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TRACING ITS ROOTS:
A BRIEF HISTORY OF THE UST LAW REVIEW

The UST LAW REVIEW is a student-edited law review published by the UST Faculty of Civil Law (Faculty). It was established in 1950 with Andres Narvasa as its first Editor-in-Chief. At the time, the UST LAW REVIEW included in its quarterly publication lead articles by law professors and members of the judiciary, as well as commentaries, case summaries, and book reviews by members of the Law Review – students of the Faculty of Civil Law. Andres Narvasa would later become the Dean of the Faculty, and from 1991 to 1998, the Chief Justice of the Supreme Court of the Philippines.

Since its foundation, the UST LAW REVIEW has paved the way for enriching legal discourse in the Philippines and has become a vehicle for exploring uncharted regions of law and an arena for deliberating pressing legal issues.

In 2000, the UST LAW REVIEW suffered a temporary setback, and the publication was discontinued. Fate, however, did not leave the publication in oblivion. The UST LAW REVIEW was revived in 2003 through the overwhelming initiative of the late Dean Augusto K. Aligada, Jr., the unconditional support of the former Regent Fr. Javier Gonzalez, the commendable leadership of its Faculty Advisor Rene B. Gorospe, and the enthusiasm of a group of eager law students. Since then, the UST LAW REVIEW has become an annual publication.[1]

In 2004, the UST LAW REVIEW published the second issue of Volume 48 as a tribute to the late Chief Justice Roberto C. Conception Jr., who also served as a Dean of the Faculty.

In 2005, the UST LAW REVIEW published its 50th volume, the Golden Edition. Its Editor-in-Chief, Marian Joanne K. Co-Pua, currently teaches at the Faculty and is one of the contributors in this present volume.

Faced with various questions of form and style, the Editorial Board (Volume 51) codified the UST LAW REVIEW Style Guide, a manual of legal citation and style.

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[1] Santos, Tomas U. 2013. "UST Law Review Turns 63." Varsitarian.net. February 10, 2013. http://varsitarian.net/news/20130210/ust_law_review_turns_63.

In 2007, the UST LAW REVIEW received its first St. Dominic De Guzman Award from UST in recognition of its outstanding performance in organizing activities that promote Thomasian excellence.

In 2008, the UST LAW REVIEW launched its first online edition and became the first law journal in the Philippines to establish its website.

To commemorate the 400th anniversary of UST, the UST LAW REVIEW published a two-part Quadricentennial Edition in 2011 and 2012.

In 2013, the UST LAW REVIEW received the St. Dominic de Guzman award through the leadership of then Editor-in-Chief Lamberto L. Santos III. The first UST LAW REVIEW exhibit and the first Grand Alumni Homecoming were also held in 2013.

In 2019, the UST LAW REVIEW, headed by its Editor-in-Chief Clarice Angeline V. Questin, received a citation of the St. Dominic De Guzman Award.

Supreme Court Citations

The UST LAW REVIEW has also been cited multiple times by the Supreme Court of the Philippines.

In 2008, the Court cited *Denouement of the Human Security Act: Tremors in the Turbulent Odyssey of Civil Liberties* (52 UST L. Rev. 1, 16-21) in *Romualdez v. COMELEC* (G.R. No. 167011, 30 April 2008). The article was written by Gilbert D. Balderama, the Editor-in-Chief of Volume 52.

In 2010, the Court in *Razon v. Tagitis* (G.R. No. 182498, 16 February 2010), cited Joan Lou P. Gamboa's article entitled *Creative Rule-Making in Response to Deficiencies of Existing Remedies* (52 UST L. Rev. 43).

In 2011, the Court cited the article *Uncertainties Beyond the Horizon: The Metamorphosis of the WTO Investment Framework in the Philippine Setting* (52 UST L. Rev 259) written by then Professor Ma. Lourdes P.A. Sereno in In the Matter of the Charges of Plagiarism etc., against Associate Justice Mariano C. Del Castillo (A.M. No. 10-7-17-SC, 8 February 2011).

In *Presidential Ad-Hoc Fact Finding Committee on Behest Loans v. Desierto* (G.R. No. 135715, 13 April 2011), the Court cited *Power and Paradox: Deconstructing Ombudsman Independence Amidst the Thicket of the Constitution, Law and Jurisprudence,* (51 UST L. Rev. 140-141). The article was written by Mischelle R. Maulion, the Editor-in-Chief of Volume 51, who is now the Presiding Judge of the Municipal Trial Court in Lubao, Pampanga.

In 2012, the Court cited Professor Rene B. Gorospe's Songs, *Singers and Shadows: Revisiting Locus Standi in Light of the People Power Provisions of the 1987 Constitution* (51 UST L. Rev 15-16) in *Galicto v. Aquino III* (G.R. No. 193978, 28 February 2012).

The Court likewise cited Franco Aristotle G. Larcina's *Judicial Review of Impeachment: The Judicialization of Philippine Politics* (50 UST L. Rev 45) in the impeachment case against former Chief Justice Renato Corona, *Corona v. Senate of the Philippines* (G.R. No. 200242, 17 July 2012).

Chief Justice Andres Narvasa Lecture Series

The UST LAW REVIEW also holds *The Chief Justice Andres Narvasa Lecture Series,* inviting speakers, often Supreme Court Justices, to talk about legal issues of national interest. Then Associate Justice Roberto Abad was the speaker during the first Narvasa lecture in 2013 titled Chartering New Rules of Civil Procedure for the Philippines.

The second lecture was held in 2014 titled Environmental Reforms: The Role of the Judiciary, featuring then Associate Justice (later Chief Justice) Diosdado M. Peralta as the guest speaker.

The third lecture held in 2015 focused on the right to privacy and featured Atty. Raul C. Pangalangan, who later became the first Filipino Judge to sit at the International Criminal Court at The Hague, Netherlands

The fourth lecture was held in 2016. Associate Justice Marvic M.V.F. Leonen was the honorary lecturer. The theme of the lecture was *Reexamining Dura Lex Sed Lex: Social Justice, the Constitution, and the Continuing Challenge of the Rule of Law*.

Lastly, the fifth lecture was held in 2019. Retired Associate Justice Angelina Sandoval-Gutierrez discussed Multi-Jurisdictional Practices and Disputes. The occasion also served as a homecoming event for UST LAW REVIEW alumni.

70 Years of Indelible Imprint

In 2020, the UST LAW REVIEW celebrated its 70th anniversary with a series of activities, the foremost of which is the launching of its new website hosted by UST's Sto. Tomas e-Service Providers (STEPS). The website was officially launched on 7 October 2020 and can be accessed at

http://lawreview.ust.edu.ph. This occasion could not come at a more opportune time as the world grappled with the Covid-19 pandemic, forcing the UST LAW REVIEW to operate entirely online. The present volume is the first edition of the UST LAW REVIEW to utilize the website for its initial release.

In 2020, the UST LAW REVIEW also adopted a new official seal, which retained the color and form features of its old seal, but with improved image resolution. The effort to digitize past volumes, which began a few years ago, was also revived and is currently in the works.

In April 2021, the UST LAW REVIEW published a Digest Handbook which codifies the rules and guidelines of the USTLAW REVIEW in writing and editing case digests.

As telecommuting and online learning become the norm, the UST LAW REVIEW continues to expand its reach through its website and its Facebook page where readers and subscribers are updated with recent developments of the law and jurisprudence. Aside from the online editions of its journal, the UST LAW REVIEW website also contains articles, commentaries, and trends in jurisprudence written by its members and understudies. Excerpts featuring articles from previous volumes and notes on landmark cases are regularly posted on its Facebook page.

Today, the UST LAW REVIEW carries on its legacy of leaving an indelible imprint as it pushes the boundaries of legal scholarship with this online edition. It celebrates its triumphs as well as the stumbling blocks that it had overcome and used as stepping stones to reach new heights. This volume is a testament to the resilience of the UST LAW REVIEW and its commitment to igniting legal discourse.

UST LAW REVIEW

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ARTICLE

RECENT JURISPRUDENCE

RECENT LEGISLATION

A REVIEW OF THE MLAS AND CLAS RULES: ADVANCING LEGAL AID IN THE PHILIPPINES

JOSE MARIE Z. CARPIO*

CARPIO, CARPIO & CARPIO

Naga City, Bicol

In memoriam:

Jose Luis Martin "Chito" C. Gascon

Chairperson, Commission on Human Rights

Member, 1986 Constitutional Commission

ABSTRACT

We review the core provisions of the Supreme Court MLAS and CLAS rules for mandatory free or pro bono legal aid service for private practitioners. These rules are currently suspended, but they are now being re-examined for harmonization and re-issuance. With all due respect, we find such rules devoid of proper constitutional, legal, factual, and historical basis.

Thus, we offer an alternative proposal of basic guiding principles, drawing from the constitution, international human rights law, and, since justice has no country, comparative insights from best practices in forty-nine countries and leading jurisdictions like the United Kingdom, Spain, and Austria. We submit that following the mandate of the constitution, we can advance legal aid through a combined system of state-handled assistance and adequately state-funded legal aid service by private practitioners or other providers on a contractual basis in parallel with purely voluntary work.

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* Attorney at Law, Republic of the Philippines and the State of New York. Associate, Chartered Institute of Arbitrators, London (2008). Founding Dean, Ateneo de Naga University College of Law (2017-2018). LL.M. in International and Comparative Law, Georgetown University Law Center (1996), LL.B., University of the Philippines College of Law (1993), A.B. Philosophy, *First Honor*, Holy Rosary Major Seminary. Former faculty member: UST-Legazpi College of Law, Ateneo de Naga University College of Law, and Ateneo de Manila Law School. Special thanks to Nicole Ann Delos Reyes, our litigation and teaching assistant (4th year law student of Ateneo de Naga University College of Law) for her invaluable research, and to our office staff Faye Tino and Carpio Law scholar Pam Armendi (3rd year law student of Ateneo de Naga University College of Law) for their usual support.

To ensure resource optimization, effectiveness, and sustainability, we may restructure this program on the four established pillars: the Commission on Human Rights (CHR), Public Attorney's Office (PAO), Integrated Bar of the Philippines (IBP), and the Legal Aid Clinics (LACs) of our law schools.

The generous feelings which prompt acts of charity are admirable and ennobling to our nature. But even charity itself almost ceases to be a virtue, when they, whose duty it is to provide for the poor, make private charity a pretext for public neglect.[1]

INTRODUCTION

Legal aid in the Philippines is a fundamental constitutional right enshrined in the Bill of Rights. It is intertwined with the broader right of access to justice. "Free access to the courts and quasi-judicial bodies and adequate legal assistance shall not be denied to any person by reason of poverty."[2] In criminal proceedings, legal aid is expressly guaranteed by the Bill of Rights as well to any person under investigation for an offense who could not afford the services of counsel.[3]

To this end, the constitution created an independent office, the Commission on Human Rights (CHR), to provide "legal aid services to the underprivileged whose human rights have been violated or need protection."[4] Additionally, Congress established the Public Attorney's Office (PAO) as "the principal law office of the Government in extending free legal assistance to indigent persons in criminal, civil, labor, administrative and other quasi-judicial cases."[5]

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[1] *Webb v. Baird*, 6 Ind. 13 (Supreme Court of Indiana, 1854).

[2] CONST., art. III, sec. 11.

[3] CONST., art. III, sec. 12.

[4] CONST., art. XIII, sec. 18, para. (3).

[5] Republic Act No. 9406, sec. 12, amending E.O. No. 292, sec. 14, chap. 5, title III, bk. IV.

For its part, the Supreme Court (SC) issued the rule on Mandatory Legal Aid Service for Practicing Lawyers (MLAS)[6] in 2009, but its implementation was suspended. Thereafter, in 2017, the SC issued the Community Legal Aid Service (CLAS)[7] rule providing for the same mandatory free or pro bono legal aid service but only for newly admitted lawyers in 2018 and 2019. However, this program was suspended as well in September 2019, following the court's issuance of the Revised Law Student Practice Rule.[8]

In support of MLAS, Congress passed the Free Legal Assistance Act of 2010.[9] However, this law remains suspended for lack of implementing rules.

Now, the Supreme Court has renewed its efforts for legal aid, and "requested the IBP Community to prepare and submit a written proposal for the establishment of a legal aid program that covers all lawyers, instead of only new lawyers, including harmonization of MLAS and CLAS."[10]

I am a member of the IBP Camarines Sur Chapter. And upon *Facebook* request of our officers for comments and suggestions, I researched the matter and came up with this pro bono contribution from the perspective of a private practitioner.

In essence, the MLAS and CLAS rules requiring mandatory free or pro bono legal aid service are, with all due respect, devoid of constitutional, legal, factual, and historical basis. Rather, to advance legal aid in the Philippines, we should go back to the basic mandate of our constitution, that is, as an overriding state obligation and duty following a human rights approach.

In Part A, I review the core provisions of the MLAS and CLAS rules. In Part B, I cover the constitutional mandate for legal aid and layout the real duty-holders therefor. Then in Part C, I raise the constitutional infirmities of mandatory free or pro bono legal aid service: (1) involuntary servitude, and (2) illegal taking by the government coupled with undue taxation, both of which also constitute a breach of international human rights. Thereafter in Part D, I offer comparative insights from international law and best practices from leading jurisdictions like the United Kingdom, Spain, and Austria. In Part E, I offer an alternative proposal of guiding principles for building a legal aid program that is legally in order and just.

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[6] B.M. No. 2012, February 10, 2009. (Hereinafter, MLAS rule)

[7] A.M. No. 17-03-09-SC, October 22, 2017. (Hereinafter, CLAS rule)

[8] A.M. No. 17-03-09-SC, September 3, 2019.

[9] Republic Act No. 9999, February 23, 2010.

[10] IBP Memorandum to Chapter Officers, September 13, 2021.

Conclusion follows. I close with a Reflection on my own legal aid experience.

I. THE MLAS and CLAS Rules

The 2009 Rule on Mandatory Legal Aid Service (MLAS) required every practicing lawyer to provide 60 hours of free legal aid services in a year, thus:

> Every practicing lawyer is required to render a minimum of sixty (60) hours of free legal aid services to indigent litigants in a year. Said 60 hours shall be spread within a period of twelve (12) months, with a minimum of five (5) hours of free legal aid services each month. However, where it is necessary for the practicing lawyer to render legal aid service for more than five (5) hours in one month, the excess hours may be credited to the said lawyer for the succeeding periods.[11]

In turn, the 2017 Rule on Community Legal Aid Service (CLAS) for newly admitted lawyers doubled the time required for *pro bono* work to 120 hours:

> Covered lawyers, as defined under Section 4 (a), are required to render one hundred twenty (120) hours of pro bono legal aid services to qualified parties enumerated in Section 4 (b), within the first year of the covered lawyers' admission to the Bar, counted from the time they signed the Roll of Attorneys.[12]

Building on the MLAS rule, the Free Legal Assistance Act of 2010, provided for a similar time-measured form of legal aid service for work beyond the 60-hour MLAS requirement for which a tax deduction of up to 10% from gross income could be availed of by the concerned lawyer or partnership.[13] But as mentioned earlier, this law has not been implemented.

The MLAS rule was based on the "duty of lawyers to society as agents of social change and to the courts as officers thereof by helping improve access to justice by the less privileged members of society and expedite the resolution of cases involving them."[14] "Mandatory free legal service by members of the bar and their active support thereof will aid the efficient and effective

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[11] Sec. 5 (a).

[12] Sec. 5 (a).

[13] R.A. No. 9999, sec. 5.

[14] MLAS rule, sec. 2.

administration of justice especially in cases involving indigent and pauper litigants."[15]

With all due respect, however, the notion that lawyers are "officers of the court" is strictly limited in Philippine jurisprudence and used only in reference to maintaining respect due to the courts and judicial officers as well as for upright conduct in the practice of law in accordance with the Lawyer's Oath and the Code of Professional Responsibility.[16] Such mere ascription cannot be unduly stretched to include private practitioners being compelled to work for free through mandatory free or pro bono legal aid service without running afoul of the constitutional proscription against illegal taking without just compensation, especially given that our constitution commands that rules of court "shall not diminish, increase, or modify substantive rights."[17]

It may please be recalled that an obligation is the "juridical necessity to give, to do or not to do."[18] And the sources of demandable obligations are the following, and the following only: (1) law; (2) contracts; (3) quasi-contracts; (4) acts or omissions punished by law; and (5) quasi-delicts.[19] Out of these five sources, it is only law, which can possibly support MLAS. However, the Civil Code further provides that "[o]bligations derived from law are not presumed."[20] "Only those expressly determined in this Code or in special laws are demandable, and shall be regulated by the precepts of the law which establishes them; and as to what has not been foreseen, by the provisions of this Book."[21] This basic provision obviously does not include the rules of court umbrella under which MLAS has been required. In effect, the MLAS rule is unfortunately a form of judicial legislation as to render it unconstitutional.

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[15] *Id.*

[16] See, e.g. *Pesto v. Millo*, Adm. Case No. 9612, March 13, 2013 (suspending a lawyer for "conduct unbecoming of an officer of the court"); *Kara-an v. Atty. Pineda*, A.C. No. 4306, March 28, 2007 (explaining disbarment only for "clear cases of misconduct affecting the standing and moral character of the lawyer as an officer of the court and member of the bar."); *Rafols v. Atty. Barrios*, A.C. No. 4973, March 15, 2010, citing *Rivera v. Corral*, A.C. No. 3548, July 4, 2002 ("A lawyer may be disbarred or suspended for misconduct, whether in his professional or private capacity, which shows him to be xxx unworthy to continue as an officer of the court.); *Igoy v. Atty. Soriano*, A.M. No. 2001-9-SC, October 11, 2001 (holding that "[a]s an officer of the court, it is the duty of a lawyer to uphold the dignity and authority of the court to which he owes fidelity according to the oath he has taken.")

[17] CONST., art. VIII, sec. 5, para. (5).

[18] CIVIL CODE, art. 1156.

[19] CIVIL CODE, art. 1157.

[20] CIVIL CODE, art. 1158.

[21] *Id.*

The Civil Code likewise provides that "a custom must be proved as a fact, according to the rules of evidence."[22] The "officer of the court" tradition or custom as a source of obligation for MLAS should then be specifically set forth by competent evidence. But research shows that such a supposition from English common law that found its way in our country during the American era is bereft of factual and historical basis. And, it has long been debunked in the United States for "[a]s early as 1794, the Supreme Court of Pennsylvania recognized that American attorneys during the colonial period did not enjoy the privileges and exemptions of their English counterparts." [23] Thereafter, "[i]n 1810, for similar reasons, the Virginia Supreme Court questioned the appropriateness of applying this doctrine in America."[24] More importantly "in 1854, the Indiana Supreme Court held that an attorney had no obligation to serve gratuitously, since the idea of an attorney having special privileges was obsolete."[25]

Over 130 years later, in 1985, the Supreme Court of Missouri abandoned this officer of the court anachronism by clarifying that the practice of English courts appointing for legal aid the elite lawyers called serjeants-at-law of the Order of the Coif was only because they were appointed public officials with special privileges like exemption from arrest or militia duty who shared no common role with American attorneys.[26] The Court, citing the work of Professor Shapiro, pointed out that: "We next examine the validity of the officer of the court doctrine. Professor Shapiro explains that '[T]o justify coerced, uncompensated legal services on the basis of a firm tradition in England and the United States is to read into that tradition a story that is not there.'" [27] The Court explained that: "It seems apparent, therefore, that we cannot transplant the English experience onto American soil, nor can we merely claim that lawyers are 'officers of the court' based upon English precedent. Attempts to do so overlook the ambiguity surrounding the use of 'appointed' counsel in English practice, and such attempts fail to recognize that America departed from the traditional English model for the legal profession."[28] The Court added that "[u]nfortunately, the oft-repeated doctrine

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[22] CIVIL CODE, art. 12.

[23] Stafford Henderson Byers, *Delivering Indigents' Right to Counsel While Respecting Lawyers' Right to Their Profession: A System "Between a Rock and a Hard Place"*, 13 Journal of Civil Rights and Economic Development 491, 502 (1999). Available at: https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1301&context=jcred.

[24] *Id.*

[25] *Id.*

[26] See *id.* at 502-503, citing *State v. Roper*, 688 S.W.2d 757, 767 (Mo. 1985).

[27] *State v. Roper*, 688 S.W.2d 757, 767-768 (Mo. 1985). (citations omitted)

[28] *Id.*

that lawyers are officers of the court and as such may have conditions imposed by the court on their privilege to practice law has been 'used as an incantation with little or no analysis of what the title means or why a particular result should flow from it.'"[29] Consequently, the Court then declared that "the time has come to abandon invoking the doctrine that lawyers are officers of the court or, as some courts suggest, public officers and lay to rest this anachronism from English legal history. In lieu of the doctrine, decisions should rest upon sound reasoning and analysis."[30] And as a practical matter, the Missouri Court highlighted the fact that times have changed and that the practice of law has changed dramatically:

> Literally thousands of our lawyers, sad to relate, never see the inside of the court room at all. Not only has the bar itself been divided into specialties but of the very **small percentage of lawyers who can be said to be trial lawyers an even smaller percentage of them have developed skills in the practice of criminal prosecution and defence. It is unjust that this comparative handful of individuals should alone bear the burdens which are rightly those of all of the bar and indeed of the community and the taxpayers.**[31] (Emphasis ours)

In sum, "reliance by many courts on the long history of court appointment thus appears to be misplaced."[32] "Although mandatory court appointment indeed burdened some especially privileged members of the legal profession, the claim is unwarranted that this isolated occurrence supports an obligation by all attorneys today."[33]

We need not belabor here that private practitioners in the Philippines are not public officers even if our profession is "imbued with public interest" in the sense akin to public utilities that serve the general populace. We do not enjoy special privileges by reason of our membership in the Bar. Unlike public utilities, we enjoy no tax perks or subsidies or exemptions in law whatsoever such as income tax holidays. We have no discounts for the purchase of consumer goods and services, food, office supplies and computers, and medicines or hospitalization, especially with our ranks more prone to serious diseases like hypertension and heart ailments arising from the pressures of litigation.

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[29] *Id.*

[30] *Id.*, at 768.

[31] *Id.*

[32] Christopher D. Atwell, *Comment, Constitutional Challenges to Court Appointment: Increasing Recognition of an Unfair Burden*, 44 SW L.J. 1229, 1236 (1990). Available at: https://scholar.smu.edu/smulr/vol44/iss3/6.

[33] *Id.*

What the Missouri Court held in 1985 about the practice of law having become specialized with fewer lawyers handling cases in court is all the more our present reality now. Less and less lawyers engage in trial work, especially with its burdensome load such as the submission of all evidence and judicial affidavits at the filing of a civil complaint or answer, which may even turn out to be a waste of time and effort if the parties settle the case anyway before trial.

Thus, the "officer of the court" reliance of the MLAS rule has no factual and historical basis and is not a valid legal foundation for imposing an enforceable obligation on private practitioners to render such "forced donation" or "compelled charity." As Professor Shapiro put it: "Responsibility implies an element of choice, of freedom not only to choose membership in the profession but to chart one's course after membership is attained. To turn an aspiration of public service into an enforceable obligation, then, would be to deprive the professional of an element of choice that may be an important part of self-fulfillment. Compelled altruism is not much of a virtue."[34]

The CLAS rule, in turn, was based on the premise that "the legal profession is imbued with public interest."[35] Consequently, "lawyers are charged with the duty to give meaning to the guarantee of access to adequate legal assistance under Article III, Section 11 of the 1987 Constitution by making their legal services available to the public in an efficient and convenient manner compatible with the independence, integrity and effectiveness of the profession."[36] Accordingly, by this recast or new formulation of a "constitutional duty to give meaning," "lawyers are obliged to render *pro bono* services to those who otherwise would be denied access to adequate legal services."[37]

However, it is elementary that the constitution is a document that provides for what we, the people, by way of social contract, have imposed on the government that we established thereby. Specifically, as Tañada and Fernando explained, citing Malcolm and Laurel, it is "the written instrument by which the fundamental powers of the government are established, limited, and defined, and by which those powers are distributed among the several

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[34] David L Shapiro, *"The Enigma of the Lawyer's Duty to Serve"* (1980) 55(5) New York University Law Review 735 , 788.

[35] CLAS rule, sec. 2.

[36] *Id.*

[37] *Id.*

departments for their safe and useful exercise for the benefit of the body politic."[38]

Hence, the "rationale" for CLAS that practicing lawyers or private citizens now have a "constitutional duty to give meaning" to the guarantee of access to adequate legal assistance because the legal profession is "imbued with public interest" is, with all due respect, fundamentally flawed. If we were to follow that arbitrary line of argument, then all the members of other professions should be required to render mandatory free service in their respective work.

For example, private doctors should be required to save lives for free or treat poor patients for free as a "constitutional duty to give meaning" to the people's right to life and health. Civil engineers should be required to provide free engineering or building services for housing projects for the homeless as a "constitutional duty to give meaning" to their right to shelter. Even professional plumbers should be required to give free service to indigents whose kitchen sinks may have gotten clogged as a "constitutional duty to give meaning" to the state mandate to instill health consciousness among the people through proper sanitation in the home.

As well, airlines, buses, taxis, jeepneys, UVs, Grab or Angkas rides, as public utilities imbued with public interest, should be required to give free transportation to all the underprivileged as a "constitutional duty to give meaning" to their freedom of movement in support of their rights to life especially in case of medical emergencies or even for work to earn some money for food in these Covid-19 pandemic times.

The entire constitution as a social contract imposes obligations and mandates for action on the state or the government—not on private citizens like private law practitioners. The one and only exception is the defense of the state for which all able private citizens may be required to render military service or alternative personal or civil service.[39] For this is about the very survival of our nation itself that is every citizen's duty and not something imposed on a targeted class.

Even then, defense service is paid work where everything we need for battle or alternative support for war efforts would be at the expense of the state, that is, we will be supplied with all the necessary arms, weaponry, and equipment, clothing and food, combat boots, helmets, body armor, and accessories, transportation, medical treatment and rehabilitation or disability

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[38] 1 LORENZO M. TAÑADA & ENRIQUE M. FERNANDO, CONSTITUTION OF THE PHILIPPINES 12 (4th ed., 1952).

[39] CONST., art. II, sec. 4.

benefits, other necessities as well as funeral honors and expenses and a sacred resting place for our remains plus pension and other support for our families left behind in the event we make the ultimate sacrifice.

Compare all that with mandatory free or pro bono legal aid service under the MLAS and CLAS rules where we private practitioners would be left to shoulder everything that we would need: our time, competences, efforts, training, and office resources for handling a case for an indigent or underprivileged, including out-of-pocket expenses for transportation, photocopying of documents, or mail.

That a profession, trade, calling or industry is imbued with public interest does not mean that private citizens who render their services therein can already be required by the government to engage in charity or pro bono work. It only means that the government can make reasonable regulations through the police power of the state to ensure the general welfare of everyone who may avail of the services thus offered to the public in order to protect life and limb, guard against fraud, curtail exorbitant fees or unreasonable pricing, and check on substandard service, or temper corporate or individual greed. Thus, it has been held for our profession that: "The practice of law is a privilege burdened with conditions and is reserved only for those who meet the twin standards of legal proficiency and morality. It is so delicately imbued with public interest that it is both a power and a duty of this Court to control and regulate it in order to protect and promote the public welfare."[40] As expressly recognized in Rule 138, sec. 24, a lawyer is entitled to compensation as a matter of right for services rendered to a client subject only to the standard that it be reasonable upon consideration of the importance of the subject matter of the controversy, the extent of the services rendered, and the professional standing of the attorney.

Otherwise, with bare "public interest" as an expedient motherhood mantra for new government impositions on private citizens not found at all in the constitution or statute, we will end up in a totalitarian state or dictatorship in the same way that Marcos used the "national interest" and his self-proclaimed "covenant with the Filipino people" incantations to justify his tyrannical regime back then.

More importantly, a plain meaning or *verba legis* reading of section 11 of article III shows nothing in it that it is the private practitioners who have been charged with the guarantee of access to adequate legal assistance. For clarity's sake, it reads: "Section 11. Free access to the courts and quasi-judicial

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[40] *Judge Pantanosas Jr. v. Atty. Pamatong*, A.C. No. 7330, June 14, 2016. (Per J. Caguioa)

bodies and adequate legal assistance shall not be denied to any person by reason of poverty."

And this provision is an integral part of the Bill of Rights, which under our system of constitutional government is precisely a "bill", that is, "an itemized list or a statement of particulars"[41] or a "to-do list" chargeable to or demandable from the state. In other words, every provision therein is the duty and obligation of the government, and not the citizenry, or in our case, private practitioners. Father Joaquin Bernas, our eminent authority and member of the 1986 Constitutional Commission, explained in his sponsorship remarks for article III that: "The Bill of Rights governs the relationship of the individual and the state. Its concern is not the relation between individuals, between a private individual and other individuals. What the Bill of Rights does is to declare some forbidden zones in the private sphere inaccessible to any power holder."[42]

On section 11, he specified that "the matter of giving adequate legal assistance, is something which is not self-executory."[43] "It needs legislation,"[44] he added. And law-making is the exclusive province of the legislature as conferred by our constitution, excepting only the provision for direct legislation by the people through initiative and referendum.[45]

Thus, the CLAS rule is regrettably unconstitutional and a form of unwarranted judicial legislation.

In sum, both the MLAS and CLAS rules are, with all due respect, devoid of a proper constitutional, legal, factual, and historical basis. And upon closer examination, they even run counter to the legal aid mandate of the constitution as well as the overriding proscriptions—traditionally rooted in the very *Magna Carta* of England,[46] against involuntary servitude and illegal taking coupled with undue taxation, both of which are also a breach of international human rights

II. Constitutional Mandate for Legal Aid

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[41] Merriam-Webster, https://www.merriam-webster.com/dictionary/bill.

[42] JOAQUIN G. BERNAS, SJ, THE INTENT OF THE 1986 CONSTITUTION WRITERS, 164 (1995).

[43] *Id.* at 191.

[44] *Id.*

[45] CONST., art. VI, sec. 1.

[46] Clauses 39 and 40: 39. No free-man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land. 40. To no one will we sell, to no one deny or delay right or justice.

The Bill of Rights, no less, commands that: "Free access to the courts and quasi-judicial bodies and adequate legal assistance shall not be denied to any person by reason of poverty."[47]

Specifically for criminal cases, the constitution guarantees any person under investigation for the commission of an offense the right to have competent and independent counsel preferably of his own choice, and "[i]f the person cannot afford the services of counsel, he must be provided with one."[48]

For these ends, the constitution vested the Supreme Court with the task of promulgating the necessary rules.[49]

Significantly, the constitution purposefully reposed in the Commission on Human Rights (CHR) the express power and function to provide "legal aid services to the underprivileged whose human rights have been violated or need protection."[50] This duty tallies with the state obligation under article 8 of the Universal Declaration of Human Rights to ensure "the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to [everyone] by the constitution or by law." It bears stressing, too, that human rights are universal, inalienable, interrelated, indivisible, and interdependent.

No other agency created in the constitution has been given this noble responsibility. The CHR then is the primary duty-holder and government agency for the provision of legal aid.

And vis-à-vis the private practitioners, the deliberations of the constitutional commission reveal that "Father Bernas pointed out that the legal aid contemplated need not always be free legal aid."[51] "Those who could afford legal fees could be referred to private practitioners," he added.[52] Mandatory free or pro bono legal aid service by private practitioners was never contemplated in the drafting and later promulgation of our constitution.

Furthermore, we point out that in the general scheme of government in line with the above-mentioned constitutional mandate and for the rationalization of functions and maximization of resources, the existing Public Attorney's Office (PAO) attached to the Department of Justice (DOJ) should rather be placed under the CHR. By this, we could avoid the conflict of interest

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[47] CONST., art. III, sec. 11.

[48] CONST., art. III, sec. 12, para. (1).

[49] CONST., art. VIII, sec. 5, para. (5).

[50] CONST., art. XIII, sec. 18, para. (3).

[51] BERNAS, *supra* note 42, at 1026.

[52] *Id.*

between the DOJ prosecution service vis-à-vis the PAO where both offices are under the control and supervision of the president.[53]

As an attached agency to the DOJ for policy and program coordination, the PAO remains under presidential control or resolution and direction in case of an unresolved disagreement with the secretary of justice following the unitary executive doctrine and the Administrative Code.[54] Thus, PAO's independence and autonomy,[55] especially for its own budget and services such as legal assistance to victims of extra-judicial killings resulting from the government's "war on drugs" could be solidified under the CHR since the CHR is not under executive control as an independent constitutional body.[56]

For sure, the great wisdom and foresight of the esteemed writers of our constitution are manifested in the stark reality that most people who need legal aid now are criminal defendants, victims of violent crimes, and victims of martial law-like abuses by state agents or law enforcement authorities as in the case of extra-judicial killings resulting from the government's "war on drugs."

