 16, 2013), https://www.opensocietyfoundations.org/voices/safe-and-effective-drug-policy-look-dutch

[46] Spain Drug Report 2018, http://www.emcdda.europa.eu/system/files/publications/11320/spain-cdr-2018-with-numbers.pdf (last accessed July 1, 2019).

[47] United Kingdom Drug Report 2018, http://www.emcdda.europa.eu/system/files/publications/11322/united-kingdom-cdr-2018-with-numbers.pdf (last accessed July 1, 2019).

[48] Portugal Drug Report 2018, http://www.emcdda.europa.eu/system/files/publications/11298/portugal-cdr-2018.pdf (last accessed July 1, 2019).

[49] Netherlands Drug Report 2018, http://www.emcdda.europa.eu/system/files/publications/11314/netherlands-cdr-2018-with-numbers.pdf (last accessed July 1, 2019).

[50] *Drug consumption rooms: an overview of provision and evidence (Perspective on drugs)*, European Monitoring Centre for Drugs and Drug Addiction (June 2018), http://www.emcdda.europa.eu/system/files/publications/2734/POD_Drug%20consumption%20rooms.pdf

While some countries are now focused on providing treatment and rehabilitation, police enforcers still play a vital role in preventing public nuisance like abatement of selling of drugs in private property. In Australia, a police diversion scheme has been implemented in which a person caught in possession of a small quantity of illegal drugs are given the option to participate in a program for education and/or treatment. This is on the condition that such offender has "little or no past contact" with the justice system.[51]

VI. RECOMMENDED REFORMS

The Philippine war on drugs has resulted in approximately 40% increase in inmate population[52] and as of May 2018, records of the Bureau of Jail Management and Penology (BJMP) show that a total of 102,692 people were either sentenced or detained for drug-related crimes (use, possession, trafficking, sale or manufacture of drugs), comprising more than 70% of the prison population.[53] Meanwhile, the New Bilibid Prison (NBP), as of May 2018, has 4,387 prisoners convicted of drug related crimes– the third most common crime committed by inmates.[54] This has resulted in further overcrowding of prisons and worse conditions for prisoners.

In a landmark case[55], the Supreme Court granted accused Salvador Estipona to plead to a lesser offense arguing that the power to promulgate rules to govern pleading, practice and procedure is the sole prerogative of the Court. This case led the Office of the Court Administrator (OCA) and the Department of Justice (DOJ) to issue OCA Circular No. 90-2018 and Department Circular No. 027 respectively, prescribing the allowable plea bargain for certain offenses under R.A. No. 9165. Although the Court has recognized the benefits of allowing plea-bargaining and has prescribed treatment and rehabilitation for specified drug offenders, these persons are still charged and convicted even for possession of small amounts of drugs (less than 5 grams for shabu, opium, morphine, heroin and cocaine; and less than 300 grams for marijuana). The Supreme Court, however, does not allow plea-bargaining for the use of dangerous drugs.

It has been shown that not all drug users or persons in possession of drugs become drug dependent or cause violence or public disturbance. Therefore, policymakers should delve into the benefits of the following:

1. Removing/lowering the penalty for drug use, even for repeat or recurrent drug users, provided that such persons do not harm or cause injury to others (nonviolent drug users);

2. Prescribing a lower threshold for the amount of illegal drugs possessed; persons who possess an amount *lower* than the threshold will be imposed a

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[51] Handbook on basic principles and promising practices on Alternatives to Imprisonment, http://www.unodc.org/pdf/criminal_justice/07-80478_ebook.pdf (last accessed January 15, 2019).
[52] PS Jun M Sarmiento, *War on drugs congests Philippine jails – Recto*, Sun Star (September 26, 2017), https://www.sunstar.com.ph/article/166148
[53] PDL with Drug Cases, https://www.bjmp.gov.ph/datstat.html (last accessed January 15, 2019).
[54] Rambo Talabong, *IN NUMBERS: The inmates of New Bilibid Prison*, Rappler (May 16, 2018), https://www.rappler.com/newsbreak/in-depth/202418-new-bilibid-prison-bucor-inmates-figures
[55] *Estipona v. Lobrigo*, G.R. No. 226679, August 15, 2017.

fine and/or if found to be drug dependent, then he/she should be referred for treatment and rehabilitation, and persons caught in possession *beyond* the threshold will be prosecuted;

3. Adopting Harm Reduction measures.

By removing the penalty of imprisonment for use or possession of drugs for personal use (up to a certain threshold), law enforcers will be able to focus their attention to more serious offenses such as trafficking of drugs which may lead to a decrease in the supply of illegal drugs.

The police will still play a key role in our fight against illegal drugs. It has been shown that drug users commonly commit petty crimes like theft, robbery, or fraud in order to support their habit. Our law enforcers have the advantage of having first contact with users and are, therefore, in the best position to refer them for treatment and rehabilitation. The police should also work towards decreasing the harmful effects of drug use by coordinating with agencies/organizations which can implement harm reduction programs.

Various agencies/groups from both the government and private sector have initiated programs to adapt to the changing needs of Filipinos with regard to the drug problem. In fact, even the DDB, through Resolution 298, conducted a study in Barangay Kamagayan, Cebu City to determine the effectiveness of a needle exchange program within the said community. Although the program was suspended after only months of implementation (due to oppositions mostly from public officials), evaluators of the program reported an increase in the demand for treatment and rehabilitation. Furthermore, persons who inject drugs (PWID) have expressed that the program offered them a safe environment free from stigma.[56]

Senator Risa Hontiveros-Baraquel has also filed Senate Bill No. 1313 on February 6, 2017 entitled "*An Act Mainstreaming the Public Health Approach to Philippine Drug Policy, Establishing and Implementing Community-based Programs and Strategies for Drug-related issues and concerns, and Prohibiting Harmful and Discriminatory interventions and practices, Appropriating Funds Therefor, and for Other Purposes*". In the private sector, a non-profit organization called NoBox advocates for the implementation of harm reduction measures in relation to the Philippines' drug problems.

VII. CONCLUSION

The drug prohibition was an answer to the increased global drug problem. But despite the stringent penalties imposed by law, the demand for illegal drugs increased. Governments then resorted to creating laws which put a premium on law enforcement and violence as means of stopping the proliferation of illegal drugs and curbing its use; with countries such as the US calling on the police and military to aid in its drug war. These have resulted in human rights violations and extrajudicial killings.

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[56] Pascal Tanguay, *Evaluation of Harm Reduction Service Delivery in Cebu City, Philippines (2013-2015)*, World Bank Group (April 7, 2016), http://documents.worldbank.org/curated/en/413401468197106125/pdf/106126-WP-P132149-PUBLIC-ACS.pdf

Leaders such as Former Colombian President Cesar Gaviria have acknowledged that drug prohibition has failed. Global drug prohibition is a thing of the past. However, this does not mean that those engaged in manufacturing, selling, and trafficking drugs should go unpunished. These offenses should still be prohibited. But in enforcing the law, the government should not forget that these offenders have the same rights as "non-criminals". This is where the Bill of Rights under the 1987 Constitution comes into play, as a safeguard against abuses that may be committed by the government. It must be remembered that violating a law does not render nugatory the rights of a person regardless of the offense committed. Whether it is pressure from the government, lack of fear of punishment, or the lure of a possible incentive for each kill or arrest, law enforcers should respect and protect human dignity and maintain and uphold the human rights of all persons.

In order to effect change, the first step is to recognize that drug use/addiction is a multi-faceted issue which cannot be eliminated by sheer force; focusing only on law enforcement is not the answer. Lowering (and in some cases removing) the penalty for certain drug offenses like the use or possession for personal use does not mean that the government encourages the distribution and use of illegal drugs. It, however, should realize that the existence of illegal drugs is a reality. And although its existence cannot be completely erased, there are still ways the government can protect its citizens from its harmful consequences. Other countries have already adopted alternative policies to answer its drug problems. As a matter of fact, countries such as Portugal and the Netherlands have shown positive results after changing its laws to adapt to the needs of its people.

Policies enforced in one country are not necessarily suited to another and the reforms made by these countries require extensive research or testing to ascertain if the same can be applied here in the Philippines. The government should analyze why the drug policies of these countries work and formulate its own, relying on evidence-based research and adopting measures to accommodate the needs of its citizens. Admittedly, harm reduction remains controversial and is thus far not accepted here in the Philippines. There is no doubt that debates or conflicts will arise as to the soundness of implementing, for instance, the NSEP or the supervised consumption rooms. But in order to truly respond to the needs of the society, both the government and its citizens must be open to change.

BLOOD-STAINED LAND FOR THE PROMISE OF GOLD:
Unfolding the Lumad's Struggle to Protect their Land against Mining Operations

MAE SHARMANE T. PASTRANA[1]

In loving memory of my brother, Manong Nonoy.

"The economic benefits derived from mining will never outweigh the loss, not only of lands but also of the lives of the indigenous people found therein."

[1] Circulation Manager, UST Law Review, (Vol. 62); Ll. B Candidate (2020), University of Santo Tomas Faculty of Civil Law; A.B. Legal Management, University of Santo Tomas Faculty of Arts and Letters (2014).

I. INTRODUCTION

The Philippines is a culturally-diverse country with an estimated 14-17 million Indigenous Peoples (IPs) belonging to 110 ethno-linguistic groups, 41% of which are Lumad.[2] The IPs are those who belong to the communities using the traditional form of livelihood which depends on the availability of natural resources. They are often victims of progress and modernization. Hence, several laws have been enacted recognizing, protecting, and promoting their rights such as the Indigenous Peoples Rights Act (IPRA). The IPRA defined the IPs as those who have been living in the land since time immemorial and who have retained their customs and beliefs, including the economic, political, and cultural systems practiced by their ancestors even before colonization.

Due to its natural and mineral resources, the Philippines has become attractive to the mining industry. It encouraged both small-scale and large-scale mining companies to conduct mining projects in the country. Because the IPs occupy the areas rich in natural and mineral resources, their lands have been surrounded and occupied by a growing number of corporations engaged in mining.

R.A. 7942 or the Philippine Mining Act of 1995 was enacted to protect national interest and at the same time attract more foreign investment in mining. However, in 2004, several provisions of R.A. 7942 were declared unconstitutional on the ground that the provisions have, in effect, conveyed beneficial ownership over the nation's mineral resources to service contractors, leaving the State with nothing but bare title thereto.[3] However, in the same year, the Supreme Court reversed its decision, allowing 100% foreign ownership and control of mining activities in the country. The efforts of the government to encourage investment by multinational mining corporations bear all the hallmarks of neoliberalism.[4] As a result of the government's program, destructive industrialization has increased and has adversely affected the lives of the IPs.

More than twenty years have lapsed since the passage of the IPRA, yet the struggle of the country's indigenous people remains unresolved. Security of land ownership based on native title has slowly lost its meaning, and incidents of land-grabbing and killings have been reported and linked with mining operations in Mindanao. As the cultural, political, and economic systems of IPs are closely related to their ancestral lands, to drive them out of their lands is to deprive them of their right to life and identity.

As 41% of the population of the IPS is comprised by the Lumad, this article will expound on the adverse effects of mining activities on the lives of the Lumad. Likewise, the laws on which the Lumad anchor their claims will be discussed.

The article seeks to spread awareness of the Lumad's struggle for the protection of their ancestral lands and to advocate existing laws as well as to encourage the legislation of

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[2] Purple Romero, *SC tackles Mining Act Again*, Rappler (April 16, 2013), https://www.rappler.com/nation/26310-sc-tackles-mining-act-again

[3] Rocel Felix & Aurea Calica, *Supreme Court voids provisions of mining law,* Philstar (January 30, 2004), https://www.philstar.com/headlines/2004/01/30/236984/supreme-court-voids-provisions-mining-law

[4] William Holden, et al., *Exemplifying Accumulation by Dispossession: Mining and Indigenous Peoples in the Philippines,* 93:2 Human Geography, 141-161.

new laws that will further protect the social being not only of the Lumad but of the IPs in general.

II. THE LUMAD'S STRUGGLE

A. Who are the Lumad?

Lumad is the collective identity of the non-Islamized indigenous people of northern Mindanao. The term means "born of the earth" or "native" and was officially adopted on 26 June 1986 by delegates to the Lumad Mindanao People's Federation (LMPF) founding assembly. The term is the appropriation propagated to pursue actively issues on ancestral land claims and cultural self-determination.[5]

The term Lumad refers to 15-18 ethno-linguistic groups which includes Atta, Bagobo, Banwanon, Bukidnon, B'laan, Dibabawon, Higaonon, Mamanwa, Mandaya, Manguwangan, Manobo, Mansaka, Subanen, Tagakaolo, Talaandig, Tiruray, T'boli, and Ubo.[6] They are considered as the largest indigenous population, comprising about 18% of the country's population. Majority of them (61%) are in Mindanao, while 33% are concentrated in the Cordillera Administrative Region (CAR). Other indigenous groups are located in the Visayas region.[7] Some are concentrated in varying degrees in the hilly portions of the provinces of Davao, Bukidnon, Agusan, Surigao, Zamboanga, Misamis, and Cotabato.

B. What are they fighting for?

Mindanao is the second largest island in the Philippines. As early as 1910, ninety-seven (97) major plantations were already established in Mindanao and up to the Second World War and beyond, Mindanao had become the locus of the country's border of expansion.[8] Owing to its rich biodiversity, it is often exploited despite the opposition of the affected communities.

It is noteworthy that Indigenous control over our natural resources is the soul and the material basis of many cultures. For the indigenous cultural communities (ICC) and IPs, their ancestral lands are a part of their identity as it is the foundation of their right to self-determination. Ancestral domain claims may be defined as claims to certain tenurial rights over lands and resources, based on uninterrupted occupancy and use across time.[9]

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[5] J.R. Nereus Acosta, *Loss, emergence, and retribution- The Politics of Lumad Ethnicity in Northern Mindanao (Philippines)*, https://scholarspace.manoa.hawaii.edu/bitstream/10125/15249/Loss%2C%20emergence%2C%20and%20retribalization%20-%20The%20politics%20of%20Lumad%20ethnicity%20in%20Northern%20Mindanao%20%28Philippines%29.pdf

[6] Belinda Espiritu, *The Lumad Struggle for Social and Environmental Justice*, Journal of Alternative and Community Media, 45-59.

[7] *INFOGRAPHIC: Who are the Lumad?*, Rappler (August 10, 2017), https://www.rappler.com/move-ph/178181-infographic-lumad-indigenous-peoples

[8] *Ibid.*

[9] O. J. Lynch, "Withered roots and landgrabbers: A survey of research on upland tenure and displacement" in *Uplands and uplanders; In search for new perspectives*. Quezon City: BFD Upland Development Program, Bureau of Forest Development.

The lands where the Lumad live are considered some of the country's last frontiers in the quest for natural resources. For this reason, their ancestral lands have been subjected to encroachment by mining companies. In a study conducted in 2007, it was said that about half of the mining applications in the Philippines are in areas inhabited by indigenous people.[10] In fact, of the 23 priority mining projects under a government mining revitalization program in Mindanao, most of them lie within ancestral lands.[11]

Unfortunately, the entry of the mining industry has deprived the Lumad not only of their right to fully utilize their natural resources, but also to live solitarily on the land they call home.

III. ECONOMIC OBJECTIVE AT THE COST OF COMPROMISING THE RIGHTS OF THE LUMAD

Even before the enactment of the Philippine Mining Act, the lands of the IPs have been subjected to exploitation. Numerous human rights violations, such as arbitrary detention, persecution, killings of community representatives, demolition of houses and destruction of property are allegedly committed in the attempt to drive the IPs away from their lands. Unfortunately, with the enactment of the Philippine Mining Act, incidents of such violations have increased. As of today, the 15 biggest mining operations in Mindanao which covers up to 131,775 hectares of land are situated on or near Lumad communities. Some of the 15 biggest mining operators include Pacific Nickels Phils. Inc., Minimax Mineral ExplOration Corp., Maharlika Dragon Corporation, VI Resorces Development Philippines. Inc., Sagittarius Mines, Inc., Holcim Philippines Inc, Agusan Petroleum and Mineral Corp., etc.[12]

Land grabbing is the large-scale acquisition of land for commercial or industrial purposes, such as agricultural and biofuel production, mining and logging concessions, or tourism. It involves land being purchased often by foreign investors rather than producers. This is done with limited (if any) consultation of the local communities, limited (if any) compensation, and a lack of regard for environmental sustainability and equitable access to, or control over, natural resources.[13]

Land-grabbing is one of the many effects of the government's move towards neoliberalism. The gravamen of land grabbing is loss of access and/or control over land. Such concept is demonstrated by a) fraudulent acquisition of consent from IPs, b) physical displacement, c) environmental damage, and d) militarization of areas where mining projects are located.

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[10] William Holden & Allan Ingelson, *Disconnect between Philippine mining investment policy and indigenous peoples' rights*, 25:4 Journal of Energy and Natural Resources Law, 375-391.
[11] ROMERO, *supra* note 2.

[12] Ibon, *15 Biggest Mining Operations in Mindanao*, http://ibon.org/file/2015/10/15-Biggest-Mining-Operations-in-Mindanao.png (last accessed November 27, 2018)
[13] IWGIA - International Work Group for Indigenous Affairs. (n.d.). INDIGENOUS PEOPLES' RIGHTS TO LAND The Threat of Land Grabbing. Copenhagen, Denmark.

"Indigenous peoples' lives are within the land," as a Subanen tribal leader said.[14] For the IPs, land is more than a mere source of livelihood as it is their life – it is part of their identity. Mineral deposits are usually found in the mountainous regions and as previously said, most mining projects lie within the ancestral domain of the Lumad. While the IPRA recognizes and protects the rights of ownership and possession of ICCs/IPs over their ancestral domains, the Lumad continue to face struggles in relation said rights.

Mining companies comprise some of the biggest land grabbers.[15] Following the enactment of the Philippine Mining Act, mining policies have been liberalized thereby attracting not only small-scale mining, but also large-scale mining operated by foreign companies. The Philippine Mining Act has granted mining companies an unimpeded access to the lands of the Lumad. Linked with land-grabbing, the Philippine Mining Act has resulted to incidents of loss of control by the Lumad over their lands. The State's projects in the uplands have only served to worsen the dispossession of the indigenous lands.[16] The Lumad rely on their ancestral lands for their livelihood as it is rich in natural resources. To deprive them of control and access over their land amounts to depriving them of their right to utilize its natural resources as well as to live peacefully therein.

Several lands have already been militarized and this only worsened the Lumad's struggle. After a month of military encampment in Lianga, San Agustin, Tago and Lianga, on July 16, 2018, a total of 328 Lumad families were forced to leave their homes and seek temporary refuge elsewhere. By January 24, 2019, a total of 300 Lumads were transferred to evacuation centers owing to a series of aerial bombings and harassments. Moreover, local residents reported that military forces under the 401st Brigade conducted an aerial strike, dropping six bombs on the mountainous parts of Barangay Diatagon, 150 meters away from Lumad communities of Sitio Decoy and Panukmoan.[17]As the Manobos has consistently pointed out, the military appears to be protecting the investors while driving the Lumad off their land.[18]

The Lumad, having been driven away from their lands, are deprived of their right to freely exercise their culture. For the Lumad, their lands are sacred[19]; hence, they should not be separated therefrom. The lands, being part of their identity, if destroyed or encroached upon, is tantamount to attacking their ethnicity.

In pursuit of the mining industry's operations, the Lumad are often red-tagged as terrorists. This is not new to the Lumad. On August 18, 2015, five Lumad, including two minors were killed by the Special Forces in Pangantucan, Bukidnon. The military claimed that they were rebels despite claims of the New People's Army that they were civilians.

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[14] Ricardo Bernabe III, *Enhancing the rights of indigenous peoples in the context of ILO Convention 169*, ILO (March 1, 2013), https://www.ilo.org/manila/WCMS_207584/lang--en/index.htm

[15] *Land Grabbing Cases in the Philippines: Greed, Hunger, and Resistance.* (n.d.). Philippine Network of Food Security Programmes.

[16] ACOSTA, *Supra* note 5.

[17] M. Genotiva, *New rounds of bombings drive IPs out from homes, communities*, Davao Today (January 24, 2019), http://davaotoday.com/main/human-rights/new-rounds-of-bombings-drive-ips-out-from-homes-communities/

[18] *Dispossessing the 'lumad',* Philippine Daily Inquirer (July 21, 2018), https://opinion.inquirer.net/114774/dispossessing-the-lumad

[19] *CHR: Ancestral lands of Indigenous Peoples 'sacred*', Abs-cbn News (February 7, 2018, https://news.abs-cbn.com/news/02/07/18/chr-ancestral-lands-of-indigenous-peoples-sacred

Human rights advocates claim that red-tagging is employed in order to justify the militarization in Mindanao.