The CHR's 2020 accomplishment report shows that the commission provided protection services for the year 2020 to a total of 4,889 cases covering 2,988 for legal assistance, 1,072 complaints for human rights violations, and 829 motu proprio action.[57] For the period May 10, 2016, to December 31, 2020, the CHR resolved 3,273 cases of drug-related extra-judicial killings out of which 1,893 were killed in law enforcement operations and 1,379 were killed by unidentified assailants.[58]

PAO, in turn, in its 2020 accomplishment report, prides itself as a human rights agency through which "the fundamental human right of every individual to free access to justice, guaranteed by our Constitution, is given life."[59] Precisely, its "mandate is to independently render, free of charge, legal representation, assistance, and counselling to indigent and other qualified persons in criminal, civil, labor, administrative, and other quasi-judicial

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[53] CONST., art. VII, sec. 17.

[54] E.O. No. 292, Bk. IV, chap. 7, sec. 38 (3)(b).

[55] R.A. 9406, sec. 2.

[56] CONST., art. XIII, sec. 17, para. (1).

[57] CHR 2020 Annual Report, 6, https://chr.gov.ph/wp-content/uploads/2021/08/CHR-2020-ANNUAL-ACCOMPLISHMENT-REPORT.pdf.

[58] *Id.*, at 17-18..

[59] Public Attorney's Office, 2020 PAO Accomplishment Report (Narrative), 1, https://pao.gov.ph/UserFiles/Public_Attorney's_Office/file/2020%20PAO%20Accomplishment%20Report%20(Narrative).pdf.

cases."[60] PAO reports that in 2020, it served 6,687,630 clients and handled 752,196 cases, which included 57,002 persons deprived of liberty who were released from detention.[61] The bulk of cases PAO handled were criminal cases that totaled 586,438 cases for 572,497 clients served.[62]

Relevantly, on September 15, 2021, the International Criminal Court Pre-Trial Chamber I has released its "Decision on the Prosecutor's request for authorisation of an investigation pursuant to Article 15(3) of the Statute" concerning the situation in the Philippines, that is, the extra-judicial killings that have resulted from the administration's "war on drugs." The Chamber thus:

> AUTHORISES the commencement of the investigation into the Situation in the Philippines, in relation to crimes within the jurisdiction of the Court allegedly committed on the territory of the Philippines between 1 November 2011 and 16 March 2019 in the context of the so-called 'war on drugs' campaign; and
>
> INSTRUCTS the Registrar to provide notice of the present decision to the victims who have made representations.

For sure, legal aid by the CHR and PAO working as one team at this time is even more necessary for at least the 204 victims' representations to help ensure that the ICC investigation is fully carried out so that justice may be truly served despite the strong opposition and non-cooperation by the current administration. There are other victims of extrajudicial killings whose families have chosen to lay low for now out of fear of the police and other law enforcement agents, but who certainly need the support of CHR and PAO in due time.

Legal aid is a right in itself under international human rights law that is binding on the Philippine government as an international obligation or duty to provide:

> 20. Legal aid is an essential component of a fair and efficient justice system founded on the rule of law. It is also a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights, including the right to a fair trial and the right to an effective remedy. Access

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[60] *Id.*

[61] *Id.* at 2.

[62] Public Attorney's Office, 2020 Case Handled and Clients Served, 1, https://pao.gov.ph/UserFiles/Public_Attorney's_Office/file/2020%20Cases%20Handled%20and%20Clients%20Served.pdf.

> to legal advice and assistance is also an important safeguard that helps to ensure fairness and public trust in the administration of justice.[63]

It is recognized in international and regional human rights treaties:

> 21. Several international and regional human rights treaties recognize access to free legal assistance as an essential component of the right to a fair trial. Article 14 (3) (d) of the International Covenant on Civil and Political Rights lists, among the procedural guarantees available to persons charged with a criminal offence, the right "to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."[64]

It is but unfortunate, however, that the CHR's budget for FY 2021, despite its "commission" rank and being directly created by the constitution, has been severely limited by Congress to a minuscule sum of Php883,097,000 only.[65] There was even an attempt in 2017 to defund and effectively abolish CHR through a Php1,000 budget for 2018. Compare that allocation with the executive's multi-billion budget for PAO in the total amount of Php4,203,056,000[66] and a complement staff of 2,287 public attorneys.[67]

We emphasize the constitutional mandate once again for the "primacy of human rights"[68] and guarantee of "full respect for human rights."[69] Surely, if several billions of pesos of our people's money have been lost through the ill-gotten wealth of then president Marcos and his family[70] or wasted in congressional pork barrel projects,[71] there is no reason why Congress now cannot provide or find ways to allocate—in obedience to the constitution—even just a few billions more for human rights promotion and protection through legal aid. For starters, Congress has yet to meet its own prescribed 1:1

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[63] Report of the U.N. Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Human Rights Council, March 15, 2013, A/HRC/23/43, 5. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/119/35/PDF/G1311935.pdf?OpenElement.

[64] *Id.*

[65] General Appropriations Act, FY 2021, 116 (No. 2) O.G. 689, 689-691.

[66] General Appropriations Act, FY 2021, 116 (No. 1) O.G. 1096, 1096-1098.

[67] 2020 PAO Accomplishment Report (Narrative), *supra* note 59, at 2.

[68] CONST., art. XIII, sec. 17, para. (5).

[69] CONST., art. II, sec. 11.

[70] See *Republic v. Sandiganbayan*, G.R. No. 152154, July 15, 2003; Marcos, Jr. v. Republic, G.R. No. 189434, April 25, 2012.

[71] See generally *Belgica v. Executive Secretary*, G.R. No. 208566, November 19, 2013.

ratio of public attorney with an organized sala. As PAO reports, "[t]here are only 2,427 authorized positions for public attorney vis-à-vis 2,465 organized courts" thus leaving 38 uncreated positions.[72] But still, PAO avers that more plantilla positions are needed for the handling of legal aid cases in the appellate courts, Sandiganbayan, and in quasi-judicial agencies.[73] And, of course, the CHR should be adequately funded.

In fine, legal aid for the poor or underprivileged is a constitutional right and governmental duty and international obligation for which both the CHR and the PAO have been tasked to provide. Public neglect or non-allocation of enough budget for legal aid cannot be an excuse to draft private practitioners and force them to work certain hours for free or pro bono legal aid service, and thus commandeer their precious time, hard-earned competences and experience, labor and resources no matter how noble this purpose is.

Too, for PAO's suggested consolidation with the CHR, we may consider U.N. Special Rapporteur Gabriela Knaul's 2013 report to the U.N. Human Rights Council that: "Whatever its organization and structure, public defenders' programmes should be autonomous and independent of the judiciary, the prosecutor's office and executive power. The Special Rapporteur considers that this kind of programme often constitutes one of the most effective ways of delivering legal aid, since public defenders have financial incentives to provide adequate, continuous and effective legal aid to those who cannot afford a lawyer and to other disadvantaged persons."[74]

Consequently, the legal aid program the Supreme Court and the IBP seek to advance must be pursued within this context and in coordination with Congress, the CHR and PAO following the whole-of-government approach. After all, the sovereign Filipino people established but ONE government tasked by our constitution to provide legal aid to whomsoever may be in need.

III. Constitutional Infirmities and Breach of Human Rights

For a law to be valid and binding, we must source its provenance in the constitution. Otherwise, it is void.[75] And, with all due respect, a Supreme Court

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[72] 2020 PAO Accomplishment Report (Narrative), *supra* note 59, at 2.

[73] *Id.*

[74] Report, *supra* note 63, at 13-14.

[75] CIVIL CODE, art. 7.

rule with the force of law is no exception. For no one is above the law, no matter how supreme one is.

Tañada and Fernando instruct that: "Public officials must justify whatever action they take by the existence of any law empowering official action or at least not prohibiting it. For the law is the only supreme power under constitutional government and every man who by accepting office participates in its function is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. The supreme law is the Constitution. It is the test of the legality of all government action. It provides the measure for its validity."[76] Simply put, the highest officials of the land must defer to the constitution and no act or rule shall be valid, however nobly intentioned, if it conflicts with the constitution since all must bow to its mandate.[77]

It is mandatory, in fact, that rules promulgated by the Supreme Court "shall not diminish, increase, or modify substantive rights."[78]

While legal services, including legal aid, are the monopoly of lawyers since only licensed attorneys can provide them under our present system, the constitution does not require mandatory free or pro bono legal aid service. There is nothing at all in the constitution that requires a private citizen who chooses and qualifies to be a member of the Bar to be compelled to render legal services without compensation. As Justice Harlan of the United States Supreme Court declared: "We do not hold that lawyers, because of their special status in society, can therefore be deprived of constitutional rights assured to others."[79]

The constitutional mandate under the Bill of Rights to ensure adequate legal assistance to the underprivileged is imposed on the state. Legal aid is a government, not a private, obligation and duty. For this reason, providing instead for mandatory free legal aid service or obligatory uncompensated pro bono legal work is subject to the built-in restraints in the constitution on governmental actions for which lawyers are equally entitled as sovereign citizens duly recognized with inherent personal and political freedoms and individual human rights.

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[76] TAÑADA & FERNANDO, *supra* note 38, at 16.

[77] See ISAGANI CRUZ, CONSTITUTIONAL LAW, 4 (1989 ed.).

[78] CONST., art. VIII, sec. 5, para. (5).

[79] *Cohen v. Hurley*, 366 U.S. at 129-30.

"Imposition of a duty by the state, whatever its support in history and tradition, raises substantial constitutional issues and is perhaps even more vulnerable on economic and other policy grounds."[80]

We, therefore, submit that mandatory free legal aid service is unconstitutional and a breach of international human rights on at least two grounds: (1) involuntary servitude, and (2) illegal taking of private property coupled with undue taxation.

Involuntary Servitude

Under the Bill of Rights, it is expressly commanded that: "No involuntary servitude in any form shall exist except as a punishment for a crime whereof the party shall have been duly convicted."[81] (Underlining ours) The Universal Declaration of Human Rights, a landmark international instrument constitutionally incorporated in and binding on the Republic of the Philippines,[82] equally provides that: "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."[83]

"Involuntary servitude denotes a condition of enforced, compulsory service of one to another (*Hodges vs. U.S.,* 203 U.S. 1; *Rubi vs. Provincial Board of Mindoro*, 39 Phil. 660, 708) or the condition of one who is compelled by force, coercion, or imprisonment, and against his will, to labor for another, whether he is paid or not (Black's Law Dictionary, 4th Ed., p. 961)."[84]

Involuntary servitude is also known or includes under the International Covenant on Civil and Political Rights (ICCPR) of which the Philippine is a State Party, "forced or compulsory labour,"[85] excepting, as relevant for lawyers, "[a]ny work or service which forms part of normal civil obligations."[86] Such free service exception that is part of our normal civic duties usually happens when we are appointed counsel *de officio* in court while we are in a hearing for a case to assist an accused without counsel in another case for the sole or limited purpose of arraignment or other incident at hand pursuant to sections 31 and 32 of Rule 138, with discretionary provision for compensation subject to availability of funds. For this rare or one-time service appointment, we

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[80] Shapiro, *supra* note 34, at 738-739.

[81] CONST., art. III, sec. 18, para. (2).

[82] *Mejoff v. Director of Prisons*, G.R. No. L-4254, September 26, 1951.

[83] Art. 4.

[84] *In re Aclaracion v. Hon. Gatmaitan*, G.R. No. L-39115, May 26, 1975.

[85] ICCPR, art. 8, sec. 3, para. (a).

[86] *Id.* art. 8, sec. 3, para. (a)(iv).

willingly lend pro bono assistance in much the same way that a doctor called to assist in a medical emergency gives first aid for free. Surely, first aid for a case, as it were, is oceans apart from treatment for complete healing or the handling of a case towards its just conclusion or proper disposition.

The purposes of the Integrated Bar of the Philippines (IBP), the official organization or association of all the country's lawyers of which every lawyer automatically becomes a member upon signing the Roll of Attorneys do not include providing compulsory free legal aid.[87] Thus, a lawyer cannot be presumed by that signature to have consented specifically to rendering unpaid legal aid.

Free legal aid under our Code of Professional Responsibility, to which we agree when we become lawyers, is hortatory at most. We are only exhorted to accommodate any such "request" from the IBP and refuse only for serious and sufficient cause.[88] The operative term "request" in the code bespeaks of an intent not to authorize mandatory appointments of counsel for free legal aid who is then confronted with an important ethical decision but who can nevertheless rightly refuse to serve for any valid reason.[89]

Ethical aspiration or professional responsibility is different from and should not be confused with a legally demandable and enforceable obligation.

In a trailblazing international case, *Gussenbauer v. Austria*, an Austrian practicing lawyer's two human rights applications or complaints about uncompensated mandatory legal aid service under article 4 of the European Convention on Human Rights (ECHR) prohibiting forced labour or work beyond one's normal civic obligations were held admissible in 1972, by the European Human Rights Commission and which resulted in a friendly settlement.[90]

Dr. Heinrich Gussenbauer was a practicing lawyer based in Vienna who was appointed ex officio counsel for defendants in two different criminal proceedings. In both cases, his requests to be released from these obligations were rejected by the Austrian Judges Chamber of the Regional Court. At that time, under the Austrian legal aid system, lawyers are obliged to act for

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[87] Rule 139-A, secs. 1-2.

[88] Canon 14, rule 14.02.

[89] *Mallard v. District Court*, 490 U.S. 296, 301 (1989) ("In everyday speech, the closest synonyms of the verb 'request' are 'ask,' 'petition,' and 'entreat.' *See, e.g.,* Webster's New International Dictionary 1929 (3d ed.1981); Black's Law Dictionary 1172 (5th ed.1979). The verbs 'require' and 'demand' are not usually interchangeable with it.").

[90] *Gussenbauer v. Austria*, Application Nos. 4897/71 and 5219/71, European Commission of Human Rights, March 22, 1972, and July 14, 1972.

defendants if so appointed by the court, and they are subject to severe disciplinary sanctions and liable to pay damages if their refusal to act causes prejudice to the defendant, or to the State. However, the lawyer is not entitled to any fees from the State, nor to the reimbursement of out-of-pocket expenses, except travelling expenses. Nevertheless, the Bar Associations get an annual sum for charitable purposes in respect of lawyers or their relatives and which is paid by the State to support the Bar Associations' pension fund for needy members or their widows or their orphans. Dr. Gussenbauer "alleged that his appointment as ex officio counsel violated Art. 4 by itself, and also in conjunction with Art. 14 of the Convention, and Art. 1 of Protocol No. 1. In his opinion, the Austrian legal aid system constituted forced labour and did not form a 'part of normal civic obligations' within the meaning of Art. 4. (3)(e) of the Convention. As regards Art. 4 in conjunction with Art. 14, he alleged that other comparable legal professions, such as notaries, court experts etc., had no such obligation to work without remuneration. Furthermore, he alleged a violation of his property rights under Art. 1 of Protocol No. 1 by the fact that he had to work without remuneration and without even compensation for the actual costs which he incurred."[91]

These facts are quite similar to the MLAS and CLAS regime of compulsory service without pay under pain of sanctions and penalties on non-compliant lawyers tantamount to suspension from the practice of law with a fine to boot. Section 7 of the MLAS rule provides in part, thus:

> SECTION 7. *Penalties*.
>
> (a) At the end of every calendar year, any practicing lawyer who fails to meet the minimum prescribed 60 hours of legal aid service each year shall be required by the IBP, through the NCLA, to explain why he was unable to render the minimum prescribed number of hours. If no explanation has been given or if the NCLA finds the explanation unsatisfactory, the NCLA shall make a report and recommendation to the IBP Board of Governors that the erring lawyer be declared a member of the IBP who is not in good standing. Upon approval of the NCLA's recommendation, the IBP Board of Governors shall declare the erring lawyer as a member not in good standing. Notice thereof shall be furnished the erring lawyer and the IBP Chapter which submitted the lawyer's compliance report or the IBP Chapter where the lawyer is registered, in case he did not submit a compliance report. The notice to the lawyer shall include a directive to pay Four Thousand Pesos (P4,000) penalty which shall accrue to the special fund for the legal aid program of the IBP.

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[91] European Commission of Human Rights, Application Nos. 4897/71 and 5219/71, Report of the Commission, 8 October 1974, 2.

> (b) The "not in good standing" declaration shall be effective for a period of three (3) months from the receipt of the erring lawyer of the notice from the IBP Board of Governors. During the said period, the lawyer cannot appear in court or any quasi-judicial body as counsel. Provided, however, that the "not in good standing" status shall subsist even after the lapse of the three-month period until and unless the penalty shall have been paid.
>
> (c) Any lawyer who fails to comply with his duties under this Rule for at least three (3) consecutive years shall be the subject of disciplinary proceedings to be instituted *motu proprio* by the CBD. The said proceedings shall afford the erring lawyer due process in accordance with the rules of the CBD and Rule 139-B of the Rules of Court. If found administratively liable, the penalty of suspension in the practice of law for one (1) year shall be imposed upon him.

We hasten to add here that this provision for "not in good standing" declaration that bars the concerned lawyer from appearing in court or any quasi-judicial body effectively grants the IBP disciplinary powers over lawyers, which is an undue delegation of the regulatory power of the Supreme Court, and, not to mention, a violation of due process.

In turn, the CLAS rule provides, thus:

> SECTION 14. Penalties. –
>
> (a) A covered lawyer who fails to comply with the requirements of this Rule shall be required to show cause in writing within ten (10) days from receipt of notice why no disciplinary action should be taken against him/her. Should the OBC find the new lawyer's explanation insufficient to justify the non-compliance, it shall recommend to the Supreme Court that the lawyer be delisted as a "member in good standing" of the Bar. It may also recommend any appropriate disciplinary measures depending on the reasons for and the gravity of the non-compliance.

We also hasten to point out here that the effective penalty is too harsh and oppressive to the new lawyer: immediate disbarment under a different collar of being "delisted" as a "member in good standing" that prevents one from practicing law.

Going back to *Gussenbauer*, subsequent to the filing of the applications, the Constitutional Court of Austria declared "unconstitutional certain provisions of the Austrian law relating to the legal aid system" through a decision given on 19 December 1972.[92] New legislation was passed by the Austrian parliament, which became the basis of the friendly settlement of the consolidated applications. The Commission stated, thus:

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[92] *Id.* at 3.

> The representatives of the Government referred to the new Austrian acts which Parliament had adopted on 8 November 1973, and which had entered into force on 1 December 1973 (citations omitted).
>
> They mentioned in particular the following characteristic features of the measures concerned:
>
> Maintenance of the lump-sum system which was according to the wishes of the Bar Associations who had been consulted in this connection. This sum, however, was fixed so as to amount to the full equivalent of the annual sum which the lawyers were entitled to if the official tariff (Rechtsanwalttariff) would apply;
>
> This sum was paid into a pension fund for the provision of old-age and other pensions to members of the profession, their widows and orphans; members of the Bar would now have a statutory right to his pension, the details of which were fixed in delegated legislation by autonomous rules of the Bar Associations. These rules were applied under the control of both the administrative and constitutional courts;
>
> In order to correct any unequal distribution of work under the old system, radical new measures were provided so as to ensure that all members of the Bar would basically have to do the same amount of work under the legal aid systems. This includes a fairer grouping of local Bars;
>
> The principle idea under the new system was still to remunerate legal aid lawyers by the provision of an adequate pension and not to pay fees to individual lawyers in respect of each case undertaken by them. Such pensions would be the same for everybody and the work-load should also be the same for each member of the Bar.[93]

The ECHR and ICCPR provisions on forced labour are identical as to give this international human rights case great weight in our jurisdiction. Its domestic binding force even while pending, led the Constitutional Court of Austria to declare unconstitutional certain aspects of the legal aid system. Furthermore, the Austrian Parliament passed new measures for compliance with the European Convention on Human Rights. Hence, this case may equally be binding here as an international precedent for domestic application. As Justice Perfecto long averred about the importance of international law, especially with Philippine membership in the United Nations:

> Justice has no country. It is of all countries. The horizon of justice cannot be limited by the scene where our tribunals are functioning and moving. That horizon is boundless. That is why in our Constitution the bill of rights has been written not for Filipinos, but for all persons. They are rights that belong to men, not as Filipinos, Americans, Russians, Chinese, or Malayan, but as members of humanity. The international

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[93] *Id.*, at 4.

> character of our duty to administer justice has become more specific by the membership of our country in the United Nations.[94]

Summing up, being required to render free or pro bono legal aid services by the MLAS or CLAS rules constitutes involuntary servitude or forced or compulsory labour that violates the constitutional prohibition against any form thereof. This violation is a breach, too, of international human rights and Philippine treaty obligations under the International Covenant on Civil and Political Rights against forced labour beyond a private lawyer's normal civic obligations.

Illegal Taking and Undue Taxation

The practice of law in the Philippines is exclusively regulated by the Supreme Court pursuant to its constitutional rule-making power on admission to the bar and over the Integrated Bar of the Philippines.[95] Lawyers, especially private practitioners, are thus bound to comply with the Court's regulations if they want to continue in the profession or practice of law. Thus, we often take for granted the validity of a Supreme Court issuance. After all, the Court has the last word on what is constitutional or not or what the law is—even in error. And we submit.

But the Constitution provides plainly, without exception or distinction that "(p)rivate property shall not be taken for public use without just compensation."[96]

The concept of private property in our jurisdiction includes a person's work, which is that individual's means of livelihood essential to the enjoyment of the most basic and primordial right to life guaranteed by no less than the Bill of Rights.[97] "Today employment is no longer just an ordinary human activity. For most families, the main source of their livelihood, employment has now leveled off with property rights which no one may be deprived of without due process of law."[98] "A profession, trade or calling is a property right within the meaning of our constitutional guarantees. One cannot be deprived of the right to work and the right to make a living because these rights

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[94] Perfecto, J. (Dissenting Opinion), *Cham v. Keh*, G.R. No. L-5, September 17, 1945.

[95] CONST., art. VIII, sec. 5, para. (5).

[96] CONST., art. III, sec. 9.

[97] CONST., art. III, sec. 1.

[98] *Alhambra Industries v. NLRC*, G.R. No. 106771, November 18, 1994.

are property rights, the arbitrary and unwarranted deprivation of which normally constitutes an actionable wrong."[99]

Thus, our profession or work as lawyers is property within the constitutional guarantee against taking without just compensation. Private lawyers' practice of law as employment or their very means of livelihood is constitutionally protected against taking by the government for public use or purpose without just compensation in the same way that other types of properties like lands are amply protected.

Under DUE PROCESS and EQUAL PROTECTION[100] a lawyer is no different in the eyes of the law from any other person seeking a living wage[101] and toiling long hours and sleepless nights for a higher standard of living and improved quality of life for all.[102] In *Schware v. Board of Bar Examiners*,[103] the United States Supreme Court has held that "(a) State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." It added that "[w]e need not enter into a discussion whether the practice of law is a 'right' or 'privilege.' Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace."[104] As one's means of livelihood rooted in the fundamental right to work, a lawyer duly qualified and admitted enjoys the right to practice and to continue to do so under the mantle of our constitutional guarantees for property rights.

It must be borne in mind, too, that private law practice, especially for solo or small law firms in the country and those in far flung provincial towns is an arduous financial struggle. Mandatory free legal aid service could even impoverish a lawyer, particularly if unduly burdened by a case that demands more than the minimum hours required for which the ethics of the profession compel all necessary work to avoid prejudice to a client or miscarriage of justice. Lawyers are human beings, not time machines. In litigation, we go mostly by results or outputs if we want quality work to fulfill "effective" counsel. If it were only a matter of hours, that would readily be consumed by travel or time stuck in traffic or waiting time for our case to be called in court.

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[99] *JMM Promotion and Management Inc. v. Court of Appeals*, G.R. No. 120095, August 5, 1996.

[100] CONST., art. III. sec. 1.

[101] CONST. art. XIII, sec. 3.

[102] CONST., art. II, sec. 9.

[103] 353 U.S. 232, 239 (1957).

[104] *Id.* Footnote 5, citing *Ex parte Garland*, 4 Wall. 333, 379.

Added to that are the overhead expenses, administrative costs, and out-of-pocket expenses for litigation.

When by mandatory rule a lawyer is effectively deprived of such employment by being compelled to provide free legal aid, actual taking occurs in that respect. The lawyer is completely ousted of the beneficial enjoyment of the product of professional services rendered and restrained from devoting that time and effort for personal needs or enjoyment of the reasonable returns or fruits of one's labor, which are all private property. Hence, such taking that goes too far beyond mere regulation for competent legal service and upright conduct in law practice and personal life certainly warrants just compensation.

For the rule is: "a taking also could be found if government regulation of the use of property went 'too far.' When regulation reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to support the act. While property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.[105]

As applied to lawyers' services, we can further borrow—since justice has no country and by our own Supreme Court's lead[106]—the "polestar" *Penn Central Test* of the U.S. Supreme Court, which outlined three elements for ad hoc analysis of whether taking occurs or not, thus:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. [107]

First, "economic impact"—taking where loss or harm is suffered. "Attorneys cannot perform two jobs at once. When appointed to represent an indigent client, the time spent on that case cannot be charged to a paying client." [108] A practicing attorney who commands, for example, the average amount of Php5,000.00 pesos per hour in billable time would in effect suffer the equivalent sum of Php300,000.00 pesos in lost revenues each year under the MLAS rule. For the newly admitted attorney with the minimum rate of

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[105] *Mosqueda v. Pilipino Banana Growers & Exporters Association, Inc.*, G.R. No. 189185, August 16, 2016, citing *City of Manila v. Hon. Laguio*, Jr., G.R. No. 118127, April 12, 2005. See *Southern Luzon Drug Corporation v. DSWD*, G.R. No. 199669, April 25, 2017.

[106] *City of Manila v. Laguio*, G.R. No. 118127, April 12, 2005.

[107] *Pennsylvania Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

[108] Atwell, *supra* note 32, at 1258.

Php1,000.00 pesos per hour, the loss suffered would be the total sum of Php120,000.00 pesos for the year of service.

Second, "investment-backed expectations"—taking where the statute or regulation substantially furthers important public policies that frustrate distinct investment-backed expectations. "When compared to eminent domain law, court appointment clearly appears to constitute a taking. The Court accepts as a taking of property mere interferences with property interests when the imposition is direct. When an attorney receives an appointment, he is directly imposed upon because his property becomes the property of the state until the case or appointment terminates. When appointments sometimes last for intolerable periods, the appointed attorney suffers a direct burden which nullifies his earning power."[109] Quite obviously, mandatory free or pro bono legal aid service deprives the covered private lawyer of the expected fruits of legal work and the reasonable returns on his or her huge investments in four or more years of legal education, preparation for the Bar examinations, further training and specialization, and actual private law practice expenses for a respectable office, overhead costs, and other requirements including staff compensation plus MCLE expenses. Compare all that with public attorneys—and those who do the imposing, who are not only fully salaried, but well-provided with offices and equipment, vehicles or transportation services, allowances, further training, support staff, and a host of government benefits including retirement pension—all funded by taxpayers' money inclusive of private lawyers' income tax payments.

Third, "character of the regulation"—taking through "acquisitions of resources to permit or facilitate uniquely public functions."[110] Both the MLAS and CLAS rules effect a taking of our property rights in legal work to support the public function of legal aid as guaranteed and mandated by the constitution.

In an early case involving a lawyer appointed by the court to defend a pauper defendant in accordance with a statutory provision similar to our constitution, but whose attorney's fee was denied by the county government, it was held by the Iowa Supreme Court in 1850, that:

> The only question for decision here, is, as to the county of Washington being liable for the services of the attorney rendered in pursuance of the requirement of the statute in this case. The statute, *(Jfev. Stat.* 155, § 64,) provides that "The court shall assign counsel to defend the prisoner, in case he cannot procure counsel himself."

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[109] *Id.*

[110] *Pennsylvania Central*, *supra* note 107, at 128.

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> Where an act of service is performed in obedience to direct mandate of statutory law, under the direction of a tribunal, to which the enforcement of that law is committed, reasonable compensation to the person who performs that service is a necessary incident, otherwise the arm of the law will be too short to accomplish its designs. **If attorneys as officers of the court, have obligations under which they must act professionally, they also have rights to which they are entitled, and which they may justly claim in common with other men in the business of life. Among these rights, that of reasonable compensation for services rendered in their profession, is justly to be considered.**[111] (Emphasis ours)

The Iowa Supreme Court explained that:

> The exercise of judicial power, in order to effectuate the common and statute law, frequently becomes necessary, and must exist incidentally. By virtue of such power, auditors, commissioners, masters in chancery, i.e., are appointed and act; and proper compensation is awarded to them. All the officers of the court are recognized, as being on just consideration, entitled to fees for official services performed. All that has been done by the law, is merely to limit them in amount. **Why should the attorney at law be made an exception to this general principle? We see no good reason for it. His time, labor and professional skill are his own. He should not be required to bestow them gratuitously at the will of the court, any more than should any other officer.**[112] (Emphasis ours)

In justifying its holding, the Iowa Supreme Court further cited the U.S. Constitution, thus:

> We are of the opinion, that the act requiring the court to appoint counsel for the prisoner is quite sufficient for that purpose, as we have shown. If it were not, however, when the duty enjoined had been performed by the counsel, his right to his pay for it had accrued. The prisoner being a pauper, the liability attached to the county of which he was a citizen. The right of the attorney to compensation was complete, without further legislative enactment. This is not a case of voluntary services. **It is a fundamental rule of right, established by the constitution of the United States, "that private property shall not be taken for public use without just compensation." The service was required by competent legal authority, which having been rendered, the attorney is entitled to his pay for it.**[113] (Emphasis ours)

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[111] *Hall v. Washington Co.,* 2 Greene 473, 476 (Iowa Supreme Court, 1850).

[112] *Id.*, at 476-477.

[113] *Id.*, at 478.

For sure this decision could be applied to the mandatory free or pro bono legal aid service being required by "competent legal authority", that is, the Supreme Court, and upon such mandatory service being rendered entitles the lawyer to appropriate compensation. Otherwise, a violation of the constitution would clearly arise.

Equally persuasive or instructive against compulsory free legal aid service is the 1854 landmark case of *Webb v. Baird* decided by the Supreme Court of Indiana.[114] The Indiana Supreme Court held that:

> It will not be contended that the Court had the right to demand *Baird's* services as an attorney in defending *Wickens* as a pauper, without any reward. - **The 21st section, art. 1, of the constitution, provides, "that no man's particular services shall be demanded without just compensation."**[115] (Emphasis ours)

The Indiana Supreme Court explained that:

> The gratuitous defence of a pauper is placed upon two grounds, viz., as an honorary duty, even as far back as the civil law; and as a statutory requirement. Honorary duties are hardly susceptible of enforcement in a Court of law. Besides, in this state, the profession of the law was never much favored by special pecuniary emoluments, save, some years ago, in the case of docket-fees in certain contingencies. The reciprocal obligations of the profession to the body politic, are slender in proportion. **Under our present constitution, it is reduced to where it always should have been, a common level with all other professions and pursuits. Its practitioners have no specific fees taxed by law—no special privileges or odious discriminations in their favor. Every voter who can find business, may practice on such terms as he contracts for. The practitioner, therefore, owes no honorary services to any other citizen, or to the public.** The constitution and laws of the state go upon the just presumption that the public are discriminating enough in regard to qualifications. Every man having business in Court, is presumed to be as competent to select his legal adviser as he is to select his watchmaker or carpenter. **The idea of one calling enjoying peculiar privileges, and therefore being more honorable than any other, is not congenial to our institutions. And that any class should be paid for their particular services in empty honors, is an obsolete idea, belonging to another age and to a state of society hostile to liberty and equal rights.**[116] (Emphases ours)

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[114] *Supra* note 1.

[115] *Id.*, at 15.

[116] *Id.*, at 16.

Going further, the Indiana Supreme Court highlighted the economic aspect of a lawyer's professional services and even considered gratuitous services exacted from a lawyer as a form of undue taxation in violation of the constitutional mandate for a uniform and equal rate of assessment for all citizens. Our own constitution similarly provides that "[t]he rule of taxation shall be uniform and equitable."[117] Thus:

> The legal profession having been thus properly stripped of all its odious distinctions and peculiar emoluments, the public can no longer justly demand of that class of citizens any gratuitous services which would not be demandable of every other class. **To the attorney, his profession is his means of livelihood. His legal knowledge is his capital stock. His professional services are no more at the mercy of the public, as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic. The law which requires gratuitous services from a particular class, in effect imposes a tax to that extent upon such class—clearly in violation of the fundamental law, which provides for a uniform and equal rate of assessment and taxation upon all the citizens.**[118] (Emphasis ours)

Finally, the Indiana Supreme Court stressed that the responsibility for legal aid rests on the state or the particular polity, and not on private lawyers:

> An attorney of the Court is under no obligation, honorary or otherwise, to volunteer his services. As a matter of private duty, it devolves as much on any other citizen of equal wealth to employ counsel in the defence, as on the attorney to render service gratuitously. Nor indeed is it the duty of any private citizen to incur the expense. It is precisely like providing for the wants of the poor in other respects. **The generous feelings which prompt acts of charity are admirable and ennobling to our nature. But even charity itself almost ceases to be a virtue, when they, whose duty it is to provide for the poor, make private charity a pretext for public neglect.** If the state has not made provision for the defence of poor prisoners, it has presumed and trespassed unjustly upon the rights and generous feelings of the bar; levying upon that class a discriminating and unconstitutional tax. *Blythe v. The State*, 4 Ind. R. 525. It is therefore not their duty, and, under the circumstances, if no constitutional provision is made by law, no very great virtue, to encourage public neglect by gratuitous service.
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> Whenever, therefore, the law makes provision for the one, at the public expense, the other, being within the reason of the law, is also embraced. It seems eminently proper and just, that **the treasury of the county, which**

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[117] CONST., art. VI, sec. 28, para. (1).