Even the right to education is a struggle among Lumad communities. Several houses and a Lumad school were burned in Diatagon, Lianga, Surigao del Sur.[20] A school head and two Lumad leaders were killed in Surigao del Sur in the same year.[21] On July 12, 2019, the Department of Education ordered the temporary closure of 55 Lumad schools in the Davao Region based on the findings of the *Task Force to End Local Communist Armed Conflict* which alleged that the schools deviated from the basic curriculum and for allegedly teaching students to rebel against the government.[22] Are Lumad children really taught to rebel or do they just learn from what they see?

What was initially a quest to uphold the Lumad's rights over their ancestral lands has become a fight for their right to life. Michelle Campos, the daughter of slain Lumad leader Dionel Campos, uttered the following words showing her critical consciousness of the crisis: "But in my community, large-scale mining interests are sowing fear and violence. Not only are the fossil fuel and extractive corporations driving the climate crisis, leaving us extremely vulnerable to typhoons…that killed thousands of people – they are taking our land and killing our people, too."[23]

The Lumad's resistance against mining operations covers not just their rights over the ancestral lands but also their collective survival. Worth-remembering are the killings of Lumad leaders and teachers on September 1, 2015. The systematic attacks against indigenous leaders and their communities are associated with the economic value of the Lumad's ancestral lands.[24] Under the Arroyo Administration, there were a total of 89 documented cases of extrajudicial killings of IPs, many of which involve the Lumad. This number has increased during the Aquino Administration to 102 indigenous peoples out of which 87 are Lumad.[25] Likewise, since the Duterte Administration came to power in 2016, thirty (30) extra-judicial killings related to mining have been reported.[26] Without the people who actively fight for their rights, the mining industry will be given unhampered access to their lands.

Mining is another way of dispossessing the IPs. It is an activity which may result to environmental degradation. For this reason, the Philippine Mining Act of 1995 mandates mining companies to ensure the safety and protection of the environment they are operating

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[20] Karlos Manlupig, *TIMELINE: Attacks on the Lumad of Mindanao*, Rappler (September 16, 2015), https://www.rappler.com/nation/105847-timeline-attacks-lumad-mindanao

[21] Karlos Manlupig, *School head, 2 lumad leaders killed in Surigao del Sur*, Rappler (September 1, 2015), https://www.rappler.com/nation/104433-school-head-lumad-leaders-killed-surigao-del-sur

[22] *DepEd orders temporary closure of 55 Lumad schools in Davao region*, Rappler (July 13, 2019), https://www.rappler.com/nation/235305-deped-orders-closure-lumad-schools-davao-region

[23] M. Campos, *#StopLumadKillings: An appeal from a Lumad daughter*, Kalikasan.net (October 23, 2015), http://www.kalikasan.net/features/2015/10/23/stopLumadKillings-appeal-Lumad-daughter

[24] Alamon, A. (n.d.). *Wars of Extinction: The Lumad Killings in Mindanao, Philippines*., Kyoto Review of Southeast Asia, https://kyotoreview.org/issue-21/lumad-killings-philippines/, (last accessed January 2, 2019)

[25] Mark Ambay III, *COMMENTARY: Stalked by Death: Indigenous Lumad killings continue in the Philippines*, Minda News (December 23, 2016), https://www.mindanews.com/mindaviews/2016/12/commentary-stalked-by-death-indigenous-lumad-killings-continue-in-the-philippines/

[26] Nóra Katona, *The struggle of indigenous students against large-scale mining industries in the Philippines – the case of ALCADEV*. Retrieved July 15, 2019, Catapa (February 18, 2019), https://catapa.be/en/the-struggle-of-indigenous-students-against-large-scale-mining-industries-in-the-philippines-the-case-of-alcadev/

in.[27] Pursuant to the said mandate, environmental groups have asked the Department of Natural Resources (DENR) to shut down mining operations as they have caused massive environmental destruction and have made the people vulnerable to natural calamities.

The vast tracks of ancestral lands covered by mining operations means larger environmental damage. Pacific Nickels Philippines, Inc., a British mining firm, extracts silver, zinc, chrome, and iron in the Suriago area, covering about 25,000 hectares. In the General Santos City area, New Zealand-based corporation, Saggitarius Mines, Inc., extracts gold and copper in about 23,571 hectares. It is worth mentioning that the B'Laan, T'Boli, and Manobo tribes live in this area.[28]

Studies show that mining operations lead to environmental damage, threatening the people's lives and livelihood. The environmental impact of mining includes erosion, formation of sinkholes, and loss of biodiversity and contamination of soil, groundwater and surface water by chemicals from mining processes.[29]

In 2017, the Department of Environment and Natural Resources has ordered the closure of 23 mining firms and the suspension of five others for violations of environmental laws and regulations.[30] On January 9, 2012, Sagittarius Mines Incorporated was ordered to stop all its operations for failure to meet the requirements for the issuance of Environmental Compliance Certificate (ECC), a prerequisite for large-scale mining. The application for ECC was denied as it has retained an open pit which is banned in South Cotabato.[31] These reported violations corroborate the fact that despite existing laws, rules and regulations, mining companies still fail to follow them, resulting to environmental damage.

The government should not be blinded by economic benefits derived from the mining industry. The rights of the IPs are still supreme over the rights of the mining companies. Hence, economic objective of the mining industry should not be pursued at the expense of compromising the rights of the Lumad.

IV. RIGHTS OVER ANCESTRAL DOMAINS AND LAND

A. Laws governing the IPs

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[27] An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, And Conservation, Republic Act 7942, sec. 29. Environmental Protection. – Every contractor shall undertake an environmental protection and enhancement program covering the period of the mineral agreement or permit. Such environmental program shall be incorporated in the work program which the contractor or permittee shall submit as an accompanying document to the application for a mineral agreement or permit. The work program shall include not only plans relative to mining operations but also to rehabilitation, regeneration, revegetation and reforestation of mineralized areas, slope stabilization of mined-out and tailings covered areas, aquaculture, watershed development and water conservation; and socioeconomic development.

[28] Ruth Lumibao, *As landlessness, land grabbing intensifies, so does agrarian unrest*, Bulatlat (June 11, 2018), http://bulatlat.com/main/2018/06/11/landlessness-land-grabbing-intensifies-agrarian-unrest/

[29] *Effects of Mining Module 12: Geological Resources*. Lumen Learning, https://courses.lumenlearning.com/geo/chapter/reading-effects-of-mining/, (last accessed January 3, 2019).

[30] Manila Bulletin February 13, 2017, https://news.mb.com.ph/2017/02/13/mining-firms-run-afoul-of-environmental-laws/

[31] M. Wetzlmaier, *Cultural Impacts of Mining in Indigenous Peoples' Ancestral Domains in the Philippines*, ASEAS – 5:2 Austrian Journal of South-East Asian Studies, 335-344.

The indigenous people are protected both by international and domestic law. In the international sphere, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted to regulate and lay down the rights of the IPs. It was adopted by the UN General Assembly in 2007 and is considered as the most recent and fullest expression of IPs' aspirations.[32] While the UNDRIP lacks the binding effect of a treaty, it enumerates the rights and corresponding actions and norms of conduct for the States and their government to comply in good faith.

The Philippines is likewise a signatory of the International Convention on Economic, Social, and Cultural Rights (ICESCR) and the International Convention on Civil and Political Rights (ICCPR). The ICESCR mentions the rights of the indigenous and tribal groups such as the right to education, to housing, and to take part in cultural life. The ICCPR, on the other hand, guarantees the right to self-determination.

Domestically, the 1987 Constitution recognizes and promotes the rights of indigenous cultural communities and declares as a State policy the promotion of their rights within the framework of national unity and development.[33] The 1987 Constitution likewise mandates the State to protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural wellbeing. To further strengthen the said rights, the Constitution authorizes Congress to provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.[34]

The Indigenous Peoples Rights Act was enacted in 1997 in recognition, promotion and protection of the rights of Indigenous Cultural Communities and Indigenous Peoples (ICCs/IPs). It was legislated to put an end to the historical injustice of the IPs. The IPRA recognizes the rights of the IPs to their ancestral land and domains and provides the identification, delineation, and certification processes of these ancestral land and domains. It also touches on the more general topic of human rights and social justice.[35] To carry out the policies of IPRA, the National Commission on Indigenous Peoples (NCIP) was created as the lead agency for the implementation of the IPRA and the mechanism for the enforcement of the rights enriched in IPRA. Furthermore, the IPRA substantially incorporates and contains the minimum standards and principle of International Labor Organization (ILO) Indigenous and Tribal Peoples Convention No. 169 (ILO Convention No. 169), and the UNDRIP. However, as of today, the ILO has not yet been ratified by the Philippines.

B. Petition to ratify ILO Convention No. 169

In 1989, ILO Convention No. 169 was adopted as an amendment to the Indigenous and Tribal Populations Convention, 1957 (ILO Convention No. 107), whose integrationist approach became obsolete and detrimental to the objective of fostering IP rights. As of

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[32] Sedfrey Candelria, *Comparative analysis on the ILO Indigenous and Tribal Peoples Convention No. 169, UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and the Indigenous Peoples' Rights Act (IPRA) of the Philippines*, ILO, https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-manila/documents/publication/wcms_171406.pdf, (last accessed July 22, 2019)

[33] CONST., art. II, sec. 22.

[34] CONST., art. XII, sec. 5.

[35] CANDELARIA, *supra* note 32.

today, there are a total of 23 countries which have ratified the said convention.[36] The Convention is the only international law on indigenous and tribal peoples recognizing their land rights and rights to self-determination. Its cornerstone are the principles of consultation and participation of the IPs on any matter affecting them, such as legislative and administrative measures, government projects, and mining activities. It covers a comprehensive range of issues affecting these peoples, such as rights to land and natural resources, health, education, vocational training, conditions of employment, and development.[37] It is open for ratification. Once ratified, there is an obligation to apply all its requirements in law and in practice.

But despite the enactment of the IPRA in 1997, the rights of tribal peoples in the country continue to be ignored and violated. The indigenous people as well as the advocates of their rights have been appealing to the government to ratify the said Convention. With its ratification, an additional mechanism and technical support will be set to reinforce and supplement the IPRA and the continuing efforts of the governments and advocates in upholding the right of the IPs. It will provides access to the ILO's relatively effective supervisory and oversight mechanisms in which indigenous peoples can raise concerns about their human rights situations and challenge state actions or policies. As the said mechanisms are considered unique tools in resolving conflicts involving the IPs, the ratification of the Convention will provide effective procedures for the vindication of their rights.

While the IPRA contains some provisions and principles enriched in UNDRIP and ILO Convention No. 169, there are, on the other hand, some provisions of ILO Convention No. 169 and UNDRIP which are not found in or are not sufficiently addressed by IPRA. It is strongly recommended that the Philippine government ratify the said convention to put more teeth to the IPRA.

C. Petition to declare the Philippine Mining Act unconstitutional

Mining is considered an issue of social justice. While it may have contributed to the country's gross domestic product, its negative impact, as discussed, cannot be ignored. For this reason, the constitutionality of the Philippine Mining Act has been challenged several times. In 2004, the Philippine Mining Act of 1995 was declared unconstitutional, but this decision was reversed in the same year.[38] In the 2004 case of *La Bugal-B'laan Tribal Association, Inc. v. Ramos*, the crux of the controversy is the amount of discretion to be accorded to the President in negotiations over the terms of Financial or Technical Assistance Agreements (FTAAs), particularly when it comes to the government share of financial benefits from FTAAs. In the same decision, due to the perceived insufficiency of Filipino capital, the State was allowed to procure service contracts with foreign corporations as contractors for the exploration, development, and utilization of mineral or petroleum resources. This serves as an exception to the general norm established in the first paragraph of Section 2 of Article XII, which reserves or limits to Filipino citizens and corporations at least 60 percent owned by such citizens.[39]

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[36] NORMLEX Information System on International Labour Standards, ILO, https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314, (January 5, 2019).
[37] BERNABE, *Supra* note 14.
[38] *La Bugal-B'laan Tribal Association, Inc. v. Ramos*, G.R. No. 127882, December 1, 2004.
[39] CONST., art. XII, sec. 2

The constitutionality of the provisions of the Philippine Mining Act was challenged again. However, the Supreme Court upheld its validity in the 2006 case of *Didipio Earth-Savers Multi-Purpose Association v. Gozun*.[40] The Supreme Court ruled that the contention of the petitioner that the Mining Law and its implementing rules and regulations do not provide for just compensation in expropriating private properties is without basis. In fact, Section 76 of R.A. 7942 and Section 107 of DAO 96-40 provide for the payment of just compensation:

> Section 76. xxx Provided, that any damage to the property of the surface owner, occupant, or concessionaire as a consequence of such operations shall be *properly compensated* as may be provided for in the implementing rules and regulations.
>
> Section 107. Compensation of the Surface Owner and Occupant- Any damage done to the property of the surface owners, occupant, or concessionaire thereof as a consequence of the mining operations or as a result of the construction or installation of the infrastructure mentioned in 104 above *shall be properly and justly compensated*.
>
> Such compensation shall be based on the agreement entered into between the holder of mining rights and the surface owner, occupant or concessionaire thereof, where appropriate, in accordance with P.D. No. 512.

The Court further ruled that the mere fact that the term service contracts found in the 1973 Constitution was not carried over to the present constitution, sans any categorical statement banning service contracts in mining activities, does not mean that service contracts as understood in the 1973 Constitution was removed in the 1987 Constitution. The 1987 Constitution allows the continued use of service contracts with foreign corporations as contractors who would invest in and operate and manage extractive enterprises, subject to the full control and supervision of the State; this time, however, safety measures were put in place to prevent the abuses of the past regime.[41]

All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty *per centum* of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.

The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.

The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fishworkers in rivers, lakes, bays, and lagoons.

The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.

The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.

[40] *Didipio Earth-Savers Multi-Purpose Association v. Gozun*, G.R. No. 157882, March 30, 2006.

[41] *Ibid.*

In 2013, the Supreme Court tackled the said Act again. This time, the validity of Sections 80 and 81 of Philippine Mining Act were questioned.[42] Sec. 80 states that the total government share in a mineral production sharing agreement (MPSA) shall be the excise tax on mineral products, while Sec. 81 specifies the government share in FTAAs.[43]

The Cordillera People's Alliance in 2013 issued a statement in defense of the ancestral domain and for self-determination. It called on the Supreme Court to declare the Philippine Mining Act unconstitutional. It argued that the Supreme Court's decision in L*a Bugal-B'laan Tribal Association, Inc. v. Ramos* opened the gate for foreign investors' and corporations' total control over mineral resources and the country's whole natural resources as well, a clear violation of the rights of the indigenous peoples over their land and resources. It emphasized the various forms of violations committed against the IPs such as violation of the collective right to Free, Prior, and Informed Consent (FPIC), violation of the right to ancestral land and self-determination, pollution of agricultural lands and water bodies, health hazards, food insecurity, extrajudicial killings and enforced disappearances.[44]

V. DISCUSSION

A. Conflict laws: The Philippine Mining Act and the Indigenous Peoples Rights Act

The Philippine Mining Act has encouraged foreign investment in mining. Since the 1970s, Mindanao has been considered as the site of small-scale mining. Natural resources such as gold, copper, silver, and nickel lay beneath the tribal lands of the Lumad.[45] As multinational mining corporations sought access to mineral deposits which were made available to them by mining laws, they have increasingly come into conflict with indigenous peoples inhabiting areas where mineral deposits are located.[46] Shortly after its enactment, the

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[42] ROMERO, *supra* note 2.

[43] R.A. 7942. Section 80. Government Share in Mineral Production Sharing Agreement. - The total government share in a mineral production sharing agreement shall be the excise tax on mineral products as provided in Republic Act No. 7729, amending Section 151(a) of the National Internal Revenue Code, as amended.

Section 81. Government Share in Other Mineral Agreements.- The share of the Government in co-production and joint-venture agreements shall be negotiated by the Government and the contractor taking into consideration the: (a) capital investment of the project, (b) risks involved, (c) contribution of the project to the economy, (d) other factors that will provide for a fair and equitable sharing between the Government and the contractor.

The Government shall also be entitled to compensations for its other contributions which shall be agreed upon by the parties, and shall consist, among other things, the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholders, in case of a foreign national, and all such other taxes, duties and fees as provided for under existing laws. The Government share in financial or technical assistance agreement shall consist of, among other things, the contractor's corporate income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholder in case of a foreign national and all such other taxes, duties and fees as provided for under existing laws.

The collection of Government share in financial or technical assistance agreement shall commence after the financial or technical assistance agreement contractor has fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive.

[44] Cordillera Peoples Alliance, *CPA to Supreme Court: Declare the Philippine Mining Act of 1995 Unconstitutional* (April 15, 2013), http://cpaphils.org/campaigns/CPA%20statement.%20mining%20act.4162013.pdf

[45] S. H. ALI (2003): Mining, the Environment, and Indigenous Development Conflicts. University of Arizona Press, Tucson, AZ.

[46] *Ibid.*

IPRA was passed. Its passage is considered as a "blow to the mining industry" which has led to various petitions challenging the constitutionality of IPRA.

The Philippine Mining Act is a legislation primarily to encourage foreign investment and generally grants mining industry rights to explore, develop, and utilize mineral resources. It encourages the collective efforts of the government as well as of the private sector in the enhancement of national growth. On the other hand, the IPRA is a piece of legislation made pursuant to the constitutional mandate to protect the indigenous cultural communities. The latter law is not concerned with foreign investment as it is crafted primarily for the benefit of the IPs.

The requirement of FPIC (Free Prior Informed Consent) is the cornerstone of IPRA. However, this is seen as an impediment to the mining industry's rights granted under the Philippine Mining Act. While both laws mentions FPIC, it is alleged that fraud is often employed in obtaining such consent. Even with the passage of IPRA, the participation of the members of the ICCP/IPs in all levels of decision-making process is not ensured. Inconsistencies and conflict between the two laws have caused confusion as to what law shall govern mining activities over ancestral domain and lands. Therefore, there is a need to reconcile both laws.

If the IPRA was enacted pursuant to the state's constitutional obligation to protect the rights of indigenous cultural communities to their ancestral lands, to allow mining industries to conduct operations within the lands of ICC's by virtue of the Philippine Mining Act runs counter with the said constitutional mandate.

B. Concept of free prior and informed consent

FPIC (Free Prior Informed Consent) has been defined as the consensus of all members of the ICCs/IPs to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of an activity, in a language and process understandable to the community.[47] FPIC is embedded in the right to self-determination which is aimed to guarantee the IPs/ICCs their right to participate at all levels of decision-making in matters which may affect their rights, lives, and destinies.[48] Aimed to prevent the unauthorized and unlawful intrusion upon, or use of any portion of the ancestral domain, or any violation of the rights, in theory, the IPRA is one of the most enlightened laws dealing with IPs, recognizing the FPIC of IPs, and asserting that in the absence of such a clear level of consent, a project cannot proceed.[49] It is also required in case of permanent relocation or displacement and before the entry of migrants and other entities in the ancestral domain or lands. However, in reality, this is hardly practiced.

While it is considered as the soul of IPRA, mining companies consider FPIC as an impediment to its operations as it recognizes the IP community's right to make a decision and be heard. This prompted mining companies to employ deceitful mechanisms such as bribery, misinformation, force, and intimidation in obtaining their consent. In fact, in 2007,

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[47] National Commission on Indigenous Peoples Administrative Order No. 1 Series of 1998

[48] The Indigenous Peoples Rights Act of 1997, Republic Act 8371, sec. 16 (1997).

[49] *Indigenous Rights*, Philippine Indigenous People Links, http://www.piplinks.org/indigenous_rights.html, (December 30, 2018).

there were several allegations that fraudulent tactics were adopted to obtain the consent of the council elders with respect to the Canatuan Gold Project on the island of Mindanao, operated by Toronto Ventures Incorporated (TVI) Pacific, a Canadian mining company.[50] Likewise, FPIC is a concept unfamiliar to the local Lumad known as Subanon; hence, it was easy to make it appear that they have consented to such project. It is alleged that maneuvers such as inviting people to an "information session" and asking the participants to sign an "attendance sheet" were employed in order to use such sheet as a signification of their consent.[51]

While greatly flawed, the standard of FPIC enriched in IPRA has strengthened the rights of the IPs over their ancestral domain. In July 2018, about five coal mining companies were set to operate in Surigao del Sur. Caraga Watch, an anti-mining group, identified the companies as Benguet Corp. of the Romualdez family, Abacus Coal Exploration and Development Corp., Chinese-owned Great Wall Mining and Power Corp., ASK Mining and Exploration Corp. and Coal Black Mining Corp. These mining companies are said to have been raring to operate since 2015 but were constantly prevented because of the refusal of the Lumad communities to sign the FPIC agreement.[52]

C. Economic promise, an empty word

To reiterate, the Philippine Mining Act was enacted to encourage foreign investment. While mining activities generate income both for the local and the national government, as of December 15, 2016, the mining industry has only contributed less than 1% of the country's gross domestic product.[53] This shows that the mining industry is not the only source of the country's revenue.