[118] *Webb*, *supra* note 1, at 17.

> **bears the expense of his support, imprisonment and trial, should also be chargeable, with his defence.**[119] (Emphases ours)

"*Webb* represents the first rejection by a state supreme court of the various theories advanced in support of compulsory legal assistance."[120]

So, too, the *Gussenbauer* international case may well control here since one of the grounds for admissibility of the applications therein was the similar "violation of [Gussenbauer's] property rights under Art. 1 of Protocol No. 1 by the fact that he had to work without remuneration and without even compensation for the actual costs he incurred."[121] Art. 1 of Protocol No. 1 to the European Convention on Human Rights provides in part:

> Article 1 of Protocol No. 1 – Right to property
>
> 1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.[122]

While we use the term "taking" as adopted from American law or the negative formulation of the "Takings Clause" of the 5th Amendment of the U.S. Constitution, under this provision, which is expressed in positive terms of entitlement, the term is "deprivation" that has been interpreted to mean as "interference with the right to peaceful enjoyment of possessions"[123] or one's "right to property" following *Marckx v. Belgium*.[124]

The "three rules" approach of the European Court of Human Rights in Art. 1 Protocol 1 analysis could enlighten us:

> 78. Article 1 of Protocol No. 1 comprises three distinct rules. The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property. The second rule, contained in the second sentence of the first paragraph, covers only deprivation of "possessions" and subjects it to certain conditions. The third rule, stated in the second paragraph, recognises that the Contracting

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[119] *Id.*, at 18-19.

[120] Atwell, *supra* note 32, at 1240.

[121] European Commission of Human Rights, *supra* note 91, at 2.

[122] European Court of Human Rights, Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights: Protection of Property (updated 31 August 2021), 6. Available at: https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf.

[123] *Id.*, at 19, *et seq.*

[124] European Court of Human Rights, Application No. 6833/74, Judgment of 13 June 1979.

> States are entitled, *inter alia*, to control the use of property in accordance with the general interest.
>
> 79. The three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to the peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.
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> 80. To be deemed compatible with Article 1 of Protocol No. 1, the interference must fulfil certain criteria: it must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised.
>
> 81. This approach structures the Court's method of examination of cases where it is satisfied that Article 1 of Protocol No. 1 is applicable. It consists of a number of successive steps whereby the following questions are addressed: **Has there been an interference with the applicant's right to the peaceful enjoyment of his/her "possessions"? If so, does the interference amount to a deprivation of property? If not, was control of use of property concerned?** If the measures which affected the applicant's rights cannot be qualified as either deprivation or control of use of property, can the facts of the case be interpreted by the Court in the light of the general principle of respect for the peaceful enjoyment of "possessions"?[125] (Citations omitted; emphasis ours)

If by the universality of human rights doctrine we apply to the MLAS and CLAS rules Article 1 of Protocol 1 to the European Convention on Human Rights given its derivation from the Universal Declaration of Human Rights and as "the first steps for the collective enforcement of certain of the rights stated [therein],"[126] we could readily make a positive answer to the first two questions above-mentioned. Indubitably, there is interference with a private practitioner's peaceful enjoyment of the right to one's work as a lawyer since one must set aside private time, that is, 60 hours a year or 120 hours for 12 months upon admission to the bar for free legal aid service. Secondly, such interference amounts to a deprivation of property for in the words of *Webb*: "To the attorney, his profession is his means of livelihood. His legal knowledge is his capital stock. His professional services are no more at the mercy of the public, as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic."[127]

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[125] European Court of Human Rights, Guide, *supra* note 122, 19.

[126] European Convention of Human Rights, Preamble: "Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration." Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf.

[127] *Webb*, *supra* note 1, at 112.

More importantly, our Supreme Court has consistently held that a profession is a property right within the meaning of the guarantees of our constitution. For sure, this includes the legal profession for lawyers, especially private practitioners, have the fundamental right to work or practice law and be gainfully employed to make a living or in these Covid-19 pandemic times, survive and make ends meet at the very least.

It is inescapable, therefore, that mandatory free or pro bono legal aid service is plainly a form of "compelled charity" or "forced donation." It is akin to a forced donation of subdivision land to the local government that has been declared unconstitutional. A private practitioner is like a real estate developer who invests resources and builds a subdivision, that is, his or her law practice, part of which cannot be the subject of a forced donation for legal aid to the poor, the needy or underprivileged.

As our Supreme Court explained in *Republic v. Llamas* on the provision of P.D. No. 957 requiring mandatory donation of subdivision roads, alleys, sidewalks and playgrounds by the owner or developer to the LGU:

> The last paragraph of Section 31 is oxymoronic. One cannot speak of a donation and compulsion in the same breath.
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> A donation is, by definition, "an act of liberality."
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> xxx xxx xxx
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> In jurisprudence, *animus donandi* (that is, the intent to do an act of liberality) is an indispensable element of a valid donation, along with the reduction of the donor's patrimony and the corresponding increase in the donee's patrimony.
>
> Section 31's compulsion to donate (and concomitant compulsion to accept) cannot be sustained as valid. Not only does it run afoul of basic legal concepts; it also fails to withstand the more elementary test of logic and common sense. As opposed to this, the position that not only is more reasonable and logical, but also maintains harmony between our laws, is that which maintains the subdivision owner's or developer's freedom to donate or not to donate. This is the position of the 1998 *White Plains* Decision. Moreover, as this 1998 Decision has emphasized, to force this donation—and to preclude any compensation—is to suffer an illegal taking.

In fine, mandatory free or pro bono legal aid service is untenable for being an unconstitutional regulatory taking, and even an undue tax imposition. It is

likewise an interference in the peaceful enjoyment of one's private property or work as a lawyer that constitutes a breach of international human rights. And following the words of the Supreme Court, commonsensical wisdom shows that as a "forced donation," mandatory free or pro bono legal aid service cannot be sustained as valid for being oxymoronic and if we want to maintain harmony between our laws and our basic freedoms as sovereign citizens of this republic—and if we want to keep it as a republic.

IV. Comparative Insights

It is quite ironic that the discredited "officer of the court" notion about private practitioners purportedly rooted in English custom and history has been used still to justify mandatory free or pro bono legal aid service.

On the contrary, however, the United Kingdom itself has long established for more than one hundred years a state-funded national program for legal aid where willing English solicitors and barristers, as a matter of policy, were compensated adequately for their services.

In fact, the landmark 1945 Report of the Committee on Legal Aid and Legal Advice in England and Wales, otherwise known as the Ruschliffe Committee Report,128 made no mention at all of the "officer of the court" so-called tradition in its comprehensive review of legal aid and legal advice in England and Wales. Instead, the Report found a voluntary and compensated system of court appointment for legal aid.

In the Supreme Court, for example, the Report revealed:

> 6. For probably more than 150 years there has existed, in many of the courts of whose jurisdiction the present Supreme Court is heir, and in the Supreme Court when it came into existence in 1876, a system whereby Poor Persons could sue or defend in forma pauperis. xxx
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> 7. The first regular scheme for the assistance of Poor Persons litigation in the Supreme Court xxx came into operation on 1st January, 1914.
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> 8. The general scheme of these Rules (which applied only litigation in the Supreme Court) was as follows:—
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> xxx xxx xxx

[128] Available at: https://www.lawgazette.co.uk/download?ac=13526.

> (d) On receiving the report the court might admit the applicant as a Poor Person, and thereupon assign to him to conduct his case counsel and a solicitor taken from lists kept of members of the Bar and the Solicitors' profession who were **willing to act**.[129] (Emphasis ours)

These 1914 Rules provided that "nothing contained in this Rule shall preclude any solicitor or counsel from receiving remuneration out of any fund which may from time to time be created by the Treasury for the payment of the out-of-pocket expenses or other charges of solicitors or the fees of counsel as assigned."[130]

For criminal courts, the Report revealed the same system of voluntary and compensated counsel for legal aid, thus:

> 34. For many years, and perhaps from time immemorial, there has existed the practice of granting "dock briefs." That is to say a prisoner on indictment has been entitled to the service in his defence of any barrister ho happens to be in court at the time when he is in the dock **on tendering to counsel the sum of one guinea** without the intervention of a solicitor. A barrister so selected is under an obligation to accept the brief.
>
> 35. It has also long been the practice of Judges when about to try cases which present features of difficulty, either of fact or of law, if the prisoner is obviously not in a financial position to pay for counsel, **to ask** some member of the Bar to undertake the defence gratuitously.
>
> 36. In 1903 the Poor Prisoners' Defence Act of that year made provision for more substantial legal aid for prisoners tried on indictment, giving power to the committing Justices, or the Judge of the court of trial (including the Recorder or the Chairman of Quarter Sessions), to certify that he ought to have such aid, and that, in that event, a prisoner should be entitled to have a solicitor and counsel assigned to him. xxx **Where a certificate was given, the expenses of the defence, including fees of counsel and solicitor, and the expenses of witnesses, were to be paid out of public money, the rates and scales of payments being settled by Regulations made by the Home Secretary.** There Regulations provided for fees to counsel of £1 3S. 6d. which might be increased to £3 5S. 6d if the Judge certified that the case was one of exceptional length or difficulty, and to the solicitor a fee not exceeding two guineas, which might be increased in similar circumstances to £5.[131] (Emphases ours)

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[129] *Id.*, at 2.

[130] *Id.*

[131] *Id.*, at 6.

It was no surprise then that a key recommendation of the Ruschliffe Committee on the provision of legal aid in all courts, and whose cost should be borne by the state, was that "(6) Barristers and solicitors should receive adequate remuneration for their services."

For legal advice, the Committee recommended that:

> 176. We have come to the conclusion that there should be facilities for legal advice available all over the country. Further, as there are often times where advice is needed immediately, it is clear that we must provide a system that can meet this demand. Lastly, it is plain that we can only do this through the solicitors' branch of the legal profession, and **we must provide for remuneration for the services they render**.[132] (Emphasis ours)

In its concluding summary of recommendations, the Committee specified certain details for ensuring adequate remuneration by the state for lawyers willing to handle legal aid and legal advice with due regard to the amount of work involved in each case or matter.[133]

Additionally, as against the negative or pejorative connotation of a "poor person", the Committee recommended the use instead of the term "assisted person."[134]

Today, state-funded legal aid in the United Kingdom is an established special area of practice for willing lawyers or firms under a procurement system of tenders for legal aid service contracts run by the Legal Aid Agency.[135] A comprehensive review has been underway since December 2018, and recent data gathered for criminal legal aid (CLA) in 2019-2021 shows a total of 1,220 CLA firms which handled about 922,000 cases for a combined fee or income of £616.9 million.[136]

Spain has a similar state-funded legal aid program:

> The Spanish system of legal aid (Asistencia Jurídica Gratuita) is determined by law, financed by the State, organized and managed by the Spanish Bar and supervised by the CGAE. Additionally, the CGAE and the

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[132] *Id*., at 36.

[133] *Id*., at 41-43.

[134] *Id*., at 23.

[135] See https://www.gov.uk/crime-justice-and-law/legal-aid-for-providers#guidance_and_regulation. See also https://www.gov.uk/government/organisations/legal-aid-agency. See further https://www.gov.uk/government/organisations/legal-aid-agency/about/procurement.

[136] Summary Information on Publicly Funded Criminal Legal Services (February 2021), 8. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/960290/data-compendium.pdf.

> Bar of each territory or province have gradually developed additional services that are financed by the Bars themselves, in conjunction with specific aid from regional or local administrations. These additional services are known as Specialized Legal Guidance Services (Servicios de Orientación Jurídica Especializados).
>
> xxx xxx xxx
>
> The attorney undertaking a legal aid matter is appointed by the court which granted the aid at the aided person's request on the basis of lists of attorneys compiled and kept by local Bar Associations. The attorneys are included in these lists on a voluntary basis and, if chosen, are obliged to provide their legal services. **Legal aid lawyers receive payment in exchange for the services provided, according to a fees schedule set by the State.** This payment, however, is lower than the fees typically received by Spanish lawyers, in particular compared to the fees of large firms.[137] (Emphasis ours)

Additionally, to ensure competence of legal aid service providers, a minimum of three years' professional practice experience is required. Compare this with the CLAS rule that covered newly admitted lawyers only.

Another country with a long-established legal aid program that is subsidized by the state is Austria following the leading international human rights case of *Gussenbauer v. Austria* that was settled with, *inter alia*, a system of equal work with equal pay albeit in the form of pension rights.[138] In Austria, private lawyers who register with the local bar association may be called to render legal aid upon court request and can only refuse the mandate on serious grounds such as conflict of interest. "[T]he attorney is compensated by the opposing party if the applicant prevails in the litigation. Otherwise, the attorney is not entitled to fees. However, as legal aid has the character of a social security benefit, the federal states pay a certain contribution to the local bar as remuneration, thus providing for an indirect benefit to the attorneys registered with the bar. The funds are used to sponsor retirement pensions, occupational disability pensions and provision for dependents."[139]

A glimpse of European practice of compensation for legal aid lawyers or reimbursement procedure is related by the Council of Europe citing as

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[137]Latham & Watkins, Pro Bono Practices and Opportunities in Spain, 615-616, https://www.lw.com/admin/Upload/Documents/Global%20Pro%20Bono%20Survey/pro-bono-in-spain.pdf.

[138] European Commission of Human Rights, *supra* note 91.

[139]Latham & Watkins, Pro Bono Practices and Opportunities in Austria. Available at : https://www.lw.com/admin/Upload/Documents/Global%20Pro%20Bono%20Survey/pro-bono-in-austria.pdf.

examples, Austria, Lithuania, Luxembourg, Montenegro, Ukraine, and Switzerland, thus:

> 34. In Austria, private lawyers acting in the framework of the legal aid scheme are not paid unless the proceedings result in exceptional expenses. Instead, the government pays a lump sum to the pension fund of the bar association; this lump sum is calculated on the basis of the costs of all legal aid cases handled by lawyers during a given year. In Lithuania, lawyers providing legal aid on a regular basis receive a fixed monthly salary. Other lawyers are paid for each case based on the established rate for certain procedural actions, taking into account the complexity of the case. In the future, legal aid providers will be able to submit an application for reimbursement and provide supporting documents online via TEISIS. In Luxembourg, reimbursement is calculated by the bar association on the basis of the list of services provided. A legal aid provider can request advance payment for the work. In Montenegro, legal aid providers are entitled to 50% of the fee provided for in the Lawyer Tariffs and the reimbursement of necessary expenses linked to the provision of legal aid. In Switzerland, the level of remuneration is calculated by courts in accordance with cantonal law. In Ukraine, the procedure for calculating reimbursement is complex and takes into account a wide range of factors, such as the number of court hearings attended, the number of procedural actions carried out, the number of procedural documents drafted and the outcome of the proceedings. Legal aid providers forfeit their right to reimbursement if they do not make a claim within 120 days of the date on which the right to reimbursement arises.[140]

The 2016 global study on legal aid in 49 countries around the world conducted by the United Nations Office on Drugs and Crime revealed a common system of legal aid lawyers or providers being compensated through state-funding in various ways.[141] These countries include: Afghanistan, China, Japan, Nepal, Thailand, and Viet Nam in the Asia Pacific; Benin, Burkina Faso, Cabo Verde, Chad, Democratic Republic of Congo, Ghana, Kenya, Mauritania, Mauritius, South Africa in Sub-Saharan Africa; Argentina, Brazil, Dominican Republic, Ecuador, Guatemala, Haiti, Mexico, and Paraguay in Latin America & the Caribbean; Armenia, Belarus, Bulgaria, Czech Republic, Georgia, Kazakhstan, Lithuania, Moldova, Montenegro, Slovak Republic, Turkmenistan, and Ukraine in Eastern Europe & Central Asia; Australia, Austria, Canada, Cyprus, Finland, Greece, Israel, Italy, New Zealand, Portugal,

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[140] Committee of Ministers of the Council of Europe, Guidelines on the Efficiency and the Effectiveness of Legal Aid Schemes in the Areas of Civil and Administrative Law and Explanatory Memorandum, 31 March 2021, 28. Available at: https://rm.coe.int/guidelines-of-the-committee-of-ministers-of-the-council-of-europe-on-t/1680a39918.

[141] United Nations Office on Drugs and Crime, GLOBAL STUDY ON LEGAL AID: COUNTRY PROFILES (2016). Available at: https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/GSLA_-_Country_Profiles.pdf.

Spain, United Kingdom, and the United States of America in Western Europe & Others Group.[142]

Not one of these countries provides for mandatory free or pro bono legal aid for private practitioners.[143] The study even showed that "the assigned counsel model, wherein private lawyers are paid a fixed fee per case/action or on an hourly basis, is the most frequent form of payment."[144]

These leading lights of consistent state practice around the world for state-funded legal aid may well be posited to have attained the level of a general principle of international law and/or customary international law in that our government should likewise "ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons"[145] as a principle constitutionally incorporated in our legal system with direct and binding effect.[146]

Furthermore, it has come to light through the World Bank's cost benefit analyses of 50 past and present legal aid programs around the world that "the benefits of legal aid and related services significantly outweigh their costs."[147]

The World Bank asserts and exhorts governments that "legal aid can also be smart economics," thus:

> The price of failing to address the global justice gap is high. Not providing legal aid can be a false economy, as the costs of unresolved problems shift to other areas of government spending such as health care, housing, child protection, and incarceration. For example, a study for Canada estimates the cascading costs of unequal access to justice on public spending in other areas (e.g., employment insurance, social assistance, and health care costs) to be approximately 2.35 times more than the annual direct service expenditures on legal aid. In Australia, numerous studies show that there are net public benefits from legal assistance expenditures. Investments in legal aid can lead to significant government savings through avoided cost of arrest, conviction, incarceration, probation, and post-prison supervision. In addition, public investments in legal aid are also found to generate net savings in terms of avoided shelter/housing costs. Studies find

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[142] *Id.*

[143] *Id.*

[144] United Nations Office on Drugs and Crime, GLOBAL STUDY ON LEGAL AID: GLOBAL REPORT, 106 (2016). Available at: https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global_Study_on_Legal_Aid_-_FINAL.pdf.

[145] UN Basic Principles on the Role of Lawyers, sec. 3 (1990). Available at: https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx.

[146] CONST., art. II, sec. 2.

[147] World Bank, A TOOL FOR JUSTICE: THE COST BENEFIT ANALYSIS OF LEGAL AID, 2 (2019). Available at: https://documents1.worldbank.org/curated/en/592901569218028553/pdf/A-Tool-for-Justice-The-Cost-Benefit-Analysis-of-Legal-Aid.pdf.

> significant net economic benefits, even in the short term, including immediate benefits to clients and cost-savings to governments. Moreover, many studies may underestimate net benefits due to short time horizons and conservative assumptions.[148]

Finally, Professor Shapiro cautions that exaction of mandatory services could be counterproductive. "The draftee may well end up simply resenting the exaction. And certainly there is little to be said for imposing the service obligation solely to increase the satisfaction of those who are doing the imposing."[149] Not to mention the question of quality of the legal aid rendered, especially in respect of the international standard or obligation of a state to ensure or provide "effective" counsel in case of such need. Furthermore, private attorneys are not, strictly speaking, state agents by which a state obligation under international law can be deemed to be complied with. Hence, it is imperative that legal aid be primarily handled by the government as other countries do. It is simply a duty that cannot be passed on to the private sector.

To recap, comparative insights from around the world show the prevailing system of legal aid service that is state-funded compensated work done mainly by state attorneys and complemented by private lawyers on a voluntary or contractual basis constituting a specialized practice area in accordance with national legislation and international law.

In addition, as the World Bank has found, investing in legal aid is smart economics for the government since its benefits significantly far outweigh its costs.

V. Alternative Proposal

From all the foregoing, I respectfully propose these basic guiding principles to building an effective and sustainable legal aid program that is legally in order and equally just for private practitioners under the rule of law and *recta ratio*.

First Principle

Legal aid service should be adequately funded and primarily handled by the state as expressly mandated by the constitution and as a state duty and

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[148] *Id*., at 8.

[149] Shapiro, *supra* note 34, at 782.

obligation under international law for effective counsel, which should not be passed on to the private sector as a matter of law and justice.

Second Principle

For private law practitioners, legal aid should be on a voluntary or contractual basis in consonance with every attorney's fundamental freedoms and individual rights under the constitution and international human rights.

Third Principle

Legal aid service should be adequately compensated through regular salaries and standardized benefits for public attorneys, and by way of graduated fees and payment schemes or equivalent forms of remuneration such as tax incentives, consumer discounts, scholarships, training support, travel and subsistence allowances especially for those in economically or socially disadvantaged areas or far-flung localities in the provinces, health plans, and pension support for participating private lawyers or other service providers.

Fourth Principle

State-funded legal aid should be jointly administered through the Commission on Human Rights, as the primary constitutional agency therefor, the Public Attorney's Office, and the Integrated Bar of the Philippines, together with the country's law schools being invited to participate in the program by way of national and local government subsidies or other incentives for their respective legal aid clinics.

Reference may be made, *mutatis mutandis*, to the United Nations Principles and Guidelines on Access to Justice in Criminal Justice Systems adopted by the UN General Assembly on December 20, 2012.[150] Guideline 12 suggests, thus:

> Guideline 12. Funding the nationwide legal aid system
>
> 60. Recognizing that the benefits of legal aid services include financial benefits and cost savings throughout the criminal justice process, States should, where appropriate, make adequate and specific budget provisions for legal aid services that are commensurate with their needs, including by

[150] United Nations Office on Drugs and Crime. Available at: https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf.

providing dedicated and sustainable funding mechanisms for the national legal aid system.

61. To this end, States could take measures:

(a) To establish a legal aid fund to finance legal aid schemes, including public defender schemes, to support legal aid provision by legal or bar associations; to support university law clinics; and to sponsor non-governmental organizations and other organizations, including paralegal organizations, in providing legal aid services throughout the country, especially in rural and economically and socially disadvantaged areas;

(b) To identify fiscal mechanisms for channelling funds to legal aid, such as: (i) Allocating a percentage of the State's criminal justice budget to legal aid services that are commensurate with the needs of effective legal aid provision; (ii) Using funds recovered from criminal activities through seizures or fines to cover legal aid for victims;

(c) To identify and put in place incentives for lawyers to work in rural areas and economically and socially disadvantaged areas (e.g., tax exemptions or reductions, student loan payment reductions);

(d) To ensure fair and proportional distribution of funds between prosecution and legal aid agencies.

62. The budget for legal aid should cover the full range of services to be provided to persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence, and to victims. Adequate special funding should be dedicated to defence expenses such as expenses for copying relevant files and documents and collection of evidence, expenses related to expert witnesses, forensic experts and social workers, and travel expenses. Payments should be timely.

CONCLUSION

With all due respect, the Supreme Court rules on MLAS and CLAS requiring free or pro bono legal aid service for private practitioners are essentially devoid of proper constitutional, legal, factual, and historical basis. They provide for involuntary servitude and regulatory taking of private property without just compensation, and even an undue form of taxation; at the same time, they constitute a breach of international human rights. Exacting gratuitous service by mandatory rules will only encourage public neglect of a constitutional mandate imposed on the government by the sovereign Filipino people. But all these constitutional and human rights infirmities can readily be avoided if legal aid service is engaged by contract and justly compensated or if unpaid private lawyers are retained on a voluntary basis.

Under the rule of law and basic *recta ratio*, there can never be "compelled charity" or a "forced donation" since it is plainly oxymoronic and against commonsensical wisdom.

For that matter, most of us private practitioners do provide pro bono services in our own free and independent ways and within the limits of our means and resources not as "officers of the court," but more properly as Members of the independent Bar or "essential agents of the administration of justice" in line with international principles.[151]

It is high time now that our one government invest more and adequately provide for legal aid as a matter of constitutional duty instead of expediently passing the buck to private lawyers and struggling practitioners in these Covid-19 pandemic times.

By these back-to-basics strategies then, we could rightly advance legal aid in the Philippines.

REFLECTION

I grew up during the dark days of martial law in a family of human rights lawyers, that is, my twice-detained father, J. Antonio M. Carpio, Sr., and my older brother Jesus Antonio Z. Carpio, Jr. I then helped out in every little way I could in their work such as serving drinks and food to visiting clients or doing home-office chores. Thus, I had seen firsthand the sublime example for Primum Regnum Dei and the great benefits for the community of laying down one's life each day for another out of one's free will, courage, and generosity even in trying times. Never underestimate, as the wisdom of old tells us, the compelling power for the good of a volunteer or the hired laborer who is paid a just wage as the Gospel teaches us.

From these lenses then, I stand for voluntary or contracted legal aid service for us private practitioners. We presume good faith, too, and any practicing lawyer will always do selfless deeds for our society including legal aid without need for compulsion.

Mandatory exaction makes us slaves and robs us of our fundamental freedoms. It denies us of the supernatural joy of selfless altruism in our profession that makes it a most noble pursuit. It is like the dictatorial tree

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[151] U.N. Basic Principles, sec. 12, *supra* note 145. See U.N. Office on Drugs and Crime, Model Law on Legal Aid in Criminal Justice Systems with Commentaries, (2017). Available at: https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Model_Law_on_Legal_Aid.pdf.

planting decree during martial law, which Papa decried in his now classic poem "Trees" (adapted from Joyce Kilmer's "Trees")—

TREES

I think I shall not plant a tree
I shall not follow this decree.
I'm neither cowardly nor brave
I just don't wanna be a slave
Of any mortal same as me!
God made us free; and free I'll be!

Why should they rob me of the joy
I've known since I was still a boy?
The thrill of growing what I chose—
A pili, mango or a rose!
That's why I will not plant a tree.
I say—"to hell with this decree!"

Why let the loggers roam at will
Denuding every virgin hill
Then let the burden on us fall?
Where is the justice of it all?
Poems are made by fools like me
But greater fools made this decree![152]

Truly, why let the robbers in office roam at will, plundering every treasury hill, then let the burden of state-guaranteed legal aid on us, practicing attorneys, fall?

Where is the justice of it all?

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[152] J. ANTONIO M. CARPIO, "VIVA LA VIRGEN!" VERSES & POEMS & A PINCH OF PROSE, 18 (1995).

Papa led the Free Legal Assistance Group in Bicol. He served as our IBP Camarines Sur chapter's pioneer president and first IBP governor for Bicolandia.

At the IBP First Annual Convention of the Third House of Delegates held at the Manila Hilton on May 20, 1977, with then President Marcos as Guest of Honor and Keynote Speaker, Papa delivered the Invocation he wrote for the purpose. Marcos was then at the height of his martial law powers wielding both executive and legislative powers with a subservient Supreme Court. Papa's words then could hopefully give us more courage for challenging legal aid work under the present dispensation. The prayer reads in part:

> We're told this "temporary" martial rule
> Is "under the Supreme Court." Yet only a fool
> Would see reality in what is read
> But see not what are seen and left unsaid
> The subtle sight of military might
> The climate of coercion, where might is right!
> The uselessness of writs of liberty!
> But ah, all these we must not fear; instead
> Must dare where even Justices fear to tread! [153]

Our home in Naga was a de facto sanctuary for the poor and the underprivileged including some "nice people around" or families of the disappeared or "salvaged" then seeking legal help plus lodging after days of travel from far flung towns. At one time, I came home not even being able to sleep in my bed since our room had been lent to some visiting clients with nowhere to stay in the city.

Our home was likewise a headquarters in the fight against the dictatorship then, including justice for the victims of the infamous 1981 Daet Masscacre that killed four marchers and injured scores of peaceful protesters.[154] This mission Papa relentlessly pursued, which even led to his arrest and detention by the military upon orders of then President Marcos.[155]

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[153] *Id.*, at 29.

[154] https://www.bantayog.org/martyrs-of-the-1981-daet-massacre/.

[155] See generally, *Carpio v. Guevarra*, G.R. No. L-57439, August 27, 1981.

On another instance, I answered a call at our front gate by a trembling man and his wife from a nearby town looking for "Atty. Carpio". He was in handcuffs. I let them in and quickly called Papa and Mama. His story was that an abusive policeman arrested him for no reason at all, but then abandoned him in the middle of the market square. Papa then plucked a hairpin from Mama's hair and used it to pry loose the handcuffs. The great joy of that man upon being set free and the huge relief of his wife were simply indescribable.

That picture is forever etched in my childhood memory. It has inspired me to do pro bono work whenever I could. For one, I am now setting up the new legal office of the Diocese of Sorsogon, with plans for legal aid services in due time. It was for this reason, too, that earlier in 2017 when I became the founding dean of the Ateneo de Naga University College of Law (ADNU Law), I pursued the immediate establishment of the Ignatian Legal Apostolate Office (ILAO) as a beacon light for legal aid, experiential learning, and global legal education for our students. For startup and capacity-building, I secured a strategic partnership with The Asia Foundation. I further ensured a forward location of ILAO's office on the ground floor of the law building so that our students would first pass by it on their way to their classrooms—a subtle way of instilling the spirit of service and volunteerism in our future Ignatian lawyers. For as Papa and Mama showed us, "values are never taught; they are caught."

And I was elated to know that ILAO, in a collaborative effort with the government and other private organizations, recently assisted 13 Filipino migrant workers, who ended up as trafficking in persons victims stranded in Damascus, Syria. Twenty-four (24) pioneer graduating students then of ADNU Law helped prepare the judicial affidavits of the victims, which facilitated the filing of cases against their illegal recruiters.[156] Our congratulations to ADNU Law-ILAO and everyone else for such great global legal aid service!

To close, may Papa's Invocation for the IBP Camarines Sur Chapter induction of officers way back on August 6, 1977, strengthen us and inspire more lawyers to volunteer or work for the cause of legal aid, thus:

> Dear Jesus, we are gathered in Your name,
>
> And we of the Camarines Sur Bar proclaim

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[156] Clinical Legal Education Program, "Law Clinics Beyond Borders: Ateneo de Naga University Assistance to Migrant Workers in Damascus, Syria," at https://clep.ph/2021/07/09/law-clinics-beyond-borders-ateneo-de-naga-university-assistance-to-migrant-workers-in-damascus-syria/.

Anew our commitment to the Rule of Law
….
May we see You in each case we try
Beyond the dockets disposed that satisfy
Statistical efficiency; the size
Of retainers; the want to win at any price
That renders litigations up for sale
And the ministering of justice bound to fail.
Because each case is people. And what we do
To the least of our brethren, we do to You!

May we visit you in prison cells
In civil jails and army citadels
Upholding human rights with fortitude
For criminal or rebel as we should.
Because, our Lawyer's Oath and our Christian Creed
See only with compassion, those in need.
And each detainee is a sister or brother
Loved by God—by You—if by no other![157]

[157] CARPIO, *supra* note 152, at 31-32.

JUDICIAL INDEPENDENCE AND THE SELECTION OF SUPREME COURT AND CONSTITUTIONAL COURT JUDGES: THE EXPERIENCE IN EAST AND SOUTHEAST ASIA

FLORIAN KIM P. DAYAG*

ABSTRACT

Supreme courts, as the seat of the judiciary, and constitutional courts, in jurisdictions with specialized constitutional review mechanisms, play an important role in modern democracy. Their independence from the other branches of the government is crucial in maintaining the balance of powers among the different branches. The manner of their appointment is one important factor in assessing their independence, especially against the branches of government with the selecting and appointing power. While there is no settled standard as to how judges and justices of supreme courts and constitutional courts should be appointed, there are various mechanisms that are practiced, each with its own noteworthy advantages and disadvantages. This article explores the concept of judicial independence in East and Southeast Asia in the context of how judges and justices of supreme courts and constitutional courts are appointed. It will discuss the formal mechanisms of judicial appointment and explore how they are utilized by East and Southeast Asian nations - as reflected primarily in their constitutions and, in some instances, in statutory laws which govern the judicial organization of the state.

I. JUDICIAL SELECTION AND JUDICIAL INDEPENDENCE

Separation of power is a cornerstone of modern democracy. The three branches of government – the executive, legislative, and judiciary – have powers and responsibilities distinct from each other and it is generally not permissible for one branch to interfere in another branch's sphere of control. The introduction of the power of judicial review and the concept of judicial

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supremacy in western societies in the 18th and 19th centuries, consistent with eminent political theories prevalent at that time, gave rise to the conception of the judiciary as a significant social institution vested with an important constitutional role.[1] Currently, it is globally recognized that the judiciary, as an institution, is an essential pillar of liberty and rule of law in every democratic society.[2] And for the judiciary to properly perform this role, it is imperative to provide judicial independence by protecting judges and the court system from legislative, executive, and even popular sentiments.[3]

There is no universally accepted definition of judicial independence. Various countries have differing notions - depending on political, social, economic, historical, and other perspectives - of what constitutes independence and to what degree must the judiciary be separated from external partisan forces. Landes and Posner define an independent judiciary as "one that does not make decisions on the basis of the sorts of political factors … that would influence and in most cases control the decision were to be made by a legislative body."[4] Other definitions offered include:

> Judicial independence can be defined as the ability of the individual judges and the judiciary as a whole to perform their duties free of influence or control by other actors.[5]
>
> Judicial independence … encompasses the idea that the individual judges and the judicial branch as a whole should work free of ideological influences. [It is] broken down … into two distinct concepts: decisional independence and institutional, or branch, independence. Decisional independence refers to a judge's ability to render decisions free from political or popular influence based solely on the individual facts and applicable law. Institutional independence describes the separation of the judicial branch from the executive and legislative branches of the government.[6]
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> [A] person is independent if she is able to take actions without fear of interference by another. In this sense, judicial independence is the idea that

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[1] Shimon Shetreet, *The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges*, 10 CHI. J. INT'L L. 275, 275-277 (2009).

[2] Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L.REV. 579, 592 (2005).

[3] Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW L.J. 31, 34 (1986).

[4] William Landes and Richard Posner, *The Independent Judiciary in an Interest-Group Perspective*, J.L. & ECON, 18(3), fn 1, (1975).

[5] Mia Stewart, *Independence of the Judiciary* in Max Planck Encyclopedia of Comparative Constitutional Law, *available at* https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e339.

[6] Joseph M. Hood, *Judicial Independence*, 23 J NAT'L ASS'N ADMIN L. JUDGES 137, 138 (2003).

> a judge ought to be free to decide the case before her without fear or anticipation of (illegitimate) punishment or rewards.[7]

> [The] relation between an actor A that delegates authority to an actor B, where the latter is more or less independent of the former depending on how many controls A retains over B. [Specifically] the relation between the elected branches of (A) that delegate authority to judges and/or the judiciary (B).[8]

There is, nonetheless, a central theme to be noted amongst the many definitions proposed for judicial independence in the context of separation of powers - that courts must be insulated from mechanisms of executive or legislative control or undue influence that could undermine their judgments.

Judicial independence is often related to judicial impartiality. Judges and justices are required to decide on matters solely based on the facts and in strict accordance with the law. The ability of the judiciary to adjudicate without any improper influences, inducements, pressures, threats, or interferences is inimical to most legal systems.[9] A judiciary that is dependent on the other branches of the government, the parties, or interest groups will not be expected to create an impartial decision. But while related, impartiality and independence are still distinct concepts, as observed by the Supreme Court of Canada in *Valente v. The Queen*:[10]

> The concepts of "independence" and "impartiality" […], although obviously related, are separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. "Independence" reflects or embodies the traditional constitutional value of judicial independence and connotes not only a state of mind but also a status or relationship to others--particularly to the executive branch of government--that rests on objective conditions or guarantees. Judicial independence involves both individual and institutional relationships: the individual independence of a judge as reflected in such matters as security of tenure and the institutional independence of the court as reflected in its institutional or administrative relationships to the executive and legislative branches of government.

In the perspective of international human rights law, one's right to an effective remedy requires that he be heard by an independent and impartial

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[7] John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 (Issues 2 & 3) S. CAL. L. REV. 353, 355 (1999).

[8] Julio Ríos-Figueroa, *Judicial Independence and Corruption An Analysis on Latin America*, 4-5 (2006), *available at* https://ssrn.com/abstract=912924.

[9] See United Nations Basic Principles on the Independence of the Judiciary (UN Basic Principles), para 2. See also, the Bangalore Principle of Judicial Conduct.

[10] [1985] 2 SCR 673.

tribunal.[11] The United Nations (UN) Special Rapporteur on the independence of judges and lawyers opines that "the general practice of providing independent and impartial justice is accepted by States as a matter of law and constitutes, therefore, an international custom."[12] While there is also no precise definition of what constitutes independence of the judiciary in any international treaties, conventions, or agreements, the UN Human Rights Committee (HRC) posits that the notion of an independent and impartial tribunal is absent in situations where the functions and competences of the judiciary and the branches of the government are not clearly distinguishable or where the latter is able to control or direct the former.[13] It further notes the following matters in assessing judicial independence: the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer, and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative.[14]

A similar provision which guarantees the right to an independent tribunal is found in the European Convention of Human Rights.[15] The European Court of Human Rights provides the following factors in determining whether a judicial body can be considered to be independent, especially from the executive: the manner of appointment of its members and the duration of their term of office; the existence of guarantees against outside pressures; and the question whether the body presents an appearance of independence.[16] Also, the Inter-American Court of Human Rights had previously held that "the

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[11] These provisions include Article 10 of the Universal Declaration of Human Rights, which states that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal"' Article 14 of the International Covenant on Civil and Political Rights, which guarantees the right to "be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

[12] UNCHR, Report of Special Rapporteur Param Cumaraswamy, *Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers*, (1995) UN Doc. E/CN.4/1995/39, 12.

[13] *Ol Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, U.N. Doc. CCPR/C/49/D/468/1991 (1993). See also *Fei v. Colombia*, Communication No. 514/1992, U.N. Doc. CCPR/C/53/D/514/1992 (1995).

[14] UN HRC, CCPR General Comment No. 13: Article 14 (Administration of Justice), para 3.

[15] European Convention of Human Rights, art. 6, provides that "everyone is entitled to a fair and public hearing … by an independent and impartial tribunal established by law."

[16] *Campbell and Fell v. The United Kingdom*, (1985) 7 EHHR 165, [1984] ECHR 8, 7 EHHR 165, (1985) 7 EHRR 165.

independence of any judge presumes that there is an appropriate appointment process, a fixed term in position and a guarantee against external pressure."[17]

The manner and integrity of the judicial selection and appointment process is therefore recognized as a major factor in achieving and maintaining the independence of individual judges and the judiciary as an institution. The legitimacy of this independence can be viewed as contingent upon the selection and appointment process of judges and justices. The appointment and selection procedure must thus ensure that only those who are the most capable are given a seat in the judiciary and that they are thereafter insulated from any external or political pressures, control, and influence. Mechanisms that perpetuate a system where judges and justices are dependent on the person or authority which appointed them or owes them some gratitude that affects their decision-making must be avoided. Judges and justices that are borne from these mechanisms may not be trusted to adjudicate with neutrality and impartiality, especially on matters where the appointing authority himself is a party to a case or where his actions or policies are assailed or challenged.

Particularly important in this discussion is the manner of selection and appointment of the judges and justices of superior courts or courts of last resort. In countries with a decentralized constitutional review system, this power is vested in the supreme court.[18] In countries with centralized constitutional review, there exist independent constitutional courts which exercise final jurisdiction over constitutional matters and whose decisions are unappealable even to the supreme court.[19] Justices or judges of these superior courts, both supreme courts and constitutional courts, exercise significant authority in every democratic institution. As the final arbiter of judicial and/or constitutional matters, they serve as the ultimate check to restrain and prevent excessive and indiscriminate use of power of the legislative and executive. Because of their position in the judicial hierarchy, they more often face controversial questions, usually of political matters, and can influence or even create, reverse, or modify laws. Thus, it has been suggested that the mechanism

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[17] Inter-American Court of Human Rights, *Case of the Constitutional Court v. Peru*, [1999] IACHR 8. See also, Inter-American Commission for Human Rights, *Guarantees for the Independence of Justice Operators*, OEA/Ser,L/V/II. Doc. 44, 5 December 2013, 25.

[18] For consistency, the term supreme court will be used throughout this article to refer to the highest judicial body of the State, regardless of the nomenclature used by the State in its constitution and statutory laws, *e.g.*, for Taiwan, this paper will cover the Judicial Yuan, and not the Supreme Court, which is merely under the authority of the Judicial Yuan.

[19] For consistency, the term constitutional court will be used to refer to judicial institutions that carry out constitutional review independently of supreme courts, regardless of how they are called, *e.g.*, in Cambodia, it is called the Constitutional Council; in Myanmar, the Constitutional Tribunal.

of appointment for superior courts must be specifically tailored because of their nature.[20] Malleson and Russell explained:

> [I]t is precisely at [the highest ranks of the judiciary] that the highest caliber of judges is needed, and great damage will be done to the legal system if the selection of candidates on the basis of partisan political affiliation rather than skills and ability undermines the quality of the bench. The challenge that all appointment processes for top review courts face is to ensure that the democratic legitimacy of the judiciary is maintained without introducing a form of politicisation that reduces the quality of judges appointed and transforms judges into politicians in wigs.[21]

But while the issue is of significance, especially in the age of rising dictatorial tendencies among leaders of democratic nations, there remains a lack of consensus as to what may be considered as the best selection and appointment mechanism to ensure the independence of superior courts. While some general principles attend to the discussion, no universally-accepted practice is recognized. There are also no binding international agreements or treaties that govern this topic. States are given a wide margin of appreciation in this endeavor, evident in the variety of systems practiced across the globe. The practices vary and depend on, among others, the type of government and legal system, the democratic values of a particular nation, or other non-legal or non-political context, such as history and culture.[22] The diversity of practice considered, several concerns have been raised, especially in recent history, with regard to how the appointment process had been severely politicized and used to advance political motive or to ensure that the composition of courts is drawn along an ideological line that favors the appointing authority. The failed attempt of Franklin Roosevelt in 1937 to pack the Supreme Court of the United States of justices that would uphold his New Deal legislation[23] or the appointments made by the National Party government during the South African apartheid[24] illustrate how, in the past, the appointment mechanism could have been and had been taken advantage of to advance political and partisan agenda by undermining the independence of the judiciary.

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[20] Dmitry Bam, *Tailored Judicial Selection*, 39 U. ARK. LITTLE ROCK L. REV. 521, 522-523 (2017).

[21] Kate Malleson and Peter H. Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*, (University of Toronto Press, 2006), at 6.

[22] Resnik, supra note 2, at 600.

[23] William E. Leuchtenburg, *When Franklin Roosevelt Clashed With the Supreme Court—and Lost* (Smithsonian Magazine, May 2005), *available at* https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/.

[24] Amy Gordon and David Bruce, *Transformation and the Independence of the Judiciary in South Africa*, The Centre for the Study of Violence and Reconciliation (2007), *available at* http://www.csvr.org.za/docs/transition/3.pdf.

"[N]o single subject has consumed as many pages in law reviews and law-related publications over the past fifty years as the subject of judicial selection."[25] But most of these papers deal with theoretical or comparative analysis of systems practiced in American and European nations. There is little that deals with the appointment and selection process in Asia. This leaves a significant gap in the literature considering the number of countries and the diversity of legal and political systems that exist in the continent.

This paper does not attempt to discuss all the previous discourses related to the process of judicial selection and appointment. While the salient arguments in support and in opposition of the different methods will be reviewed, this paper primarily aims to provide a brief comparative review of the constitutional provisions and special laws of East and Southeast Asian countries related to the selection and appointment of supreme court and constitutional court judges and justices - primarily, the members of the Association of Southeast Asian Nations, South Korea, Japan, Mongolia, and Taiwan, although other nations and specialized administrative regions, such as China, Hong Kong, and Timor Leste, are also referred to. This paper excludes judges and justices with no adjudicatory powers and those who sit in military and religious tribunals.[26] Further, a topical, instead of a per-country, approach is used. The different practices will be examined generally and subsequently in the context of how they are established and utilized in the East and Southeast Asian regions. In Part II, the paper will discuss the relevance of prescribing standards of eligibility as a preliminary safeguard mechanism in ensuring the integrity and independence of the appointment process. Part III will elaborate on the various formal mechanisms for the selection and appointment of judges and justices of superior courts, in relation to whom the appointive power is granted. In Part IV, the unique system of judicial election will be discussed.

II. QUALIFICATIONS AND ELIGIBILITY

A merit-based judicial selection process based on objective criteria is inimical in maintaining the independence and impartiality of the courts. "Appointments should be made on the basis of evidence demonstrating that the appointee possesses the various qualities that together constitutes merit."[27]

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[25] Dubois, supra note 3, at 31.

[26] Thus, the justice of the Supreme Court of South Korea who is designated as the Minister of Court Administration is not included.

[27] Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, 30 (2) SIDNEY L.REV. 295, 299 (2008). They define merit as 'legal excellence, a demonstrated capacity for industry and a

The United Nations Basic Principles on the Independence of the Judiciary require that "[p]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law" and that the "method of judicial selection shall safeguard against judicial appointments for improper motives."[28] To guarantee that the judiciary is free from political interference or pressure, it is thus critical that the appointment should be on merits and be made "carefully limited to those who possess the necessary temperament, character, capabilities, and credentials."[29]

Details of judicial qualifications vary per jurisdiction. They cover general and specific requirements, but there is no prescribed formula as to how they are weighed. In some instances, the criteria are no more detailed like that in Indonesia's constitution, while the list of qualifications is long in others, as is the case in Myanmar. Objective and specific selection criteria are preferred and required,[30] although it is not uncommon for constitutions and even special laws to include general and subjective criteria, such as requirements of integrity, morality, and good character.[31] This paper will, however, be limited to the former criteria - objective standards that are precise and easily quantified or qualified – and which is further categorized into professional and personal requirements.

A. *Source of Criteria*

The source of the criteria for appointment and of the appointment process itself is an important factor in safeguarding the judiciary from legislative and executive interference. Regulating the judicial appointment process through ordinary legislation, it is argued, runs the risk of being constantly modified by

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temperament suited for the performance of judicial functions,' *citing* Philip Ruddock, *Selection and Appointment of Judges*, (Speech delivered at the University of Sidney, 2 May 2005).

[28] UN Basic Principles, sec 10.

[29] American Bar Association, Commission on the 21st Century Judiciary, *Justice In Jeopardy*, 12 (2003).

[30] The UN HRC suggests that the lack of objective criteria governing the appointment and removal of judges, including Supreme Court justices, may undermine the independence of the judiciary. See UN HRC, *Concluding Observations of the Human Rights Committee on Paraguay*, UN Document CCPR/C/PRY/CO/2, para 17. The Venice Commission also opined that although it is essential that a judge have a sense of justice and fairness, these criteria are difficult to assess. Thus, transparent procedures and a coherent practice are required when they are applied. See Study No. 494 / 2008, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), para 26.

[31] See e.g. the Constitution of the Republic of Indonesia (Constitution of Indonesia), art 24A, which requires that justices of the Supreme Court "must possess integrity and a personality that is not dishonourable and shall be fair, professional, and possess legal experience." See, however, Resnik, supra note 2, at 598, arguing that this "level of generality [render] them minimally illuminating and constraining."

the legislature. If given the unfettered discretion to manipulate the judicial appointment process, the legislature can prescribe qualifications and establish a selection process that would fill the courts with judges and justices who are more likely to uphold their political agenda. Thus, the stronger position is to ensure that judicial selection issues are established and protected by the constitution.[32] Unlike an ordinary legislation which can be repealed by a mere vote of the legislature, constitutional amendment usually entails a more elaborate process and requires more than just simple legislative vote. In the Philippines, for instance, any amendment to the constitution must be ratified by a majority vote of the voting population in a national plebiscite.[33]

In Southeast Asia, majority of the States enumerate the eligibility requirement for superior courts in their constitutions, such as that in Malaysia, Myanmar, and the Philippines. The constitutions of Indonesia and Singapore likewise refer to some qualifications, but other qualifications may be provided and are provided by special laws.[34] In Thailand, the qualifications for the justices of the Constitutional Court are provided in the constitution, but not the Supreme Court.[35] In contrast, the qualifications for judges of the Supreme Court of Brunei are enumerated in Section 7(2) of the Supreme Court Act. In East Asia, the practice of incorporating the qualifications in the constitution is less common. Except for Mongolia, the qualifications for supreme court and constitutional court judgeship in East Asia are prescribed in special laws. For instance, in Japan, the qualifications are contained in Act No. 59 of April 16, 1947, or the Court Act, while in Taiwan, they are prescribed in the Judicial Yuan Organization Act.

B. *Professional Requirements*

The public expects the judges and justices of supreme and constitutional courts to be highly qualified and professionally competent. To assess competence and expertise, reference is usually made to the education, the practice of the candidate prior to the application, and the duration of such practice.

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[32] Shetreet, supra note 1, at 288.

[33] CONST., art XVII, sec 4.

[34] Constitution of the Republic of Singapore (Constitution of Singapore) art 96 provides that "[a] person is qualified for appointment as a Supreme Court Judge if he has for an aggregate period of not less than 10 years been a qualified person within the meaning of section 2 of the Legal Profession Act xxx or a member of the Singapore Legal Service, or both." The Legal Profession Act (SG) provides for the qualification as to who is deemed a "qualified person."

[35] Constitution of the Kingdom of Thailand (Constitution of Thailand) secs 201-202.

1. *Educational requirement*

A preliminary requirement among the countries reviewed is a degree in law or the authority to practice law in the country. This requirement is present in all superior courts in the region, except for some exceptions in the constitutional courts of Thailand and Cambodia. In Thailand, the ninth justice of its Constitutional Court is required to only have a degree in political science or public administration.[36] Meanwhile, in the Constitutional Council of Cambodia, members are selected from among dignitaries with a higher-education degree not just in law, but in administration, diplomacy, and economics as well.[37] Performance in school is generally not a requirement, but in Singapore, minimum standard of educational attainment, including the class of honours, may be prescribed.[38]

2. *Practice of law*

Experience in the legal profession is the most basic professional requirement for those who seek a seat in superior courts. Basically, judges and justices of superior courts "should come from the ranks of [the] most able and most talented lawyers."[39] There is no formal discrimination with regard to the categories of legal profession or how a candidate engaged in the practice of law. Judges, prosecutors, law professors, and those who engage in private practice have the same opportunity to be appointed or selected as judges or justices of superior courts.

Similar to educational requirement, the constitutional courts of Thailand and Cambodia provide for exceptions. In Thailand's Constitutional Court, non-lawyers may be appointed. Distinguished professors of political science or public administration and directors-general or heads of government agencies are allocated certain numbers of seats. Furthermore, for the seats allocated to those who practice law, only judges of the Supreme Court and the Supreme Administrative Court, law professors, and deputy attorney-generals may be appointed as members. Not all legal professions are therefore qualified for a seat in Thailand's Constitutional Court.[40] In Cambodia, on the other hand,

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[36] *Id.* sec 200.

[37] Constitution of the Kingdom of Cambodia (Constitution of Cambodia) art 138.

[38] Legal Profession Act (SG), as revised (2009), sec 3(b).

[39] Paul Van Osdol, Jr., *Politics and Judicial Selection*, 28(2) ALABAMA LAWYER 167, 172 (1967).

[40] Constitution of Thailand, sec 200.

members of its Constitutional Council need not be lawyers so long as they are dignitaries with the required education and work experience.[41]

3. Years of practice

The distinction between the different practices of law becomes relevant when related to the requirement of years in practice. Some countries in the region provide for different minimum-year requirements depending on the candidate's legal profession. In Myanmar, a high court judge vying for a supreme court and constitutional court seat only needs five years of practice. A judicial or law officer, on the other hand, only needs 10 years of practice. A candidate who is engaged in private practice, however, must have done so for at least 20 years.[42] This distinction is similar to Japan. Generally, candidates who are judges of its high court only need 10 years of practice, while a minimum practice of 20 years is required for other judges, prosecutors, lawyers, and law professors.[43] In Brunei, there is even no prescribed years of practice for candidates who are judges of lower courts while seven years of practice is required for non-judges.[44] An even more detailed distinction is applied in Taiwan and the Constitutional Court of Thailand.[45]

No such distinction is found in Indonesia, Malaysia, Singapore, the Philippines, South Korea, and Mongolia. For supreme courts, regardless of the legal profession, Malaysia, Singapore, and Mongolia set their minimum standard at 10 years of practice, the shortest in the region, while Indonesia and South Korea require the longest, that is, 20 years of practice.[46] With regard to constitutional courts, Mongolia has no prescribed years of practice, while South Korea requires 20 years, the longest among the constitutional courts in the region.

C. *Personal Requirements*

This article refers to personal requirements as those qualifications and criteria that are not educational and professional in nature or those that do not

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[41] Constitution of Cambodia, art 138.

[42] Myanmar's Constitution, sec 301(d).

[43] Court Act (JP), art 41.

[44] Supreme Court Act (BN), sec 7 (2).

[45] Judicial Yuan Organization Act (TW), art 4; Constitution of Thailand, sec 200.

[46] Constitution of Malaysia, art 123(a); Constitution of Singapore, sec 96; Mongolia's Constitution, art 51(3); Law No. 14 of 1985 (ID), as amended, art 7; Court Organization Act (SK), art 42.

pertain to the prior practice of and experience in law of the candidate. Three of the most common personal requirements will be discussed: age, citizenship, and non-partisanship requirements.

There are other less common criteria that may be imposed. In Indonesia, for instance, a person who has been convicted of a crime punishable by a prison sentence of five years or more or had been declared bankrupt is ineligible for a seat in its Constitutional Court.[47] In South Korea, a person who has been previously dismissed by impeachment cannot be appointed as judge of its Constitutional Court within five years from impeachment.[48] There is also a growing trend toward ensuring diversity in the courts. Constitutional provisions on gender, racial, and cultural equality in the judiciary are becoming more common, particularly in more recent constitutions,[49] but such practice is not yet embraced in the East and Southeast regions, even in those countries with fairly recent constitutions.

1. *Age requirement*

Among the countries in the region reviewed, only three constitutions provide for an age requirement for the supreme court. Myanmar has the oldest minimum age requirement (50 years), while Mongolia has the youngest (35 years). The Philippine Constitution requires the justices of its Supreme Court to be at least 40 years old.[50] This is the same age requirement in South Korea and Japan while Indonesia has a minimum age of 45 years, although such requirement is not in their constitution but in separate laws organizing their judiciary.[51] For constitutional courts, South Korea, Mongolia, and Indonesia set the minimum age requirement at 40 years, while Laos and Thailand set it at 45 years.[52]

2. *Citizenship requirement*

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[47] Law Number 24 of Year 2003 (ID), art 16(1).

[48] Constitutional Court Act (SK), art 5(2) and (3).

[49] See Constitution of Kenya, sec 172(2)(b); South Africa's Constitution, sec 174(2), *cf* Shetreet, supra note 1, at 310-314.

[50] Mongolia's Constitution, art 51(3); Myanmar's Constitution, sec 301(a); Philippine Constitution, art VIII, sec 7(1).

[51] Court Organization Act (SK), art 42; Court Act (JP), art 41(1); Law No. 14 of 1985 (ID), art 7.

[52] Constitutional Court Act (SK), art 5(1); Mongolia's Constitution, art 65(2); Law Number 24 of Year 2003 (ID), art 16(1)(c); Constitution of Thailand, sec 201(2); Law on the Organization and the Functioning of the Constitutional Council (KH), art 3.

Another common personal requirement is that of nationality or citizenship.[53] Malaysia, Myanmar, the Philippines, and Mongolia explicitly prescribe this requirement in their constitution,[54] while in Thailand and Indonesia, it is contained in special laws.[55] In other countries in the region, this requirement is implied from laws governing legal practice, which prescribe nationality or citizenship requirements before one could practice law.[56] A more restrictive approach is practiced in the Philippines, Cambodia, and Myanmar where the requirement is not simple citizenship, but natural-born citizenship.[57] The natural-born citizen requirement, particularly for those in the highest seats in the government, is argued to be rooted in the fear over "ambitious and duplicitous foreigners" and the need to "assure the requisite fealty and allegiance to the nation."[58]

On the opposite end of the spectrum, there are courts that open the appointment process to non-national persons. In Hong Kong, a judge or retired judge of a court of unlimited jurisdiction in another common law jurisdiction is qualified to be appointed in the Court of Final Appeal.[59] In the Supreme Court of Brunei, judges of courts having unlimited or appellate jurisdiction in some countries of the Commonwealth may be appointed.[60] This practice is purportedly formulated to promote public confidence to the judiciary, especially among those who want to conduct international business in the country.[61]

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[53] Under the UN Basic Principles, par. 10, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, in the selection of judges, except that a requirement that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

[54] Constitution of Malaysia, art 123(a); Myanmar's Constitution, sec 301, *cf* s 20; Philippine Constitution, art VIII, sec 7(1); Mongolia's Constitution, art 51(3).

[55] Act on Judicial Service of the Courts of Justice B.E. 2543 (TH), sec 26(1).

[56] See Lawyers Act (TH), sec 35, which states that "an applicant for registration and obtaining a License" to practice law must be "a Thai national."

[57] Law on the Organization and the Functioning of the Constitutional Council (KH), art 3, requires "nationality by birth;" Myanmar's Constitution, sec 301, *cf* sec 120, provides that judges of the Supreme Court must be a "citizen who was born of both parents who are citizens." This is the very definition of natural-born under the *jus sanguinis* principle, which is used in Myanmar.

[58] Jack Maskell, U.S. Congressional Research Service, *Qualifications for President and the "Natural Born" Citizenship Eligibility Requirement*, 5-8 (2011), *available at* https://sgp.fas.org/crs/misc/R42097.pdf.

[59] Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, art 82, *cf* Court of Final Appeal Ordinance (HK), sec 9.

[60] Supreme Court Act (BN), sec 7(2)(a).

[61] H.P. Lee & Marilyn Pittard, *The challenges of judicial independence in the Asia-Pacific*, in H.P. Lee & Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2018), 399-400.

3. *Non-partisanship requirement*

To ensure that judges and justices are detached from any of the political organs of the government and the society, "[i]n many jurisdictions, judges are forbidden from holding other officers in the legislative or executive branches of the government. They may also be forbidden from active membership of a political party."[62] For instance, in Myanmar, the justices of the Supreme Court and the Constitutional Tribunal must be free from party politics. Membership in a political party and being a part of the legislature are grounds for disqualification.[63] In Indonesia, a constitutional court judge is prohibited from concurrently serving as an official occupying a public office in another state institution and from being a member of a political party or a civil servant.[64] A member of the Constitutional Council of Cambodia must not be a member of the legislature or the royal government or the president or vice-president of a political party or a union.[65]

III. SELECTION AND APPOINTMENT MECHANISMS

For judicial appointments to be genuinely based on merit, it is crucial that judges and justices are chosen strictly based on prescribed criteria and qualifications. The mechanism must itself be independent and designed to ensure that the appointing authority relies only on the prescribed criteria and qualifications, not on other factors, such as politics or patronage. As discussed, there is no single accepted mechanism. Different practices are adopted by nations. Ginsburg categorizes these mechanisms of appointment into four: single-body, professional, representative, and cooperative, which will be adopted in this paper. In a single-body appointment mechanism, the appointing power is vested in one person or office without any oversight. In a professional appointment mechanism, the existing judges and justices themselves appoint new judges. Meanwhile, representative and cooperative appointment involves multiple bodies or authorities in the process. In representative appointment, each body or authority has the power to appoint

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[62] Elliot Bulmer, *Judicial Appointment*, International Institute for Democracy and Electoral Assistance, at 18 (2017), *available at* https://www.idea.int/sites/default/files/publications/judicial-appointments-primer.pdf.

[63] Myanmar's Constitution, sec 300 *cf* s 301(f)(g) and sec 333(e)(f).

[64] Law Number 24 of Year 2003 (ID), art 17.

[65] Constitution of Cambodia, art 139.

a certain number of judges, while in cooperative appointment, the bodies or authorities must, as the name suggests, cooperate with each other to appoint. A mixed system of appointment, utilizing more than one of the four categories, is also practiced.[66]

A. *Source of Mechanism*

As with the list of qualifications and eligibilities, the source of the selection and appointment process is crucial in maintaining its integrity. Preferably, the constitution must explicitly and sufficiently describe the process and define the appointing authority so as not to give discretionary power to the legislature to change the process arbitrarily.[67] Except for Brunei, the constitutions of the subject countries contain provisions on superior courts appointments. In some constitutions, the selection and appointment process is laid down in detail, although further elaborating the process in a subsequent ordinary legislation to remedy perceived constitutional deficiencies had been observed in some countries, such as Malaysia, Vietnam, Thailand, Cambodia, and South Korea.

The experience in Malaysia, however, shows why constitutional, and not merely statutory, protection of the appointment process should be the standard. In Malaysia, a Judicial Appointments Commission was created by legislative act in 2009 to screen supreme court candidates and submit names of suitable appointees to the prime minister. This procedure, however, is not present in its constitution and no corresponding amendment thereto was introduced. Absent such constitutional amendment, ultimately, it has been held that the prime minister is not actually limited by the names submitted by the commission and may consider other candidates who are not on the commission's list. This leaves serious doubts as to the effects of the commission and whether the appointment process had been improved by its creation.[68]

B. *Single-Body Appointments*

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[66] Tom Ginsburg, *Judicial Review in New Democracies*, (Cambridge University Press, 2003), 43-44.

[67] Shetreet, supra note 1, at 289-293, proposes six fundamental principles that are imperative to an independent judicial system, which must be protected and contained in the constitution.

[68] Kevin YL Tan, *Judicial Appointments in Malaysia* in Hugh Corder and Jan van Zyl Smit (eds) *Securing Judicial Independence* (Siber Ink, 2017), 123-125.

Single-body appointments may be implemented either through the chief executive, the King in constitutional monarchies, or through the legislature. This appointment mechanism is usually coupled with a consultation process with an advisory or recommendatory body, usually a separate organ of the government, although its advice or recommendation is not binding upon the appointing authority. This distinguishes single-body appointment mechanism from cooperative appointment mechanism because, in the latter, the separate organ is not limited to a recommendatory or advisory role. In a cooperative appointment mechanism, the appointing authority is checked or limited by another body's consent or power to confirm or nominate.

1. *Presidential or Executive Appointments*

The most known method of single-body appointment is through the executive, as this is the common practice in major common law countries and has its roots as early as the 12th century.[69] It empowers the chief executive to simply deliver a "tap on the shoulder" to prospective judges and appoint whomever he chooses to sit in the bench. Those who support executive appointment maintain that the chief executive is the most well-informed authority since both confidential and public information concerning the qualifications of a candidate are available to him, especially with the assistance of his advisors. The simplicity of the process also insulates the candidate from any form of political rigors. This, however, eliminates any check mechanism that could hold the executive accountable for his actions.[70] Critics argue that it leaves too much power to the chief executive or the king, who may use the same to reward individuals or to pay personal and political debts.[71] This leaves the system "more vulnerable to cronyism, patronage, and self-dealing."[72] It "provides an unscrupulous executive with a key device for ensuring a timid judiciary"[73] and to "strengthen a political party's position or to insure judicial

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[69] Mary L. Volcansek, *Judicial Elections and American Exceptionalism: A Comparative Perspective*, 60 DEPAUL L. REV. 805, 806-807 (2011), claims that "[e]xecutive appointment can probably be traced to early English practices when Henry II appointed judges, then called 'commissioners,' as early as 1178."

[70] Special Rapporteur Leandro Despouy notes that the Committee against Torture and the Human Rights Committee had expressed their concern in this regard "given the risk this structure implies for the protection of the rights of individuals before the State." UNCHR, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*' UN Doc. A/HRC/11/41, para 26, (2009) (2009 Report of the UN Special Rapporteur).

[71] Harry O. Lawson, *Methods of Judicial Selection*, 75(1) MICH. BAR J. 20, 21 (1996).

[72] Jed Handelsman Shugerman, *The People's Courts*, (Harvard University Press, 2012), 259.

[73] Lee & Pittard, supra note 61, at 399.

subservience to presidential policies."[74] To possibly remedy this concentration of power, some jurisdiction requires a consultation or advisory process before the executive can appoint a candidate to a superior court seat, although the efficacy of such consultation alone, absent any binding authority, has been the subject of further criticism.[75]

This mechanism is still practiced in some countries in East and Southeast Asia, particularly in countries with monarchical government. In Brunei, the king alone appoints supreme court judges, consistent with its system of absolute monarchy. Although required by the constitution to consult the Council of Ministers, he is not bound to follow their advice.[76] The constitutional monarchies of Japan, Cambodia, and Malaysia differ as to some details in the process, but the appointing authority remains with the king or the chief executive. In Japan, the executive, through the cabinet, exercises the power to appoint the justices of the Supreme Court, although the power to appoint the chief justice is reserved to the emperor as recommended by the cabinet.[77] In Cambodia, the king appoints the justices of the supreme court, based on the recommendation of the Supreme Council of Magistracy.[78] The said council, however, is also led and controlled by the king, with other members coming from the judiciary and agencies of the government.[79] In Malaysia, the king or the Yang di-Pertuan Agong has the power to appoint, upon the advice of the prime minister, and after consultation with senior judges and the Conference of Rulers.[80] As well, the king is not bound by the advice of the prime minister, although there has been no known instance when the king did not accept the prime minister's advice. Similarly, the prime minister may ignore the opinion or view of the senior judges and the Conference of Rulers since the requirement of consultation is understood to be not synonymous with consent or concurrence.[81]

The Philippines, although not a monarchical government, used to vest the sole appointing authority to the President during the martial law regime of Ferdinand Marcos. This was used by Marcos to strengthen his stronghold in

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[74] Volcancek, supra note 69, at 818.

[75] Jan Van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice*, (Bringham Centre for the Rule of Law, 2015), 18-19.

[76] Supreme Court Act (BN), sec 7(1), *cf* Brunei Darussalam's Constitution (Constitution of Brunei), art 18 and 19.

[77] Constitution of Japan, art 79, *cf* art 6.

[78] Constitution of Cambodia, art132, *cf* art 134.