The country benefits from mining through taxes required under the Philippine Mining Act and the National Revenue Code. Aside from that, mining operators are required to pay or expend the government share for the Financial or Technical Assistance Agreement contractors. The landowners, on the other hand, receive royalties. Social development programs are likewise conducted.

While the economic benefits of the mining industry may be promising at the beginning, the mining industry statistics says otherwise.[54] The contribution of the mining industry to the Philippine economy is small and there is scant evidence of mining benefiting the local poor or the country's economy as a whole.[55] Considering that

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[50] P. SANZ (2007): 'The politics of consent: the state, multinational capital, and the Subanen of Canatuan', in GATMAYTAN, A. B. (ed.): Negotiating Autonomy: Case Studies on Philippine Indigenous Peoples' Land Rights. International Working Group on Indigenous Affairs, Copenhagen, 109-135

[51] *Ibid.*

[52] H. M. Mordeno, *Minda News This is Our Mindanao*, Minda News (July 24, 2018), http://www.mindanews.com/top-stories/2018/07/group-says-mining-interests-behind-military-presence-in-lumad-lands/

[53] Solita Collas-Monsod, *Is Gina bent on killing mining industry?*, Inquirer.net (February 11, 2017), https://opinion.inquirer.net/101568/gina-bent-killing-mining-industry

[54] D. B. Reymundo, *The Philippine Mining Act of 1995: Is the law sufficient in achieving the goals of output growth, attracting foreign investment, environmental protection and preserving sovereignty?*, DLSU.edu.ph, https://www.dlsu.edu.ph/wp-content/uploads/pdf/conferences/research-congress-proceedings/2014/SEE/SEE-III-026-FT.pdf, (last accessed July 22, 2019).

[55] Report of a Fact-Finding Trip to the Philippines. Mining in the Philippines Concerns and conflicts (2006, July-August).

Mindanao is rich with natural resources, it has been the center of plantation and mining industry. Despite this fact, the inhabitants therein, especially the indigenous people, remain poor. Land owners are hardly paid and the indigenous people are rendered landless owing to a series of land-grabbing incidents, depriving them of their primary source of livelihood.

VI. CONCLUSION

The IPs belong to the most marginalized and vulnerable sectors of society. The entry of mining industry in the Philippines has never raised the IPs from their status quo. The promise to deliver material benefit remains an empty word.[56] According to the Philippines' largest mining company, Philex Mining Corporation, "there is life in mining."[57] However, this runs counter to reality.

For years, the Philippine Mining Act has been criticized as it has caused struggles amongst the IPs which are often violent and disturbing. It has generated substantial controversies leading to protests, litigations, and allegations of violence and human rights violations. As a response to the pressing issue in Mindanao concerning the Lumad, the movement of advocates of indigenous people now is to "Stop Lumad Killings." Conflict between the interests of the mining industry, the government, and the IPs persist. The government's move towards economic development has vastly affected the inhabitants of Mindanao, both the Moslems and non-Moslem non-Christian Lumad groups. The entry of large mining companies in Mindanao has caused the influx of land-grabbing, internal displacement, and several other human rights violations. Hence, an acceptable balance between these opposite interests should be found.

To reiterate, it is the State's constitutional obligation to protect the rights of indigenous cultural communities to their ancestral lands. However, even if the rights of the IPs are protected under the IPRA, it is very difficult to enforce such rights on the ground.

The government may adopt ways to further protect the rights of the indigenous people, *to wit*: a) mining law reform, b) ratification of ILO Convention No. 169, and c) absolute prohibition of mining activities over ancestral lands.

Mining law reform should be encouraged. Several countries have adopted mechanisms promoting responsible mining, taking into account the environment and the inhabitants, especially the indigenous people found near or at the mining area. Through mining law reform, the implementation of the laws protecting the interest of the IPs may improve by providing concrete measures to protect their rights. Likewise, screening of mining companies will be improved, environmental violations will be reprimanded, and mining operations will be better monitored. Ratification of ILO Convention No. 169 will elevate the legal position of the IPs who oppose mining on their lands, providing them with remedies to fully ventilate their legal claims. But the best way to address the pressing issue concerning the IPs is for the government to enact a law which shall consider ancestral lands as "no go zones" for mining companies. To explicitly exclude the ancestral lands from

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[56] M. Wetzlmaier, *Cultural Impacts of Mining in Indigenous Peoples' Ancestral Domains in the Philippines*, 5:2 ASEAS - Austrian Journal of South-East Asian Studies, 335-344
[57] *Ibid.*

mining companies is the finest solution not only against land-grabbing but also against all violations of the rights of indigenous peoples.

So long as the outcry of the Lumad are not heard and resolved, oppression will always be there. Continuous dispossession of lands and violence linked with mining will amount to killing the ethnicity of the Lumad. We must not forget our origin; we must not stop protecting our native people; we must continue advocating their rights. The lands of the Lumad must be free from encroachment by outlanders. The move towards economic development cannot justify compromising justice. With these in mind, it must be remembered that the economic benefits derived from mining will never outweigh the loss, not only of lands but also of the lives of the indigenous people found therein.

MULTI-JURISDICTIONAL PRACTICE AND DISPUTES, MULTI-JURISDICTIONAL LAWYERS

JUSTICE ANGELINA SANDOVAL-GUTIERREZ (ret.)

**Lecture delivered by Justice Angelina Sandoval-Gutierrez as part of the Narvasa Lecture Series before the UST law students and alumni on February 9, 2019.*

Let me start by reminiscing some happy thoughts about Chief Justice Andres R. Narvasa in whose honor this lecture, among others, has been conceptualized.

Chief Justice Andres R. Narvasa was my professor in Sales, Evidence, and Criminal Law Review.

The first time he entered our classroom, we were awed and mesmerized by his presence. And why not? He was young, tall, captivating, and unquestionably handsome. There were only a handful of girls in our class. Believe it or not, we had crazy crush on him. (Except Mercedes Cojuangco, a very conservative lady despite the fact that she studied and finished her Bachelor of Arts degree in America. By the way, she is the mother of Gilbert Teodoro, popularly known as Gibo who ran for president but lost to his cousin President Noynoy Aquino).

Now, going back to Chief Justice Narvasa – since he was the heartthrob of the girls in our class, we were constrained to study hard his subjects. But sadly, he was not aware of our silent admiration even after we left law school.

He was an ideal professor – always at his best, articulate, eloquent, and could clearly impart to us understanding of the subjects he was handling.

He became Dean of the Faculty of Civil Law and lawyer pro bono of this university for many years.

Later, as you all know, he was appointed Chief Justice of the Philippines, thus giving honor and immeasurable pride to UST.

And now, to my lecture… but first, allow me to make an explanation. As can be gleaned from the title of this lecture, it is addressed to lawyers, especially those engaged in the practice of law.

But as law students, I believe my topic will add to your knowledge of law. Inevitably, such knowledge will somehow prepare you, even a bit, to engage in multi-jurisdictional practice. That is if you pass the Bar and eventually venture in the practice of law.

I did not choose topics in civil law, criminal law, constitutional law or other laws because your professors have been teaching you these subjects.

At this point, may I thank the students from the Law Review for inviting me as your lecturer today. It is an honor and privilege.

I find it a pleasing and unforgettable experience to mingle with you – UST law students and law alumni. In your presence, I feel I am among family members. And rightly so, for even before I became a member of the judiciary, I was first a law student and then an alumna of this university.

As I surveyed the audience earlier, I realized that aside from law students, there are generations of lawyers or alumni present – from Baby Boomer Generation or those born after the Second World War, specifically in 1945; those born between 1946 to 1964 or the Generation X; those born between 1965 to 1979 or Generation Y; the Millenials or those born between 1980 to 1995, also known as Generation Z; and of course a number of us from the Silent Generation. Let us not mention the years anymore.

To tell you honestly, as a lawyer, I never expected that I will see this day when the practice of law will go beyond the archipelagic baselines of our territory. By God's grace, my fellow lawyers and I from the silent generation have lived this long, not only to see the sweeping wind of change, but also to work for it and to live with it.

I remember it was in the 1990's when the revolutionary tide of globalization – the result of the integration of the world economies, politics, and culture –swept the way the world conducts its affairs. I was then a trial judge of Manila. At that time, globalization was a mere idea. Then it became a reality we initially refused to meet head on until we felt that change was inevitable and that we had to move into action.

It was our economy that first felt the impact of globalization. We saw the opening of our door to international trade when grapes, apples, and oranges added colors to our local fruit stands. We saw it in the foreign brands that are attached to our clothes and bags (Gucci, Chanel, Valentino, Balenciaga), gadgets (Apple, Blackberry, Samsung), cars (Audi, Lexus, BMW) and others. We observed it in the sudden increase in our direct foreign investments and flow of finances; in the codification of trade laws; in the creation of the World Trade Organization (WTO); in the enactment of the rules on transnational business contracts and in international commercial arbitration.
[1]

Just when we think that is all there is to globalization, we realize that the legal profession is not impervious to the sweeping wind of change. With the integrated global economy, incidents of multi-jurisdictional disputes had increased necessitating the rise of a new breed of lawyers – the "multi-jurisdictional lawyers" engaged in the "multi-jurisdictional practice of law."

The term "multi-jurisdictional practice of law" refers to a situation wherein a lawyer admitted to engage in the practice of law in one jurisdiction (the "home state") enters and performs legal services in a jurisdiction (the "host state") in which the lawyer is not admitted to practice. It is also known as "extra-jurisdictional practice." [2]

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[1] Wayne Sandholtz, "Globalization and the Evolution of Rules," in *Globalization and Governance*, ed. Aseem Prakash and Jefrey Hart. (Routledge, 1999).
[2] Charles McCallum, *MJP: A Review of Proposals for Reform*, 71 THE BAR EXAMINER 26 (2002).

As lawyers, *where do we stand in the current revolutionary trend? Are we in its center or merely in its periphery? Do we dictate its course or are we the ones dictated by it?*

Ready or not, "multi-jurisdictional practice" in the Philippines is an idea whose time has come.

Now, what are the initial obstacles that the Philippine Bar has to overcome before "multi-jurisdictional practice" will be adopted within our shores?

First is the apparent isolationist stance of the Philippines with respect to the practice of the legal profession.

Section 14 (2), Article XII of the *1987 Philippine Constitution* categorically states that "the practice of all professions in the Philippines shall be limited to Filipino citizens, save in cases prescribed by law."

The importance we accord to citizenship is evident from the fact that before one can be admitted to the Bar, it is imperative that he or she is a citizen and at the same time, a resident of the Philippines. In addition, he or she must be at least 21 years of age, of good moral character, must have completed all courses in law school officially approved by the Secretary of Education, and must have completed a Bachelor's degree prior to such study of law.[3]

Our jurisprudence further reinforced the isolationist stance.

In *Dacanay v. Baker & Mckenzie*,[4] the Supreme Court held that a foreign law firm cannot practice in the Philippines. The Court explained that the members of respondent law firm though members of the Philippine Bar cannot use the firm name "*Baker & Mckenzie*" because it "constitutes a representation that being associated with the firm they could render legal services of the highest quality to multinational business enterprises and others engaged in foreign trade and investment." Such representation, according to the Court, is unethical because *Baker & Mckenzie* is not authorized to practice law in the Philippines.

In the case of *Re: Application of Adriano M. Hernandez to take the 1993 Bar Examinations,*[5] the Supreme Court declared that it will no longer allow graduates of foreign law schools to take the Bar Examinations. In *In Re: Dacanay*,[6] the Supreme Court even went so far as to rule that the "loss of Filipino citizenship *ipso jure* terminates the privilege to practice law in the Philippines as the practice of law is a privilege denied to foreigners."

Second is the absence of the legal infrastructure that would govern multi-jurisdictional practice. Section 5, paragraph 5 of Article VIII of the 1987 Constitution provides:

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[3] See REVISED RULES OF COURT, rule 138, sec. 2 & 5.
[4] Adm. Case No. 2131, 136 SCRA 349, May 10, 1985.
[5] Resolution of the Supreme Court *En Banc* dated July 27, 1993 (Re: Application of Adriano M. Hernandez to take the 1993 Bar Examinations).
[6] Bar Matter No. 1678, 540 SCRA 424, 429, (Dec. 17, 2007).

Sec. 5. The Supreme Court shall have the following powers:

(5) promulgate rules concerning x x x the admission to the practice of law, x x x.

The Supreme Court has yet to set in place the mechanisms and the legal infrastructure that would regulate multi-jurisdictional practice.

Which countries allow Filipino lawyers to engage in multi-jurisdictional practice? In turn, who among our foreign counterparts should be allowed to practice law in the Philippines? Should there be minimum requirements before one can engage in multi-jurisdictional practice? Should it be based on reciprocity? What law should allow such practice? Should there be restricted areas of practice? What are the ethical considerations in multi-jurisdictional practice? Who will exercise supervision over foreign practitioners, the home state or the host state? Which has jurisdiction to penalize cross-border lawyers for their malpractices? Can the Supreme Court of the Philippines penalize erring foreign lawyers for a malpractice committed within our jurisdiction? What are the sanctions that may be imposed? What laws and rules of procedure should govern multi-jurisdictional practice? Should it be the laws or rules of the host country or that of the home country?

These are myriad of questions for which we have no answer in the meantime.

As we wait with suspended gape for the initiatives to be promulgated by the Supreme Court, it is good to know that there is a light at the end of the tunnel.

The Supreme Court has always shown openness on the aspect of liberalization.

On December 14, 1994, the Philippine senate concurred in the ratification of the *agreement establishing the World Trade Organization (WTO).* When its constitutionality was assailed, the Supreme Court held that the "**Constitution did not intend to pursue an isolationist policy, it did not shut out foreign investments, goods and services in the development of the Philippine economy. While the constitution does not encourage the unlimited entry of foreign goods, services, and investments into the country, it does not prohibit them either. In fact, it allows an exchange on the basis of equality and reciprocity, frowning only on foreign competition that is *unfair.***"

As a matter of fact, Congress has enacted **Republic Act no. 9181 empowering the *Philippine Regulatory Commission* "**to approve the registration and authorize the issuance of a certificate of registration/license and professional identification card, with or without examination, to a foreigner who is registered under the laws of his state or country and whose certificate of registration issued therein has not been suspended or revoked."

That the Philippine's is a signatory to The World Trade Organization and, therefore, a party to the *General Agreement on Trade and Services* (GATS), reinforces the possibility that the multi-jurisdictional practice is forthcoming. The general agreement on trade and services is one of the trade agreements administered and enforced by the World Trade Organization. It was established in 1994, at the conclusion of the "Uruguay Round" on the *General Agreement on Tariffs and Trade (GATT)* and was one of the trade agreements adopted for inclusion when the World Trade Organization was formed in 1995. The mandate of the General Agreement on Trade and Services is the liberalization of trade and services and the

gradual reduction of government obstacles to international competition in the services sector. [7]

It is generally acknowledged that the World Trade Organization's definition of "services" under the General Agreement on Trade and Services includes "legal services."[8] It has been articulated that with the integration of world economies, lawyers are faced with transactions involving multiple jurisdiction, requiring them to provide advice in one or more jurisdictions. The demand comes from their corporate clients who do business across borders and choose to rely on the services of professionals who are already familiar with their business and can guarantee high quality service.[9]

Laurel Terry identifies seven (7) key provisions of the general agreement on trade and services that are of great relevance to the regulation of legal services. These seven provisions include: (1) the requirements of transparency; (2) Most Favored Nation (MFN) treatment; (3) domestic regulation; (4) recognition; (5) progressive liberalization; (6) the market access; and (7) national treatment provision.[10]

The **"transparency requirement"** obliges a member state of the World Trade Organization to publish all measures regulating legal service. If there be any change in policies and regulations, then the organization must be duly notified.

The **"Most Favored Nation treatment"** demands a World Trade Organization member state to accord the same treatment to all the other member states. This prohibits, in principle, preferential arrangements among groups of members in individual sectors or of reciprocity provisions which confine access benefits to trading partners granting similar treatment.

The member states are subject to a "**domestic regulation provision**" which requires that regulatory measures, such as admission, licensing, and discipline should be reasonable, objective, and impartial. There is also an undertaking that qualification requirements and technical standards be based on transparent and objective criteria which should not be more burdensome than what is actually necessary.

The member states may independently decide to recognize the qualifications of foreign lawyers as valid or such recognition may be based on *mutual recognition agreements* between member states in order to reach a common standard and criteria for recognition as well as practice.

The member states are also required to engage in "progressive liberalization" and additional negotiations within five (5) years.

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[7] Johann Carlos Barcena, *Shifting to an Open Legal Market Policy: The Prospect of Multi –Jurisdictional Practice of Law in the Philippines Under the Aegis of the General Agreement on Trade in Services (GATS)*, 84 PHIL. L.J. 667 (2010).
[8] *Id.* at 668, citing *See* Dante Tinga, *From General Practice to Cross-Border Practice: The Changing Trends and Paradigms*, BENCHMARK ONLINE (May 2008)
[9] *Id.* at 668, citing World Trade Organization, *Communication from Australia: Negotiating Proposal: Legal Services Classification* S/CSS/W/67/Suppl.2, Mar. 11, 2002.
[10] *Id.* citing Laurel Terry, *GATS' Applicability to Transnational Lawyering and Its Potential Impact on U.S. State Regulation of Lawyers*, 34 VANDERBILT J. OF INT'L L. 989 (2001).

The foregoing are the general requirements that apply to all member states of the world trade organization.

There are additional requirements of "market access provision" and "national treatment provision" if a country lists "legal services" in the *schedule of specific commitments*.

"Market access provision" prohibits limitations on the number of service providers, such as quotas, monopolies, numerical limitations, etc.

On the other hand, the **"national treatment provision"** serves as an equal protection clause. It prohibits a country from treating foreign law firms less favorable than its own local firms.

Under the general agreement on trade and services, there are four (4) modes of supply of legal services for which specific commitments may be taken.

It was expounded in a *study,*[11] thus:

> **Mode 1** refers to **"cross-border supply of services."** Under this mode, the service is supplied from the territory of one member into the territory of another member state. This mode assumes particular relevance later with respect to "Legal Process Outsourcing" (LPO) wherein law firms in countries such as the United States may outsource lawyers from the Philippines to review contracts or prepare legal documents.
>
> **Mode 2** refers to **"consumption abroad"** or cross-border consumption of services in which the service is supplied in the territory of one member state to a service consumer from another member state. One example could be a foreign law firm providing service to a client overseas.
>
> **Mode 3** is the establishment of **"commercial presence"** which entails that the service is supplied by setting up a business or professional establishment, such as a subsidiary corporation or a branch or representative office, in the territory of one member by a service supplier of another member. This is one of the hallmarks of opening the legal market of a country as it facilitates foreign law firms opening a branch office in the territory of the host state. The opening of such branches may be classified as foreign investment as it will generate jobs for the local population.
>
> **Mode 4** pertains to the **"movement of natural persons"** which means human resource from one member goes to the territory of another to provide services for short-term, non-immigrant, business-related purposes. Here, a law firm based in the united states can send a partner or associate to a branch office in the Philippines to manage its operations for a certain number of years, or perhaps even an associate from the Philippines may be hired by a U.S. law firm to practice there for a few years – and when such Filipino lawyer returns, he/she is more experienced in transnational practice.

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[11] Johann Carlos Barcena, *Shifting to an Open Legal Market Policy: The Prospect of Multi -Jurisdictional Practice of Law in the Philippines Under the Aegis of the General Agreement on Trade in Services (GATS)*, 84 PHIL. L.J. 654 (2010).

As expected, there is a growing concern among Filipino lawyers about the possibility of them losing in the competition with their foreign counterparts. It is a given fact that while foreign mega law firms have thousands of lawyers, Filipino firms only have hundreds.[12]

This may be a legitimate concern were it not for the fact that services of foreign lawyers mostly concern cross-border commercial, trade, and investment transactions. Hardly would a foreign lawyer handle cases relating to criminal law, family law, torts, civil law, or those in violation of ordinances. In short, they will not gravitate towards the local lawyer's source of livelihood.

Another concern relates to ethics. Lawyers in the Philippines are basically governed by the *Code of Professional Responsibility,* promulgated on June 21, 1988, or around 28 years ago. Owing to its antiquated state, it does not contain provisions relating to multi-jurisdictional practice. In contrast, *the American Bar Association Commission* had submitted as early as November 2001 its report and recommendations for the amendment of the *American Bar Association Model Rules of Professional Conduct* to include provisions on the regulation of multi-jurisdictional practice.

Perhaps, it is time for our Supreme Court to come up with the rules governing the ethical requirements of multi-jurisdictional practice. Examples of the needed provisions are:

> (a) Foreign lawyers must have no derogatory records;
> (b) Foreign lawyers may be subjected to disciplinary measures by the home country and host country for unethical conduct;
> (c) Foreign lawyers must not pose unreasonable risk to his client and to the host country; and
> (d) Foreign lawyers must comply with the requirements set forth by the host country. In the Philippines, it is the Supreme Court.