[79] Law on the Organization and Function of the Supreme Council of Magistracy (KH), art 2 and 11.

[80] Constitution of Malaysia, art 122(b).

[81] Tan, supra note 68, at 131-133.

the country.[82] After his ouster, the constitution was amended to depart from single-body appointment mechanism and created an independent appointment council "in response to the public clamor in favor of eliminating politics from the appointment of judges."[83] What happened in the Philippines reflects the experience of several countries in Latin America and Africa during a similar period of authoritarian regime and the subsequent transitional justice mechanism that was imposed to secure judicial independence.

2. *Legislative appointments*

The legislature may also be vested with the sole power of appointment, although this method is not a common mechanism. Proponents argue that legislative appointment "resolves the problem of voter apathy in judicial selection." Since the legislature acts as the representative of the people, who often have limited information with regard to the qualifications of a judicial candidate, it is said to be "in the best position to act as the responsible, informed, indirect voice of the electorate." On the other hand, concerns have been raised as to whether the legislature is any more knowledgeable about judicial candidates than the voting public.[84] Much apprehension is also raised with regard to the use of this power by the legislature to advance the partisan, political, or ideological agenda of the majority or controlling group.[85] "If the same majority who passed the law has the authority to choose those who judge the merits of judicial appeals by minority," they will select judges who are most likely to uphold the law, thereby increasing "the probability of the minority's tyrannization."[86] The risk of politicization is also higher in the legislature since the forum is "very often the main theatre in which party politics are played out."[87] Similarly, the UN Special Rapporteur is of the opinion that although

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[82] CONST., art X, sec 4.

[83] Background of the creation of the Judicial and Bar Council, *available at* <http://jbc.judiciary.gov.ph/index.php/about-us/judicial-and-bar-council/3-about-jbc.

[84] Lawson, supra note 71, at 20.

[85] Douglas Keith and Laila Robins, *Legislative Appointments for Judges: Lessons from South Carolina, Virginia, and Rhode Island*, (Brennan Center for Justice, 2017), 4, *available at* <https://www.brennancenter.org/sites/default/files/analysis/North_Carolina.pdf. They conclude that "they can enable favoritism towards legislators and those close to them, breed corruption, produce and suffer from governmental dysfunction, and undermine judicial independence – all while continuing to provide a path for special interests to unduly influence nominations."

[86] Dennis C. Mueller, *Fundamental Issues in Constitutional Reform: With Special Reference to Latin America and the United States*, 10 CONSTITUTIONAL POLITICAL ECONOMY 119, 123 (1999).

[87] Smit, supra note 75, at 25. The European Commission for Democracy Through Law strongly opposed legislative appointment "because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded." Venice Commission, Opinion No. 403 / 2006, CDL-AD(2007)028,

legislative appointment may be seen as providing greater democratic legitimacy in the appointment process, it may lead to the politicization of judicial appointments, with political considerations prevailing over objective criteria or standards.[88] It has been observed as well that legislative appointment propagates the practice of having former legislators appointed as members of judiciary since they already have the access to, or even the support of, the appointing authority[89]

In the region, this mechanism is practiced in Laos and China. In Laos, judges of the People's Supreme Court are appointed by the Standing Committee of the National Assembly based on the recommendation of the President of the People's Supreme Court. The Standing Committee also has the power to appoint the President of the People's Supreme Court.[90] A similar mechanism exists in China, where the President of the Supreme People's Court is elected and removed by the National People's Congress while the other justices are appointed by the Standing Committee of the National People's Congress upon the request of the President of the Supreme People's Court.[91] Because of the single political party system in these countries, the dangers of politicization is even more present. It has been observed that, in China, the judicial appointments are ultimately determined by the Communist Party and the approval of the National People's Congress is but a mere formality[92]

C. *Professional Appointment*

The high probability of politicization in executive or legislative appointments led to an introspective theory that the judiciary must be a self-selecting and self-perpetuating institution. To insulate itself from outside political pressure, it is argued that the judiciary must have the authority to appoint the members of the bench "through a formal co-optation process that

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para 12. This is the same position taken by UN Special Rapporteur Leandro Despouy, 2009 Report of the UN Special Rapporteur, supra note 70, para 25.

[88] UN CHR, *Report of the Special Rapporteur on the independence of judges and lawyers*, (UN Doc. A/HRC/38/38 (2018 Report of the UN Special Rapporteur), para 51 (2018).

[89] Lawson, supra note 71, at 20; Keith and Robbins, supra note 85, observed this practice in the states of South Carolina and Rhode Island in the Unites States.

[90] Lao People's Democratic Republic's Constitution, art 81.

[91] Judges Law of the People's Republic of China, art 18. Unofficial English translation available at https://www.chinalawtranslate.com/en/judges-law-of-the-prc-2019.

[92] Christa Laser, et.al, *Selecting the Very Best: The Selection of High-Level Judges in the United States, Europe and Asia*, (Due Process Law Foundation, 2013), 37, *available at* http://www.dplf.org/sites/default/files/selection_high_level_judges_en.pdf.

subjects prospective judges to approval by their superiors."[93] This relies on the premise that current members of the judiciary are in the best position to observe who are deserving and qualified to join their ranks. Lower court judges have the best opportunity to observe lawyers in actual practice while appellate court judges, by the nature of their authority in the judicial hierarchy, constantly assess lower court judges' performance based on cases that are appealed to them. This mechanism, it is argued, encourages competency in the judiciary. Sitting judges and justices would prefer to appoint capable candidates so that their work could be lighter. Meanwhile, those who aspire to be a member of the judiciary, or be promoted to a higher court, must make sure that they excel in their practice or position to impress the judge, or their superiors in the higher court, who has a hand in their appointment.[94]

This process, however, may tilt in favor of lawyers whose practice is in litigation and, for higher court positions, career judges. Law professors, civil servants, and those whose practice do not require frequent appearance or interaction with judges are at a significant disadvantage, unless they have reached some degree of eminence in the bar or if they unduly rely on external factors to secure an appointment. It is also doubted whether the judiciary is less dangerous than political actors in appointments, considering that current members thereof also have their own individual or shared interest that could play a role in judicial selection.[95] Sitting judges may appoint individuals based on favoritism or ideological affinities. They may gatekeep outsiders and impose some form of conformity that could perpetuate existing homogeneity in courts.[96] For countries with a weak judicial system proliferated with corrupt judges and justices, professional appointment could also increase the risk of further populating the judiciary with incompetent and corrupt judges and justices. Persons and authorities who have some degree of influence over the judiciary may also take advantage of this mechanism to further strengthen their stronghold in the institution.

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[93] Elliot W. Bulmer, *Judicial Appointments*, (International Institute for Democracy and Electoral Assistance, 2017), 9, *available at* https://constitutionnet.org/sites/default/files/2017-10/judicial-appointments-primer.pdf.

[94] Mueller, supra note 86, at 124-125.

[95] Samuel Spáč, *Recruiting European Judges in the Age of Judicial Self-Government*, 19(7) GERMAN L.J. 2077, 2100-2101 (2018).

[96] Dante B Gatmaytan and Cielo Magno, *Averting Diversity: A Review of Nominations and Appointments to the Philippine Supreme Court (1998-2008)*, 6 AsJCL [ii], 3 (2011), argue that "[d]ecisions are more likely to be regarded as illegitimate if the decision-making body, whether by a jury or judge, 'is homogeneous, exclusive, and not representative of a cross section of the community'." See also, Felipe Sáez Garcia, *The Nature of Judicial Reform in Latin America and Some Strategic Considerations*, AM. U. INT'L L. REV. 13, no. 5, 1267-1325, 1291 (1998), expressing that an autocratic type of selection process could promote "the reproduction of the prevailing corporate culture with very limited accountability to exogenous forces."

In the region, this mechanism is mainly utilized to appoint judges of lower courts. In South Korea, lower court judges are appointed by the Chief Justice with the consent of the Supreme Court Justices' Council, which is composed of the justices of the Supreme Court.[97] In Taiwan, judges of lower courts are selected by the Judicial Yuan, the highest judicial body, through its Judicial Personnel Review Committee, which is composed of judge representatives and academic experts.[98] But this practice has not been fully adapted to appointments to supreme and constitutional courts. There, is in fact, no fully self-selecting superior court in the world. But as will be discussed in the next sections, involvement of the judiciary in the appointment process for supreme or constitutional courts is not entirely absent and is usually practiced as part of representative or cooperative appointment mechanisms.

D. Representative Appointment

In representative appointment, the seats are apportioned, and each appointing authority is allocated a certain number of seats in the court.[99] It is an appointment mechanism that is commonly used in constitutional courts. In Mongolia, South Korea, and Indonesia, the constitutional court has nine judges, and each of the three branches of the government appoints one-third of the members of the court.[100] Of the nine members of the Constitutional Council of Cambodia, for instance, three members are appointed by the executive, three members by the legislative, and three others by the Supreme Council of the Magistracy, not the judiciary.[101] In Myanmar, the president and the two houses of its bicameral congress each has the power to appoint three members of its nine-member Constitutional Tribunal.[102] For supreme courts, only Timor Leste has a system of representative appointment, where one justice is appointed by the parliament, with the rest appointed by the Superior Council for the Judiciary.[103]

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[97] Court Organization Act (SK), art 16 and 41(3),

[98] Judges' Act (TW), art 4.

[99] Volcancek, supra note 69, at 806 and 809-810, uses the term "shared appointment" to refer to systems that "place the authority to names judges to the bench in different institutional hands." If the seats are apportioned on some basis, such as political party or gender, she used the term "parity appointment."

[100] Mongolia's Constitution, art 65; Constitutional Court Act (SK), art 6(1); Law Number 24 of Year 2003 (ID), art 18(1).

[101] Constitution of Cambodia, art 118.

[102] Myanmar's Constitution, sec 321.

[103] Timor Leste's Constitution, art 125 (2).

It is posited that representative appointments "have a stronger likelihood of […] bringing some measure of diversity in thought and political persuasion to the bench" since multiple branches or agencies of the government with potentially differing ideologies or agenda participate in the process.[104] Ginsburg further characterized representative appointment as a "mutually assured politicization." He theorized that an appointing authority under this mechanism would tend to appoint neutral and non-partisan judges instead of his loyal partisan, lest the other appointing authorities respond by appointing judges and justices that are loyal to them. "By appointing someone who appears 'neutral' and non-partisan, the appointing authority signals that it does not anticipate needing or using the court to uphold its controversial actions." He fears, however, that representative systems risk deadlock or stalemate in case the appointing authorities decide to just nominate their loyal partisans instead of moderate judges.[105] The mechanism also fails when there is no healthy inter-branch competition or when one person or entity dominates the different appointing bodies.[106] In tripartite representation mechanisms common in the region, for instance, collusion between just two of the appointing bodies would be sufficient to achieve majority holding in a superior court.

E. Cooperative Appointment

Cooperative appointment mechanisms, by requiring the cooperation of two or more institutional or political bodies to appoint judges and justices, impose a super-majoritarian policy to ensure that there is a broad support for the appointment. It also negates the fear of overt and excessive control of one branch over the judiciary by combining legal safeguards that are often ignored in single-body appointments. Ginsburg, however, also noted the possibility of deadlock in case of the failure or refusal of the bodies to agree or cooperate with each other. Hence, without safeguards that would address this impasse, there is a risk that appointment would ultimately not be made.[107]

Cooperative appointments take many forms. It may require the cooperation of just two branches of the government or even the participation

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[104] Volcancek, supra note 69, at 816.

[105] Ginsburg, supra note 66, at 44-45.

[106] Volcancek, supra note 69, at 816.

[107] Ginsburg, supra note 66, at 44.

of all three branches. Judicial selection commissions also play a significant part in this type of appointment, especially in post-authoritarian countries.

1. *Executive-Legislative appointments*

The classic tug-of-war between the executive and legislative had impacted judicial appointment mechanisms. The fear of excessive executive or legislative control in single-body appointment is remedied by making the judicial appointment a shared responsibility between the two political bodies. It is believed that this dispersion of power "can encourage the appointment of adjudicators with solid reputation but moderate views" as a result of discussion and compromise between the two bodies.[108] Also, by splitting the authority between the two political branches, judges gain more legitimacy since they have been vetted and validated twice by the other branches whose authority stem from popular election.[109]

The interplay between the executive and the legislative in the appointment process takes different forms. The executive may be granted the ultimate power to appoint a superior court judge or justices, but subject to the consent or confirmation, and not mere advice, of the legislative, or *vice versa*. Also, the executive may instead be vested with the authority to submit a list of names from which the legislative will eventually pick the superior court judge or justice, or *vice versa*. Countries in the region that utilize this cooperative appointment mechanism use the former process. In Singapore, the justices of the supreme court are appointed by the President, but only if he concurs with the advice of the Prime Minister.[110] In South Korea, the justices of the supreme court are appointed by the President with the consent of the National Assembly.[111] In Taiwan, members of the Judicial Yuan are nominated and, with the consent of the Control Yuan, the legislative body, appointed by the President.[112]

This cooperative mechanism is not without any criticism. Some even question the efficacy of this system since confirming or consenting bodies always tend to just confirm or consent to the nomination made by the appointing authority. In the United States federal courts, well-known for

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[108] Charles Manga Fombad, *Appointment of constitutional adjudicators in Africa: some perspectives on how different systems yield similar outcomes*, 56(2) JOURNAL OF LEGAL PLURALISM AND UNOFFICIAL LAW 249, 257 (2014).

[109] Resnik, supra note 2, at 594.

[110] Constitution of Singapore, art 9(1).

[111] Court Organization Act (SK), art 4.

[112] Constitution of the Republic of China (Taiwan), art 79.

employing this mechanism, it has been observed that nominated persons are, in practice, sparsely rejected by the appointing authority.[113]

2. *Executive/Legislative-Judiciary appointments*

The judicial appointment power may also be divided between the judiciary and either of the two political branches. The executive-judiciary mechanism is strongly established in India, where the president appoints supreme court judges after consultation with the *collegium*, a body which consists of the Chief Justice of India and the four most senior judges of the Supreme Court. In cases of conflicting opinion, the Chief Justice's opinion generally prevails.[114] No such system exists in East and Southeast Asia. In jurisdictions where only the executive and the judiciary are involved in superior courts' appointment process, the involvement of the judiciary is often indirect, either through an advisory capacity, like in Malaysia, or in relation to a judicial selection committee, as will be further discussed.

3. *Executive-Legislative-Judiciary appointments*

Judicial selection may also require the cooperation of the three branches of the government. In Vietnam, the selection of superior court judges undergoes a three-step process that involves the Chief Justice of the Supreme People's Court, the National Assembly, and the President. Initially, the Chief Justice proposes to the National Assembly the appointment of judges of the Supreme People's Court. The National Assembly then considers the approval of this proposal. Pursuant to the approval of the National Assembly, the President shall issue the final decision to appoint judges of the Supreme People's Court.[115] This selection mechanism is uncommon and not much literature and studies can be found on the matter. It can, however, be reasonably argued that the same positions with two-body cooperative mechanism apply to three-body cooperative mechanisms. The participation of

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[113] Glenn R Winters, *One-Man Judicial Selection*, 45 J Am. Jud. Soc. 198, 200-201 (1962).

[114] Constitution of India, sec 124. Because of the primacy of the opinion of the Chief Justice in appointment, there are views that the Supreme Court of India is a self-selecting institution, and thus employs a professional appointment mechanism. The Constitution of India, however, is very clear with regard to the formal appointment mechanism. Moreover, the current appointment system has been subject of criticism with regard to its constitutionality. For an extensive discussion, see Rehan Abeyratne, *Judicial Independence and the Rise of the Supreme Court in India* in H.P. Lee & Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2018), 169-185; Anashri Pillay, *Protecting judicial independence through appointment processes: a review of the Indian and South African experiences*, 1 INDIAN L. REV. 283 (2018).

[115] Law on the Organisation of People's Courts (VT), art 72.

the three branches of the government creates a more rigorous selection process that mixes the political nature of the executive and the legislative and the existing ideals of the judiciary. However, the risk of deadlock is still present, if not magnified, and the possibility of collusion or subservience remains a danger, especially in countries with a single-party system or where, traditionally and historically, one branch of the government has some significant influence over the others.

4. *Judicial Selection Commissions*

The most recent trend in the appointment process is the creation of judicial selection commissions or JSCs[116] – independent, self-governing bodies which promote and protect judicial independence through judicial selection and appointment. JSCs have garnered much attention and support in recent years because of their potential to insulate the judiciary and the judicial appointment process from external political pressures.[117] For instance, in the Philippines, the Judicial and Bar Council was created post-Marcos' regime to prevent absolute executive discretion in judicial selection. The UN Special Rapporteur even considers the creation of judicial councils, in general, as good practice, and encourages its establishment for nations with no existing mechanism to ensure judicial independence.[118]

There are several working constitutional JSCs in the region which operate in the superior courts level, including Cambodia's Supreme Council of Magistracy, the Philippines' Judicial and Bar Council, the Judicial General Council of Mongolia, Timor Leste's Superior Council for the Judiciary, Thailand's Judicial Commission, and Indonesia's Judicial Commission. While Malaysia has a Judicial Appointments Commission, as discussed above, there is no constitutional protection afforded to it and its participation in judicial selection process remains in question.

There is no one-size-fits-all model of JSCs, and its creation and function vary per jurisdiction. Even the JSCs in the region are unique in several aspects from each other. Nonetheless, there are general principles that are common

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[116] For consistency, the term judicial selection commissions or JSCs will be used to refer to these bodies in general, regardless of the nomenclature used in a particular jurisdiction.

[117] See, for instance, the Universal Charter of the Judge adopted by the International Association of Judges, which prescribes that the "selection [of judges] must be carried out by [a Council for the Judiciary] or an equivalent body;' the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, prepared and adopted by the African Commission on Human & Peoples' Rights, which encourages the 'establishment of an independent body for [the processing of appointments to judicial bodies.]"

[118] 2018 Report of UN Special Rapporteur, supra note 88.

among JSCs which are relevant to and directly relates to their purpose in the grand scheme of judicial independence - first, how JSCs participate in the judicial selection process; second, how the JSC is composed; and third, how the members of the JSC are selected or chosen.

The concept of judicial independence is primarily related to the part that the JSC plays in the appointment process, which may be direct or indirect. The participation is direct if the JSC has the final word in the process and itself appoints the superior court judge or justice. At present, this is an uncommon method of utilizing JSCs. In the region, Timor Leste is the only country that adopts this system, with the Supreme Council for the Judiciary directly appointing all justices of the supreme court, except for one that is reserved for the parliament's choice.

On the other hand, the participation is indirect if the JSC is merely a nominating or proposing body.[119] Three models have been utilized for this purpose: a) the JSC submits a single name which is binding upon the final appointing authority; b) the JSC submits a single name and the final appointing authority retains the discretionary power or latitude to reject the nomination or proposal; and c) the JSC produces a shortlist of candidates for the selection of the final appointing authority.[120] In Thailand, appointment is upon the approval of the Judicial Commission and subsequent submission to the King for the Royal Command of Appointment[121] while in Indonesia, a candidate justice is proposed by the Judicial Commission for the approval of the House of Representative and final appointment of the President. The third model is employed in the Philippines, where the Judicial and Bar Council is constitutionally mandated only to prepare a list of at least three nominees from which the president, the final appointing authority, chooses. In the second and third models, where the final appointing authority has the discretion to reject or choose, the UN Special Rapporteur maintains that the discretion must be exercised only in exceptional circumstances:

> Where an organ of the executive or legislative branch is the one formally appointing judges following their selection by an independent body, recommendations from such a body should only be rejected in exceptional cases and on the basis of well established criteria that have been made public in advance. For such cases, there should be a specific procedure by which the executive body is required to substantiate in a

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[119] Some scholars suggest that, in this mechanism, the final appointment decision should rest with the chief executive. See Alicia Bannon, *Choosing State Judges: A Plan for Reform*, (Brennan Center for Justice, 2018), *available at* https://www.brennancenter.org/sites/default/files/2019-08/Report_Choosing_State_Judges_2018.pdf.

[120] Smit, supra note 75, at 52.

[121] Act on Judicial Service of the Courts of Justice (TH), art 19.

> written manner for which reasons it has not followed the recommendation of the above-mentioned independent body for the appointment of a proposed candidate. Furthermore, such written substantiation should be made accessible to the public. Such a procedure would help enhance transparency and accountability of selection and appointment.[122]

The ability of the JSC to operate according to its purpose is also affected by its institutional composition and structure. If the goal is to make the judiciary independent, the members of the JSC must themselves be independent. Regarding the JSC's composition, the recent global practice is to have a mixture of members who are judges, legal professionals, politicians, and lay persons. As to how the membership should be allocated, there is a consensus to ensure the presence of members of judiciary and legal profession in the JSCs. The IBA Minimum Standards of Judicial Independence simply require that majority be composed of judges and representatives of the legal profession.[123] This standard is observed in the Philippines, where four of the seven members of the Judicial and Bar Council are lawyers, although only one is a sitting judge – the chief justice. The three other lawyer-members come from the academe, the integrated bar, and a retired justice of the Supreme Court.[124] In contrast, this minimum threshold is not present in Timor Leste's Supreme Council for the judiciary, where only two out of five members are required to be lawyers. The Committee of Ministers of the Council of Europe, on the other hand, proposes a stricter approach that judges, not just lawyers, must constitute the majority of the JSC,[125] which is the same position adopted by the UN Special Rapporteur:

> The composition of this body matters greatly to judicial independence as it is required to act in an objective, fair and independent manner when selecting judges. While a genuinely plural composition of this body is recommended with legislators, lawyers, academicians and other interested parties being represented in a balanced way, in many cases it is important that judges constitute the majority of the body so as to avoid any political or other external interference.[126]

The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region further suggests that judge representatives must

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[122] 2009 Report of the UN Special Rapporteur, supra note 70, para 33.

[123] Adopted 1982, para 3(a), *available at* https://www.icj.org/wp-content/uploads/2014/10/IBA_Resolutions_Minimum_Standards_of_Judicial_Independence_1982.pdf.

[124] CONST., art VIII, sec 8(1).

[125] Smit, supra note 75, at 33-34.

[126] 2009 Report of the UN Special Rapporteur, supra note 70, para 28.

come from the higher judiciary.[127] The Judicial Commission of Thailand follows this model. Thirteen of the fifteen members thereof are members of the judiciary. The president of the supreme court acts as the chairperson while the other twelve judges-representatives are elected from different court levels – four each from the supreme court, the appellate courts, and the courts of first instance.[128] The nine-member Supreme Council of Magistracy of Cambodia has five members from the judiciary and three lawyers. The king is the only member that is not involved in the practice of law.[129]

The UN Special Rapporteur warns, however, that if the proportion of judges in the JSC is too high, there is a risk of "corporatism" and would insulate the JSC from any external oversight. The Consultative Council of European Judges is of the position that "a mixed composition would present the advantages both of avoiding the perception of self-interest, self-protection and cronyism and of reflecting the different viewpoints within society, thus providing the Judiciary with an additional source of legitimacy."[130] Hence, the necessity of including non-judge lawyers, such as law professors and members of the bar, and non-lawyers and lay members, such as those who are experts in social sciences.[131] The inclusion of non-lawyers or lay members is justified by the need to have a civil society perspective or to contribute non-legal expertise. The inclusion of politicians, on the other hand, is believed to give the JSC some form of democratic legitimacy, although the same risk in single-body appointments with regard to the politicization of the judicial appointment process is present with this inclusion.[132] The Philippine Judicial and Bar Council, for example, has representatives from the private sector and the legislative. Similarly, two members of the Judicial Commission of Thailand must be non-lawyers.

Aside from its composition, also relevant in the analysis of the JSC is the manner of the selection of its members. In recent years, major concern has been raised as to the extent to which the JSC is dominated by members appointed, whether directly or indirectly, by the appointing authority itself, usually the executive. The purpose of the JSC and its allure as an apolitical body are defeated because the executive still has a significant say in the selection of JSC members. One author noted that:

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[127] Beijing Statement of Principles of the Independence of the Judiciary, para 15.

[128] Act on Judicial Service of the Courts of Justice (TH), art 36.

[129] Law on the Organization and Function of the Supreme Council of Magistracy (KH), art 2.

[130] Consultative Council of European Judges, Opinion No.10 (2007), para 19.

[131] 2018 Report of the UN Special Rapporteur, supra note 88, para 67-68.

[132] Smit, supra note 75, at 37-38.

> The appointing authority should have no control over selecting commissioners on the judicial nominating commission. If that is not politically feasible, the appointing authority should have as little control as possible… If the appointing authority controls enough commissioners, he may be able to control the output of the commission, and therefore, help ensure that he is fed back his political choice' from whom he will select. This may also give the impression, accurate or not, that that the system is "wired" in favor of nominees connected to the appointing authority[.][133]

This issue is particularly relevant in Indonesia, where all the members of the Judicial Commission are appointed by the president.[134] While there is diversity in the Judicial and Bar Council of the Philippines, with the exception of the representative of the legislative, all the members thereof are presidential appointees.[135] In contrast, of the fifteen members of the Judicial Commission of Thailand, only three may be considered as political appointees. The president of the supreme court, who acts as the chairman, is appointed by the king while the two others are elected by the legislative. The twelve judge members are elected by their peers in the judiciary.[136] The selection mechanism of JSC members in Timor Leste is even more varied. Its Supreme Council of the Judiciary is composed of the president of the supreme court, one member who is designated by the president; one elected by the Parliament; one designated by the government; and one elected by the judges of the courts of law from among their peers.[137]

IV. JUDICIAL ELECTIONS

Issues surrounding the politicization and patronage system in the appointment process lend credence to the view that the power to put judges and justices to the courts, especially in the higher appellate courts, should be exercised directly by the people. Thus, the practice of judicial election. Instead of appointment, it is proposed that the members of the judiciary should be elected by popular votes or through the people's exercise of suffrage.

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[133] Norman Greene, *Perspective on Judicial Selection*, 56(3) MERCER L. REV. 949, 962-963 (2005).

[134] Constitution of Indonesia, art 24B.

[135] Philippine Constitution, art VIII, sec 8(1) and (2).

[136] Act on Judicial Service of the Courts of Justice (TH), art 36.

[137] Timor-Leste's Constitution, art 128 (2).

This is a common practice in state-level courts in the United States, with twenty-two states electing their justices.[138] This can be traced back to the 19th century, when several states believed that elected judges are "more independent from political elites and therefore worthy of greater public trust and confidence."[139] As opposed to the notion that the judiciary is not a political actor, some argue that courts are vested with the power to make and invalidate law, so they are, ultimately, political actors with their own constituency and they must consequently derive their authority from them through popular election.[140] Judicial election provides the judiciary with a certain degree of democratic legitimacy. Some also see judicial elections as a rejection of traditional, anti-majoritarian constitutional theories and a check on judicial activism and overreach.[141] Today, the common thread among those who support judicial elections revolves around the concepts of judicial accountability and the desirability of having a judiciary that is broadly representative of the population that it serves.[142] "[M]aking judges 'dependent on none but themselves' ran counter to the principle of 'a government founded on the public will.'"[143] Judicial election, it is argued, offers the people a direct check over the judiciary and gives them the means and forum to operationalize their outrage and register their dissent.[144]

This practice significantly deviates from the appointment process adopted for the federal Supreme Court of the United States. Madison and Hamilton argued strongly against election of judges and consistently warned against the "tyranny of the majority"[145] and the "encroachments and oppressions of the representative body."[146] Those who oppose the practice of judicial election maintain that the "American political system is not based on pure

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[138] The Brennan Center for Justice, *Judicial Selection: Significant Figures*, (2015), available at https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures.

[139] Richard L. Jolly, *Judges as Politicians: The Enduring Tension of Judicial Elections in the Twenty-First Century*, 92 NOTRE DAME L. REV. ONLINE 71, 74 (2017). For a brief history of judicial election in the United States, see Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L.REV. 1061, 1065-1107 (2010).

[140] See Chris Bonneau and Melinda Gann Hall, *In Defense of Judicial Elections*, (Routledge, 2009) chapter 1.

[141] See David Pozen, *Judicial Elections as Popular Constitutionalism*, 110 Colum. L. Rev. 2047 (2009); James J. Bopp, *Preserving Judicial Independence: Judicial Elections as the Antidote to Judicial Activism*, 6 FIRST AMEND. L. REV. 180 (2018).

[142] See Dubois, supra note 3, at 32; Shugerman, supra note 139, at 1124, citing Larry D. Kramer, *The People Themselves* (Oxford University Press, 2004), at 144.

[143] Jolly, supra note 139, at 81, quoting Thomas Jefferson, *Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816)* in Paul Leicester Ford (ed) *The Works of Thomas Jefferson* vol. 5 (1904).

[144] Pozen, supra note 141, at 2070-2071.

[145] James Madison, *Federalist Paper No. 47* (1787).

[146] Alexander Hamilton, *Federalist Paper No. 78* (1788).

majoritarianism and that the judges must be free to offer protection to the essential rights of minorities against infringement by majoritarian political interest in the elected branch and in the population at large."[147] Subjecting the courts to majoritarian pressures could lead to judges compromising "the constitutional rights of subsets of their judicial electorate who are unpopular, unorganized, or otherwise outvoted"[148] for the fear that they might not be re-elected or elected to higher office in the future. Hence, the central thesis among those who oppose judicial election is the rejection of the notion that courts can be at once both democratic and independent.[149] Elected judges, because they are answerable to the voting public and the political bodies that support them, are "more likely to respond to political pressures" and popular preference, to "rule for favorable voters and campaign contributors,"[150] and to "bow to the temporary whims of the public rather than to protect the enduring principles of law."[151]

Elections for judges and justices of superior courts, however, did not achieve prominence and is very rarely practiced outside of the United States. Only Bolivia employs election by popular votes to determine the highest-ranking authorities of its judicial organ.[152] Some form of judicial election is practiced in other jurisdictions, but they do not involve elections to superior courts.[153] In the East and Southeast Asian region, no country selects the composition of its superior courts through popular election. While Japan has a system of judicial election, it is only utilized in the retention of supreme court judges after they have been appointed. A sitting judge of the Japan Supreme Court shall be dismissed if the majority of the voters favor his dismissal.[154] This reflects "the postwar constitution's rejection of the emperor's sovereignty and

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[147] Dubois, supra note 3, at 38-39.

[148] Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 727 (1995).

[149] Jolly, supra note 139, at 73. See also Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589, 1591-1592 (2009), arguing that "judicial election […] turn judges into politicians at the expense of judicial independence" and that "the deeply rooted conviction that judicial elections are inconsistent with judicial independence."

[150] *Id.* at 82.

[151] Dubois, supra note 3, at 37. Several studies support this argument and have shown that election significantly affects judges' decision-making.

[152] Bolivia (Plurinational State of)'s Constitution of 2009, art 182, para 1 *cf* para 5.

[153] Luis Pasara, *Judicial Elections in Bolivia: An Unprecedented Event*, (nd), available at http://www.dplf.org/sites/default/files/executive_summary_rev_web.pdf. See also Jolly, supra note 139, at 72 (note 2); Shugerman, supra note 139, at 1064 (note 3).

[154] Constitution of Japan, art 79.

the recognition of popular sovereignty,"[155] although it has been observed that in practice, it is unlikely to remove a judge through this process.[156] Moreover, Japanese voters tend to not take judicial retention election with the same rigor as in executive or legislative election. Supreme court judges often have not yet participated in important legal matters at the time of their first retention election and their qualifications and voting records are not adequately provided to the public, thus voters have very little basis to evaluate them. Also, the habit of appointing supreme court judges of older age, in relation to the mandated retirement age, renders popular review moot in most instances.[157]

V. CONCLUSION

Judicial selection is one of the trickiest aspects of designing a legal system. How nations should select their judges and justices, especially for the highest or superior courts, is a crucial aspect that has been the constant subject of debate in the past decades. Different systems have been utilized, some of them have been modified, to adapt to the ever-changing political environment and perception of how the government and modern democracy must work. Discourses on this topic had primarily focused on the institutional independence of the judiciary and the decisional independence of the judge or justice from politics and partisan interest, with the ultimate goal of designing a judicial appointment mechanism that would allow a person once appointed to withstand political pressure and stand above the fray of ordinary politics. Yet, not one concrete, specific solution or process has been agreed upon or practiced in the arena of international law. The paper's comparative analysis of the different legal systems in the East and Southeast Asian regions reflects the variety of practices observed across the globe and the lack of unanimity as to what constitutes good or bad practices of judicial appointment. Unlike highly developed countries or regions, which have some form or mechanism of regional legal oversight, where vast majority of literature is concentrated, however, less attention has been devoted to Asian systems in this discourse. The diversity in government structures, constitutional regimes, and the historical and cultural backgrounds of the different countries in the region

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[155] David M. O'Brien and Yasuo Ohkoshi, *Stifling Judicial Independence from Within: The Japanese Judiciary* in Peter H. Russell and David M. O'Brien (eds) *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University of Virginia Press, 2001), at 53.

[156] Masahito Tadano, *The Role of the Judicial Branch in the Protection of Fundamental Rights in Japan* in Yumiko Nakanishi (eds) *Contemporary Issues in Human Rights Law* (Springer, Singapore 2018), at 77.