Concomitant with the acceptance of foreign lawyers in the country is the mutual benefit on the part of Filipino lawyers to engage in multi-jurisdictional practice in other jurisdictions.

A growing practice that is gaining popularity in the international market is Legal Process Outsourcing. It is the sending of work traditionally handled inside a company or firm to an outside contractor for performance. Companies or firms resort to this practice as it provides convenience, cost-savings, and easy problem solving.[13]

It must be stressed that the Philippines is rich in human resources, including lawyers. Compared with the compensation being received by their foreign counterparts, Filipino lawyers are left too far behind. Filipino lawyers may find legal process outsourcing lucrative as the compensation may be pegged on the usual rate applicable to foreign lawyers.

In other words, Filipino lawyers, given their rigid training and academic achievement, may well compete with their foreign counterparts in their jurisdictions. It is a

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[12] *Id.* at 674.
[13] Johann Carlos Barcena, *Shifting to an Open Legal Market Policy: The Prospect of Multi -Jurisdictional Practice of Law in the Philippines Under the Aegis of the General Agreement on Trade in Services (GATS)*, 84 PHIL. L.J. 676, (2010)

great advantage that Filipino lawyers have good communication skills and have adjusted themselves well to the ever-changing technologies.

Of course, the sweeping wind of change brought about by globalization calls for the creation of a sophisticated Philippine bar. Modern-day lawyers must not only be learned in the laws, domestic and international, but must also understand the rigors of international economics, politics, and technology and a host of other fields.

As of the moment, we have seen the proliferation of multi-jurisdictional disputes, particularly in the fields of arbitration, intellectual property law, maritime law, finance law, banking law and commercial law. With the rise of transnational crimes, like drug trafficking, trafficking in person, money laundering, cyber-crime, piracy, arms smuggling, it will not be long when multi-jurisdictional practice may also be felt in criminal law.

Let this be a challenge to you. Multi-jurisdictional practice presents so many opportunities. Instead of being dazed and stupefied into inaction and complacency, and merely contended as local law practitioners, accept the challenges and let them be your motivation to become cross-border lawyers.

But how can you be successful cross-border lawyers?

Cross-border lawyers must have an unquenchable thirst for knowledge. So keep on educating yourselves about foreign laws, legal systems, and jurisprudence. Attend foreign conventions or seminars if you must.

You must have an open-mind by accepting and being sensitive to the culture of other countries. One way to create a network with lawyers from other countries is to be attuned to the traits and practices peculiar to them.

Invest on technology. Serve your clients well. Provide real-time legal solutions. Learn the laws of other countries and their developments and be the first to engage in them. Collaborate with foreign lawyers.

Our Asian neighbors and other jurisdictions have successfully allowed and regulated multi-jurisdictional practice, without detriment to their local practitioners.

Japan was one of the first Asian countries to liberalize its legal services. It has been observed that since 1987, "Japan has seen a gradual expansion of Japanese law firms. This expansion was partly realized through mergers with other Japanese firms to create full-practice mega firms." Moreover, since the enactment of the *Gaiben law* in 1986, 43 foreign law firms, 28 of them American, have opened branches in Japan and more than 150 foreign lawyers have qualified to practice as *gaiben*. *Gaiben* is the Japanese term for foreign attorney.[14]

Korean law once restricted foreign law firms from establishing offices in Korea and lawyers with foreign licenses were not officially allowed to practice foreign law. With the passage of the *Foreign Legal Consultant Act* (FLCA) on March 2, 2009, South Korea permitted

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[14] BARCENA, *supra* note 13

foreign lawyers to register as "foreign legal consultants" and foreign law firms called "Foreign Legal Consulting Offices (FLCO)" to open offices in Korea. One requirement is that the countries of the jurisdiction where they are licensed have signed and ratified Free Trade Agreements (FTAs) with Korea, including liberalization of the legal services market.[15]

The *Legal Profession Act of Singapore* admits any person who is qualified for admission without reference to nationality, except in the special cases of Malayan or Hong Kong practitioners. The law broadens its coverage by allowing law firms to practice international commercial arbitration involving Singapore laws, providing for further collaboration between Singapore and foreign law firms through established and new joint law ventures.[16]

Unlike Asian countries wherein liberalization was spurred primarily by direct pressure from countries, such as the United States, or indirect pressure from market forces, Australia has independently liberalized its legal services market. One need not be a citizen of Australia to practice law. In 2001, Australia proposed a so-called *"limited licensing concept."*[17]

Other countries are already marching in cadence with the demands of the time.

Let us take a big leap now!

As with all challenges, the uncertainties brought about by globalization present fresh opportunities. More than ever, there is great opportunity for cooperation among nations and people. It is now that we, as members of the legal community, should re-assert the predominance of the rule of law as the bastion of stability amidst this swiftly changing international landscape.[18]

In asserting the rule of law to ultimately govern the rapid and increased interaction among nations, economies and people, the judiciary provides the necessary anchorage for a more stable regime. The most significant fruit of globalization may yet be the establishment of the rule of law, the idea that disputes will be settled and agreements reached through settled principles rather than the use of force, intimidation or power.[19]

Today, as we search for a fitting role for the law in this rapidly transforming era, judges and magistrates are given unique opportunities to uphold the law and the ideal of justice as universal values. While increased interdependence has spawned difficulties, it has also spurred the harmonization of common values.[20] We must take advantage of it.

At no other time is the statement of Judge Learned Hand more accurate i.e., – that rights know no boundaries and justice no frontiers; the brotherhood of man is not a domestic institution.[21]

I wish you Godspeed. *Mabuhay!*

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[15] *Ibid.*
[16] Mary Rhauline dG. Lambino*, De-Monopolizing the Philippine Legal Practice: the Constitutional Scope and Operative Effects in A Managed System of Liberalization by the Judicia*ry, 2009.
[17] BARCENA, *supra* note 13.
[18] Angelina Sandoval-Gutierrez, *Globalization in the 21st Century: A Jurist Perspective*, 81 PHIL. L.J. 187.
[19] *Ibid.*
[20] *Ibid.*
[21] *Ibid.*

TAX PRINCIPLES AND REMEDIES:
Tools to Inclusive Economic Growth, Development, Prosperity and Stability

JAPAR B. DIMAAMPAO[1]

**Fifteenth Metrobank Foundation Professorial Chair Lecture delivered on October 17, 2018 at the Supreme Court En Banc Session Hall.*

"Taxes are the sinews of the state."
Marcus Tullius Cicero
Roman Statesman Philosopher and Orator
(106-43 B.C.)

"Every tax ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible over and above what it brings into the public treasury of the state."
Adam Smith's Canons of Taxation
The Wealth of Nations,
Book V, Chapter II

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[1] Associate Justice, Court of Appeals; Chairperson, Department of Shari'a and Islamic Jurisprudence, PHILJA; and Holder, 2018 Metrobank Foundation Professorial Chair in Taxation Law.

I. PROLOGUE

The power to impose taxes is one so unlimited in force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever except such as rest in the discretion of the authority which exercises it.[2]

The power of taxation is so comprehensive in that it reaches to every trade or occupation; to every object of industry, use or enjoyment; to every species of possession; and it imposes a burden which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property. No attribute of sovereignty is more pervading, and at no point does the power of the government affect more constantly and intimately all the relations of life than through the exactions made under it.[3]

True it is that taxation is admittedly a difficult subject, however, it is equally true that the indispensability of taxation for the existence of the government strikes a chord in the hearts and minds of the taxpayers.

II. ORIGIN OF TAXATION

The history of taxes stretches thousands of years into the past. Several ancient civilizations, including Greeks and Romans levied taxes on their citizens to pay for military expenses and other public services. Taxation evolved significantly as empires expanded and civilizations became more structured.

The earliest known tax records, dating approximately six thousand years B.C., are in the form of clay tablets found in the ancient city-state of Lagash in the modern day Iraq. This early form of taxation was kept to a minimum, except during periods of conflict or hardship.

The Greeks, Egyptians and Romans also enforced tax policies that they used to fund centralized governments. The Greeks levied several types of taxes that are still enforced in many developed countries, including taxes on property and goods. Unlike early Greek taxation, the Roman policies began to weigh heavily on its citizens as the power and corruption of the empire's central government grew. The excessive tax burden on productive Roman citizens during the 4th and 5th centuries was a leading cause of the nation's eventual economic collapse.[4]

Early taxation was not limited to European and Mediterranean civilizations, ancient Chinese societies also levied taxes on their citizens. The Chinese instituted a form of property tax around 600 BC that required 10% of cultivated land to be dedicated to the central government.[5] All produce generated from the dedicated portion of land was taken as a tax.

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[2] THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS, 587 (6th ed. 1868).
[3] *Ibid.*
[4] Bruce Bartlett, *How Excessive Government Killed Ancient Rome*, The Cato Journal, Vol. 14 No. 2. Fall 1994, http://www.cato.org/pubs/journal/cjv14n2-7.html.
[5] Edward Harper Parker, *Ancient China Simplied, Chapter XVI – Land and People*, Autorama, http://www/authorama.com/ancient-china-simplied-17.html.

History of Taxes in the Middle Ages

Fair taxation was a key issue for many English citizens during the medieval period. Most citizens were subject to a poll tax which was a flat tax on every adult in a jurisdiction, as well as property and church taxes. Every peasant that did not own land had to pay property taxes on land that they rented. They were also obligated to donate 10% of their labor or produce to the church.[6]

In 1215, a large portion of the English nobility revolted against their monarch, King John, who had implemented new taxes and increased existing ones to finance his military ambitions in continental Europe. The King levied more taxes to help pay for a large-scale conflict, including hiring a large mercenary force, and to make up for the loss of taxable territories in France during the war.[7] Many land-owning nobles did not trust King John's leadership and did not feel responsible for supporting the effort.

While turmoil and provincial strife dominated European policies, a unified and expensive empire emerged in the Middle East. Muslim conquerors took over a large portion of Northern Africa and the Mediterranean region during the 14th and 15th centuries. They ruled over a diverse collection of populations, including nomads, Jews and Christians, which were subject to special forms of taxation that did not apply to Muslim citizens. Stationary societies that did not convert to the beliefs and traditions of Islam had to pay a special tax, which was more akin to tribute, to their rulers.[8] Muslim officials also taxed nomads by waiting at particular locations, like water supplies, to collect dues from the elusive wandering clans.

History of Taxation during Colonial Period

Taxation policies developed quickly during the colonial period as wealth began to flow into Europe from colonies in Africa, Asia and the America. Great Britain enforced the first general income tax in 1799 to help finance their war against Napoleonic France.[9] This tax was also scaled according to income, much like the income taxes levied in most modern systems.

The dispute between the American colonists and the English crown that essentially led to the American Revolution is partially attributed to disputes concerning fair taxation. The colonists' main grievance with the tax policy was distilled into a simple phrase, "No taxation without representation." While the colonists were forced to pay taxes to England, including hefty duties on staples like tea and stamps, they did not receive any direct representation in Parliament or in the monarch's court.

Recent Tax History

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[6] Richard Henry Carlson, *A Brief History of Property Tax*, Association of Municipal Assessors of New Jersey (September 2004), http:// www.amanj.org/files/Carlson.pdf.

[7] *Meeting at Runnymede, the Story of King John and Magna Carta*, Constitutional Rights Foundation (2001), http://www.crf-usa.org/foundation-of-our constitution/magnacarta.html.

[8] Fred Donner, *The Early Islamic Conquests,* Fordham University, Princeton University Press (1981), http://www.fordham.edu/halsall/med/donner.html.

[9] *Income Tax: History of Individual Income Taxation*, Encyclopedia Britannica, http://www.britannica.com/EBchecked/topic/284849/Incometax/71953/History-of-individual-income-taxation.

When the United States was founded, the federal government levied relatively few taxes. The country did not maintain a significant military force during times of peace. Instead, it relied on local militiamen for protection from marauders and local rebellions. The central government was also much smaller than it is now, and required much less money to maintain. As the new country developed, it encountered several crises and conflicts that prompted changes to the tax code.

The first federal income tax in the United States was created shortly after the Civil War to pay for the debts accrued during the costly internal conflict. The tax was not universal; it only applied to citizens above a certain income level.[10] This federal income tax was repealed in the 1870s, but a later administration created new federal tax legislation in 1894.

Many European nations also adopted income taxes during the 19th century. The unifying Prussian influence over many of the independent German states helped entrench the principles of income tax in continental Europe. France began to levy an income tax during World War 1, in response to the threat of a German invasion.[11]

III. TAX PRINCIPLES

A. GENERAL PRINCIPLES OF TAXATION

Tax principles are basic concepts by which a government is meant to be guided in designing and implementing a tax system. Adam Smith, the 18th century economist and philosopher, in his famous book "The Wealth of Nations" described these as canons of taxation consisting of numerous rules and principles upon which a good taxation system should be built. They are considered as the foundation of discussion on the principles of taxation.

Adam Smith, now the Father of the Modern Political Economy, attempted to systematize the rules governing a rational system of taxation, namely: 1) Canon of equality or ability; 2) Canon of certainty; 3) Canon of convenience; and 4) Canon of economy.

Brief Explanation of the Four Main Canons of Taxation

1. Canon of Equality or Ability. By equality is meant equality of sacrifice – people should pay taxes in proportion to their ability to pay. This principle adheres to progressive taxation which states that the tax rate increases as the tax base increases. Hence, rich people should pay more taxes and the poor pay less. It brings not only social equality or justice but also equal distribution of wealth in an economy. Upon this point, Adam Smith enunciates: "The subjects of every State ought to contribute towards the support of the government as nearly as possible in proportion to their respective abilities; that is, in

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[10] *Understanding Taxes*, Internal Revenue Service, http://www.irs.gov/app/understandingtaxes/teacher/whys-thm02_les03.jsp.

[11] *Income Tax: History of Individual Taxation*, Encyclopedia Britannica, http://www.britannica.com /Ebcheck/topic/284849/income-tax/71953/History-of-individual-income-taxation.

proportion to the revenue which they respectively enjoy under the protection of the State."[12]

2. Canon of Certainty. This means that the taxpayer should have full knowledge about his tax payment which includes the amount to be paid, the mode it should be paid and the date of payment. If the taxpayer is definite and certain about the amount of the tax and its time of payment, he can adjust his income to his expenditure. In other words, everything should be made clear, simple and absolutely certain for the benefit of the taxpayer. Since it is a very important guiding rule in formulating tax laws and procedures, it indeed minimizes tax evasion. This finds underpinning in Adam Smith's words of wisdom: "The tax which each individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person."[13]

3) Canon of Convenience. This requires that the time of payment and the mode of tax payment should be convenient to the taxpayer. Convenient tax system will encourage people to pay tax and will increase tax revenue. In this regard, Adam Smith articulates: "Every tax ought to be levied at the time, or in the manner, in which it is most likely to be convenient for the contributor to pay it."[14]

4) Canon of Economy. This simply implies that there should be economy in tax administration. The expenses of collection of taxes should not be excessive, that is, the cost of tax collection should be lower than the amount of tax collected. Corollarily, efficient tax administration will generate revenues to pay for the expenditures of government. On this score, Adam Smith declares: "Every tax ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible, over and above what it brings into the public treasury of the state."[15]

To attune to the changing times, modern economists[16] expanded Smith's principles as they formulated five equally important canons/ principles of taxation. They are concisely explained as follows:

5) Canon of Productivity. It is also known as the canon of fiscal adequacy. According to this principle, the tax system should be able to yield enough revenue for the treasury and the government should have no need to resort to deficit financing. This is a good principle to follow in a developing economy.

6) Canon of Elasticity. According to this canon, every tax imposed by the government should be elastic in nature. In other words, the income from tax should be capable of increasing or decreasing according to the requirement of

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[12] Adam Smith, *The Wealth of Nations*, Book V, Chapter II, 1043.
[13] *Ibid.*
[14] *Id.* at 1044.
[15] *The Wealth of Nations*, Book V, Chapter II, 1044.
[16] Adam Smith's Canons of Taxation, Ramakrishna Yellepeddi.

the country. For example, if the government needs more income at the time of crisis, the tax should be capable of yielding more income through increase in its rate.

7) Canon of Flexibility. It should be easily possible for the authorities to revise the tax structure both with respect to its coverage and rates to suit the changing requirements of the economy. With the changing time and fit conditions, the tax system needs to be changed without such difficulty. It must be flexible and not rigid.

8) Canon of Simplicity. The tax system should not be complicated. If it is difficult to understand and administer, problems of interpretation and disputes may arise.

9) Canon of Diversity. This principle states that the government should collect taxes from different sources rather than concentrating on a single source of tax. It is not advisable for the government to depend upon a single source of tax as it may result in inequity to certain sectors of the society. If the tax revenue comes from diversified source, then any reduction in tax revenue on account of any one cause is bound to be small.

Philippine Tax System

It appears that the enunciated State policy under R.A. No. 8424[17] and R.A. No. 10963[18] reflects only three basic principles of a sound tax system, *viz:*

1) Fiscal Adequacy, which means that the sources of revenue should be adequate to meet government expenditures and their variations;[19]

2) Theoretical Justice, which requires that the taxes levied must be based upon the ability of the citizens to pay; and

3) Administrative Feasibility, which mandates that each tax should be clear and plain to the taxpayers, capable of enforcement by an adequate and well-trained staff of public officials, convenient as to the time and manner of payment, and not duly burdensome upon or discouraging to business activity[20]

Discernibly, the principle of administrative feasibility encompasses the exacting requirements of the canons of certainty, convenience and simplicity.

Likewise, the canons of economy and productivity run parallel to the principle of fiscal adequacy. It cannot be gainsaid that adherence to the canons of elasticity, flexibility and diversity will create a robust environment for business to enable firms to compete better in the regional as well as the global market.

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[17] National Internal Revenue Code of 1997.
[18] Tax Reform for Acceleration and Inclusion.
[19] *Chavez v. Ongpin*, 186 SCRA 331, at 338.
[20] Report of the Tax Commission of the Philippines, February 1939, Vol. 1, 23-31.

Tax Fairness Principles – Horizontal Equity and Vertical Equity Compared

Horizontal equity yields the following maxim: like-situated taxpayers should be taxed the same. This in effect bolsters the tax equity, equal sacrifice principle and ability to pay principle.

On the other hand, vertical equity lays down this maxim: differently situated people should be taxed differently.

In a sense, horizontal equity is what fairness demands in the treatment of people at the same levels while vertical equity is what fairness demands in the treatment of people at different levels of income.[21]

Appositely, in his book *The Wealth of Nations*, Adam Smith wrote:

> When the carriages which pass over a highway or a bridge, and the lighters which sail upon a navigable canal, pay toll in proportion to their weight or their tonnage, they pay for the maintenance of those public works exactly in proportion to the wear and tear which they occasion of them. It seems scarce possible to invent a more equitable way of maintaining such works.[22]

SELECTED TAX PRINCIPLES

Lifeblood Doctrine

Taxes are the lifeblood of the government and their prompt and certain availability is an imperious need.[23]

In enunciating decisional rules, the Supreme Court underscored the interplay of the lifeblood doctrine and the general welfare clause, *viz:*

> The restriction upon the power of courts to impeach tax assessment without a prior payment, under protest, of the taxes assessed is consistent with the doctrine that **taxes are the lifeblood of the nation** and as such their collection cannot be curtailed by injunction or any like action; otherwise, the state or, in this case, the local government unit, shall be crippled in dispensing the needed services to the people, and its machinery gravely disabled.[24]

> xxx[T]he public will suffer if taxpayers will not be held liable for the proper taxes assessed against them: **"Taxes are the lifeblood of the government, for without taxes, the government can neither exist nor endure."** A principal attribute of sovereignty, the exercise of taxing power derives its source from the very existence of the state whose social contract with its citizens obliges it to promote public interest and common good. The theory behind the exercise of the power to tax

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[21] Richard Wood, *Supreme Court Jurisprudence of Tax Fairness*, http://law.shi.edu.
[22] ADAM SMITH, WEALTH OF NATIONS, 475 (1991).
[23] *Bull v. United States*, 295 U.S. 247, 15 APTR 1069, 1073.
[24] *Camp John Hay Development Corporation v. CBAA*, 706 SCRA 547.

> emanates from necessity; without taxes, government cannot fulfill its mandate of promoting the general welfare and well-being of the people.[25]
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> **Taxes are the lifeblood of the nation.** The Philippines has been struggling to improve its tax efficiency collection for the longest time with minimal success. Consequently, the Philippines has suffered the economic adversities arising from poor tax collections, forcing the government to continue borrowing to fund the budget deficits. (We) cannot turn a blind eye to this economic malaise by being unduly liberal to taxpayers who do not comply with statutory requirements for tax refunds or credits. The tax refund claims in the present cases are not a pittance. Many other companies stand to gain if (We) were to rule otherwise.[26]
>
> Revenues are intended to be liberally construed. Taxes are the lifeblood of the government and in Holmes' memorable metaphor, the price we pay for civilization; hence, laws relative thereto must be faithfully and strictly implemented.[27]
>
> (To) uphold the validity of the waivers would be consistent with the public policy embodied in the principle that taxes are the lifeblood of the government and their prompt and certain availability is an imperious need. Taxes are the nation's lifeblood through which government agencies continue to operate and which the State discharges its functions for the welfare of its constituents. As between the parties, it would be more equitable if petitioner's lapses were allowed to pass and consequently uphold the Waivers in order to support this principle and public policy.[28]

The power to tax is the power to destroy vs. The power to tax is not the power to destroy while the Court sits.

Justice Malcolm believed that the power to tax "is an attribute of sovereignty. It is the strongest of all the powers of government." This led Chief Justice Marshall of the U.S. Supreme Court, in the celebrated case of *McCulloch v. Maryland,* to declare: "The power to tax involves the power to destroy." This might well be construed to mean that the power to tax includes the power to regulate even to the extent of prohibition or destruction[29] since the inherent power to tax vested in the legislature includes the power to determine who to tax, what to tax, and how much tax is to be imposed.

However, instead of being regarded as a blanket authorization of the unrestrained use of the taxing power for any and all purposes, it is more reasonable to say that the maxim "the power to tax is the power to destroy" is to describe not the purposes for which the taxing power may be used but the degree of vigor with which the taxing power may be employed in order to raise revenue.[30]

The power to tax includes the power to destroy if it is used validly as an implement of the police power in discouraging and in effect, ultimately prohibiting certain things or enterprises inimical to the public welfare. x x x But where the power to tax is used solely for

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[25] *CIR v. BPI*, 521 SCRA 373.
[26] *CIR v. San Roque Power Corporation*, 690 SCRA 336.
[27] *Pilmico-Mauri Foods Corporation v. CIR,* 802 SCRA 618 (September 14, 2016).
[28] *CIR v. Next Mobile, Inc.*, 776 SCRA 343 (December 7, 2015).
[29] 1 COOLEY, A TREATISE ON THE LAW OF TAXATION, 67 (4th ed).
[30] *Id.* at 179-181.

the purpose of raising revenues, the modern view is that it cannot be allowed to confiscate or destroy. If this is sought to be done, the tax may be successfully attacked as an inordinate and unconstitutional exercise of the discretion that is usually vested exclusively in the legislature in ascertaining the amount of the tax.[31]

It is not the purpose of the government to throttle private business. On the contrary, the government ought to encourage private enterprise. Taxpayer, just like any concern organized for a lawful economic activity, has a right to maintain a legitimate business. As aptly held in *Roxas, et al. v. CTA:*[32] "The power of taxation is sometimes called also the power to destroy. Therefore it should be exercised with caution to minimize injury to the propriety rights of a taxpayer. It must be exercised fairly, equally and uniformly, lest the tax collector kill the 'hen that lays the golden egg."

Legitimate enterprises enjoy the constitutional protection not to be taxed out of existence. Incurring losses because of a tax imposition may be an acceptable consequence but killing the business of an entity is another matter and should not be allowed. It is counter-productive and ultimately subversive of the nation's thrust towards a better economy which will ultimately benefit the majority of our people.[33]

Judicial Review of Taxation

While taxation is said to be the power to destroy, it is by no means unlimited. When a legislative body having the power to tax a certain subject matter actually imposes such a burdensome tax as effectually to destroy the right to perform the act or to use the property subject to the tax, the validity of the enactment depends upon the nature and character of the right destroyed. If so great an abuse is manifested as to destroy natural and fundamental rights which no free government could consistently violate, it is the duty of the judiciary to hold such an act unconstitutional. Hence, the modification: "The power to tax is not the power to destroy while the Supreme Court sits." So it is in the Philippines.

The Constitution as the fundamental law overrides any legislative or executive act that runs counter to it. In any case, therefore, where it can be demonstrated that a statutory provision fails to abide by its command, then the court must so declare and adjudge it null.[34]

In the exercise of such a delicate power, however, the admonition of Cooley on inferior tribunals is well-worth remembering. Thus: "It must be evident to anyone that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility."[35] While it remains undoubted that such a power to pass on the validity of a tax law alleged to infringe certain constitutional rights of a litigant exists, still it should be exercised with due care and circumspection, considering not only the presumption of validity but also the relatively modest rank of a city court in the judicial hierarchy.[36]

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[31] ISAGANI CRUZ, CONSTITUTIONAL LAW, 87 (2000).
[32] 23 SCRA 276 at 283.
[33] *Philippine Health Care Providers, Inc. v. CIR*, 600 SCRA 413.
[34] *Sison, Jr. v. Ancheta*, 130 SCRA 654 at 661.
[35] 1 THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS, 332 (8th ed. 1927).
[36] See *City of Baguio v. De Leon*, 25 SCRA 938.

The Power to Tax Involves the Power to Destroy is a "Flourish of Rhetoric"

In a separate opinion in *Graves v. New York*[37], Justice Frankfurter, after referring to it as an "unfortunate remark", characterized it as "a flourish of rhetoric" (attributable to) the intellectual fashion of the times (allowing) a free use of absolutes.[38] This is merely to emphasize that it is not and there cannot be such a constitutional mandate. Justice Frankfurter could rightfully conclude: "The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes' pen: "The power to tax is not the power to destroy while this Court sits."[39]

Doctrine of Supremacy of the National Government over Local Governments

"Justice Holmes, speaking for the Supreme Court, made reference to the entire absence of power on the part of the States[40] to touch, in that way (taxation) at least, the instrumentalities of the United States and it can be agreed that no state or political subdivision can regulate a federal instrumentality in such a way as to prevent it from consummating its federal responsibilities, or even to seriously burden it in the accomplishment of them."[41]

Otherwise, mere creatures of the State can defeat National policies thru extermination of what local authorities may perceive to be undesirable activities or enterprise using the power to tax as "a tool for regulation"[42] The power to tax which was called by Justice Marshall as the "power to destroy"[43] cannot be allowed to defeat an instrumentality or creation of the very entity which has the inherent power to wield it.

Tax Law Must Not Violate Due Process and Equal Protection Clauses

In order to justify the nullification of a tax law, there must be a clear and unequivocal breach of the Constitution. It must be unreasonable and unjust, not merely hypothetical, argumentative, or of doubtful implication.[44]

Due process does not require that the property subject to the tax or the amount to be raised should be determined by judicial inquiry, and a notice and hearing as to the amount of the tax and the manner in which it shall be apportioned are generally not necessary to due process of law.[45]

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[37] 306 US 466 (1938).
[38] *Id.* at 489.
[39] *Id.* at 490.
[40] *Johnson v. Maryland*, 254 US 51.
[41] 2 CHESTER JAMES ANTIEAU & WILLIAM RICH, MODERN CONSTITUTIONAL LAW, 140 (1997).
[42] *U.S. v. Sanchez*, 340 US 42.
[43] *McCulloch v. Maryland*, supra.
[44] *Kapatiran v. Tan*, 163 SCRA 371.
[45] COOLEY, *supra* note 29, at 334.

Due process clause may be invoked where a taxing statute is so arbitrary that it finds no support in the Constitution, as where it can be shown to amount to confiscation of property.[46]

In one case,[47] the Supreme Court sustained petitioners' claim that a real property assessment is excessive, unwarranted, inequitable, confiscatory and unconstitutional when it shown that the assessment exceeds the yearly rentals earned from such property.

Decisional rules evince that the following are violative of due process:

a. If the tax amounts to a confiscation of property;
b. If the subject of confiscation is outside the jurisdiction of the taxing authority;
c. If the law is imposed for a purpose other than a public purpose;
d. If the law which applied retroactively imposes unjust and oppressive taxes;
e. Where the law is in violation of the inherent limitations on taxation.

"Equal protection" does not require equal rates of taxation on different classes of property, nor prohibit unequal taxation so long as the inequality is not based upon arbitrary classification. Legislation which, in carrying out a public purpose, is limited in its application, does not violate the provisions if, within the sphere of its operation, it affects alike all persons similarly situated. It does not prohibit special legislation or legislation that is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that *all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.*[48]

The equal protection clause does not require the universal application of the laws on all persons or things without distinction. This might in fact sometimes result in unequal protection. What the clause requires is equality among equals as determined according to a valid classification. By classification is meant the grouping of persons or things similar to each other in certain particulars and different from all others in these same particulars.[49]

Equality and Uniformity Distinguished

Equality in taxation is accomplished when the burden of the tax falls equally and impartially upon all the persons and property subject to it, so that no higher rate or greater levy in proportion to value is imposed upon one person or species of property than upon others similarly situated or of like character.

Uniformity requires that all taxable property shall be alike subjected to the tax, and this requirement is violated if particular kinds, species or items of property are selected to bear the whole burden of tax, while others, which should be equally subject to it, are left untaxed.[50]

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[46] *Reyes v. Almanzor*, 196 SCRA 322.
[47] *Ibid.*
[48] COOLEY, *supra* note 29, at 534-535.
[49] *International Harvester Co. v. Missouri*, 234 US 199.
[50] 37 ENCYCLOPEDIA OF LAW AND PROCEDURE 735-736.

In other words, equality in taxation simply means that the tax shall be strictly proportional to the relative value of the property.[51] In contrast, uniformity in taxation means that persons or things belonging to the same class shall be taxed at the same rate.[52]

Doctrinal rules on uniformity and equality in taxation reveal the following:

1. A tax is uniform when it operates with the same force and effect in every place where the subject of it is found.[53]
2. Uniformity in taxation means that all taxable articles or kinds of property of the same class shall be taxed at the same rate.[54]
3. The tax or license fee is uniform when it applies equally to all persons, firms and corporations placed in similar situation.[55]
4. Uniformity means that all property belonging to the same class shall be taxed alike.[56]
5. Inequalities which result from the singling out of one particular class for taxation or exemption infringe no constitutional limitation.[57]

The public purpose of a tax may legally exist even if it favors one over another

The Supreme Court held that for the purpose of undertaking a comprehensive and confirming urban development and housing program, the disparities between a real property owner and an informal settler as two distinct classes are too obvious and need not be discussed at length. The differentiation conforms to the practical dictates of justice and equity and is not discriminatory within the meaning of the Constitution. Notably, the public purpose of a tax may legally exist even if the motive which impelled the legislature to impose the tax was to favor one over another. It is inherent in the power to tax to select the subjects of taxation. Inequities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation.[58]

Instrumentality of the National Government including Philippine Economic Zone Authority (PEZA) cannot be taxed by local government

PEZA is an instrumentality of the national government. It is not integrated within the department framework but is an agency attached to the Department of Trade and Industry. It administers its own funds and operates autonomously with the PEZA Board as an instrumentality of the national government. PEZA is vested with special functions or jurisdiction by law. Being an instrumentality of the national government, the PEZA cannot be taxed by local government units.[59]

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[51] COOLEY, *supra* note 29.
[52] *De Villets v. Stanley*, 32 Phil. 541.
[53] State Railroad Tax Cases, 92 US 575.
[54] Black on Constitutional Law, 292.
[55] *Uy Matias v. City of Cebu*, 93 Phil 300.
[56] *Adams v. Mississippi State Bank*, 23 South 395.
[57] *Carmichael v. Southern Coal and Coke Co*., 301 US 495.
[58] *Ferrer, Jr. v. Bautista*, 760 SCRA 652.
[59] *City of Lapu-Lapu v. Philippine Economic Zone Authority*, 742 SCRA 524.

Taxes are not subject to set-off; exceptions

As a rule, taxes cannot be subject to compensation because the government and the taxpayer are not creditors and debtors of each other. However, the Supreme Court allowed the offsetting of taxes under the following exceptional cases:

In *Commissioner of Internal Revenue v. Court of Tax Appeals,*[60] the Court allowed offsetting of taxes in a tax refund case because there was an existing deficiency income and business tax assessment against the taxpayer. The Court said that "[t]o award such refund despite the existence of that deficiency assessment is an absurdity and polarity in conceptual effects" and that "to grant the refund without determination of the proper assessment and the tax due would inevitably result in multiplicity of proceedings or suits.

Similarly, in *South African Airways v. Commissioner of Internal Revenue,*[61] the Court permitted the offsetting of taxes because the correctness of the return filed by the taxpayer was put in issue.

In the recent case of *SMI-ED Philippines Technology, Inc. v. Commissioner of Internal Revenue,*[62] the Court also allowed offsetting because there was a need for the court to determine if a taxpayer claiming refund of erroneously paid taxes is more properly liable for taxes other than that paid. The Court explained that the determination of the proper category of tax that should have been paid is not an assessment but is an incidental issue that must be resolved in order to determine whether there should be a refund. However, the Court clarified that while offsetting may be allowed, the BIR can no longer assess the taxpayer for deficiency taxes in excess of the amount claimed for refund if prescription has already set in.

In all these cases, the Supreme Court allowed offsetting of taxes only because the determination of the taxpayer's liability is intertwined with the resolution of the claim for tax refund of erroneously or illegally collected taxes under Section 229 of the NIRC.[63]

Flexible Power Clause under the Customs Modernization and Tariff Act (RA 10863) is anchored on general welfare clause

In the interest of the general welfare and national security, the President, upon recommendation of the National Economic and Development Authority (NEDA) is empowered to: (1) increase, reduce or remove existing protective tariff rates of import duty, but in no case shall be higher than one hundred percent (100%) ad valorem; (2) establish import quota or ban importation of any commodity as may be necessary; and (3) impose additional duty on all imports not exceeding ten percent (10%) ad valorem, whenever necessary. This is known as the Flexible Power Clause enshrined in Section 1608 of R.A. 10863 otherwise known as the Customs Modernization and Tariff Act (CMTA).

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[60] 234 SCRA 348.
[61] 612 SCRA 665.
[62] 739 SCRA 691.
[63] *CIR v. Toledo Power Company*, 775 SCRA 709.

The local government's power to tax is the most effective instrument to raise the needed revenues which may ultimately enhance peace, progress and prosperity of the people

The right of local government units to collect taxes due must always be upheld to avoid severe tax erosion. This consideration is consistent with the State policy to guarantee the autonomy of local governments and the objective of the Local Government Code that they enjoy genuine and meaningful local autonomy to empower them to achieve their fullest development as self-reliant communities and make them effective partners in the attainment of national goals.

The power to tax is the most potent instrument to raise the needed revenues to finance and support myriad activities of the local government units for the delivery of basic services essential to the promotion of the general welfare and the enhancement of peace, progress, and prosperity of the people.[64]

Tax Evasion Distinguished from Tax Avoidance

Tax evasion refers to the willful attempt to defeat or circumvent the tax law in order to illegally reduce one's tax liability.

In contrast, tax avoidance delves into the act of taking advantage of legally available tax-planning opportunities in order to minimize one's tax liability.[65]

Judicious application of the requisites of tax evasion may result in the collection of millions of unpaid taxes

In the landmark case of *CIR v. The Estate of Benigno P. Toda, Jr.*,[66] the Supreme Court reversing the Decisions of the Court of Tax Appeals and Court of Appeals, held that the tax planning scheme adopted by Cibeles Corporation constituted tax evasion, *viz:*

1. Tax avoidance is the tax saving device within the means sanctioned by law while tax evasion, on the other hand, is a scheme used outside of those lawful means and when availed of, it subjects the taxpayer to further or additional civil or criminal liabilities.
2. All the three factors of tax evasion are present in this case. As early as May 4, 1989, prior to the purported sale of the Cibeles property by Cibeles Insurance Corporation (CIC) to Altonaga on August 30, 1989, CIC received P40 million from Royal Match, Inc. (RMI), and not from Altonaga. This P40 million was debited by RMI and reflected in its trial balance as "other inv. — Cibeles Bldg." In addition, as of July 31, 1989, another P40 million was reflected in RMI's trial balance as "other inv. — Cibeles Bldg." These showed that the real buyer

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[64] *National Power Corporation v. CBAA*, 577 SCRA 418.
[65] BLACK'S LAW DICTIONARY, 1599 (9th ed.).
[66] 438 SCRA 290.

of the properties was RMI, and not the intermediary Altonaga.

3. That Altonaga was a mere conduit finds support in the admission of the Toda Estate that the sale to him was part of the tax planning scheme of CIC.
4. The scheme resorted to by CIC in making it appear that there were two sales of the subject properties, *i.e.,* from CIC to Altonaga, and then from Altonaga to RMI cannot be considered a legitimate tax planning. Such scheme is tainted with fraud.
5. The intermediary transaction – the sale of Altonaga, which was prompted more on the mitigation of tax liabilities than for legitimate business purposes constitutes one of tax evasion.
6. To allow a taxpayer to deny tax liability on the ground that the sale was made through another and distinct entity when it is proved that the latter was merely a conduit is to sanction a circumvention of the tax laws. Hence, the sale to Altonaga should be disregarded for income tax purposes and the two sale transactions should be treated as a single direct sale by CIC to RMI.
7. The tax liability of CIC is governed by then Section 24 of the NIRC of 1986, as amended [now 27(A) of the Tax Reform Act of 1997]. CIC is therefore liable to pay a 35% corporate tax for its taxable net income in 1989. The 5% individual capital gains tax provided for in Section 34(h) of the NIRC of 1986 (now 6% under Section 24(D)[1] of the Tax Reform Act of 1997) is inapplicable. Thus, the assessment for the deficiency income tax issued by the BIR must be upheld.

Lifeblood doctrine favors strict construction of tax exemption (strictissimi juris)

Given that taxes are the lifeblood of the nation, statutes that allow exemptions are construed strictly against the grantee and liberally in favor of the government. Upon this point, Justice Cooley made this edifying discourse—

> Since taxation is the rule and exemption the exception, the intention to make an exception ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing it is upon him who claims it. Moreover, if an exemption is found to exist, it must not be enlarged by the construction, since the reasonable presumption is that the state has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute, the favor would be extended beyond dispute in ordinary cases. It applies not only to the power to grant exemptions, which must be strictly construed, but also to the exemption's construction as irrevocable, to the period of duration of the exemption, to the amount of the exemption, to the scope of the exemption, to charter or contract exemptions as well as other exemptions, and to a statute exempting property from retroactive assessments. Since an exemption will never be presumed, the fact that the charter of a corporation contains no provision at all for taxation, and that there is no reservation of the power to alter, amend or repeal the same, does not prevent the state from afterwards taxing the corporation.[67]

However, the strict rule on tax exemption recognized the following exceptions:

1. Where the statute granting the exemption expressly provides for a liberal

[67] 2 COOLEY, TAXATION, 1403-1414.

interpretation.

2. Special taxes relating to special cases and affecting only special classes of persons.
3. Municipal property consistent with the policy of the state that exemption is the rule and taxation the exemption.[68]
4. Exemptions to traditional exemptees, such as religious and charitable institutions.[69]
5. Exemptions in favor of the government, its political subdivisions or instrumentalities.[70]
6. If the taxpayer falls within the purview of exemption by clear legislative intent.[71]

Relief from doing public works accentuates the rationale for the tax exemption of charitable institutions

To be a charitable institution, an organization must meet the substantive test of charity. In a legal sense, a charity may be fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds and hearts under the influence of education or religion, by assisting them to establish themselves in life or otherwise lessening the burden of government.[72]

In a sense, charity is essentially a gift to an indefinite number of persons which lessens the burden of government. In other words, charitable institutions provide for free goods and services to the public which would otherwise fall on the shoulders of government. Thus, as a matter of efficiency, the government forgoes taxes which should have been spent to address public needs, because certain private entities already assume a part of the burden. This is the rationale for the tax exemption of charitable institutions. The loss of taxes by the government is compensated by its relief from doing public works which would have been funded by appropriations from the Treasury.[73]

Tax conventions are drafted with a view towards the elimination of international juridical double taxation

International juridical double taxation refers to the imposition of comparable taxes in two or more states on the same taxpayer in respect of the same subject matter and for identical periods.[74]

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[68] *Id.* at 1414-1415.
[69] *Ibid.*
[70] *Maceda v. Macaraig, Jr.*, 197 SCRA 771.
[71] *CIR v. Arnoldus Carpentry Shop*, 159 SCRA 199.
[72] *Congressional Sunday School & Publishing Society v. Board of Review*, 125 N.E. 7 (1919), citing *Jackson v. Philipps*, 14 Allen (Mass.) 539.
[73] See Henry Hansmann, *The Rationale for Exempting Nonprofit Organization from Corporate Income Taxation*, 91 YALE L.J. 54, 66 (1981).
[74] PHILLIP BAKER, DOUBLE TAXATION CONVENTIONS AND INTERNATIONAL TAX LAW, 11 (1994).