[157] Tokuji Izumi, *Concerning the Japanese Public's Evaluation of Supreme Court Justices*, 88 Wash. U. L. Rev. 1769, 1776-1777 (2011). See also O'Brien and Ohkoshi, supra note 155, at 52-53.

should warrant more attention to further the discussion and analysis on the topic.

PROBLEM AREAS IN POSITIVE IDENTIFICATION, ALIBI AND EMERGING ROLE OF FORENSIC SCIENCE IN THE APPRECIATION OF EVIDENCE

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I. INTRODUCTION

Alibi is defined as a statement, buttressed by facts and corroborated by incontrovertible evidence, establishing the impossibility for the individual to have committed the act charged against him. Alibi, in the absence of any convincing evidence that it is physically impossible on the part of the accused to be in the crime scene, is always considered by the Supreme Court as the weakest defense. Positive Identification, on the other hand, is given a greater weight by the court more so that the accused was positively identified by a competent witness. However, the theory of alibi or positive identification is not perfect. There are certain flaws during trial that may affect alibi or positive identification. In our judicial system, judges rely solely on testimonial evidence which sometimes are unreliable due to certain factors. Hence, this article tends to show that courts must not solely rely on testimonial evidence. It is about time that forensic science be appreciated in the evaluation of evidence.

II. ESTABLISHED DOCTRINES REGARDING POSITIVE IDENTIFICATION AND ALIBI

A. Alibi as a Defense

In our jurisdiction, the accused is presumed innocent until proven guilty in all criminal prosecutions.[2] This presumption undergirds the entirety of Philippine criminal procedure and is a core component of criminal due process that must be offered to all accused, lest the proceedings be voided. Therefore, it is the responsibility of the prosecution to establish the defendant's guilt beyond a reasonable doubt. More specifically, the State has the burden of proof to show: (1) The correct identification of the author of the crime; and

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[2] CONST., (1987), art. III, sec 14, par. 2.

(2) The actuality of the commission of the offense, with the participation of the accused.

It is clear that in every criminal prosecution, the identity of the offender, like the crime itself, must be established by proof beyond a reasonable doubt.[3] Only proof beyond a reasonable doubt suffices to overturn the presumption of innocence.[4] Hence, the prosecution cannot rely on the weakness of the defense, especially not if they have failed to prove his identity and culpability in the act. However, when the prosecution has discharged its burden and proven the identity of the accused beyond a reasonable doubt the burden shifts on the accused, to adduce evidence that he or she did not commit the offense.

From these well-established doctrines come the Supreme Court's long entrenched attitudes on alibi as a defense. There are many defenses available to an accused in order to rebut the State's evidence, but alibi is regarded as one of the least effective of such defenses. Indeed, in a long line of cases, the Court has consistently looked at the defense of alibi with disfavor, even characterizing it as inherently weak,[5] and when invoked, is more likely to be rejected by the Court.

Hence, the rule is that alibi cannot prosper when the accused has been positively identified by the complainant. A positive identification of the accused, when categorical, consistent and straightforward, and without any showing of ill motive on the part of the eyewitness testifying on the matter, prevails over the defense of alibi and denial.[6]

The rationale behind the Court's attitude towards alibi is due to the ease with which an alibi can be fabricated, thus rendering such defense largely unreliable.[7] Bias can easily creep into alibi, especially when such corroborating testimonies come from friends, relatives and supporters, and are marred by discrepancies.[8] It is difficult to ascertain the veracity of the alibi in order to rebut it, thanks to the frailty of human memory with regard to small details.[9]

This is not an ironclad rule, however. Despite the Supreme Court's attitude toward alibi, it has recognized alibi as an acceptable defense in certain instances. In order for the defense of alibi to prosper, it must be demonstrated that the person charged with the crime was not only somewhere else when the offense was committed, but was so far away that it would have been physically

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[3] *Angcaco v. People,* 378 SCRA 297 (2002).
[4] *Corpuz Jr v. People,* 810 SCRA 345 (2016).
[5] *People v. Violeja,* G.R. No. 177140, October 17, 2002.
[6] *People v. Silongan,* 401 SCRA 459 (2003).
[7] *People v. Dadao,* G.R. No. 201860, January 22, 2014.
[8] *People v. Malones,* 425 SCRA 318 (2004).
[9] *People v. Molleda,* 86 SCRA 667 (1978).

impossible to have been at the place of the crime or its immediate vicinity at the time of its commission.[10] The requirements of time and place must be strictly met. Where there is even the least chance for the accused to be present at the crime scene, the defense of alibi will not hold water.[11]

Moreover, alibi as a defense must be supported by clear and convincing evidence.[12] This becomes especially significant if the evidence for the prosecution is inherently weak and betrays a lack of concreteness on the question of whether or not appellants are the authors of the crimes charged. In such cases, alibi may prove instrumental to the resolution of the case. In the words of former Justice J.B.L. Reyes, speaking for the Court in the case of *People v. Fraga:*[13] "The rule that alibi must be satisfactorily proven was never intended to change the burden of proof in criminal cases; otherwise, we will see the absurdity of an accused being put in a more difficult position where the prosecution's evidence is vague and weak than where it is strong."

Physical Impossibility

The main factor that leads Courts to appreciate alibi as a defense is the degree of physical impossibility attendant in the circumstances at hand. For alibi to prosper, the accused must not only prove that he was somewhere else when the crime was committed; he must also convincingly demonstrate the physical impossibility of his presence at the *locus criminis* at the time of the incident.[14] Mere denial and alibi are not only weak defenses, but they cannot prevail over credible evidence particularly when, on their face, they do not demonstrate the physical impossibility of an accused's presence at the place and time of the commission of the offense.[15]

Physical impossibility refers to distance and the facility of access between the crime scene and the location of the accused when the crime was committed. There must be a demonstration that they were so far away and could not have been physically present at the crime scene and its immediate vicinity when the crime was committed.[16]

A few examples in our law and jurisprudence may illustrate how Courts appreciate distance for the purposes of ascertaining physical impossibility. In

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[10] *People v. Baro,* G.R. No. 146327-29, June 5, 2002.
[11] *People v. Castro,* G.R. No. 172874, December 17, 2008.
[12] *People v. Condemena,* G.R. No L-22426, May 29, 1968; *People v. Barrios,* G.R. No. L-34725, July 30, 1979.
[13] *People v. Fraga*, G.R. No. L-12005, August 31, 1960.
[14] *People v. Besmonte,* 397 SCRA 513 (2003).
[15] *People v. Lozada,* 406 SCRA 494 (2003).
[16] *People v. Tulagan,* 896 SCRA 307 (2019).

People v. Mosquerra,[17] the Court used the fact that the distance of the Mina de Oro Hotel where accused-appellant in that case claimed to have been staying from the *locus delicti* was estimated at one-and-a-half to two (1 ½-2) kilometers only, a distance which was not too far to traverse even by walking. Similarly, in *People v. Niem,*[18] the Court considered a distance of 600 yards, or around 0.5 km, as not being long enough a distance that the accused could not have momentarily left the place to commit the crime. Even the distance between Quezon City and Cebu was considered by the Court as not satisfying the requisite of physical impossibility in the case of *People v. Larranaga,*[19] as it would have taken only one hour to travel by plane from Manila to Cebu and that there were four airline companies plying the route, making it possible for the accused-appellant to have traveled back and forth.

B. Positive Identification

Nonetheless, despite the leeway which the Supreme Court occasionally bestows onto the defense of alibi, positive identification remains a strong evidentiary presumption to overcome. To repeat, the rule in our jurisdiction is that positive identification of the accused, when categorical, consistent, and straightforward, and without any showing of ill motive on the part of the eyewitness testifying on the matter, prevails over the defense of alibi.[20]

What does positive identification entail? To paraphrase the Supreme Court, positive identification entails essentially proof of identity and not per se to that of being an eyewitness to the commission of the crime.[21] There are two types of positive identification. The first is when a witness identifies a suspect or accused in a criminal case as the perpetrator of the commission of the crime. This form of positive identification constitutes direct evidence. The second consists of cases where, although a witness may not have actually seen the commission of the crime itself, he may still be able to identify a suspect or accused as the perpetrator of a crime. This type of positive identification constitutes circumstantial evidence.[22] Thus, positive identification can be provided not only by a witness actually identifying the accused as the one who

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17 *People v. Mosquerra*, 362 SCRA 441 (2001).
18 *People v. Niem*, 75 Phil 668 (1945).
19 People v. Larrañaga, G.R. No. 138874-75, January 31, 2006.
20 *People v. Silongan,* 401 SCRA 459 (2003).
21 *People v. Gallarde,* G.R. No. 133025, February 17, 2000.
22 *People v. Francisco,* 363 SCRA 637 (2001).

perpetrated the crime, but also by one who has seen the accused at the scene of the crime, on or about the time of the alleged crime.

It should be noted, however, that knowing the identity of an accused is different from knowing his name. Hence, the positive identification of the malefactors should not be disregarded just because the names of some of them were supplied to the eyewitnesses. For the wright of eyewitness account is premised on the fact that the said eyewitness saw the accused commit the crime, and not because he or she knew their names.[23]

Positive identification enjoys a strong presumption for a myriad of reasons. For one, the courts afford great weight to the good faith of witnesses. In more than a few cases, courts have appreciated positive identification by invoking perceived human nature. If an appellant has naught to do with a crime, it would be against human nature and the presumption of good faith that prosecution witnesses would falsely testify against an accused. Overcoming such presumption would then require evidence to show why a prosecution witness would falsely testify against an accused.[24] Other factors which may help the court appreciate positive identification are the witness' relationship to, and familiarity with the accused.

The presumption accorded to positive identification can withstand even inconsistencies in the testimonies of witnesses. More often than not, courts will tolerate at least a slight degree of inconsistency, as long as they concern small details pertaining to minor or collateral matters. It is generally considered sufficient that a witness' verbal portrait of the assailant is reasonably descriptive of the latter's general appearance, characteristic and bearing; what is important is that the witness positively identifies the accused.[25]

III.PROBLEM AREAS

A. Mistaken Identity

Eyewitness identification is the bedrock of many pronouncements of guilt. However, despite our jurisdiction's strong adherence to the positive identification doctrine, there are dangers in according it a blanket primacy. Eyewitness identification is inherently prone to error, as is the appreciation by

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[23] *People v. Bernardo,* 423 SCRA 448 (2004).
[24] See: *People v. Angeles,* 92 SCRA 432 (1979).
[25] *People v. Sarmiento,* L-25183

observers, such as jurors, judges, and law enforcement officers of how an eyewitness identifies supposed culprits. Many organizations have repeatedly stressed the role flawed evidence of all sorts has played in the wrongful convictions of innocent persons.

The main issue is that human memory is intrinsically unreliable and can be likened to the same kind of muddled message received at the very end of a game of Telephone. Eyewitness identification is but a product of flawed human memory. In an expansive examination of 250 cases of wrongful conviction where convicts were subsequently exonerated by DNA testing, Professor Brandon Garett noted that as much as 190 or 76% of these wrongful convictions were occasioned by flawed eyewitness identifications.[26] Variables such as environmental factors, flawed procedures, and even the mere passage of time, can whittle away at one's memories of a specific event.

Another observer has more starkly characterized eyewitness identification as the leading cause of wrongful convictions.[27]

This is reflected in several issues, such as:

(a) Inherent difficulties *vis-a-vis* over-readiness

(b) Credibility *vis-a-vis* reliability;

(c) Confidence *vis-a-vis* accuracy;

Inherent Difficulties

Many authorities would argue that there is an inherent difficulty in identifying individuals, more particularly strangers. More often than not, witnesses assume that they are part of the prosecution team, and thus, in their desire to assist law enforcement bolsters a perception on their end that the identified suspect is guilty. According to some experts, this may motivate witnesses to readily identify the suspect as the perpetrator. Only the trial judge sees the brazen face of the liar, the glibness of the schooled witness, as well as the honest face of a truthful one.[28]

Accuracy

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[26] *People v. Nunez,* 842 SCRA 97 (2017), citing Davis, Deborah and Loftus, Elizabeth F., Dangers of Eyewitnesses for the Innocent; Learning from the Past and Projecting into the Age of Social Media, Vol. 46, p. 769, New Eng. L. Rev. 769, 2012.

[27] *People v. Nunez,* 842 SCRA 97 (2017), citing Thompson, Sandra Guerra, Daubert, Gatekeeping for Eyewitness Identifications, Vol. 65, p.596, S.M.U L. Rev 593,2012.

[28] *People v. Alcodia,* 398 SCRA 673 (2003).

It is the running consensus of some authorities that testimonial evidence delivered or presented with a high level of confidence, including expressions of certainty, does not necessarily correlate with the same degree of accuracy. Case law holds that a witness is not expected to remember an occurrence with perfect recollection of minor and minute details. The testimony of a witness must be considered and calibrated in its entirety and not by truncated portions thereof or isolated passages therein. A truth-telling witness is not always expected to give an error-free testimony, considering the lapse of time and the treachery of human memory. Failure of the witness to recall each and every occurrence may even serve to strengthen, rather than weaken, the credibility of a witness because they erase any suspicion of coached or rehearsed testimony.[29]

Credibility and Reliability

Honesty is the best policy, or so the truism goes. Yet, it is understandable that even honest people make mistakes. When it comes to criminal matters, more particularly in the identification of suspects, it poses a challenge to courts to discern which testimonies are credible and which ones are unreliable. In our jurisdiction, we have adopted the "totality of circumstances" test when it comes to appreciating the credibility of a witness' testimony. In the case of *People v. Teehankee Jr,*[30] the Supreme Court identified the factors employed in this test, which were first laid down by the U.S. Supreme Court in the case of *Neil v. Biggers:*[31]

1) The witness' opportunity to view the criminal at the time of the crime;
2) The witness' degree of attention at the time;
3) The accuracy of any prior description given by the witness;
4) The level of certainty demonstrated by the witness at the identification;
5) The length of time between the crime and the identification;
6) The suggestiveness of the identification procedure;

The credibility of witnesses in our jurisdiction is ascertained by considering the first two of the above-stated factors. Did the witness have the opportunity to view the malefactor at the time the crime was committed? What

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[29] *Tapdasan Jr v. People,* 392 SCRA 335 (2002).
[30] 249 SCRA 54 (1995).
[31] 409 U.S. 188 (1972).

was the degree of attention he had at the time? The latter takes into account the visibility of the accused and the extent of time, little and fleeting as it may have been, for the witness to be exposed to the perpetrators, peruse their features, and ascertain their identity.[32]

The totality of circumstances test also requires a consideration of the length of time between the crime and the identification of the witness. Ideally, then, a prosecution witness must identify the suspect immediately after the incident. The Supreme Court generally considers acceptable an identification made two (2) days after the commission of a crime, not so one that had an interval of five and a half (5 ½ months).[33]

The passage of time is not the only factor that diminishes memory. Equally jeopardizing is a witness' interactions with other individuals involved in the event. As noted by cognitive psychologist Elizabeth F. Loftus, "post-event information can not only enhance existing memories, but also change a witness' memory and even cause non-existent details to become incorporated into a previously acquired memory."[34]

When it comes to adjudging the credibility of witnesses in court, the findings of the trial court regarding the credibility of witnesses are generally afforded great weight, as it is the trial court that has the opportunity to observe the demeanor and conduct of the witnesses while testifying, and therefore, is in a better position to properly gauge their credibility. Appellate tribunals will generally not disturb the findings of fact of the trial court unless there is proof that said court, in making the finds, had failed to appreciate some fact or circumstance of weight and substance that would have altered the results of the case.[35]

Although the well-entrenched rule is that the testimony of a single witness is sufficient on which to anchor a judgment of conviction, it is required that such testimony must be credible and reliable.[36]

B. Factors Affecting Identification

Criminal prosecution may result in consequences as severe as deprivation of liberty, property, and, where capital punishment is imposed, life.

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[32] *People v. Nunez,* 842 SCRA 97 (October 4, 2017).
[33] *Id.*
[34] *Id.*
[35] *People v. Padiernos,* G.R. No. L-37284, February 27, 1976.
[36] *Francisco v. People,* 434 SCRA 122 (2004).

Prosecution that solely relies on eyewitness identification must be approached meticulously, cognizant of the inherent frailty of human memory. Eyewitnesses who have previously made admissions that they could not identify the perpetrators of the crime, but years later and after a highly suggestive process of presenting suspects, contradict themselves and claim they can identify the perpetrator with certainty are grossly wanting in credibility. Prosecution that relies solely on these eyewitnesses' testimonies fails to discharge its burden of proving an accused's guilt beyond reasonable doubt.[37]

Admittedly, there are certain factors to be taken into consideration when it comes to identification. Errors made in identification are typically influenced by the following:

(a) The witness himself;

(b) The perpetrator;

(c) The incident;

(d) The venue;

(e) Other factors;

Moreover, as mentioned, the human memory often does not accurately store, record, and retrieve images. We must, to a certain degree, reconstruct, interpret, and rationalize. It is not uncommon that when we attempt to recall a memory, especially one that belongs to the distant past or from a shocking experience, we somehow sanitize, reconstruct, reinterpret, or imagine it very differently from what actually occurred. A very good example is traumatic memory, which our mind attempts to suppress.

Most authorities attribute such misidentification to the following contributory factors:

(a) Fallibility of the witness;

(b) Circumstances where the observation is made; and

(c) Methods of identification used

Of course, this is not an exhaustive list. There are a multitude of other factors that may contribute to the misidentification of individuals by eyewitnesses. However, this paper will focus mainly on the three listed above.

Fallibility of the Witness

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[37] *People v. Nunez*, 842 SCRA 97 (2017).

As to the fallibility of witnesses, there are several factors that contribute to the same, such as:

(a) *Stress* -- Stressful situations or events often influence witnesses, often resulting in misidentification

(b) *Transference* -- This refers to identifying an individual who has been seen on a different and unrelated occasion;

(c) *Pressure* -- This refers to the urgent need for an individual to make a choice when identifying someone--such pressure, mostly emanating from law enforcers or the public, more often than not, lead to misidentification;

(d) *External Influence* -- This refers to influence exerted by other people, perhaps other witnesses, which would likely make witnesses conform with the general narrative.

There are some instances wherein fallibility is to be expected. The crime of rape, for example, has been recognized as a prime example of this phenomenon. To paraphrase the Supreme Court in the case of *People v. Tolentino,* it is an understandable human frailty not to be able to recount with facility all the details of a dreadful and harrowing experience, and minor lapses in the testimony of a rape victim can be expected. After all, rape is a painful experience that is sometimes not remembered in detail, and the victim cannot be expected to immediately remember with accuracy every ugly detail of her harrowing experience, especially so when she might, in fact, have been trying not to remember the event. Thus, inaccuracies and inconsistencies are to be expected in the rape victim's testimony.[38]

As stated, the fallibility of eyewitness identification has been recognized and has been the subject of concerted scientific study for more than a century, with numerous studies already finding that eyewitness errors are one of the leading factors resulting in wrongful conviction. However, what is novel in Garrett's study is that he attempted to determine why mistaken identification often occurred. He came away with the following conclusions, both of which reveal the two-pronged nature of the unreliability of eyewitness evidence—(1) eyewitness identifications are subject to substantial error, and; (2) observer judgments of witness accuracy are likewise subject to substantial error.[39]

The bifurcated difficulty of misplaced reliance on eyewitness identification is borne not only by the intrinsic limitations of human memory, but can also

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[38] *People v. Tolentino,* 423, SCRA 448 (2004).

[39] Thompson, Sandra Guerra, Daubert Gatekeeping for Eyewitness Identifications, Vol. 65, p. 596, S.M.U. L. Rev 593, 2012, 808

be caused by environmental factors, flawed procedures, or the mere passage of time. Eyewitness science has pointed out the following issues regarding human memory:

1) The ability to match human faces to photographs, even when the target is present while the witness inspects the lineup or comparison photo, is poor and peaks at levels far below what may be considered reasonable doubt.

2) Eyewitness accuracy is further degraded by pervasive environmental characteristics typical of many criminal cases, such as suboptimal lighting, distance, angle of view, disguise, witness distress, and many other encoding conditions.

3) Memory is subject to distortion due to a variety of influences not under the control of law enforcement that occur between the criminal event and identification procedures and during such procedures.

4) The ability of those who must assess the accuracy of eyewitness testimony is poor for a variety of reasons. Witnesses' ability to report on many issues affecting or reflecting accuracy is flawed and subject to distortion (e.g., reports of duration of observation, distance, attention, confidence), thereby providing a flawed basis for others' judgments of accuracy.[40]

Likewise, decision-makers, such as jurists and judges, who specialize mainly in law and procedure, may simply not know better than what their backgrounds and acquired inclinations permit. The limits and determinants of performance for facial recognition are beyond the knowledge of legal practitioners, and the traditional safeguards, such as cross-examination, are not and cannot be effective in the absence of an accurate knowledge of the limits and determinants of witness performance among both the cross-examiners and the jurors who must judge the witness. Cross-examination also cannot be effective if the witness reports elicited by cross-examination are flawed. For example, with respect to factors such as original witnessing conditions (e.g., duration of exposure), post-event influences (e.g., conversations with co-witnesses), or police suggestion (e.g., reports of police comments or behaviors during identification procedures).[41]

Legal traditions in various jurisdictions have been responsive to the scientific reality of eyewitness identification. Until the latter half of the

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[40] *Id.*
[41] *Id.*

twentieth century, the general rule in the United States was that any problems with the quality of eyewitness identification evidence went to the weight, not the admissibility, of that evidence and that the jury bore the ultimate responsibility for assessing the credibility of an eyewitness' identification. In a trilogy of landmark cases on the same day in 1967, however, the Supreme Court ruled for the first time that the Constitution requires suppression of some identification evidence[42]—*United States v. Wade,*[43] *Gilbert v. California,*[44] and *Stovall v. Denno.*[45] In *Stovall,* the court held that, regardless of whether a defendant's Sixth Amendment rights were implicated or violated, some identification procedures are "so unnecessarily suggestive and conducive to irreparable mistaken identification" that eyewitness evidence must be suppressed as a matter of due process.[46]

In *Wade,* the U.S. Supreme Court noted that the factors judges should evaluate in deciding the independent source question include—

> "The prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to the lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification.[47]"

Nine months later, in *Simmons v. United States,*[48] the United States Supreme Court calibrated its approach by "focusing in that case on the overall reliability of the identification evidence rather than merely the flaws in the identification procedure." In that case, the Court ultimately noted that there was no due process violation in admitting the evidence because there was little doubt that the witnesses were actually correct in their identification.

Scholars have frequently characterized *Simmons* as the beginning of the Court's unraveling of the robust protection it had offered in *Stovall;* while *Stovall* provided a per se rule of exclusion for evidence derived from flawed procedures, *Simmons* rejected this categorical approach in favor of a reliability analysis that would often allow admission of eyewitness evidence even when an identification procedure was unnecessarily suggestive.[49]

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[42] Kahn-Fogel, Nicholas A. The Promises and Pitfalls of State Eyewitness Identification Reforms, Vol. 104, pp 104-105, KY L.J. 99, 2016
[43] 388 U.S. 218 (1967).
[44] 388 U.S. 263 (1967).
[45] 388 U.S. 293 (1967).
[46] Khan-Fogel, supra at 39; *Stovall v. Denno,* 388 U.S. 293 (1967).
[47] *United States v. Wade,* 388 U.S. 218 (1967).
[48] *Simmons v. United States,* 390 U.S. 377 (1968).
[49] *Id.*

In more recent Supreme Court decisions, the United States has reaffirmed its shift towards a reliability analysis, as opposed to a focus merely on problematic identification procedures, beginning in 1972 with *Neil v. Biggers.*[50] The *Biggers* Court stated that, at least in a case in which the confrontation and trial had taken place before *Stovall*, identification evidence would be admissible, even if there had been an unnecessarily suggestive procedure, so long as the evidence was reliable under the totality of the circumstances. To inform its reliability analysis, the *Biggers* Court articulated five factors it considered relevant to the inquiry:

1) The opportunity of the witness to view the criminal at the time of the crime;
2) The witness' degree of attention;
3) The accuracy of the witness' prior description of the criminal;
4) The level of certainty demonstrated by the witness at the confrontation;
5) The length of time between the crime and the confrontation;

The *Biggers* Court clearly proclaimed that the "likelihood of misidentification" rather than a suggestive procedure in and of itself, is what violates a defendant's due process rights. However, the *Biggers* Court left open the possibility that *per se* exclusion of evidence derived from unnecessarily suggestive confrontations might be available to defendants whose confrontations and trials took place after *Stovall.*[51]

The *Biggers* standard was further affirmed in 1977 in *Manson v. Braithwaite,*[52] wherein the Court made clear that the *Biggers* standard would govern all due process challenges to eyewitness identifications, stating that judges should weigh the five factors against "the corrupting effect of the suggestive identification." The reliability standard was affirmed as "the linchpin in determining the admissibility of identification testimony" and the per se exclusionary rule of *Stovall* was rejected. Moreover, *Manson* also extended the new standard to apply to pre-trial and in-court identification evidence, thus resulting in a unified analysis of all identification evidence in the wake of suggestive procedures.[53] *Manson* is the current federal standard and has been followed by the majority of the States.

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[50] 409 U.S. 188 (1972).
[51] Khan-Fogel, supra at 39
[52] 432, U.S. 98 (1977).
[53] Khan-Fogel, supra at 39

It is interesting to note that despite this rejection, the *Manson* Court recognized that the *Stovall* rule would promote greater deterrence against the use of suggestive procedures, even noting a "surprising unanimity" among scholars around this conclusion. However, the Court ultimately concluded that the cost to society of not being able to use reliable evidence of guilt in criminal proceedings would be too high.[54]

The United Kingdom, meanwhile, has adopted the Code of Practice for the Identification of Persons by Police Officers.[55] It "concerns the principal methods used by police to identify people in connection with the investigation of offences and the keeping of accurate and reliable criminal records" and covers eyewitness identifications. This Code puts in place measures advanced by the corpus of research in enhancing the reliability of eyewitness identification, specifically by impairing the suggestive tendencies of conventional procedures. Notable measures include having a parade of at least nine (9) people, when one (1) suspect is included to at least 14 people, when two (2) suspects are included,[56] and forewarning the witness that he or she may or may not actually see the suspect in the lineup.[57] Additionally, there should be a careful recording of the witness' pre-identification description of the perpetrator,[58] and explicit instructions for police officers to not "direct the witness' attention to any individual.[59]"

Domestically, jurisprudence recognizes that eyewitness identification is affected by "normal human fallibilities and suggestive influences.[60]" *People v. Teehankee Jr.* first introduced in this jurisdiction the totality of circumstances test already identified by *Neil v. Biggers,* as mentioned above, emphasizing the factors of the witness' opportunity to view the crime and his degree of attention at the time. Apart from extent or degree of exposure, the High Court has also appreciated a witness' specialized skills or extraordinary capabilities. *People v. Sanchez,* which concerned the theft of an armed car, featured a witness who was a trained guard, prompting the Court to note that he was particularly alert about his surroundings during the attack.

The degree of a witness' attentiveness is the result of many factors, among others — exposure, time, frequency of exposure, the criminal incident's degree

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[54] *Id.*
[55] Code of Practice for the Identification of Persons by Police Officers, available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181118/pace-code-d_2008.pdf> (last visited October 3, 2017)
[56] *Id.*, Annex B, par 19
[57] *Id.*, Annex B, par 16
[58] *Id.*, Sec 3.2(a)
[59] *Id.*, Sec 3.2(b)
[60] *People v. Teehankee Jr.,* 319 Phil. 128, 179; 249 SCRA 54, 95 (1995).

of violence, the witness' stress levels and expectations, and the witness' activity during the commission of the crime.[61]

The degree of a crime's violence affects a witness' stress levels. A focal point of psychological studies has been the effect of the presence of a weapon on a witness' attentiveness. Since the 1970s, it has been hypothesized that the presence of a weapon captures a witness' attention, thereby reducing his or her attentiveness to other details such as the perpetrator's facial and other identifying features.[62] Research on this has involved an enactment model involving two (2) groups — first, an enactment with a gun; and second, an enactment of the same incident using an implement like a pencil or a syringe as substitute for an actual gun. Both groups are then asked to identify the culprit in a lineup. Results reveal a statistically significant difference in the accuracy of an eyewitness identification between the two groups[63]—

> "The influence of [a weapon focus] variable on the eyewitness' performance can only be estimated post hoc. Yet the data here do offer a rather strong statement: To not consider a weapon's effect on eyewitness performance is to ignore relevant information. The weapon effect does not reliably occur, particularly in crimes of short duration in which a threatening weapon is visible. Identification accuracy and feature accuracy of eyewitnesses are likely to be affected, although as previous research has noted… there is not necessarily a concordance between the two.[64]

Our jurisprudence has yet to give due appreciation to scientific data on weapon focus. Instead, what is prevalent is the contrary view which empirical studies discredit.[65]

For instance, in *People v. Sartagoda* —

> "The most natural reaction for victims of criminal violence [is] to strive to see the looks and faces of their assailants and observe the manner in which the crime was committed. Most often the face of the assailant and body movements thereof, create a lasting impression which cannot easily be erased from their memory."[66]

Rather than a sweeping approbation of a supposed natural propensity for remembering the faces of assailants, the High Court now emphasizes the need for courts to appreciate the totality of circumstances in the identification of perpetrators of crimes.

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[61] Loftus, Elizabeth F., Eyewitness Testimony, pp 23-51, 1996.
[62] Steblay, Nancy Merhrkens, A Meta-Analytic Review of the Weapon Focus Effect, 16 Law and Human Behavior, 413, 414 (1992)
[63] *Id*., at p 420
[64] *Id* at p. 421
[65] See Dissenting Opinion of J. Leonen in *People vs. Pepino*
[66] *People v. Sartagoda,* 293 Phil. 259; 221 SCRA 251 (1993).

Apart from the witness' opportunity to view the perpetrator during the commission of the crime and the witness' degree of attention at the time, the accuracy of any prior description given by the witness is equally vital. Logically, a witness' credibility is enhanced by the extent to which his or her initial description of the perpetrator matches the actual appearance of the person ultimately prosecuted for the offense. Nevertheless, discrepancies, when accounted for, should not be fatal to the prosecution's case. For instance, in *Lumanog v. People,*[67] the High Court recognized that age estimates cannot be made accurately, and accounted for the circumstances under which the witness' identification could be affected.

The totality of circumstances test also requires a consideration of the degree of certainty demonstrated by the witness at the moment of identification. What is most critical here is the initial identification made by the witness during the investigation and case build-up, not identification during trial.[68]

A witness' certainty is tested in court during cross-examination. In several instances, the High Court has considered a witness' straight and candid recollection of the incident, undiminished by the rigors of cross-examination, as an indicator of credibility.[69] Still, certainty on the witness stand is by no means conclusive. By the time the witness takes the stand, he or she shall have likely made narrations to investigators, to responding police, or barangay officers, to the public prosecutor, to any possible private prosecutors, to the families of the victims, other sympathizers, and even to the media. The witness, then, may have established certainty, not because of a foolproof cognitive perception and recollection of events, but because of consistent reinforcement borne by becoming an experienced narrator. Repeated narrations before different audiences may also prepare a witness for the same kind of scrutiny that he or she will encounter during cross-examination. Again, what is more crucial is certainty at the onset or on initial identification, not in a relatively belated stage of criminal proceedings.

The totality of circumstances test also requires a consideration of the length of time between the crime and the identification of a witness. It is well-established that people are less accurate and complete in their eyewitness accounts after a long reunion than a short one.[70] Ideally then, a prosecution witness must identify the suspect immediately after the incident. The High Court has considered acceptable an identification made two (2) days after the

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[67] 630 SCRA 42 (2010).
[68] See Dissenting Opinion of J. Leonen in *People vs. Pepino*
[69] See: *People v. Ramos,* 371 Phil 66, (1999); and *People v. Guevara,* 258A Phil 909, 916-918 (1989).
[70] Loftus, Elizabeth F., Eyewitness Testimony, pp 54-55, 1996.

commission of a crime,[71] not so one that had an interval of five and a half (5 ½ months).[72] Equally jeopardizing is the witness' interactions with other individuals involved in the event. As noted by cognitive psychologist Elizabeth F. Loftus, "post-event information can not only enhance existing memories but also change a witness' memory and even cause nonexistent details to become incorporated into a previously acquired memory."[73]

Thus, the totality of circumstances test also requires a consideration of the suggestiveness of the identification procedure undergone by a witness. Both verbal and nonverbal information might become inappropriate cues or suggestions to a witness.

> "A police officer may tell a witness that a suspect has been caught and the witness should look at some photographs or come to view a lineup and make an identification. Even if the policeman does not explicitly mention a suspect, it is likely that the witness will believe he is being asked to identify a good suspect who will be one of the members of the lineup or set of photos… if the officer should unintentionally stare a bit longer at the suspect, or change his tone of voice when he says "Tell us whether you think it is number one, two, THREE, four, five, or six, the witness' opinion might be swayed."[74]

In appraising the suggestiveness of identification procedure, the High Court has previously considered prior or contemporaneous[75] actions of law enforcers, media or even fellow witnesses.