Tax conventions are drafted with a view towards the elimination of *international juridical double taxation*. The apparent rationale for doing away with double taxation is to encourage the free flow of goods and services and the movement of capital, technology, and persons between countries, conditions deemed vital in creating robust and dynamic economies.[75] Foreign investments will only thrive in a fairly predictable and reasonable international investment climate and the protection against double taxation is crucial in creating such a climate.

Double taxation usually takes place when a person is resident of a contracting state and derives income from, or owns capital in, the other contracting state and both states impose tax on that income or capital. In order to eliminate double taxation, a tax treaty resorts to several methods. First, it sets out the respective rights to tax of the state of source or situs and of the state of residence with regard to certain classes of income or capital. In some cases, an exclusive right to tax is conferred on one of the contracting states; however, for other items of income or capital, both states are given the right to tax, although the amount of tax that may be imposed by the state of source is limited.

The second method for the elimination of double taxation applies whenever the state of source is given a full or limited right to tax together with the state of residence. In this case, the treaties make it incumbent upon the state of residence to allow relief in order to avoid double taxation. There are two methods of relief – the exemption method and the credit method. In the exemption method, the income or capital which is taxable in the state of source or situs is exempted in the state of residence, although in some instances it may be taken into account in determining the rate of tax applicable to the taxpayer's remaining income or capital. On the other hand, in the credit method, although the income or capital which is taxed in the state of source is still taxable in the state of residence, the tax paid in the former is credited against the tax levied in the latter. The basic difference between the two methods is that in the exemption method, the focus is on the income or capital itself, whereas the credit method focuses upon the tax.[76]

Lifeblood doctrine favors imprescriptibility of taxes

Taxes are imprescriptible as they are the lifeblood of the government. However, tax statutes may provide for statute of limitations, *viz:*

a) *National Internal Revenue Code* – The statute of limitations for assessment of tax if a return is filed is within three (3) years from the last day prescribed by law for the filing of the return or if filed after the last day, within three (3) years from date of actual filing. If no return is filed or the return filed is false or fraudulent, the period to assess is within 10 years from discovery of the omission, fraud, or falsity.

   Any internal revenue tax which has been assessed within the period of limitation as prescribed in paragraph (a) of Section 222 of the NIRC may be collected by distraint or levy or by a proceeding in court within five (5) years following the assessment of the tax.

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[75] *Id.* at 6.
[76] *Id.* at 70-72.

However, the prescriptive period of assessment does not apply to improperly accumulated earnings tax. A tax imposed upon unreasonable accumulation of surplus is in the nature of a penalty. It would not be proper for the law to compel a corporation to report improper accumulation of surplus.[77]

b) *Tariff and Customs Code* – It does not express any general statute of limitations; it provides, however, that "when articles have been entered and passed free of duty of final adjustments of duties made, with subsequent delivery, such entry and passage free of duty or settlements of duties will, after the expiration of three (3) years from the date of the final payment of duties, in the absence of fraud or protest or compliance audit pursuant to the provisions of this Code, be final and conclusive upon all the parties, unless the liquidation of the import entry was merely tentative."[78]

c) *Local Government Code* – Local taxes, fees, or charges shall be assessed within five (5) years from the date they became due. In case of fraud or intent to evade the payment of taxes, fees or charges the same may be assessed within 10 years from discovery of the fraud or intent to evade payment. They shall also be collected either by administrative or judicial action within five (5) years from date of assessment.[79]

   (i) Local taxes, fees, or charges shall be assessed within five (5) years from the date they became due. No action for the collection of such taxes, fees, or charges, whether administrative or judicial, shall be instituted after the expiration of such period.[80]
   (ii) The basic real property tax and any other tax levied under Real Property Taxation shall be collected within five (5) years from the date they become due. No action for the collection of the tax, whether administrative or judicial, shall be instituted after the expiration of such period. In case of fraud or intent to evade payment of the tax, such action may be instituted for the collection of the same within 10 years from the discovery of such fraud or intent to evade payment.[81]

Taxpayer's suit differentiated from citizen's suit

In taxpayer's suit, the plaintiff is affected by the expenditure of public funds, while in citizen's suit, he is but the instrument of the public concern.[82]

Concept of locus standi vis-à-vis doctrine of transcendental importance

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[77] *Helvering v. National Grocery Co.*, 304 US 282.
[78] An Act Modernizing the Customs and Tariff Administration, Republic Act 10863, sec. 430 (2016).
[79] LOCAL GOVT. CODE, sec. 194.
[80] *Ibid.*
[81] LOCAL GOVT. CODE, sec. 270.
[82] *Beauchamp v. Silk*, 275 Ky at 120 SW2d 765 (1938).

Locus standi is defined as "a right of appearance in a court of justice on a given question." In public suits, the plaintiff who asserts a "public right in assailing an illegal official action does so as a representative of the general public. He may be a person who is affected no differently from any other person. He could be suing as a stranger, or in the category of a citizen, or taxpayer. In either case, he has to adequately show that he is entitled to seek judicial protection. In other words, he has to make out a sufficient interest in the vindication of the public order and the securing of relief as a citizen or taxpayer."

The "direct injury" test in our jurisdiction holds that the person who impugns the validity of a statute must have a personal and substantial interest in the case such that he has sustained, or will sustain direct injury as a result.

However, being a procedural technicality, the requirement of locus standi may be waived by the Court in the exercise of its discretion. Even where the petitioners have failed to show direct injury, the Court allowed them to sue under the principle of "transcendental importance." Decisional rules on the principle are as follows:

(1) *Chavez v. Public Estates Authority,* where the Court ruled that **the enforcement of the constitutional right to information and the equitable diffusion of natural resources are matters of transcendental importance which clothe the petitioner with *locus standi;***

(2) *Bagong Alyansang Makabayan v. Zamora,* wherein the Court held that **"given the transcendental importance of the issues involved, the Court may relax the standing requirements and allow the suit to prosper despite the lack of direct injury to the parties seeking judicial review"** of the Visiting Forces Agreement;

(3) *Lim v. Executive Secretary,* while the Court noted that the petitioners may not file suit in their capacity as taxpayers absent a showing that "Balikatan 02-01" involves the exercise of Congress' taxing or spending powers, it reiterated its ruling in *Bagong Alyansang Makabayan v. Zamora,* **that in cases of transcendental importance, the cases must be settled promptly and definitely and standing requirements may be relaxed.[83]**

Let us now delve into the systems of income taxation. The complexity of income tax structure evokes this remark of the renowned genius Albert Einstein - "(The) hardest thing in the world to understand is the income tax."[84]

NET INCOME TAXATION

In this day and age, we hew to the *Net Income Taxation* (NIT).

By its nomenclature, taxes payable by individuals and corporations are based on net income, *i.e.*, allowable deductions are deducted from the gross income to arrive at the tax base. These deductions are perceived as equitable reliefs provided under the NIT.

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[83] *David v. Macapagal-Arroyo*, 489 SCRA 160.
[84] *Murphy v. Internal Revenue Service*, D.C. Cir. No. 05-5139, August 22, 2006, citing MICHAEL JACKMAN, THE MACMILLAN BOOK OF BUSINESS AND ECNOMIC QUOTATIONS, 195 (1984).

Presumably, these reliefs contemplate a net income regime which is just and fair to taxpayers as it considers their ability to pay tax, in keeping with the principle of theoretical justice. Unfortunately, NIT is not without flaw or glitch. Neither does it command a plausible solution to a brisk revenue collection on the part of our government.

In scrutiny, tax mavens opined that this system is prone to abuse and corruption by taxpayers and tax collectors alike. Allowable deductions, intrinsic to NIT, bestow upon revenue collectors a wide margin of discretion conducive to abuse. Some unscrupulous revenue collectors manipulate these deductions in rigging and concealing the taxable income of taxpayers. Indeed, a resort to such sophisticated and artful manipulations of deductions constitutes tax shelters, thereby resulting in the difficulty to capture the taxpayers' true income.

Another grudging setback of this system is its costly and difficult administration. The compliance requirements under the Administrative Provisions of the Tax Code may prove to be complicated and cumbersome for ordinary taxpayers. These are essentially mandatory for the system to work and achieve its envisioned goals.

GROSS INCOME TAXATION

Oppositely, *Gross Income Taxation* (GIT) proffers divergent rules.

In the main, GIT allows no deductions. Likewise, the taxpayer's income is subject to lower rates.

This regime, however, admits of exclusions from gross income: those items of receipt that do not fall within the definition of income as contemplated by law for tax purposes, *i.e.,* damages awarded or recovered from suits, proceeds of life insurance policies, return of premiums, compensation for injuries or sickness, and income exempt under tax treaty. Quite palpably, these items are not subject to tax because they are not in essence considered by law as profit or income.

The minimum corporate income tax (MCIT) imposed upon corporate taxpayers best illustrates tax upon gross income. Under the MCIT, corporate tax liability is simply based upon the gross income, without deduction. MCIT is making headway owing to the favorable results in the collection of corporate taxes. Still and all, most corporate taxpayers frown upon MCIT inasmuch as they can still be held liable to pay corporate income tax even if they incur net loss.

Parenthetically, proponents of GIT favorably commend the adoption and shift to this regime because the computation of income tax is easily approximated given the absence of deductions. Bearing in mind the principle of administrative feasibility, the GIT's method of arriving at its tax base is so simple that ordinary taxpayers need not lean on accountants or seek help from the Bureau to compute their taxes.

Withal, the lower tax rate under this system is foreseen to attract more taxpayers to invest and venture into business that, in effect, would yield to an increase in revenue.

Advocates of the GIT postulate that this system may help curb corruption in revenue collection by way of less complicated tax computation. Without tax deductions, the real income of the taxpayer is easily calculated and the corresponding taxes are duly imposed. By taxing income at gross, without any deductions, the computation of one's tax liability becomes plain, clear and definite.

Although this regime of taxation is conceivably laden with the foregoing advantages, GIT draws criticism from tax savants who are opposed to this system rebuffing it as perilous if applied in our jurisdiction. They assert that it is a system that has neither been explored nor tested and shifting to it may prove to be risky as it is unlikely to raise new revenues.

MODIFIED **GROSS INCOME TAXATION**

The pursuit towards a simpler method of tax regime gains light with the current and burning proposal to shift towards the Gross Income Taxation. The NIT has been widely criticized as an avenue for corruption ultimately leading to the downfall of revenue collection. Upon the other hand, the absence of legitimate deductions under the GIT precludes a thriving environment for business ventures.

With this reality, a modification of the GIT is in order. This tax regime would ineludibly adhere to the principles of a sound tax system: fiscal adequacy, administrative feasibility, and theoretical justice.

Under the *Modified* Gross Income Taxation, legitimate business expenses must be allowed as deductions from the gross income. Therewithal, the resulting income would then be covered by a lower tax rate. This method of computing tax liability does away with the complicated and burdensome Compliance Requirements under the NIT. Moreover, the lower tax rates and the allowance of legitimate business expenses would inveigle more investors and create a lucrative business climate under a less onerous tax system.

Apropos to the objective of boosting revenue, it is noteworthy to revisit *Section 57 of the National Internal Revenue Code* on final withholding tax. Appropriately, *Section 57* must include more items subject to final tax, and that tax rates on these items must perforce be increased. Given that a final withholding tax is a full settlement of one's tax liability, the collection thereof engenders immediate revenues to the government.

TRAIN (Tax Reform for Acceleration and Inclusion –R.A. 10963) LAW AMENDMENTS

Discourse on TRAIN LAW strikes the right chord with the brewing protestation against the amendments to the National Internal Revenue Code.

In fealty to the declared State policy which is to ensure that the government is able to provide for the needs of those under its jurisdiction and care, the taxes that may be collected under the TRAIN LAW shall provide basic services such as education, health, infrastructure, and social protection for the people. Specifically, these taxes are used to pay for our doctors, teachers, soldiers, and other government personnel and officials. They are likewise used to build schools, hospitals, road, and various infrastructure for connectivity,

and industrial and agricultural facilities. Indeed, prioritizing these investments would give the people an opportunity to contribute in economic progress and nation-building.

A percipient examination of the amendments divulges that the three basic principles of a sound tax system provide the underlying touchstones therefor.

A.
New rules consistent with the principle of fiscal adequacy

1. Increase in Income Tax – 20% to 35% effective January 1, 2018 until December 31, 2022; 15% to 35% effective January 1, 2023 and onwards.

2. Interest income from deposit under the foreign currency deposit system received by resident individual – 15% Final income tax.

3. Sales of shares of stock not listed and traded – 15% Final income tax. If traded in the stock exchange – 6/10 of 1% of gross selling price (percentage tax).

4. Interest income derived by a domestic corporation from a depository bank under the expanded foreign currency deposit system – 15% Final income tax.

5. Fringe benefits – 35% Final tax.

B.
New rules in accord with the principle of administrative feasibility

1. Rates of tax on income of purely self-employed individuals and/ or professionals whose gross sales or gross receipts and other non-operating income do not exceed the value-added tax (VAT) threshold of ₱3 million – self-employed individuals and/or professionals shall have the **option** to avail of an **eight percent (8%**) tax on gross sales or gross receipts and other non-operating income in excess of two hundred fifty thousand pesos (₱250,000) in lieu of the graduated income tax rates (20%-35%) and the percentage tax under Section 116 of the Code (3% of the gross sales or receipts)

   Rates of tax for mixed income earners. Taxpayers earning both compensation income and income from business or practice of procession shall be subject to the following taxes:

   (1) **All Income from Compensation** – 20%-35% tax rates

   (2) **All Income from Business or Practice of Profession** –
   "(a) If Total Gross Sales and/or Gross Receipts and Other Non-operating Income Do Not Exceed the VAT Threshold of ₱3 Million— 20%-35% on taxable income, or **eight percent (8%)** income tax based on gross sales or gross receipts and other non-operating income in lieu

of the graduated income tax rates (20%-35%) and the percentage tax under Section 116 of the Code (3% of the gross sales or receipts)

2. Optional Standard Deduction (OSD)

   A general professional partnership and the partners comprising such partnership may avail of the optional standard deduction only once, either by the general professional partnership or the partners comprising the partnership. [Section 11, RA 10963]

3. Substituted filing of income tax returns by employees receiving purely compensation income. – Individual taxpayers receiving **purely** compensation income, regardless of amount, from only **one** employer in the Philippines for the calendar year, the income tax of which has been **withheld** correctly by the said employer (tax due equals tax withheld) shall not be required to file an annual income tax return. The certificate of withholding filed by the respective employers, duly stamped "received" by the BIR, shall be tantamount to the substituted filing of income tax returns by said employees." [Section 14, RA 10963]

4. Installment of payment. — When a tax due is in excess of Two Thousand Pesos (P2,000), the taxpayer other than a corporation, may elect to pay the tax in two (2) equal installments, in which case, the first installment shall be paid at the time the return is filed and the second installment **on or before October 15** following the close of the calendar year, if any installment is not paid on or before the date fixed for its payment, the whole amount of the tax unpaid becomes due and payable together with the deliquency penalties." [Section 16, RA 10963]

5. Estate Tax Returns

   a) Time for filing – within one (1) year from the decedent's death
   b) Payment by installment – within two (2) years from the statutory date for its payment without civil penalty and interest
   c) Withdrawal from the decedent's bank deposit account – subject to a final withholding of six percent (6%)

6. Sale, exchange, or other transfer of property made in the course of business (bona fide, at arm's length, and free from donative intent) – considered as made for an adequate and full consideration in money or money's worth; hence, no taxable donation.

C.
New rules in congruence with the principle of theoretical justice or equality

1. Net income of ₱250,000 is exempt.

2. 13th Month Pay and Other Benefits. – Gross benefits received by officials and employees of public and private entities: *Provided, however,* That the total exclusion shall not exceed **Ninety Thousand Pesos (P90,000)** which shall cover:

   "(i) Benefits (Annual Christmas bonus) received by officials and employees of the national and local government pursuant to Republic Act No. 6686;
   "(ii) Benefits (13th Month Pay) received by employees pursuant to Presidential Decree No. 851, as amended by Memorandum Order No. 28, dated August 13, 1986; and
   "(iii) Benefits received by officials and employees not covered by Presidential Decree No. 851, as amended by Memorandum Order No. 28, dated August 13, 1986; and
   "(iv) Other benefits such as productivity incentives and Christmas bonus." [Section 9, RA 10963]

3. Estate tax rate: Six percent (6%) based on the value of net estate.

4. Allowable deductions from gross estate:
   Standard Deduction
   a) Resident Decedent – Five Million Pesos (P5,000,000)
   b) Non-Resident Decedent – Five Hundred Thousand Pesos (P500,000)

5. Family house – Ten Million Pesos (P10,000,000)

6. Exempt donation – P250,000

7. Donor's tax rate – 6% of the total net gifts in excess of P250,000

8. VAT exempt transactions
   a) Importation of professional instruments and implements . . . personal and household effects belonging to persons coming to settle in the Philippines or Filipinos or their families and descendants who are not residents or citizens of other countries, x x x for their own use and not for barter or sale accompanying such persons, or arriving within a reasonable time.
   b) Sale of residential lot – **₱1,500,000**
   c) Sale of residential house and lot – **₱2,500,000**
   d) Lease of a residential unit with a monthly rental not exceeding **₱15,000**
   e) Transport of passengers by international carriers
   f) Sale or lease of goods and services to senior citizens and persons with disability (PWD)
   g) Transfer of property pursuant to a plan of merger or consolidation
   h) Association dues, membership fees, and other assessments and charges collected by homeowners associations and condominium corporations
   i) Sale of gold to the Bangko Sentral ng Pilipinas (BSP)
   j) Sale of drugs and medicines prescribed for diabetes, high cholesterol, and hypertension beginning January 1, 2019

k) Sale or lease of goods or properties or the performance of services – the gross annual sales and/or receipts do not exceed the amount of **₱3Million**

IV. TAX REMEDIES

A. Fundamental Rules[85]

1. **Government's remedies**

a) In cases where the law is silent on any specific administrative and/or judicial remedy in its enforcement, the appropriate government agency may nonetheless avail itself of both remedies. Its administrative recourse, however, will be deemed merely for convenience or expediency. Judicial recourse can always be had as courts are always open.

b) Where the law is explicit on administrative and/or judicial remedies, recourse to either or both remedies is proper but always conformably with the legal parameters set forth in the tax laws.

2. **Taxpayer's remedies**

a) If the law imposing a particular tax is explicit on the taxpayer's specific judicial remedies, then these remedies become exclusive in nature. Where administrative remedies are additionally provided for, the basic rule and sub-rules on exhaustion of such remedies should be observed before one can securely take judicial action. However, it was held that this rule on exhaustion of administrative remedies is inapplicabale to cases where the question involved is essentially judicial, the act is patently illegal or performed without jurisdiction, or the respondent official acted in utter disregard of due process.[86]

b) In the absence of express administrative remedies, a recourse to such remedies becomes purely one of convenience or practicability and the rules on administrative due process or exhaustion of administrative remedies, as the case may be, would be inapplicable.

Where the law imposing the tax is silent on judicial relief, even where administrative recourse is given, the taxpayer may nonetheless avail himself of judicial action. In this regard, the laws of general application, more particularly the settled rules of procedure, would be applicable. As a rule of thumb, the judicial remedy would ordinarily take the form of either declaratory relief[87] or the payment of the tax and a claim thereafter for its refund within the statute of limitations. And in cases where a judicial review of an administrative action is contemplated by the

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[85] JOSE VITUG, COMPENDIUM OF TAX LAW AND JURISPRUDENCE, 39-42 (2nd ed. 1984)
[86] *Municipality of Trinidad v. CFI*, 123 SCRA 81.
[87] REVISED RULES OF CIVIL PROCEDURE, rule 63.

taxpayer, then the special civil actions under the Revised Rules of Court might be considered.

B. Special/Selected Rules

A. Remedies of the Government

Remedies have been allowed, in every age and country, for the collection by the government of its revenues. They have been considered a matter of state necessity. The existence of the government depending on the regular collection of revenue must, as an object of primary importance, be insured. With this objective in mind, promptness in collection is always desirable, if not imperative.

Assessment and Collection

Assessment precedes collection except when the unpaid tax is a tax due per return as in the case of a self-assessed income tax under the pay-as-you-file system in which case collection may be instituted without need of assessment pursuant to Section 56 of the NIRC.

In cases were assessment is necessary, the primordial consideration is its final and unappealable nature. Collectability of the tax liability attaches only when the assessment becomes final and unappealable.

An assessment contains not only a computation of tax liabilities but also a demand for payment within a prescribed period. It also signals the time when penalties and interests begin to accrue against the taxpayer. To enable the taxpayer to determine his remedies thereon, due process requires that it must be served on and received by taxpayer.[88]

An assessment is deemed made only when the collector of internal revenue releases, mails or sends such notice to the taxpayer. A revenue officer's Affidavit merely contained a computation of respondents' tax liability. It did not state a demand or a period for payment. Worse, it was addressed to the justice secretary, not to the taxpayers.[89]

Best Evidence Obtainable Rule

Section 6(B) of the National Internal Revenue Code (NIRC), envisioned the ***Best Evidence Obtainable Rule***, which edifies—

> When a report required by law as a basis for the assessment of any national internal revenue tax shall not be forthcoming within the time fixed by laws or rules and regulations or when there is reason to believe that any such report is false, incomplete or erroneous, the Commissioner shall assess the proper tax on the *best evidence obtainable*.

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[88] *CIR v. Pascor*, 309 SCRA 402.
[89] *Ibid.*

> In case a person fails to file a required return or other document at the time prescribed by law, or willfully or otherwise files a false or fraudulent return or other document, the Commissioner shall make or amend the return from his own knowledge and from such information as he can obtain through testimony or otherwise, which shall be *prima facie* correct and sufficient for all legal purposes.

This is fleshed out in **Revenue Memorandum Circular No. 23-2000** setting forth the procedure in the assessment of deficiency internal revenue taxes based on the *Best Evidence Obtainable Rule.*

The scope of evidence falling under the *Best Evidence Obtainable Rule* is broad and extensive. It includes the corporate and accounting records of the taxpayer who is the subject of the assessment process, the accounting records of *other* taxpayers engaged in the same line of business, including their gross profit and net profit sales. Such evidence also includes data, record, paper, document and or any evidence gathered by internal revenue officers from other taxpayers who had personal transactions or from whom the subject taxpayer received any income; and record, data, document, and information secured from government offices or agencies, such as the SEC, the Central Bank of the Philippines, the Bureau of Customs, and the Tariff and Customs Commission.[90]

The statutory authority given to the Commissioner allows him access to all relevant or material records and data in unearthing taxpayer's accurate and true income. It places no limit or condition on the type or form of the medium by which the record subject to the order of the BIR is kept. The purpose of the law is to enable the BIR to get at the taxpayer's records in whatever form they may be kept. Such records include computer tapes of the said records prepared by the taxpayer in the course of business. In this era of developing information-storage technology, there is no valid reason to immunize companies with computer-based, record-keeping capabilities from BIR scrutiny. *The standard is not the form of the record but where it might shed light on the accuracy of the taxpayer's return.*[91]

Therewithal, hearsay evidence may be considered in making a preliminary or final tax assessment against a taxpayer. The BIR may accept hearsay evidence, which in ordinary circumstances may not be admitted in a regular proceeding in the regular courts. It can accept documents which cannot be admitted in a judicial proceeding where the Rules of Court are strictly observed.[92]

In American setting, the *Best Evidence Obtainable Rule* finds its mark in ***Harbin v. Commissioner.***[93] Harbin filed his tax return for 1957 showing a small amount of net income amounting to $42.91 from the operation of a restaurant, poolroom and a bar, and a wagering income in the aggregate sum of $14,700. No explanation, details, or schedules were shown on the return as to the method used in arriving at the wagering income. Harbin did not maintain books and records from which his income from gambling could be ascertained.

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[90] *Commissioner of Internal Revenue v. Hantex Trading Co., Inc.*, 454 SCRA 301 at 325-326 (2005).
[91] *Ibid.*
[92] *Id.* at 327.
[93] 40 TC 373 (1963).

The Commissioner endeavored to assess Harbin's gross income from wagering by investigating his bank records, and located only one small checking account. The Credit Bureau was examined for his credit charges, but none were found. State records were looked into for possible property owned or listed, yet only one automobile was discovered.

With no other basis from which it may establish Harbin's income from gambling, the Commissioner relied on his net income in the years 1952 and 1953. The Commissioner then determined the average percentage of net income, after deduction of expenses but before deduction of wagering excise taxes, and applied this percentage to determine Harbin's net wagering income in 1957.

The US Tax Court upheld the method applied by the Commissioner enunciating that where a taxpayer, as Harbin, maintains no records or books, the Commissioner has no other course than to reconstruct income in the most reasonable way possible. Approximation in the calculation of net income is justified. To hold otherwise would be tantamount to holding that skillful concealment is an invincible barrier to proof.[94]

So too, in ***Campbell, Jr. v. Guetersloh***,[95] the United States Court of Appeals (5th Circuit) declared that it is the duty of the Commissioner to investigate any circumstance which led him to believe that the taxpayer had taxable income larger than reported. Necessarily, this inquiry would have to be outside of the books because they supported the return as filed. He may take the sworn testimony of the taxpayer; he may take the testimony of third parties; he may examine and subpoena, if necessary, traders' and brokers' accounts and books and the taxpayer's book accounts. The Commissioner is not bound to follow any set of patterns. The existence of unreported income may be shown by any practicable proof that is available in the circumstances of the particular situation.

Still and all, the extent of evidence that may be considered under the *Best Evidence Obtainable Rule* admits of limitations. This is aptly demonstrated in the doctrinal case of ***Commissioner of Internal Revenue v. Hantex Trading Co., Inc***.[96] decided in Our jurisdiction.

Hantex Trading, a corporation engaged in the importation of synthetic resin, is required by law to file an Import Entry and Internal Revenue Declaration (Consumption Entry) with the Bureau of Customs. The Counter-Intelligence Division of the Economic Intelligence and Investigation Bureau received confidential information that Hantex Trading understated its importations as shown by photocopies of its Consumption Entries. The Commissioner subsequently assessed Hantex Trading of tax deficiency predicated on the machine copies of the aforesaid documents.

The Supreme Court, however, drew the line against mere photocopies of Consumption Entries as the only basis for assessment of tax deficiency. The original copies thereof were of prime importance to the BIR. This is so because such entries are under oath and are presumed to be true and correct under penalty of falsification or perjury. Admissions

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[94] *Ibid.*
[95] 287 F. 2d 878 (1961).
[96] 454 SCRA 301 (31 March 2005).

in the said entries of the importer's documents are admissions against interest and presumptively correct.[97]

In epitome, the spectrum of evidence that may be considered *Best Evidence Obtainable* within the periphery of our Tax Code may be comprehensive, but it is not without parameters. The evidence which may be regarded by the Commissioner in computing net income must be relevant, trustworthy and necessary in assessing tax liabilities. Just as every taxpayer is bound to declare his true income, the government must likewise collect taxes reasonably and within the prism of prescribed procedure. We have to strike a balance. In a sense, **as the government should never be over-reaching or tyrannical, neither should a taxpayer be permitted to escape payment by the concealment of material facts**.[98]

The Commissioner's Power to Compromise
May Conveniently Collect Taxes
Needed For Government Expenditures

The Commissioner may compromise any internal revenue tax when – 1) A reasonable doubt as to the validity of the claim against the taxpayer exists; or 2) The financial position of the taxpayer demonstrates a clear inability to pay the assessed tax.[99]

The compromise settlement is subject to the following minimum amounts:

1) For cases of financial incapacity, a minimum compromise rate of ten percent (10%) of the basic assessed tax;

2) For other cases, a minimum compromise rate equivalent to forty percent (40%) of the basic tax assessed.

Where the basic tax involved exceeds P1,000,000 or the settlement offered is less than the prescribed minimum rates, the compromise shall be subject to the approval of the Evaluation Board composed of the Commissioner and the four (4) Deputy Commissioners.[100]

The following cases cannot be compromised:

1. Withholding tax cases, unless the applicant-taxpayer invokes provisions of law that cast doubt on the taxpayer's obligation to withhold;
2. Criminal tax fraud cases confirmed as such by the Commissioner of Internal Revenue or his duly authorized representative;
3. Criminal violation already filed in court;
4. Delinquent accounts with duly approved schedule of installment payments;
5. Cases were final reports of reinvestigation or reconsideration have been issued resulting to reduction in the original assessment and the taxpayer is agreeable to such decision by signing the required agreement form for the purpose. On the other hand, other protested cases shall be handled by the Regional

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[97] *Commissioner of Internal Revenue v. Hantex Trading Co., Inc.,* 454 SCRA 301 at 329 (2005).
[98] *Harbin v. Commissioner,* 40 TC 373 (20 May 1963).
[99] TAX CODE, R.A. 8424 as amended, sec. 204.
[100] *Ibid.*

Evaluation Board (REB) or the National Evaluation Board (NEB) on a case to case basis;

6. Cases which become final and executory after final judgment of a court, where compromise is requested on the ground of doubtful validity of the assessment; and
7. Estate tax cases where compromise is requested on the ground of financial incapacity of the taxpayer.[101]

No Injunction to Restrain Tax Collection

An injunction is not available to restrain collection of tax. No court shall have the authority to grant an injunction to restrain the collection of any national internal revenue tax, fee, or charge imposed by the NIRC.[102]

Such prohibition to issue injunction against collection of tax has its provenance in this ratiocination – it is a wise and reasonable precaution for the security of the government. No government could exist that permitted its collection to be delayed by every litigious man or very embarrassed man, to whom delay was more important than payment of taxes.[103]

This general rule admits one exception, *i.e.,* when the decision of the Commissioner is pending appeal before the Court of Tax Appeals, the said court may enjoin the collection of taxes if such collection will jeopardize the interest of the government and/or the taxpayer. In such case, the CTA at any stage of the proceeding may suspend the collection of the tax and require the taxpayer either to deposit the amount claimed or to file a surety bond for not more than double the amount with the Court. The posting of a bond is not an absolute requirement, its imposition lies within the sound discretion of the Tax Court.

In the recent case of *Pacquiao v. CTA*[104], the Supreme Court echoed the recognized exceptions to the filing of the required bond, *viz:*

1) The taxpayer need not file a bond if the method employed by the collector in the collection of the tax is not sanctioned by law.[105]
2) The order of the Collector of Internal Revenue to effect collection of the alleged income taxes through summary administrative proceeding had been issued well beyond the three-year period of collection.[106]

The purpose of the rule is not only to prevent jeopardizing the interest of the taxpayer, but more importantly, to prevent the absurd situation wherein the court would declare that the collection by the summary methods of distraint and levy was violative of law, and then, in the same breath, require the taxpayer to deposit or file a bond as a prerequisite for the issuance of a writ of injunction.

B. Taxpayer's Remedies

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[101] Revenue Regulations No. 30-2002.
[102] TAX CODE as amended, Sec. 218.
[103] *State of Tennessee v. Sneed*, 96 U.S. 69 (1877).
[104] 789 SCRA 19.
[105] *Collector v. Avelino*, 100 SCRA 327 (1956).
[106] *Collector v. Zulueta*, 100 Phil 872 (1957).

There are two remedies accorded to the taxpayer under the Tax Code: 1) administrative protest against the assessment and is filed before payment; and 2) claim for refund filed with the Commissioner of Internal Revenue after payment.

Protest against Assessment

The procedural steps in protesting an assessment may be outlined as follows:

1. Issuance of a pre-assessment notice by the BIR informing the taxpayer that taxes ought to be assessed against him, except under the circumstances enumerated in paragraphs [a] to [e] of Section 228.[107] The taxpayer is given fifteen (15) days from receipt of the pre-assessment notice within which to file reply thereto.
2. If the taxpayer fails to respond, or despite the response, the BIR still opines that the taxpayer ought to be assessed for deficiency taxes, the BIR will issue the assessment notice.
3. The taxpayer may file an administrative protest against the assessment within thirty (30) days from receipt of the assessment. Within sixty (60) days from filing the protest, all the relevant documents should be submitted; otherwise, the assessment shall become final and unappealable.
4. From the receipt of the adverse decision of the Commissioner, or from the lapse of the one hundred eighty (180) days from the submission of the documents, the taxpayer may appeal to the Court of Tax Appeals within thirty (30) days; otherwise, the decision or the assessment shall become final.[108]

Claim for Refund

A taxpayer claiming for refund has the burden of proving the concurrence of the following requisites:

a. There must be a written claim for refund filed by the taxpayer with the Commissioner;
b. The claim for refund must be a categorical demand for reimbursement;
c. The claim for refund must be filed within two (2) years from date of payment of the tax or penalty regardless of any supervening cause.

Refund or tax credit involving unused creditable input tax under R.A. 10963

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[107] (a) When the finding for any deficiency tax is the result of mathematical error in the computation of the tax as appearing on the face of the return;
(b) When a discrepancy has been determined between the tax withheld and the amount actually remitted by the withholding agent; or
(c) When a taxpayer who opted to claim a refund or tax credit of excess creditable withholding tax for a taxable period was determined to have carried over and automatically applied the same amount claimed against the estimated tax liabilities for the taxable quarter or quarters of the succeeding taxable year; or
(d) When the excise tax due on excisable articles has not been paid; or
(e) When an article locally purchased or imported by an exempt person, such as, but not limited to, vehicles, capital equipment, machineries and spare parts, has been sold, traded or transferred to non-exempt persons.

[108] Revenue Regulations 18-2013.

(Train Law)

The Commissioner of Internal Revenue shall grant a refund for creditable input taxes within ninety (90) days from the date of submission of the official receipts or invoices and other documents in support of the application therefor.

R.A. No. 10963 amended Section 112 in this wise:

"Sec. 112. *Refunds or Tax Credits of Input Tax.* –

"(A) x x x

"(B) x x x

"(C) *Period within which Refund of Input Taxes shall be made*. - In proper cases, the Commissioner shall grant a refund for creditable input taxes within ninety (90) days from the date of submission of the official receipts or invoices and other documents in support of the application filed in accordance with Subsections (A) and (B) hereof: *Provided*, That should the Commissioner find that the grant of refund is not proper, the Commissioner must state in writing the legal and factual basis for the denial.

"In case of full or partial denial of the claim for tax refund, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim, appeal the decision with the Court of Tax Appeals: *Provided, however*, That failure on the part of any official, agent, or employee of the BIR to act on the application within the ninety (90)-day period shall be punishable under Section 269 of this Code.

The foregoing proviso enunciates the following new rules:

1. The prescriptive period within which the CIR shall grant a refund for creditable input taxes is ninety (90) days from the submission of the official receipts or invoices and other documents in support of the application therefor;
2. In case the CIR finds the refund improper, he must state in writing the legal and factual basis for the denial;
3. The taxpayer aggrieved may within thirty (30) days from receipt of the CIR decision denying the claim, appeal the decision with the Court of Tax Appeals;
4. Any official, agent, or employee of the BIR who fails to act on the application within the ninety (90)-day period shall be punishable under Section 269 which states:

Sec. 269. *Violations Committed by Government Enforcement Officers.- x x x*

"(j) Deliberate failure to act on the application for refund within the prescribed period provided under Section 112 of this Act.

"Provided, That the provisions of the foregoing paragraph notwithstanding, any internal revenue officer for which a *prima facie* case of grave misconduct has been established shall, after due notice and hearing of the administrative case and subject to Civil Service Laws, be dismissed from the revenue service: *Provided, further,* That the term 'grave misconduct', as defined in the Civil Service Law, shall include the issuance of fake letters of authority and receipts, forgery of signature, usurpation of authority and habitual issuance of unreasonable assessments.

Rivetingly, the phrase **"or failure on the part of the Commissioner to act on the application within the period prescribed above"** has been deleted. The amended provision merely provides that failure on the part of any official, agent, or employee of the BIR to act on the application within the ninety (90)-day period shall be punishable under Section 269 of the Code.

CTA Proceedings Shall Not Be Governed Strictly by the Technical Rules of Evidence

This finds application in the following jurisprudential rulings:

1. The Affidavit of non-forum shopping was signed by petitioner's counsel. Upon receipt of the resolution of the CA, however, which dismissed its petition for non-compliance with the rules on affidavit of non-forum shopping, petitioner submitted, together with its motion for reconsideration, an affidavit signed by petitioner's president in compliance with the said rule. We deem this to be sufficient especially in view of the merits of the case, which may be considered as a special circumstance or a compelling reason that would justify tempering the hard consequence of the procedural requirement on non-forum shopping.

The fundamental principle that technical rules of procedure are not ends in themselves but are primarily designed to aid in the administration of justice. And in cases before tax courts, Rules of Court applies only by analogy or in a suppletory character and whenever practicable and convenient shall be liberally construed in order to promote its objective of securing a just, speedy and inexpensive disposition of every action and proceeding. The quest for orderly presentation of issues is not an absolute. It should not bar the courts from considering undisputed facts to arrive at a just determination of a controversy. This is because, after all, the paramount consideration remains the ascertainment of truth. Section 8 of R.A. No. 1125 creating the CTA also expressly provides that it shall not be governed strictly by the technical rules of evidence.

Since it is not disputed that petitioner is entitled to tax exemption, it should not be precluded from presenting evidence to substantiate the amount of refund it is claiming on mere technicality especially in this case, where the failure to present invoices at the first instance was adequately explained by petitioner.[109]

2. Strict procedural rules generally frown upon the submission of the Return after the trial. The law creating the Court of Tax Appeals, however, specifically provides that proceedings before it "shall not be governed strictly by the technical rules of evidence." The paramount consideration remains the ascertainment of truth. Verily, the quest for orderly presentation of issues is not an absolute. It should not bar courts from considering undisputed facts to arrive at a just determination of a controversy. In the present case, the Return attached to the Motion for Reconsideration clearly showed that petitioner suffered a net loss in 1990. Contrary to the holding of the CA and the CTA, petitioner could not have applied the amount as a tax credit. In failing to consider the said Return, as well as the other documentary evidence presented during the trial, the appellate court committed reversible error.

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[109] *Philippine Phosphate Fertilizer Corporation v. CIR*, 461 SCRA 369 (2005).

It should be stressed that the rationale of the rules of procedure is to secure a just determination of every action. They are tools designed to facilitate the attainment of justice. But there can be no just determination of the present action if we ignore, on grounds of strict technicality, the Return submitted before the CTA. To repeat, the undisputed fact is that petitioner suffered a net loss in 1990; accordingly, it incurred no tax liability to which the tax credit could be applied. Consequently, there is no reason for the BIR to withhold the tax refund which rightfully belongs to the petitioner.

Respondents argue that tax refunds are in the nature of tax exemptions and are to be construed *strictissimi juris* against the claimant. Under the facts of this case, petitioner has established its claim. Petitioner may have failed to strictly comply with the rules of procedure; it may have even been negligent. These circumstances, however, should not compel the Court to disregard this cold, undisputed fact: that petitioner suffered a net loss in 1990, and that it could not have applied the amount claimed as tax credits. Substantial justice, equity and fair play are on the side of petitioner. Technicalities and legalisms, however exalted, should not be misused by the government to keep money not belonging to it and thereby enrich itself at the expense of its law abiding citizens. If the State expects its taxpayers to observe fairness and honesty in paying their taxes, so must it apply the same standard against itself in refunding excess payments of such taxes. Indeed, the State must lead by its own example of honor, dignity and uprightness.[110]

3. The Court of Tax Appeals erred in denying petitioner's supplemental motion for reconsideration alleging and bringing to said court's attention the existence of the deficiency income and business tax assessment against Citytrust. The fact of such deficiency assessment is intimately related to and inextricably intertwined with the right of respondent bank to claim for a tax refund for the same year. To award such refund despite the existence of that deficiency assessment is an absurdity and a polarity in conceptual effects. Herein private respondent cannot be entitled to refund and at the same time be liable for a tax deficiency assessment for the same year.

The grant of a refund is founded on the assumption that the tax return is valid, that is, the facts stated therein are true and correct. The deficiency assessment, although not yet final, created a doubt as to and constitutes a challenge against the truth and accuracy of the facts stated in said return which, by itself and without unquestionable evidence, cannot be the basis for the grant of the refund.

Moreover, to grant the refund without determination of the proper assessment and the tax due would inevitably result in multiplicity of proceedings or suits. If the deficiency assessment should subsequently be upheld, the Government will be forced to institute anew a proceeding for the recovery of erroneously refunded taxes which recourse must be filed within the prescriptive period of ten years after discovery of the falsity, fraud or omission in the false or fraudulent return involved. This would necessarily require and entail additional efforts and expenses on the part of the Government, impose a burden on and a drain of government funds, and impede or delay the collection of much-needed revenue for governmental operations.[111]

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[110] *BPI-Family Savings Bank, Inc. v. Court of Appeals*, 330 SCRA 507 (2000).
[111] *CIR v. CTA*, 234 SCRA 348 (1994).