One of the most notable cases dealing with the subject is *People v. Escordial,*[76] a prosecution for robbery with rape wherein the victim and her companions were blindfolded throughout the incident. The victim, however, felt a "rough projection" on the perpetrator's back, and also gained familiarity with the perpetrator's voice by hearing him speak. Escordial recounted the investigative process which brought the perpetrator into custody. After several individuals were interviewed, the investigating officer had an inkling of who to look for. He "found accused-appellant in a basketball court and 'invited' him to go to the police station for questioning." When the suspect was brought to the police station, the rape victim was already there, and upon seeing the suspect enter, the victim requested to see the suspect's back. When the victim saw a "rough projection" on his back, she identified the suspect as the perpetrator. Four other witnesses were brought in and they all identified the

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[71] *People v. Teehankee Jr,* 249 SCRA 54 (1995).
[72] *People v. Rodrigo,* 586 Phil. 515 (2008).
[73] Loftus, Elizabeth F., Eyewitness Testimony, pp 54-55, 1996.
[74] Id., pp. 73-74
[75] *People v. Algarme,* 578 SCRA 601, 619 (2009).
[76] 373 SCRA 585 (2002).

suspect, despite there being four others with the suspect in the cell during the showup.

The Court found the showup to have been tainted with irregularities, noting that the out-of-court identification could have been the subject of objections to its admissibility, though they were never raised. Despite this, however, the Court found that the prosecution failed to establish the accused's guilt beyond a reasonable doubt and acquitted him, noting that the victim was blindfolded throughout the ordeal, thus rendering her account unreliable as she had admitted she could only recognize her perpetrator through his eyes and voice. It also found the officer's improper suggestion to have possibly aided in the identification of the suspect.

The Court cited with approval the following excerpt from an academic journal—

> "Various social psychological factors also increase the danger of suggestibility in a lineup confrontation. Witnesses, like other people, are motivated by a desire to be correct and to avoid looking foolish. By arranging a lineup, the police have evidenced their belief that they have caught the criminal; witnesses, realizing this, probably will feel foolish if they cannot identify anyone and therefore, may choose someone despite residual uncertainty. Moreover, the need to reduce psychological discomfort often motivates the victim of a crime to find a likely target for feelings of hostility.
>
> Finally, witnesses are highly motivated to behave like those around them. This desire to conform produces an increased need to identify someone in order to show the police that they too, feel that the criminal is in the lineup, and makes the witnesses particularly vulnerable to any clues conveyed by the police or other witnesses as to whom they suspect of the crime."[77]

People v. Pineda,[78] meanwhile, involved six (6) perpetrators committing robbery with homicide aboard a passenger bus. A passenger recalled that one of the perpetrators was referred to as "Totie" by his companions. The police previously knew that a certain Totie Jacob belonged to the robbery gang of Rolando Pineda. At the time, Pineda and another companion were in detention for another robbery. The police presented photographs of Pineda and his companion to the witnesses, who positively identified the two as among the perpetrators. The Court found the identification procedure unacceptable It

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[77] *People v. Escordial,* 373 SCRA 585 (2002), citing Woocher, Frederic D., Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Witness Identification, 29 STAN L. REV 969 (1977).

[78] 473 Phil. 517 (2004).

then articulated two rules for out-of-court identifications through photographs—

> "The first rule in proper photographic identification procedure is that a series of photographs must be shown, and not merely that of the suspect. The second rule directs that when a witness is shown a group of pictures, their arrangement and display should in no way suggest which one of the pictures pertains to the suspect."

Non-compliance with these rules suggests that any subsequent corporeal identification made by a witness may not actually be the result of a reliable recollection of the criminal incident. Instead, it will simply confirm false confidence induced by the suggestive presentation of a photograph to a witness.

Pineda further identified 12 danger signals that might indicate erroneous identification:

1) The witness originally stated that he could not identify anyone;
2) The identifying witness knew the accused before the crime, but made no accusation against him when questioned by the police;
3) A serious discrepancy exists between the identifying witness' original description and the actual description of the accused;
4) Before identifying the accused at the trial, the witness erroneously identified some other person;
5) other witnesses to the crime fail to identify the accused;
6) Before trial, the witness sees the accused but fails to identify him;
7) Before the commission of the crime, the witness had limited opportunity to see the accused;
8) The witness and the person identified are of different racial groups;
9) During his original observation of the perpetrator of the crime, the witness was unaware that a crime was involved;
10) A considerable time elapsed between the witness' view of the criminal and his identification of the accused;
11) Several persons committed the crime; and
12) The witness fails to make a positive trial identification.

Pineda further underscored that "the more important duty of the prosecution is to prove the identity of the perpetrator and not to establish the existence of the crime." Establishing the identity of the perpetrators is a

difficult task because of this jurisdiction's tendency to rely more on testimonial evidence rather than on physical evidence. Unlike the latter, testimonial evidence can be swayed by improper suggestion. Legal scholar Patrick M. Wall notes that improper suggestion "probably accounts for more miscarriages of justice than any other single factor."[79] Marshall Houts, who served the Federal Bureau of Investigation and the American judiciary, concurs and considers eyewitness evidence as "the most unreliable form of evidence.[80]"

In *People v. Rodrigo,*[81] which involved the same circumstances as *Pineda,* the High Court categorically stated that a suggestive identification violates the right of the accused to due process, denying him or her a fair trial. Said the Court—

> "The greatest care should be taken in considering the identification of the accused, especially when this identification is made by a sole witness and the judgment in the case totally depends on the reliability of the identification. This level of care and circumspection applies with greater vigor when, as in the present case, the issue goes beyond pure credibility into constitutional dimensions arising from the due process rights of the accused."

Circumstances Observation was Made

As to the circumstances the observation is made, the factors that contribute are the following:

(a) *Familiarity* — Refers to whether or not the perpetrator is known to the witness or simply a stranger;

(b) *Brevity* — Refers to the length of time the witness observed the accused;

(c) *Lightning and Obstruction* — Refers to matters of visibility either as to the ambient location or to the ability of the witness to see;

(d) *Distance* — Refers to the distance between the witness and the suspect;

(e) *Intervening Time* — Refers to the total period of time within which the observation was made by the witness;

(f) *Description* — Refers to certain features that may or may not be identifiable with the accused;

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[79] Wall, Patrick M. Eye-Witness Identification in Criminal Cases, p. 26 (1995)
[80] Houts, Marshall, From Evidence to Proof, pp. 10-11 (1956)
[81] 586 Phil. 515 (2008).

(g) *Exculpatory Identification* — Refers to an earlier identification of another individual by another witness;

A single one of these factors, or a combination thereof, effectively contributes to misidentification of an individual by a witness. Absent arbitrariness or oversight or circumstance of significance and influence, courts usually will not interfere with the credence given to the testimony of witnesses, as assessments of credibility are generally left to the trial court whose proximate contact with those who take the witness stand places it in a more competent position to discriminate between a true and false testimony.[82]

Familiarity

The identification of a person could be established through familiarity with one's physical features.[83]

In *People v. Bagsit,*[84] one of the main contentions was that the vision of the witness, Richard, had been obscured by a glare of light, thus rendering his identification of the appellant impossible. The Court, in reversing this contention, not only noted that the glare did not make identification impossible, but placed great stock in the fact that the appellant and Richard were from the same locality and had been neighbors since childhood. This familiarity reduced any possible error Richard may have committed in identifying the appellant.

In *People v. Mapalao,*[85] the appellant was identified by witnesses who saw both his face and the gun he used by the side of the door facing him. Another witness identified appellant through his voice, as during the flight, they had been joking with each other. The Court held that the fact that these witnesses had spent the whole day with the appellant, in the same vehicle, and who themselves were the victims of the hold-up committed by the appellant, gave them a familiarity with the appellant, which made their identification more reliable.

In *People v. Morales,*[86] the appellant tried to refute a witness' identification of him by claiming that he was only 5'4 tall, and could not be mistaken for a six-footer. The Court was not convinced and held that the witness was lying at the lower double-deck bed while the accused was standing about one foot away

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[82] *People v. Quirol,* 473 SCRA 509 (2005).
[83] *People v. Mante,* 312 SCRA 673 (1999).
[84] 409 SCRA 350 (2003).
[85] 197 SCRA 79 (1991).
[86] 343 SCRA 276 (2000).

from her, creating an impression that the accused-appellant was taller than his actual height. The Court affirmed the rule that familiarity with the physical features of a person is an acceptable means of proper identification.

Lighting and Obstruction

This refers to the illumination of the crime scene, which allows the witness to observe the situation and make a proper narrative as to the turn of events. This is important, especially if the witness is to make a positive identification of the culprit. Jurisprudence has constantly held that visibility is a vital factor in determining whether an eyewitness could have identified the perpetrator of a crime. It is settled that when conditions of visibility are favorable and when the witnesses do not appear to be biased, their assertion as to the identity of the malefactor should normally be accepted.[87]

Aside from illumination, issues as to obstruction arise in determining if the witness had an unobstructed or clear view of the events that took place.

In *Tapdasan Jr v. People,*[88] the Court considered a light emanating from the headlights of a passing vehicle as sufficient illumination to enable the witness in that case to identify the petitioner, and held that wicklamps, flashlights and even moonlight or starlight may be considered sufficient illumination in proper cases. In *People v. Caraang,*[89] the Court similarly considered the moonlight illuminating the place where the witnesses were brought as sufficient illumination which enabled them to observe and remember the face of the appellant.

Description

The Supreme Court has acknowledged that victims of violence strive to see the appearance of the perpetrators of the crime and observe the manner in which the crime is being committed, and not unduly concentrate on extraneous features and physical attributes unless they are striking. A failure to accurately observe certain physical features of the malefactors need not be taken against the witness, seeing as the identification of malefactors is not an easy task. The carelessness or superficiality of observers, the rarity of powers of graphic

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87 *People v. Caraang,* 418 SCRA 321 (2003).
88 392 SCRA 335 (2002).
89 418 SCRA 321 (2003).

description, and the varying force with which peculiarities of form, color or expression strike different people make recognition difficult.[90]

Jurisprudence on this issue has varied, and the Supreme Court takes stock of the circumstances attending to each case. For example, in *People v. Delmo,*[91] the Supreme Court took excused the failure to accurately observe certain physical features of the malefactors, and gave weight to the testimony offered because the witness had clearly and readily identified the offenders in open court without hesitation, despite the appellants' attempts to change their physical appearances by shaving off their mustaches and beards and putting on weight. Meanwhile, the Supreme Court ruled the opposite way in *People v. Corro,* holding that the differing descriptions offered by the rape victim as to the actual rapist's identity gave rise to a reasonable doubt, as the description did not fit the appellant's actual appearance.

Methods of Identification

As to methods of identification, there are also several factors that contribute to misidentification, as follows:

(a) *Confrontation* — this refers to allowing a face-to-face confrontation between the accused and the witness or victim;

(b) *Police Line-ups* — Common in other jurisdictions, this refers to having the witness make an identification based on a line-up of possible suspects;

(c) *Rogues' Gallery* — This refers to making the witness make an identification based on a prepared set of mug shots, or what we usually call a rogue's gallery.

(d) *Street Identification* — Refers to the practice of accompanying the witness to the scene of the crime with the purpose of making an identification;

Confrontation

Confrontation refers to the practice of allowing the witness and the suspect to meet face-to-face in order to make a positive identification.

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[90] *People v. Delmo,* 390 SCRA 395 (2002).
[91] 390 SCRA 395 (2002).

In *People v. Arellano,*[92] the Court noted that the show-ups therein, where the suspect was brought face-to-face with the witness, was properly done considering that all the six (6) factors were substantially satisfied. —

1) The victim and one eyewitness had more than sufficient time to observe the rapist;
2) Terez and Mendez's attention were focused on the appellant who struck fear into their hearts, especially Terez, who was raped;
3) Terez and her eyewitness, Mendez, gave prior accurate descriptions of appellant which became the source of the cartographic sketch;
4) There is no higher degree of certainty than the testimony of Terez, who was raped;
5) The crime was committed on August 28, 1992, and appellant was identified by Mendez on September 13, 1992, while she was buying softdrinks at a store; Terez identified appellant on September 14, 1992; in both instances, their memories of appellant were still fresh as only sixteen to seventeen days had passed since the commission of the crime;
6) Suggestiveness was non-existent because after the rape, appellant was seen by Mendez at a nearby store and pointed to the authorities;

In *People v. Alshiaka,*[93] the Court held that there was no objectionable suggestion from the police where the witness did not incriminate the accused merely because the latter was the lone suspect presented by the police but because he was certain that he recognized the accused as one of his abductors.

Street Identification

As previously stated, street identification refers to the practice of bringing the witness back to the scene of the crime in order to refine his testimony and with the possibility of finding leads as to the identification of the suspected perpetrator. This is often referred to in other jurisdictions as conducting a "canvass" of the area with the purpose of finding other witnesses or possible leads that would lead to a positive identification of a suspect.

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92 343 SCRA 276 (2000).
93 261 SCRA 637 (1996).

There is no hard and fast rule as to the place where suspects are identified by witnesses. Identification may be done in the open field. It is often done in hospitals while the crime and the criminal are still fresh in the mind of the victim. This rule was applied by the Court in *People v. Teehankee Jr,* wherein the totality of circumstances showed that the alleged irregularities cited by the appellant therein did not result in his misidentification or a denial of his due process rights.

Other Factors

Aside from the above-mentioned factors, certain investigative misconduct also contribute to either contamination, memory distortion or suggestibility—misidentification that leads to conviction:

(a) *Expectation* — More often than not, communication made by law enforcement to victims or witnesses such as that the individual singled out is most likely the perpetrator creates an expectation in the mind of said witnesses, thereby leading to a positive identification

(b) *Singling Out* — Refers to undue involvement of law enforcement or investigators in the identification of the witness of the individual;

(c) *Irregular Process* — Refers to highly irregular and unconventional means of providing the witness with identification tools, such as photographs, thereby leading to a misidentification;

(d) *Highlight* — Refers to creating a predisposition for a witness to identify or choose an individual;

(e) *Contamination* — Refers to the influence of opinions, media accounts, and overall bias created;

(f) *Reinforcement* — Refers to actions made by law enforcement or other persons, be it deliberate or not, that tends to influence the confidence or certainty in the identification;

Contamination

Contamination deals with the influence of opinions, media accounts, and the overall bias created regarding the case, particularly on the identification of suspects.

The corruption of out-of-court identification corrupts the integrity of in-court identification during the trial.[94]

One notable case is that of *People v. Rodrigo.*[95] In this case, the Court noted that the initial photographic identification to the accused potentially violate his due process rights, because his in-court identification was influenced by impermissible suggestions in said initial photographic identification. Said the Court, "The investigators might not have been fair to Rodrigo if they themselves, purposely or unwittingly, fixed in the mind of Rosita, or at least actively prepared her mind to, the thought that Rodrigo was one of the robbers. Effectively, the act is no different from coercing a witness in identifying an accused, varying only with respect to the means used. Either way, the police investigators are the real actors in the identification of the accused; evidence of identification is effectively created when none really exists."

Another dangerous element, in that case, was that Rosita provided no other description of Rodrigo and the other two accused, whether in her Sinumpaang Sinalaysay or in court. All that was in her Sinumpaang Salaysay was Rodrigo's name, and the fact that he was a "suspect." There was thus no basis to compare Rosita's, or any other witnesses' immediate recollection of what transpired at the crime scene and the description of her perpetrators with Rosita's photographic identification and her in-court identification at the trial.

Moreover, the identification of Rodrigo happened a month after the crime happened, a long month wherein the police had not made any headway in their investigation. She did not even know Rodrigo's name until she got information from a person who, glaringly, was not even presented as a witness. The photographic identification made of Rodrigo, who was expressly noted to be a "suspect" in the Sinumpaang Sinalaysay, was done by showing his lone photograph. This means the police did not even give Rosita the option to identify him from among several photographed suspects; instead, the police's actions had effectively branded Rodrigo as *the* suspect.

Reinforcement

It is a common occurrence that actions made by law enforcement, investigators, or other persons, deliberate or not, tend to influence the confidence or certainty in the identification process. Thus, more often than

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[94] *People v. Navales,* 337 SCRA 436 (2000).
[95] 564 SCRA 584 (2000).

not, these factors tend to influence the selection by the witness of suspects in the process.

When confronted with such a situation, the Court, in the case of *People v. Villena,* acknowledged the role identification of an accused through mugshots plays as one of the established procedures in identifying criminals. In that case, the prosecution witnesses were shown three pictures, and they pointed to the appellant therein's picture, identifying him as one of the malefactors. However, the picture conspicuously showed him holding up a board with the following markings, "***EFREN VILLENA, ROBBERY HOLDUP, LINGAYEN, PANGASINAN."*** The Court found such markings suggestive as it placed within the witnesses' minds that the accused had committed a similar crime in the area, thereby placing the idea that the suspect therein was a criminal. To avoid charges of impermissible suggestion, said the Court, there should be nothing in the photograph that would focus attention on a single person.

IV. CHALLENGES

While the primacy placed by our jurisprudence on positive identification makes it pivotal in determining the conviction of an accused, the factors outlined above demonstrate a pressing need to re-examine our Courts' staunch adherence to this doctrine. We must revisit and refine our established predispositions, biases and practices, allowing our appreciation of the defense of alibi to be utilized more effectively in securing justice.

It is strongly submitted that our legal system must acknowledge, recognize, accept, and utilize innovations in the field of forensic science in order to assist, reinforce, and ensure that the true perpetrators are properly charged, and to aid prosecution and judicial determination of guilt with a tried and tested scientific approach.

Acknowledgement

It is respectfully submitted that the very first thing legal practitioners must do is to actively discern and ascertain the testimony of the witness—to really *listen* to what the witness is trying to say. This avoids the long-established practice of trying to subsume the witness' statements into the prepared, and often *"de kahon"* narratives seen in court-bound affidavits.

Taking into consideration the factors earlier observed, litigants, especially defense counsels, must be vigilant as to recognize the existence of said factors that unduly influence a witness' identification as to its nature, modality, relevance, admissibility, and truthfulness.

There is ample jurisprudential basis for such a conclusion. Judges are already expected to exercise their discretion wisely and take whatever action necessary in order to properly evaluate the merits of a case, and are urged not simply to make blanket conclusions. In *People v. Ancheta,* the Supreme Court emphasized that a presiding judge enjoys a great deal of latitude in examining witnesses within the course of evidentiary rules. The presiding judge should see to it that a testimony should not be complete or obscure. In *People v. Zheng Bai Hui,* the Court reiterated that a severe examination by a trial judge of some of the witnesses for the defense in an effort to develop the truth and to get at the real facts affords no justification for a charge that he has assisted the prosecution, as it is precisely a trial judge's role to put as many questions as necessary to witnesses in order to elicit relevant facts to make the record speak the truth. Otherwise, a judge would be remiss in their duties and would permit a miscarriage of justice.[96]

Other rules of procedure also support the above submission. For example, in the Rule on Examination of a Child Witness, Judges are also mandated to ensure that questions propounded to child witnesses are stated in a form that is appropriate to the developmental level of a child, protect them from harassment or undue embarrassment, and avoid a waste of time.[97]

Beyond Documentation

It is also submitted that the identification procedure be recorded with the end in view of preserving the same and attesting to its truthfulness and reliability.

In this jurisdiction, it is common practice that statements and sworn affidavits are prepared by law enforcement officers. This means that more often than not, they are not reflective of the affiant has actually witnessed. This practice also opens the floodgates to widespread coaching and the proliferation of heavily-prepared statements.

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[96] *Ancheta* and *Zheng Bai Hui,* as cited in *People v. Canete,* 400 SCRA 109 (2003).
[97] Rule on the Examination of Child Witnesses, Sec 19.

Moreover, with the advent and proliferation of electronic and digital devices that could easily record and store lengthy testimonies, it is submitted that the use of electronic recording and digital storing devices be the norm rather than the exception, to ensure the integrity and truthfulness of the testimony elicited from witnesses.

Not only will recording witness statements ensure its reliability, but it will also afford both parties the opportunity to review such statements in their raw form, free from annotations and editorial touches usually present in most affidavits.

Yet, we must be ever-mindful of laws that regulate such recording, and initiate remedial legislative measures to institute this proposed practice.

Scrutiny

It is also respectfully submitted that an enhanced emphasis be given to the duty of judges, more particularly lower court judges, to scrutinize and highlight the factors undermining the identification process.

Lower courts are considered the first line of defense of the judicial process as they are in a unique position to physically observe the decorum, attitude, and conduct of the witness while being subjected to direct and cross-examination. More often than not, the body language, manner of answering questions, and rapport with the prosecution and defense counsel, elicits valuable insight as to the temperament of the witness, including the candidness and truthfulness of the proffered statements.

Discretionary Exclusion

'Discretionary exclusion' refers to actions taken by courts, either at the first instance but usually on the appellate level, to exclude evidence that is deemed unfair or unreliable, or contrary to public policy, or evidence considered highly prejudicial and of little probative value. As a natural progression from the earlier discussion about the scrutiny judges must take, discretionary exclusion takes the scrutiny process a step further and actually orders the evidence excluded from consideration.

One example of discretionary exclusion is in the case of *People v. Flores.*[98] In this case, the Court found serious doubts in the testimony of the victim, Cristina Dulay, as to whether one of the robbers in the case had consummated the act of rape on her. The Court found glaring incredulities in her testimony, such as her allegation that she was menstruating at the time the rape occurred, which was put into doubt by the medical officer's finding that there was still semen present in her vaginal canal, without any mention of blood being mixed therein. The Court also found her allegation that the man actually lit a match to check if she was menstruating to be unnatural, as it was improbable that a man seized of beastly desire could find the time to verify if his victim was menstruating and proceed to commit the act anyway despite such knowledge. The fact that no one corroborated Dulay's claim also cast doubt on her allegations.

Passivity

Passivity refers to the predilection of appellate bodies to adopt the findings of the courts *a quo.* To appreciate the extent of such practice, we find in our local jurisprudence numerous examples reinforcing this trend, to the point of instituting it as a revered doctrine. Numerous appellate court decisions begin with statements to the effect that the findings of lower courts will not be disturbed as to the appreciation of the factual milieu of evidence presented. Of course, this principle is subject to qualifications and exceptions.

As early as 1913, the Court had already instituted this policy, holding in one case that—

> "It is to be expected that the testimony of several witnesses to the events which transpired in rapid succession, which were attended by hurry and excitement, and with the opportunity for observation so greatly hindered by the darkness of the night, will disagree in the details. If the witnesses in the present case should agree in their testimony that all the events occurred in precisely the same order and in the same manner, that fact would itself be a suspicious circumstance. It must be remembered that much of the work of putting out the fire was done by persons who did not appear as witnesses at all. With so many assisting in putting out fires, and the fact that it occurred in the nighttime, it is not strange that some should see what others did not see, that to witnesses observing the same incident should differ in some respects in describing it later, or that gaps in the evidence should appear because persons who assisted in putting out the fire were not called as witnesses. The fact that a united and orderly narrative of

[98] 23 SCRA 309 (1968).

> the fire in the bodega cannot be drawn from the testimony of the various witness who took part in extinguishing it tends rather to stamp the testimony of each as being truthful to the best of his observation. Furthermore, the conflicting testimony was for the lower court to weigh. The court has repeatedly refused to disturb a finding of guilt when the evidence was conflicting and there was enough before the court to warrant a conviction where evidence of the prosecution true, and conflicting evidence offered by the defense false, unless from the record it appeared that there was reasonable doubt as to the correctness of the trial court's classification of the evidence as true or false."[99]

Fast forward to the late 1960s and this policy was reiterated:

> "When the issue is one of credibility of witnesses, appellate courts will not generally disturb the findings of the court a quo, considering that it is in a better position to decide the question, having seen and heard the witnesses themselves and observed their deportment and manner of testifying during the trial, unless it is shown that it has overlooked certain facts of substance and value that, if considered, might affect the result of the case."[100]

Unreliable Identification

It is submitted that an unreliable identification alone cannot sustain a conviction. Thus, it would greatly unburden court dockets if, at the investigation level, witness narratives are scrutinized first for their reliability and credibility. We must reiterate at this point that we rely on the strength of the prosecution evidence, not on the weakness of the evidence for the defense.

Thus, in one case, the High Court emphasized that in reviewing rape cases, it is guided by these three principles. —

1) An accusation of rape can be made with facility; it is difficult to prove but more difficult for the person accused, though innocent, to disprove;
2) In view of the intrinsic nature of the crime where only two persons are usually involved, the testimony of the complainant must be scrutinize with extreme caution; and

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[99] *United States v. Go Foo Suy and Go Jancho,* 25 Phil. 187 (1913).
[100] *People v. Berganio,* 110 Phil 332 (1960).

3) The evidence for the prosecution must stand or fall on its own merit, and cannot be allowed to draw strength from the weakness of the evidence of the defense.[101]

However, it should be noted that in our case law, the variations in the declarations of the witnesses respecting collateral, peripheral and incidental matters do not impair the verisimilitude of the testimonies of such witnesses and the probative weight thereof on the corpus delicti and the perpetrators thereof. Minor inconsistencies in the testimonies of said witnesses strengthen, rather than weaken, their credibility, as such testimonies clearly show that the witnesses are neither rehearsed, nor coached. Moreover, the testimonies of witnesses should be calibrated and considered in their entirety and not in truncated parts.[102]

V. FINAL CONSIDERATIONS

Revisiting Alibi

To date, current jurisprudence on alibi still echoes the doctrine that was established many decades ago. Lower courts, true and faithful as they are to such established doctrine, perpetuate the same ad infinitum, with their decisions sounding off like a mantra, reinforce and ensure said doctrine permeates the jurisprudential horizon.

Yet, it is clear that our legal system and its attitudes toward alibi need to change. Positive identification is not the powerful legal defense our Court seems to think it is. Even the Court's own decisions seem to realize this, albeit implicitly. For example, the Court noted the many danger signs which could affect eyewitness testimony in the case of People v. Nunez:[103]

1) The witness originally stated that he could not identify anyone;
2) The identifying witness knew the accused before the crime, but made no accusation against him when questioned by the police;
3) A serious discrepancy exists between the identifying witness' original description and the actual description of the accused;

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[101] *People v. Novio,* 404 SCRA 462 (2003).
[102] *People v. Patoc,* 398 SCRA 62 (2003).
[103] 842 SCRA 97 (2017).

4) Before identifying the accused at the trial, the witness erroneously identified some other person;
5) Other witnesses to the crime fail to identify the accused;
6) Before trial, the witness sees the accused but fails to identify him;
7) Before the commission of the crime, the witness had limited opportunity to see the accused;
8) The witness and the person identified are of different racial groups;
9) During his original observation of the perpetrator of the crime, the witness was unaware that a crime was involved;
10) A considerable time elapsed between the witness' view of the criminal and his identification of the accused;
11) Several persons committed the crime; and
12) The witness fails to make a positive identification.

The fact that there are so many danger signs hints at the weaknesses of positive identification, which suggests that it should not so easily be used as a magic sword with which to defeat the defense of alibi without first considering other factors. It is here where the challenge lies—that of revisiting current doctrines, current predispositions, current practices, with the end in view of refining our judicial process and ensuring that justice is truly served within the hallowed halls of the judiciary.

The Problem with Wrongful Convictions

Our discussion at the beginning dealt with the problems and challenges that faced law enforcement, prosecution, and the courts in how to sift through evidence. From a cursory survey of our jurisprudential history, we see that there have been a number of reversals of convictions made.

The American system from which we derive our own, grounded in British common law, has long erred on the side of protecting innocence. Thus, we have the fundamental law's presumption of an accused's innocence until he is proven guilty in a court of law. We, therefore, universally subsume into a mantra of sorts what English jurist William Blackstone long ago declared—"It is better that ten guilty escape than one innocent suffer."

This led the Court to observe, in *People v. Mateo,*[104] the prevalence of wrongful convictions, quoting statistics to the effect that within the eleven-year period since the reimposition of the death penalty between 1993 until 2004, capital punishment had been imposed in approximately 1,493 cases, out of which 907 had been reviewed by the Supreme Court and 230 of them being affirmed upon review (25.36% of the total number). The Court rendered a judgment of acquittal in 65 cases. In sum, the cases where the death penalty had been modified made up 71.77% of the total number of cases brought before it on automatic review, meaning a total of 651 out of 907 cases. This trend prompted the Court to prescribe an intermediate review by the Court of Appeals before the Supreme Court's automatic review comes into play, in order to thoroughly scrutinize the imposition of the death penalty.

The Emergence of Forensic Science; History of Forensic Science

The history of forensic science dates back thousands of years. Fingerprinting was one of its first applications, with the ancient Chinese having used fingerprints to identify business documents. In 1892, a eugenicist named Sir Francis Galton established the first system for classifying fingerprints. Sir Edward Henry, commissioner of the Metropolitan Police of London, developed his own system in 1896 based on the direction, flow, pattern, and other characteristics in fingerprints. The Henry Classification System became the standard for criminal fingerprinting techniques worldwide.

In 1835, Scotland Yard's Henry Goddard became the first person to use physical analysis to connect a bullet to the murder weapon. Bullet examination became more precise in the 1920s, when American physician Calvin Goddard created the comparison microscope to help determine which bullets came from which shell casings. And in the 1970s, a team of scientists at the Aerospace Corporation in California developed a method for detecting gunshot residue using scanning electron microscopes.

In 1836, a Scottish chemist named James Marsh developed a chemical test to detect arsenic, which was used during a murder trial. Nearly a century later, in 1930, scientist Karl Landsteiner won the Nobel Prize for classifying human blood into its various groups. His work paved the way for the future use of blood in criminal investigations. Other tests were developed in the mid-1900s

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[104] 433 SCRA 640 (2004).

to analyze saliva, semen, and other bodily fluids, as well as to make blood tests more precise.

With all of the new forensic techniques emerging in the early 20th century, law enforcement discovered that it needed a specialized team to analyze evidence found at crime scenes. To that end, Edmond Locard, a professor at the University of Lyons, set up the first police crime laboratory in France in 1910. For his pioneering work in forensic criminology, Locard became known as the "Sherlock Holmes of France."

August Vollmer, chief of the Los Angeles Police, established the first American police crime laboratory in 1924. When the Federal Bureau of Investigation was first founded in 1908, it did not have its own forensic crime laboratory; that came in 1932.

By the close of the 20th century, forensic scientists had a wealth of high-tech tools at their disposal for analyzing evidence, from polymerase chain reaction (PCR) for DNA analysis, to digital fingerprinting techniques with computer search capabilities.[105]

The first written account of using medicine and entomology to solve criminal cases is attributed to the book Xi Yuan Lu ("Washing Away Wrongs"), written in China in 1248 by Song Ci (1186-1249), a director of justice, jail and supervision during the Song dynasty. Song Ci introduced regulations concerning autopsy reports to court, how to protect the evidence in the examining process, and explained why forensic workers must demonstrate impartiality to the public. He devised methods for making antiseptic and for promoting the reappearance of hidden injuries to dead bodies and bones (using sunlight and vinegar under a red-oil umbrella); for calculating the time of death (allowing for weather and insect activity); described how to wash and examine the dead body to ascertain the reason for death. The book had also described methods for distinguishing between suicide and faked suicide.

In one of Song Ci's accounts, the case of a person murdered with a sickle was solved by an investigator who instructed each suspect to bring his sickle to one location. He realized it was a sickle by testing various blades on an animal carcass and comparing the wounds. Flies, attracted by the smell of blood, eventually gathered on a single sickle. In light of this, the owner of the sickle confessed to the murder. The book also described how to distinguish between a drowning (water in the lungs) and strangulation (broken neck

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[105] History of Forensics - How Forensic Lab Techniques Work, by Stephanie Watson from How Stuff Works

cartilage) and described evidence from examining corpses to determine if a death was caused by murder, suicide, or accident.[106]

Methods from around the world involved saliva and examination of the mouth and tongue to determine innocence or guilt, as a precursor to the Polygraph test. In ancient India, some suspects were made to fill their mouths with dried rice and spit it back out. Similarly, in ancient China, those accused of a crime would have rice powder placed in their mouths. In ancient Middle Eastern cultures, the accused were made to lick hot metal rods briefly. It is thought that these tests had some validity since a guilty person would produce less saliva and have a drier mouth; the accused would be considered guilty if rice was sticking to their mouths in abundance or if their tongues were severely burned due to lack of shielding from saliva.[107]

As discussed earlier, courts mostly rely on testimonial evidence. It is very seldom that you see expert witnesses being presented to testify on the results of forensic examinations conducted on the crime scene, if any. The numerous issues surrounding testimonial evidence, which have already been discussed above, should make our judicial system reconsider its preference for testimonial evidence and adopt a forensic-based approach instead.