Fundamental evidentiary rules must still be observed

The liberality of procedure is not absolute. It should not be construed as a license to disregard certain fundamental evidentiary rules. While the rules of evidence prevailing in the courts of law or equity are not controlling in proceedings before the CTA, the evidence presented before it must at least have a modicum of admissibility for it to be given some probative value.[112]

Upon this doctrinal precept, the Supreme Court enunciated the following jurisprudential teachings:

1. The settled rule is that defenses not pleaded in the answer may not be raised for the first time on appeal. A party cannot, on appeal, change fundamentally the nature of the issue in the case. When a party deliberately adopts a certain theory and the case is decided upon that theory in the court below, he will not be permitted to change the same on appeal, because to permit him to do so would be unfair to the adverse party.[113]

2. The faxed documents did not constitute substantial evidence, or that relevant evidence that a reasonable mind might accept as adequate to support the conclusion that it was in Germany where she performed the income producing service which gave rise to the reported monthly sales in the months of March and May to September 1995. She thus failed to discharge the burden of proving that her income was from sources outside the Philippines and exempt from the application of our income tax law.[114]

3. The assessment notice and the demand letter should have stated the facts and the law on which they were based; otherwise, they were deemed void. The appellate court held that while administrative agencies, like the BIR, were not bound by procedural requirements, they were still required by law and equity to observe substantive due process. The reason behind this requirement, said the CA, was to ensure that taxpayers would be duly apprised of – and could effectively protest – the basis of tax assessments against them. Since the assessment and the demand were void, the proceedings emanating from them were likewise void, and any order emanating from them could never attain finality.[115]

4. The best evidence obtainable may consist of hearsay evidence, such as the testimony of third parties or accounts or other records of other taxpayers similarly circumstanced as the taxpayer subject of the investigation, hence, inadmissible in a regular proceeding in the regular courts. Moreover, the general rule is that administrative agencies such as the BIR are not bound by the technical rules of evidence. It can accept documents which cannot be admitted in a judicial proceeding where the Rules of Court are strictly observed. It can choose to give weight or disregard such evidence, depending on its trustworthiness.

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[112] *See PLDT v. Tiamson*, 474 SCRA 71, at 777 (2005).
[113] *CIR v. Mirant Pagbilao Corporation*, 504 SCRA 484 (2006).
[114] *CIR v. Baier-Nickel*, 500 SCRA 87.
[115] *CIR v. Reyes,* 480 SCRRA 380 (2006).

However, the best evidence obtainable under Section 16[116] of the 1977 NIRC, as amended, does not include mere photocopies of records/documents. The petitioner, in making a preliminary and final tax deficiency assessment against a taxpayer, cannot anchor the said assessment on mere machine copies of records/documents. Mere photocopies of the Consumption Entries have no probative weight if offered as proof of the contents thereof. The reason for this is that such copies are mere scraps of paper and are of no probative value as basis for any deficiency income or business taxes against a taxpayer. Indeed, in *United States v. Davey,* the U.S. Court of Appeals (2nd Circuit) ruled that where the accuracy of a taxpayer's return is being checked, the government is entitled to use the original records rather than be forced to accept purported copies which present the risk of error or tampering.[117]

RECENT JURISPRUDENCE ON CTA JURISDICTION

1. The CTA has jurisdiction over petitions for certiorari

The CTA, by constitutional mandate, is vested with the jurisdiction to issue writs of certiorari.

Reasons:

1. The judicial power of the CTA includes that of determining whether or not there has been grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the RTC in issuing an interlocutory order in cases falling within the exclusive appellate jurisdiction of the tax court.

2. In transferring exclusive jurisdiction over appealed tax cases to the CTA, it can reasonably be assumed that the law intended to transfer also such power as is deemed necessary, if not indispensable, in aid of such appellate jurisdiction.

3. The supervisory power or jurisdiction of the CTA to issue a writ of certiorari in aid of its appellate jurisdiction should co-exist with, and be a complement to, its appellate jurisdiction to review, by appeal, the final orders and decisions of the RTC, in order to have complete supervision over the acts of the latter.[118]

2. The CTA En Banc has no jurisdiction over Petition for Annulment of judgment of its division

The Revised Rules of the CTA provide for no instance of an annulment of judgment. The CTA en banc may not reverse, annul or void a final decision of a division. Instead, what remained as a remedy for the aggrieved party was to file a petition for certiorari under Rule 65, which could have been filed as an original action before the Supreme Court and not before the CTA *En Banc.*[119]

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[116] Now TAX CODE as amended, sec. 6(B).
[117] *CIR v. Hantex Trading, Co., Inc.*, 454 SCRA 301 (2005).
[118] *City of Manila v. Grecia-Cuerdo*, 715 SCRA 182.
[119] *CIR v. Kepco Ilijan Corporation*, 794 SCRA 193.

3. **The Secretary of Justice has jurisdiction over the dispute between PSALM (Power Sector Assets and Liabilities Management Corporation) and NPC and BIR over the imposition of VAT on the sale of the two power plants**

A dispute between PSALM and NPC and BIR, which are both wholly government-owned corporations, and the BIR, a government office, over the imposition of VAT on the sale of the two power plants is vested in the Secretary of Justice. There is no question that original jurisdiction is with the CIR, who issues the preliminary and the final tax assessments. However, if the government entity disputes the tax assessment, the dispute is already between the BIR (represented by the CIR) and another government entity, in this case, the petitioner PSALM. Under Presidential Decree No. 242 (PD 242), all disputes and claims solely between government agencies and offices, including government-owned or controlled corporations, shall be administratively settled or adjudicated by the Secretary of Justice, the Solicitor General, or the Government Corporate Counsel, depending on the issues and government agencies involved.[120]

4. **The Court of Tax Appeals may take cognizance of cases directly challenging the constitutionality or validity of a tax law or regulation or administrative issuance**

The Court of Tax Appeals has undoubted jurisdiction to pass upon the constitutionality or validity of a tax law or regulation when raised by the taxpayer as a defense in disputing or contesting an assessment or claiming a refund. It is only in the lawful exercise of its power to pass upon all the matters brought before it, as sanctioned by Section 7 of Republic Act No. 1125, as amended.

Republic Act No. 9282, a special and later law than Batas Pambansa Blg. 129 provides an exception to the original jurisdiction of the Regional Trial Courts over actions questioning the constitutionality or validity of tax laws or regulations. Except for local tax cases, actions directly challenging the constitutionality or validity of a tax law or regulation or administrative issuance may be filed directly before the Court of Tax Appeals.[121]

5. **The irrevocability rule applies only to the option of carry-over**

In the recent case of *University Physicians Services, Inc. v. CIR,*[122] G.R. No. 205955, 7 March 2018, the Supreme Court, passing upon a novel issue, held that the irrevocability rule is limited only to the option of carry-over such that a taxpayer is still free to change its choice after electing a refund of its excess tax credit. But once it opts to carry over such excess creditable tax, after electing refund or issuance of tax credit certificate, the carry-over option becomes irrevocable. Accordingly, the previous choice of a claim for refund, even if subsequently pursued, may no longer be granted. xxx Sections 76 and 228, paragraph (c) of the NIRC, as amended, unmistakably evince that choice of refund or tax credit certificate is not irrevocable.[123]

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[120] *PSALM v. CIR*, G.R. No. 198146 (August 8, 2017).
[121] *Banco De Oro v. Secretary of Finance*, 800 SCRA 392.
[122] G.R. No. 205955 (March 7, 2018).
[123] *Ibid.*

V. EPILOGUE

It is imperative to reconcile the discernible conflicting interests of the taxing authority and the taxpayers so that the genuine and true objective of taxation, which is the promotion of the general welfare and well-being of the people, may be achieved. In this accord, the guiding norms in establishing and enforcing a tax system must cut the mustard as equitable and reasonable rules.

In the same breath, tax remedies should ensure the collection of taxes and provide ample safeguards against unreasonable and arbitrary investigation, examination and assessment. Needless to say that unflawed and valid demand for payment of taxes dispenses with the filing of protest thereby resulting in the speedy collection of taxes. This will give a flicker of hope to the realization of the government's poignant wish – flow of revenues like springs of living water and rivers that never run dry.

Revenues brought to public coffers are appropriately earmarked for public purposes. In general, these taxes may be used to carry out the legitimate objectives of the government. In particular, these taxes may be utilized to build schools, hospitals, roads, various infrastructure, and to pay for government personnel and officials.

Indeed, the adoption of sound tax principles and clear-cut rules on remedies will propel sustainable and inclusive economic growth, development, prosperity and stability. In the end, taxation is used as an instrument to attain economic progress and stable governance.

With this empirical pronouncement, let us disabuse our minds from the notion that taxation is an arbitrary method of exaction by those in the seat of power.

THE SPANISH ROOTS OF PHILIPPINE LAW

RUBÉN F. BALANE[1]

** Keynote Address delivered at the Third Scientific Congress on the Law of the Philippines and Spain*
held in Málaga, Spain on May 10, 2017

I. THE MAGELLANIC EXPEDITION.

In March 1521, three ships flying the Spanish flag made landfall on a small island in the Philippine Archipelago, on the south-eastern fringe of the great continent of Asia. They had sailed from the port of Sanlúcar de Barrameda one-and-a-half years earlier, on 20 September 1519, having made their way from Seville down the grand Guadalquivir.

Actually, five ships had set out on the journey from Sanlúcar, but two were lost along the way: one to shipwreck, and another to desertion, on the southern tip of the South American continent.

The commander of the expedition was Portuguese by birth, Spanish by naturalization: Fernão de Magalhaes. His commission: to exploit the spice treasures of the Indies and to colonize whatever lands might be discovered in the region of the Moluccas.

Magellan might have colonized the archipelago which he named Islas de San Lázaro but he overplayed his hand and made serious miscalculations. As a result, he ended up a corpse on the shore of one of the archipelago's tiny islands. He died on 27 April 1521, barely a month-and-a-half after he came ashore. Neither his plan of conquest nor the name he had given to the islands outlived him.

Of the five ships that left the harbor of Sanlúcar de Barrameda on that September day of 1519, only one made it back to its port of origin, dropping anchor there on 6 September 1522. The ship Victoria carried 18 of the 265 men who had started on the voyage. She had achieved a historic feat: the circumnavigation of the globe.

But if Magellan's personal dreams perished with him, the dream of a Spanish empire in the Indies did not.

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[1] Professor of Law, University of the Philippines, Ateneo de Manila University, and University of Santo Tomás; Chair, Department of Civil Law, Philippine Judicial Academy.

II. POST-MAGELLANIC EXPEDITIONS

In the immediate wake of Magellan's voyage, expedition after expedition was dispatched by the Spanish Crown to retrace Magellan's path and realize his frustrated dream of empire.

Loaisa (sailing from La Coruña in 1525), Sebastian Cabot (sailing from Seville in 1526), Saavedra (sailing from Mexico in 1527), and Villalobos (sailing from Mexico in 1542), all attempted but failed to establish Spanish sovereignty in the region of the fabled spices.

Of those four, my country remembers the Malagueño Villalobos best, for it was he who gave the archipelago the name by which it has permanently come to be known: Las Islas Filipinas.

Success finally came with the expedition commanded by Miguel López de Legazpi, sailing from Mexico in 1564 and arriving in Cebu, in the Central Philippines, in 1565. By a series of brilliant strategies exhibiting remarkable political *savoir–faire*, Legazpi was able to bring the islands under the sovereignty of the Spanish Crown. Establishing his capital in the thitherto Muslim settlement of Manila (which he named *Insigne y Siempre Leal*) in 1571, Legazpi laid the groundwork for the colonial institutions in the Islands — a *groundwork* so stable that it lasted more than 300 years.

III. LAS ISLAS FILIPINAS: SPANISH OUTPOST OF EMPIRE

From 1565 to 1898, across the broad expanse of two oceans, Spain maintained her sovereignty over the Philippine Islands. Too remote for direct governance, the archipelago was ruled through Spain's American empire – as a *gobernación* of the Viceroyalty of Mexico.

For the greater part of these 333-odd years, the Philippines, like all the other Spanish colonies, was chiefly governed under three main laws: the *Siete Partidas*, the *Nueva Recopilación*, and the *Recopilación de las Leyes de las Indias*. The operation of these laws — taken separately or in relation to one another — was never very clear. The result was, frequently, confusion, inefficiency, corruption, and delay.

The chaotic state of colonial law is picturesquely described by *Sinibaldo de Mas*, Spanish economist and diplomat, who had been dispatched to Manila in the mid-nineteenth century by the central government. In a three-volume report entitled *Informe Sobre El Estado de las Islas Filipinas en 1842,* Sinibaldo de Mas minced no words about the colonial justice system:

> The Leyes de Indias, compiled in 1754, and all the previous decrees and royal orders before that time still rule in Filipinas, in addition to the decrees and edicts of governors-general. Of all this there is nothing, or very little, printed. The advocates generally know the laws in force by tradition and hearsay, but when they need any of the laws they have to look for it in the house of some friend, or if not that, in the secretary's office of the government, whence very frequently, it has disappeared, or in the office of the fiscal, or that of the intendant; because some orders are communicated by [the Ministry of] Grace and Justice, and others by the treasury or by other ministries. He who has no relatives or is new in the country is ignorant of the rules in force, or has not the means of acquiring them. Besides so far as they are not overthrown by the Leyes de Indias, the laws of the Siete Partidas have as much force as do the latest Recopilación [de las Indias], Roman law, royal and old law, and, in fact all the confused mass of the Spanish codes. Consequently, it is a vast sea in which are found abundantly the resources necessary to mix up matters and stultify the course of justice.

IV. JUDICIAL SYSTEM IN SPANISH PHILIPPINES

The supreme judicial body in the colony was the *Royal Audiencia*, established in 1584, headed by the Governor-General.

In 1861, the *Audiencia* was reorganized and divided into two divisions (*Sala de lo Civil* and *Sala de lo Criminal*) with a Chief Justice as its head and eight Associate Justices composing the Court.

In 1893, a further reorganization established two territorial *Audiencias* (Cebu and Vigan) subject to the appellate jurisdiction of the *Audiencia* of Manila.

Below the *Audiencia* were the inferior courts: The Courts of First Instance (established in 1886) and the Justice of the Peace Courts (established in 1885).

It is interesting to note how long this judicial structure lasted. It was not until the 1980's that a general reform of the court system in the Philippines discontinued the use of the terms Court of First Instance and Justice of the Peace Courts.

V. LAST-MINUTE REFORMS

Major reforms did come in the late nineteenth century, with the extension to, and promulgation in, the colony of legislation of far-reaching significance. Among these important laws were:

1. the Spanish Mortgage Law, which systematized the registration of privately-owned land;

2. the Mining Law;

3. the Copyright Law; and

4. the Maura Law of 1893, which introduced broad local government reforms and laid the basis for the local-government system effective in the Philippines to this day.

The most significant of the new laws were the three major codes: the *Código Penal*, in 1887; the Code of Commerce, in 1889, and, of course, the *Código Civil*, also in 1889. These three codes formed much of the basis of Philippine private law and endured long after Spain left the Islands in 1898.

The *Código Penal* was not superseded until the Revised Penal Code of 1932.

Portions of the Code of Commerce remain in force to the present day.

The *Código Civil* was in force until 1950, when it was superseded by the Civil Code of the Philippines, which resembles the Spanish Code so closely some scholars consider it an English version of the *Código Civil*.

The importance and effect of these laws cannot be overemphasized. They would have brought about genuine and far-reaching, perhaps radical, reform in colonial Philippines. But introduced as they were at a time when the forces of revolt and independence had percolated to a boiling point among the populace, they came too late.

The Philippine Revolution broke out in 1896. It gave birth to the First Philippine Republic of 1898 — the first in Asia — with a full-dress civil government and a republican Constitution. It was a short-lived republic, for hardly had the Spanish colonial authorities departed when the United States imposed its rule over the Islands. By 1901, an American civil government was in place in Manila.

VI. THE TWENTIETH CENTURY: CONTINUING INFLUENCE OF SPANISH CIVIL LAW

The Americans set up a structure of civil government in the Philippines, but the influence of Spanish law did not die. On the contrary, it continued to grow and flourish. For one thing, both the Civil Code and the Code of Commerce — being laws of a non-political nature — remained in force. For another, young Filipinos in increasing numbers were enrolling in the law schools and with the passage of the years became the law practitioners, the judges, the law teachers, and the legal scholars of the new American colony.

At the end of the Spanish sovereignty at the turn of the new century, there were only two law schools in the Islands: the *Facultad de Derecho Civil* of the University of Santo Tomás and the Escuela de Derecho. Both schools taught the law courses in Spanish. In 1911, the newly-founded University of the Philippines opened a law school, conducting its courses in English. In quick succession, more law schools were established, all using the English language as medium of instruction.

In the beginning, all the products of the law schools were Spanish-speaking and all of them studied the Spanish Codes still in force in the Philippines. Together with the codal provisions, those law students studied the commentaries of the eminent scholars who had written treatises on the Spanish codes. In the field of civil law, the names of the great Spanish commentators of the age became legends and by-words: Manresa, Sánchez Román, Valverde, Navarro Amandi, Díaz Martínez, Scaevola, Puig Peña, De Buen, and (later) Castán. The Philippine Supreme Court cited and quoted the works of these Spanish *jurisconsults*, sometimes critically, but most often approvingly and even reverentially. Their names became part of the jargon of Philippine law. If these names inspired respect in Spain, in the Philippines they inspired reverence.

In time, as already pointed out, these young Filipino students of law became prominent lawyers and scholars, and a number of them started writing commentaries on civil law and other fields. The students of yesterday had become the authorities and *gurus* of the succeeding decades. Home-grown legal legends sprouted, doing justice to their Spanish counterparts, all of them immersed in the works of the Spanish commentators. In civil law emerged the names of Arellano, Bocobo, JBL Reyes, Tolentino, Padilla, Caguioa, Parás, Jurado, Vitug, Abad Santos, Aquino — everyone of them a titan of civil-law scholarship. They loomed gigantic, larger than life, for they stood on the shoulders of their Spanish mentors. The intellectual tradition from whose waters they drank was formed by the great civilists of the post-Spanish-Civil-Code era. The bonds of Spanish sovereignty may have been severed but the links uniting Philippine law to Spanish law had remained firm, not the least because all these Filipino civilists continued to be proficient in the Spanish language, thereby keeping the linguistic doors open.

VII. TWILIGHT: FROM CASTILIAN TO YANKEE

But gradually — and unnoticed by many — twilight was descending on the landscape. The Spanish language was slowly dying in the Philippines. The American public school system, print media, post-World War II political developments, and (not least) Hollywood and Tin Pan Alley were making English the *lingua franca* of the Philippines. By the 1950's the young men and women of the Philippines could no longer speak the language in which their parents conducted educated conversation. English had displaced Spanish in the Philippines. We were reading, no longer García Lorca and Darío, but Longfellow and Hemingway (and worse, trashy romantic novels in substandard English).

If our fathers recited:

> *Juventud, divino tesoro,*
> *Ya te vas para no volver,*
> *Cuando quiero llorar, no lloro …*
> *Y a veces lloro sin querer …*

We were reciting:

> The curfew tolls the knell of parting day,
> The lowing herd wind slowly o'er the lea,
> The ploughman homeward plods his weary way,
> And leaves the world to darkness and to me

VIII. EFFECT OF THE LANGUAGE SHIFT ON LEGAL STUDIES

The repercussions of the linguistic shift on legal scholarship were cataclysmic. A symptom may be detected in one tell-tale development. Supreme Court Justice JBL Reyes (perhaps the greatest Filipino civilist) once recounted to me that when he was appointed to the Supreme Court in 1954, the deliberations of the Court were exclusively in Spanish. In 1961, however, a new Chief Justice was appointed to succeed Ricardo Parás, who had retired. The new Chief Justice – Cesar Bengzon – an eminent jurist, who later became a judge of the International Court of Justice, began to conduct deliberations in English, because, although fluent in Spanish, he was more comfortable with English.

This linguistic shift was obvious in the younger generation of authors and commentators in Civil Law. This post-World War II generation is almost exclusively English-speaking, familiar with Shakespeare but not quite on speaking terms with Cervantes. As a result of this unfamiliarity with Spanish (and the other languages of the European homeland of the civil law tradition) there is a growing tendency on the

part of these younger commentators to turn to American sources as their authorities, even in the field of civil law. The mismatch is many times painfully obvious, since American private law is not the well-spring of Philippine private law.

Now, there is nothing wrong for Filipino legal scholars to deepen their common-law roots. The Philippine legal system is a blend of the two great legal traditions of the world. Our public law is largely derived from the common-law tradition. Obviously, we have to turn to that legal tradition for a broader and deeper understanding of those lofty principles of justice and liberty enshrined in the Bill of Rights of our Constitution.

By the same token, however, we have to return to our civil law roots to revitalize those fundamental concepts of our private law, to drink once more from the waters springing from the fountainhead of our own private-law tradition.

IX. SIGNIFICANCE OF THIS CONFERENCE

It is in this context that this series of conferences that we started in this beautiful city in 2015 acquires profound significance. By coming together in this manner, we acknowledge the crucial need to re-establish links, to reopen doors, to water the roots of our shared tradition – and for us Filipinos, to reconfirm our own *Hispanidad* as an essential aspect of what it is to be Filipino. The burden is mainly on us Filipinos. But what we started here in Málaga, the seeds we sewed in 2015 and continue to nurture to life today, may be the beginning of something meaningful, and valuable, and lasting; a new adventure, a rediscovered path, to knowledge, scholarship, and brotherhood.

Thank you.

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