Forensic science plays three important roles in the judicial process:

1) It establishes the elements of a crime. For example, testing suspected controlled substances proves they are drugs, and thus, that the crime has been committed. It associates defendants with crime, or disassociates them more accurately;

2) Forensic evidence, particularly fingerprint and firearm evidence, can conclusively associate a defendant with a crime;

3) Forensic evidence such as blood, semen, hairs, and fibers, an also tentatively associate a defendant;

4) Forensic evidence can also help exonerate a defendant while laboratory results are inconclusive or when they definitely disassociate the defendant from the crime;

5) Forensic evidence helps reconstruct the crime or the crime scene;

The importance attached to forensic evidence varies in relation to the case, the type of evidence, and the prosecutor's perspective. Forensic evidence is

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[106] Song Ci, and Brian E. McKnight. *The washing away of wrongs: forensic medicine in thirteenth-century China*, Ann Arbor: Center for Chinese Studies, U of Michigan, 1981. Print. p.3

[107] Parmeshwarand, Swami (2003). Encyclopaedic Dictionary of the Dharmasastra, Volume 1. New Delhi: Sarup & Sons, p. 499. ISBN 8176253650.

regarded as more important and more likely to be gathered and analyzed in violent crimes than property crimes.[108]

Forensic evidence can also provide the missing link in many cases which were formerly regarded as cold or unsolvable. The case of Jane Britton, who disappeared in 1969, was only solved upon the advent of forensic evidence in 2012, when crime scene DNA was found to match that of a serial sexual predator who had been convicted back in 1973. The death of Krystal Beslanowitch, whose skull was crushed by a rock in 1995, was only solved in 2013 when DNA was extracted from the rock and was matched with the DNA of a local airport shuttle-bus driver who had recently been released from prison after having been convicted in 1987.[109]

DNA Analysis

DNA analysis is one of the most powerful tools for human identification, and has clear forensic applications in identity testing (crime scene and mass disaster investigations) and parentage determination. It has attracted widespread use in the years since its adoption, often resolving long-unsolved cases and making it possible to resolve cases which were previously thought to be unsolvable.

DNA, or deoxyribonucleic acid, is the fundamental building block of a person's entire genetic makeup. DNA is present in all human cells, and is the same in every cell. It is composed of sugar, phosphate, and nitrogen bases, namely Adenine (A), Guanine, (G), Cytosine (C) and Thymine (T). The order of the nitrogen bases determines the so-called DNA sequence. Once samples are processed, possible sources of DNA profile/s are evaluated. Sources may include:

(a) The victim;

(b) Human handlers, such as crime scene investigators, medico-legal officers, forensic analysts, and lawyers;

(c) The perpetrator of the crime;

The presence of two or more mismatches between the evidentiary stain and the suspect's reference sample necessarily excludes him as the source of

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[108] Use of Forensic Evidence by the police and courts, U.S. Department of Justice National Institute of Justice by Joseph L. Peterson, Oct 1987

[109]Lauren Cahn, *13 Mysteries Finally Solved by Forensics,* Reader's Digest (2019) available at https://www.rd.com/list/forensics-solved-mysteries-cold-cases.

the evidentiary sample. Notably, mismatches do not necessarily equate with innocence, but merely show that the suspect is not the source of the evidentiary sample. Other evidence collected from the crime scene may still contain the suspect's DNA or that the suspect did not leave sufficient DNA, if he is indeed the real perpetrator of the crime. Alternatively, the suspect may not have left sufficient DNA at the crime scene and other physical evidence (e.g. ballistics, shoe print evidence) and information (e.g. eyewitness testimony) must be used to further the case.

Nonetheless, the exclusion of a suspect as a possible source of non-victim DNA that is not that of any known human handler is crucial in criminal investigations since this indicates the presence of another individual at the crime scene who remains unaccounted for.

If a suspect's reference sample is consistent with the DNA profile of the evidentiary sample, however, then the suspect remains a prime candidate source of the sample. Since only a selected set of STR markers are analyzed, there remains a probability that another individual has the same DNA profiled. If the alleles comprising the DNA profile are rare, then this profile may be attributed to only a few persons in a given population, and the likelihood of the suspect being the source of evidence is higher. Hence, it is essential that the significance of matching profiles must be estimated using established statistical principles. In addition, match probability estimates and/or likelihood ratios must accompany all DNA reports submitted to courts to assist in the proper evaluation of the weight of DNA evidence.

The inclusion or exclusion of a suspect greatly contributes to the reconstruction of events that transpired and the progress of criminal investigations. In this manner, DNA evidence is objective and irrevocable, unlike some witness' statements that may be partial or subject to various psychosocial influences.

How DNA evidence makes a difference in the criminal justice system

Since 1989, there have been tens of thousands of cases where prime suspects were identified and pursued, until DNA testing prior to conviction proved that they were wrongly accused. In more than 25% of cases in a National Institute of Justice study, suspects were excluded once DNA testing was conducted during the criminal investigation.[110]

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[110] https://innocenceproject.org/dna-exonerations-in-the-united-states

It is a welcome development that in most jurisdictions, the use of forensic science as a tool for law enforcement to determine the culpability or guilt of suspects are on the rise. Forensic science clears the cobwebs of guesswork in sifting through evidence, as long as one has the proper training in searching for, acquiring and preserving it, ultimately for final use by the courts.

Yet, domestically, numerous problems hound the full utilization of this approach. The foremost problem is lack of acceptance. While most would admit and accept the fact that forensic science would greatly ease and assist in the proper acquisition of evidence, the costs of such use for now is too high. Note that most crime laboratories in the country, such as those operated by the PNP, the NBI and the PDEA, lack some vital equipment needed to perform their task.

Moreover, there is a lack of qualified and trained personnel to perform the tasks within an operating crime laboratory. This is not due to lack of qualified people, but lack of interest in being overworked and underpaid. Most would rather seek employment in the private sector locally, or abroad.

Another factor to consider is that the current slew of legal practitioners are too set in their ways in following the current practice, ingrained through long years of study and reinforced by long-settled legal practices. Much effort, time and resources are needed to realign the perspectives of today's legal practitioners. This is compounded by the dearth of forensic evidence availing from law enforcement. All of this makes it easier for those in the legal profession to just continue with what they are comfortable with.

On a deeper level, if we advocate strongly for a full application of forensic evidence, we must not only recognize the limitation on resources we currently face, but also the complexity of our criminal justice system. How can we seamlessly institutionalize the use of forensic evidence at every level? Can we be assured today that prosecutors would be comfortable using scientific evidence? Any lapse or mistake, regardless of how miniscule, may discourage the further use of scientific evidence in a judicial setting.

CUTTING RED TAPE: A LOOK AT THE EMPOWERMENT AND ENFORCEMENT FUNCTIONS OF THE ANTI-RED TAPE AUTHORITY

JEDREK C. NG[1]

INTRODUCTION

I believe all of us have experienced the unpleasant and arduous task of lining up in long queues in government offices for the submission of an application, or after waiting for several hours, then being told to come back the following day just to complete a rather simple ministerial transaction. During these moments, we would wish that government services would somehow be more efficient and less burdensome.

Red tape, or the excessive regulations and bureaucracies involved in processing documents in the government, has been a bane for the Philippines. This culture of delays and inaction has led to corruption and the country's lackadaisical performance in an international ease of doing business report.[2] To address this issue, the Philippine government enacted Republic Act (RA) 9485 or the "Anti-Red Tape Act (ARTA) of 2007." The said law had broad application covering most government agencies. However, its scope was quite narrow—it primarily related to mandating fixed processing times, rather than an assessment of whether the regulatory requirements themselves remained appropriate.[3]

When President Rodrigo Duterte assumed office last 2016, among his administration's top priorities were to completely eradicate red tape and

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[2] As of 2020, the Philippines ranks 95th of 190 economies. World Bank, Doing Business Report (2020).

[3] OECD, Regulatory Impact Assessment in the Philippines, 2020. Page 29, https://www.oecd.org/gov/regulatory-policy/regulatory-impact-assessment-philippines-2020.pdf

corruption. Thus, the President pushed for the passage of RA 11032 or the "Ease of Doing Business and Efficient Government Service Delivery Act of 2018," which amended the old ARTA law. The strengthened version of the law is poised to facilitate prompt actions or resolution of all government transactions with efficiency. It applies to all government offices and agencies in the Executive Department including local government units (LGUs), government-owned or -controlled corporations, and other government instrumentalities, located in the Philippines or abroad, that provide services covering business-related and non-business transactions as defined in the law.[4]

THE ANTI-RED TAPE AUTHORITY(ARTA)

This game-changing legislation has led to the creation of the Anti-Red Tape Authority, or ARTA.[5] Its main task is to implement and oversee a national policy on anti-red tape and ease of doing business.[6] ARTA envisions a clean, highly efficient, technology-enabled and citizen-centric government that enables a vibrant business environment and a high-trust society.[7] To achieve this, the Authority is transforming the way that government service is delivered through good regulatory practices, collaboration and innovation.[8]

The ARTA's mandate to oversee a national anti-red tape policy includes two important categories of powers and functions: empowerment and enforcement. The empowerment function of the Authority mainly emphasizes its role as a helper of government agencies in their streamlining, reengineering and automation efforts. ARTA is tasked to monitor, recommend, and assist government agencies on initiatives that could make their processes faster and more efficient. Meanwhile, the ARTA's enforcement function focuses primarily on the policing aspect in the government bureaucracy. It can crack the whip on government agencies that fail to comply with the Anti-Red Tape law. ARTA's investigative function enables it to file cases against government

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[4] An Act Promoting Ease Of Doing Business And Efficient Delivery Of Government Services, Amending For The Purpose Republic Act No. 9485, Otherwise Known As The Anti-Red Tape Act Of 2007, And For Other Purposes, RA 11032, Sec. 3.

[5] Ibid, Section 17,

[6] Ibid, Section 17 (a)

[7] ARTA, ARTA's Vision 2021-2031, https://arta.gov.ph/about/mandate-vision-mission/ (last accessed Feb. 3, 2022).

[8] ARTA, ARTA's Mission, https://arta.gov.ph/about/mandate-vision-mission/ (last accessed Feb. 3, 2022).

employees, and even heads of agencies, if they are found to have violated any of the provisions of Section 21 of Republic Act No. 11032.

A. Empowerment function

It has only been three years since ARTA was established, but it has already initiated many reforms and collaborated with various government agencies and development partners to improve competitiveness and ease of doing business in the country. ARTA, through its empowerment function, implemented various initiatives, policies, and programs, adopting the whole-of-government approach, to pursue high quality regulation, collaboration, and innovation, pushing government agencies to improve and make more efficient the delivery of their services to the Filipino people.

The Philippines has been stagnant in terms of the maturity of its regulatory management system for the past 20 years. A Regulatory Management System (RMS) is a set of policies, institutions, processes, and tools employed by the government to pursue and maintain good quality regulation. With the establishment of ARTA and the implementation of its initiatives on RMS, the Philippines now transitions from the starter stage to the enabled stage, joining other countries such Malaysia, Japan, and Vietnam.[9]

One of the major policies issued by ARTA to improve RMS in the Philippines is the *Philippine Good Regulatory Principles (PGRP)*, launched last 17 June 2021. The PGRP are a set of principles outlining good regulatory practices that agencies can use as a guide on how they should regulate and expect to be regulated.[10] The ten (10) PGRP are the principles of Clarity, Legal and Empirical Basis, Benefit-Cost, Assessment, Engagement, Coherence, Whole-of-Government, Continuous Evaluation, Competition, and Risk Management.[11]

ARTA likewise launched and implemented various tools, initiatives, and programs, namely: Citizen's Charter; National Regulatory Impact Assessment (RIA) Manual; Whole-of-Government (WOG) Re-Engineering Manual; Report Card Survey; Philippine Business Regulations Information System (PBRIS); Anti-Red Tape Electronic Management Information System

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[9] Peter Caroll & Ponciano Intal, Jr., (2016). ASEAN's Regulatory Reform Imperative and Future Prospects. *ASEAN@50*, Vol. 5, 159-183. Retrieved from https://www.eria.org/5.6.ASEAN_50_Vol_5_Carrol_Gill_and_Intal.pdf

[10] ARTA, Philippine Good Regulatory Principles (PGRP). Retrieved from https://arta.gov.ph/philippine-good-regulatory-principles/

[11] *Id.*

(ARTEMIS); Central Business Portal (CBP); Electronic Business One-Stop Shop (eBOSS); TradeNet; and the NEHEMIA Program.

Citizens Charter.

One of the most defining features of RA 11032 is the requirement for all government agencies and LGUs to put up their latest Citizen's Charter. The Citizen's Charter is an official document which communicates in simple terms the service standards or pledge of an agency on the government services being provided to the citizens. It also serves as the basis for establishing liability of all erring government employees involved in unnecessary red tape and corruption and for the grant of incentives and rewards as forms of acknowledgement for compliant government agencies that have shown exemplary services and best practices.

Section 6 of RA 11032 mandates all covered government agencies and LGUs to set up their most current and updated Citizen's Charters, to wit:

> "SEC. 6. *Citizen's Charter.* – All government agencies including departments, bureaus, offices, instrumentalities, or government-owned and/or controlled corporations, or LGUs shall set up their respective most current and updated service standards to be known as the Citizen's Charter in the form of information billboards which shall be posted at the main entrance of offices or at the most conspicuous place, in their respective websites and in the form of published materials written either in English, Filipino, or in the dialect, that detail:
>
> (a) A comprehensive and uniform checklist of requirements for each type of application or request;
>
> (b) The procedure to obtain a particular service;
>
> (c) The person/s responsible for each step;
>
> (d) The maximum time to conclude the process;
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> (e) The document/s to be presented by the applicant or requesting party, if necessary;
>
> (f) The amount of fees, if necessary; and
>
> (g) The procedure for filing complaints."

The setting up of a Citizen's Charter has already been mandated under RA 9485 or the "Anti-Red Tape Act of 2007". However, RA 11032 expanded the covered agencies who are required to setup their Citizen's Charters as well as the services that should be included therein, covering both internal and external services of the agency or office. RA 11032 gave more teeth to the previous law as it already provides for penalties for those government agencies

or LGUs that fail to render government services within the processing time provided in their Citizen's Charter as well as those that impose additional requirements or fees other than those provided in their Citizen's Charter. ARTA issued the corresponding guidelines that provided all government agencies with pertinent information and instructions in developing and revising their Citizen's Charter in compliance with RA 11032 and its IRR. [12]

As part of its empowerment function, ARTA provides assistance to agencies and LGUs in the crafting of their Citizen's Charters by conducting orientations and write shops through its Compliance Monitoring and Evaluation Office (CMEO). CMEO monitors the compliance of covered agencies and LGUs as they are mandated to regularly update their Citizen's Charter and submit the same to ARTA. It also conducts on-site inspection to check whether the agency or office is compliant with the posting requirement under the law, as well as check whether the posted Citizen's Charter is updated and compliant with the format mandated by ARTA to standardize all Citizen's Charters.

National Regulatory Impact Assessment (RIA) Manual.

RA 11032 mandates all proposed regulations of covered government agencies to undergo Regulatory Impact Assessment (RIA) to establish if the proposed regulation does not add undue regulatory burden or cost to these and agencies and the applicants or requesting parties.[13] In partnership with the United States Agency for International Development (USAID) and the UP Research and Extension Services Foundation – Regulatory Report Support Program for National Development (UPPAF-RESPOND), ARTA launched the Regulatory Impact Assessment (RIA) Manual which is a reference document that provides the tools, process and procedures of undertaking RIA to ensure that regulations are subjected to proper consultations and evidence-based analysis before its issuance.[14] It aims to help government agencies, LGUs, and other government instrumentalities to enact sound and effective regulations that provide the most benefit for citizens and stakeholders without causing any undue burden or cost. ARTA, through Regulatory Management and Training Division (RMTD) under the Better Regulations Office (BRO), conducts regulatory management training programs to capacitate National

[12] ARTA Memorandum Circular No. 2019-002, s. 2019.

[13] RA 11032, Sec. 5.

[14] Regulatory Impact Assessment Manual. Retrieved from https://arta.gov.ph/riamanual/

Government Agencies and LGUs to comply with sound regulatory management principles.

Whole-of-Government (WOG) Re-Engineering Manual.

RA 11032 mandates all covered government agencies and offices to regularly undergo evaluation and improvement of their transaction systems and procedures and reengineer the same if deemed necessary to reduce bureaucratic red tape and processing time.[15] The reengineering process also entails an interagency review and harmonization of permitting and licensing laws, policies, regulations, and issuances to eliminate redundant and undue regulatory burdens to the transacting public.[16]

In partnership with the United Kingdom Government – Department for Business, Energy, and Industrial Strategy (UK BEIS), ARTA developed the Guidelines and Manual on the WOG Reengineering. This Manual is a reference document containing tools and principles in streamlining and reengineering processes, derived from principles and practices in business engineering tailor-fitted to the public Sector. It provides a walk-through of the process of reengineering methodology and the tools that agencies can use to support their reforms. The Manual was formally launched through a virtual ceremony on 29 July 2021. ARTA is currently conducting trainings and capacity building for covered agencies on the conduct of reengineering and the use of the Manual through its Compliance Monitoring and Evaluation Office.

Report Card Survey.

Section 20 of RA 11032 provides that all offices and agencies providing government services shall be subjected to a Report Card Survey. The RCS was initially overseen by the Civil Service Commission (CSC), but with the enactment of RA 11032, ARTA is now responsible for its implementation, in coordination with CSC and the Philippines Statistics Authority (PSA). Last November 2021, ARTA officially launched the Report Card Survey (RCS) 2.0., a scorecard of government agencies that will measure the effectiveness of the Citizen's Charter in reducing regulatory burdens and the impact of human resources systems and programs in delivering efficient government service. It is a holistic tool that is aimed at reducing regulatory burdens.

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[15] RA 11032, Sec. 5.

[16] ARTA Memorandum Circular No. 2021-09, S. 2021. Retrieved from: https://arta.gov.ph/wp-content/uploads/2020/07/Signed_Memorandum_Circular_No._2019-002_Series_of_2019.pdf

The RCS can be conducted both online and on-site. It examines three core areas: institutionalization of RA 11032 mandates, overall client satisfaction, and agency performance and recognition. The RCS 2.0 uses compliance reports, surveys-using a survey questionnaire and inspection checklist—the Client Satisfaction Measure (CSM), and reports and awards from other government agencies as its methods of measurement. The CSM is a feedback mechanism that measures the specific and overall satisfaction of the transacting public for every service that government agencies offer. The results of the RCS will still be used as one of the bases in granting rewards and incentives to government agencies.

Philippine Business Regulations Information System (PBRIS) and Anti-Red Tape Electronic Management Information System (ARTEMIS).

ARTA, with the assistance of the United States Agency for International Development (USAID) and the University of the Philippines Public Administration Research and Extension Services Foundation, Inc. – Regulatory Support Program for National Development (UPPAF-RESPOND), launched the Phase 1 of the Philippine Business Regulations Information System (PBRIS) and the Anti-Red Tape Electronic Management Information System (ARTEMIS) last September 2021.

The PBRIS is an online platform that provides accessible information on the Philippine Regulatory Management System and the laws and regulations that are relevant to the public. Its establishment by ARTA is mandated under RA 11032, Section 17(k) to ensure the dissemination of and public access to information on regulatory management system and changes in laws and regulations relevant to the public. The PBRIS will serve as a comprehensive repository of all government regulations and relevant regulatory documents, accessible through a user-friendly catalogue that the public can search through.

On the other hand, the ARTEMIS is a web-based platform that provides real-time and on-demand database and mapping of all government services indicated in the Citizen's Charter—the information billboard containing pertinent facts on government services and how much they'll cost, what are the steps, and how long the transaction will be processed. It will also serve as a tool for ARTA to monitor the compliance of government agencies in posting and updating their Citizen's Charter which is mandated under RA 11032. ARTEMIS Phase 1 will allow the public to search, view, and download the Citizen's Charter of national government agencies (NGAs), LGUs, government-owned and controlled corporations, local water districts, state universities and colleges, and public hospitals.

ARTA is currently planning and developing the Phase 2 Features of PBRIS and ARTEMIS. For the Phase 2 features of ARTEMIS, the public will be able to search for specific government services and process maps and to subscribe to government agencies and services that will automatically notify them whenever there are changes in the services or processes. It will also enable government agencies to create, submit, and update their Citizen's Charters using data capture forms. For PBRIS Phase 2, the system will allow regulators and regulated bodies to upload existing and proposed regulations, subscribe to specific sets of regulations, submit preliminary and regulatory impact statements, conduct public consultation and commenting, regulatory notification, and reports generation.

Central Business Portal (CBP)

The creation of a Central Business Portal is mandated under Section 13 of RA 11032 which provides, to wit:

> "SEC. 13. *Central Business Portal (CBP).* – To eliminate bureaucratic red tape, avert graft and corrupt practices and to promote transparency and sustain ease of doing business, the DICT shall be primarily responsible in establishing, operating and maintaining a CBP or other similar technology, as the DICT may prescribe.
>
> "The CBP shall serve as a central system to receive applications and capture application data involving business-related transactions, including primary and secondary licenses, and business clearances, permits, certifications, or authorizations issued by the LGUs: Provided, That the CBP may also provide links to the online registration or application systems established by NGAs." X X X X

ARTA, together with the Department of Information and Communications Technology (DICT), Securities and Exchange Commission (SEC), Bureau of Internal Revenue (BIR), Social Security System (SSS), Home Development Mutual fund or Pag-IBIG Fund, Philippine Health Insurance Corporation (PhilHealth), and eighteen (18) pilot LGUs launched the first phase of the Central Business Portal last January 2021. ARTA oversees the implementation of the CBP and provides support, facilitation, and assistance to the participating agencies throughout its development and implementation.

The CBP Phase 1 will allow for the registration of one person corporations, corporations with two to four incorporators, and regular corporations whose incorporators are juridical entities and/or the capital structure is not covered by the 25%-25% rule. The portal provides a Unified Application Form for all agencies involved in the business registration process, thus eliminating the undue burden on applicants of having to fill up redundant

entry forms with different agencies. Through the portal, applicants can now complete their business registration with SEC and BIR, generate BIR tax identification number, pay for BIR filing and registration fees, and register employer numbers for SSS, PhilHealth, and Pag-IBIG. The CBP now also features a Unified Employee Reporting Module for SSS, Philhealth, and Pag-IBIG, and process applications for secondary license featuring FDA's License to Operate (LTO) for Center for Drugs.

The CBP now also links to the online business permitting system of the local government of Quezon City, Paranaque City, Ilagan City, Baler, Dipaculao, Limay, Macabebe, Paete, Santa Cruz in Marinduque, Labo, Santa Barbara in Iloilo, Mandaue City, Dumingag, Catarman, and Kabacan. The online business permitting systems of other LGUs are also being targeted for integration in the portal in the future. Additional features will also thereafter be developed and incorporated in the CBP.

Electronic Business One-Stop Shop (eBOSS)

RA 11032 mandated cities and municipalities to automate their business permitting and licensing system or set up an electronic business one-stop shop (eBOSS) within a period of three (3) years upon the effectivity of the law. Section 11 (c) of RA 11032 provides, to wit:

> "SEC. 11. Streamlined Procedures for the Issuance of Local Business Licenses, Clearances, Permits, Certifications or Authorizations.—
>
> X X X X
>
> (c) Cities/Municipalities are mandated to automate their business permitting and licensing system or set up an electronic BOSS within a period of three (3) years upon the effectivity of this Act for a more efficient business registration processes. Cities/Municipalities with electronic BOSS shall develop electronic versions of licenses, clearances, permits, certifications or authorizations with the same level of authority, which may be printed by businesses in the convenience of their offices. The DICT shall make available to LGUs the software for the computerization of the business permit and licensing system. The DICT, DTI, and DILG, shall provide technical assistance in the planning and implementation of a computerized or software-enabled business permitting and licensing system.
>
> "(d) To lessen the transaction requirements, other local clearances such as, but not limited to, sanitary permits, environmental and agricultural clearances shall be issued together with the business permit.
>
> "(e) Business permits shall be valid for a period of one (1) year. The city/municipality may have the option to renew business permits within the

> first month of the year or on the anniversary date of the issuance of the business permit.
>
> "(f) Barangay clearances and permits related to doing business shall be applied, issued, and collected at the city/municipality in accordance with the prescribed processing time of this Act: Provided, That the share in the collections shall be remitted to the respective barangays." X X X

Together with the Department of Trade and Industry (DTI), Department of the Interior and Local Government (DILG), and the Department of Information and Communications Technology (DICT), ARTA issued Joint Memorandum Circular No. 1, s. 2021 which provides guidelines for processing business permits, related clearances and licenses in all cities and municipalities.[17] It mandated LGUs to automate their business permitting and licensing system or set up an eBOSS not later than 17 June 2021. The eBOSS should have the following functionalities:

1. Accept online or electronic submission of business permit applications using a Unified Application Form which an applicant can fill up or edit:
2. Issue electronically the tax bill/order of payment which indicates the amount that the applicant has to pay covering the business tax, fees and charges;
3. Accept online payments using online payment facilities and other payment gateways or alternative digital payment options;
4. Issue electronic versions of permits, licenses or clearances, which may be printed by businesses at the convenience of their offices, and which have the same level of authority as hard copies usually issued by LGUs;
5. Provide a gateway facility linked with courier services to allow physical delivery of permits, clearances, and other documents issued in relation to a business registration in cases where the applicant prefers to receive the hard copy of the permit.

ARTA monitors the compliance of LGUs to the eBOSS and extends assistance to them in establishing their eBOSS platforms. For LGUs that face challenges in establishing their eBOSS platforms, ARTA encourages LGUs to adopt the Integrated Business Permits and Licensing System (iBPLS)—a software developed by the DICT that may be adopted by LGUs for free. This

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[17]Anti-Red Tape Authority-Department of Trade and Industry-Department of Interior and Local Government-Department of Communication Technology, ARTA-DTI-DILG-DICT Joint Memorandum Circular No. 01 (2021).

software incorporates the Business Permits and Building Permits Registration Systems.

TradeNet

TradeNet is an interoperable online platform to reduce processing time and harmonize the permitting procedures involved in import and export. It is the National Single Window System that will allow for the online processing of import and export permits. Pursuant to ARTA Memorandum Circular No. 2021-01[18], all seventy-six (76) identified Trade Regulatory Government Agencies (TRGAs) involved in the issuance of license, permit, clearance, and certification for movement of cargo (import-export-transit) of cargo are now mandated to get onboard with the TradeNet in order to simplify and harmonize the permitting and licensing processes concerning imports and exports. ARTA Secretary Jeremiah B. Belgica is presently the chairperson of the technical working group that will onboard TRGAs to the TradeNet.

National Effort for the Harmonization of Efficiency Measures of Inter-related Agencies (NEHEMIA Program).

The NEHEMIA program, a flagship program of ARTA, is a sectoral-based streamlining effort that aims to reduce processing time, costs, requirements, and procedures in the government. For its Phase 1 implementation, ARTA identified and focused on five priority sectors: Telco, Logistics, Food and Pharma, Housing, and Energy. Through this program, ARTA has coordinated with various government agencies and members of the private sector and issued various Memorandum Circulars and Joint Memorandum Circulars (JMCs) that provide guidelines on the streamlined processing of documents in the said sectors.

JMCs released in connection with this program includes issuances providing guidelines on the following: Automation of business one-stop shops (eBOSS); Issuance and/or reinstitution of permits and licenses in the "new normal"; Creation of a *Bayanihan* one-stop shop for securing a license to operate to import critical COVID-19 commodities for commercial distribution; Mandatory online filing, processing, and payment of port charges, cargo handling charges, other cargo handling-related charges, permits and ancillary fees, and customs taxes and duties; Processing of documents for the construction of Shared Passive Telecommunications Tower Infrastructures

[18]Anti-Red Tape Authority, ARTA Memorandum Circular No. 2021-01 (2021).

(PTTIs); Erection of poles, construction of underground fiber ducts, and installation of aerial and underground cables and facilities; Establishment of a green lane for a vaccine manufacturing facility; Suspension of LGU imposition and collection of illegal pass-through fees; processing of uniformed services benefit claims; Processing of construction-related permits in 2020; and the Unified Logistics Pass which will facilitate the unhampered movement of trucks for hire that deliver basic goods and necessities across the country through a unified application form.

One of the successful NEHEMIA Programs of ARTA is in the Telco Sector. Since the start of its initiative in 2020, three (3) Joint Memorandum Circulars (JMC) have been issued, streamlining the process and requirements for the issuance of permits, licenses, and clearances to accelerate the deployment of telecommunications and internet infrastructure. According to Ookla, a speed test global indexing company, the Philippines ranked 73rd for mobile and 63rd for fixed broadband as of August 2021, which is a huge leap coming from the 100th rank for mobile and 94th rank for fixed broadband last August 2017. Since the signing of the first JMC in 2020, at least 44,920 permits in the Telco Sector have been released. Of this figure, 38,630 are from PLDT/Smart as of December 20, 2021, 4,433 are from DITO Telecommunity as of December 31, 2021, and 1,857 are from Globe as of September 2021.[19]

This was made possible through the initiatives and collaborative work of the NEHEMIA Telco Sector Oversight Committee, composed of ARTA, the Department of Information and Communications Technology (DICT), Department of Public Works and Highways (DPWH), Department of the Interior and Local Government (DILG), Department of Human Settlements and Urban Development (DHSUD), National Telecommunications Commission (NTC), Civil Aviation Authority of the Philippines (CAAP), Department of Health (DOH) – Food and Drug Administration (FDA), Bureau of Fire Protection (BFP), National Electrification Administration (NEA), Energy Regulatory Commission (ERC), Philippine Competition Commission (PCC), and its Private Stakeholders.

In just a short span of three years since it was established and two years into the Covid-19 Pandemic, ARTA has achieved great heights in improving ease of doing business and overall competitiveness of the country through its empowerment function. Even with limited manpower and budget, ARTA, in collaboration with its developmental partners, various government agencies and offices, and private stakeholders, was able to accomplish the foregoing

[19] Data gathered from the submissions of PLDT/SMART, Dito Telecommunity, and Globe Telecom Inc. to ARTA.

initiatives and programs, launch tools and machineries, and assisted government agencies and offices in the digital transformation of their services and compliance with RA 11032 mandates, in order to improve regulatory management and the delivery of government services in the Philippines.

B. Enforcement function

While the empowerment role of ARTA is to partner and foster cooperation with government agencies and LGUs to comply with the ease of doing business law. In situations where government personnel are recalcitrant and causing undue hardships to the transacting public, the ARTA will have to wield its enforcement function.

The ARTA is vested with investigatory powers and to file complaints against erring government officials. Among its powers are to monitor and evaluate the compliance of agencies covered and issue notice of warning to erring and/or noncomplying government employees or officials[20]; to initiate investigation, *motu proprio* or upon receipt of a complaint, refer the same to the appropriate agency, or file cases for violations of this Act[21]; and to assist complainants in filing necessary cases with the Civil Service Commission, the Ombudsman and other appropriate courts.[22]

Filing of cases

The proverbial teeth of R.A. 11032 lie within Section 21. It enumerates acts or omissions, and the performance of which can lead to civil, criminal, and administrative liabilities, as follows:

> (a) Refusal to accept application or request with complete requirements being submitted by an applicant or requesting party without due cause;
>
> (b) Imposition of additional requirements other than those listed in the Citizen's Charter;
>
> (c) Imposition of additional costs not reflected in the Citizen's Charter;
>
> (d) Failure to give the applicant or requesting party a written notice on the disapproval of an application or request;

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[20] RA 11032, Sec. 17 (c).

[21] RA 11032, Sec. 17 (d).

[22] RA 11032, Sec. 17 (e).

> (e) Failure to render government services within the prescribed processing time on any application or request without due cause;
>
> (f) Failure to attend to applicants or requesting parties who are within the premises of the office or agency concerned prior to the end of official working hours and during lunch break;
>
> (g) Failure or refusal to issue official receipts; and
>
> (h) Fixing and/or collusion with fixers in consideration of economic and/or other gain or advantage.[23]

Moreover, the law imposes a two-strike policy in penalizing offenders, to wit:

> (a) First Offense: Administrative liability with six (6) months suspension: *Provided, however,* That in the case of fixing and/or collusion with fixers under Section 21(h), the penalty and liability under the following paragraph shall apply.
>
> (b) Second Offense: Administrative liability and criminal liability of dismissal from the service, perpetual disqualification from holding public office and forfeiture of retirement benefits and imprisonment of one (1) year to six (6) years with a fine of not less than Five hundred thousand pesos (P500,000.00), but not more than Two million pesos (P2,000,000.00).
>
> Criminal liability shall also be incurred through the commission of bribery, extortion, or when the violation was done deliberately and maliciously to solicit favor in cash or in kind. In such cases, the pertinent provisions of the Revised Penal Code and other special laws shall apply.[24]

3-7-20 days

One of the salient provisions of RA 11032 is the 3-7-20 processing time, the shorter and more realistic time for the completion of government services—three (3) working days for simple transactions, seven (7) working days for complex transactions, and twenty (20) working days for highly technical transactions. The maximum time prescribed may be extended only once for the same number of days which shall be indicated in the Citizen's Charter.[25] If the application requires a *Sanggunian* approval, the latter will be given forty-five (45) working days to act on the application, extendible for another twenty (20) working days.[26]

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[23] RA 11032, Sec. 21.

[24] RA 11032, Sec. 22.

[25] RA 11032, Sec. 9 (b)(1).

[26] RA 11032, Sec. 9.

Simple transactions are defined as applications or requests submitted by applicants or requesting parties of a government office or agency which only require ministerial actions on the part of the public officer or employee, or that which present only inconsequential issues for the resolution by an officer or employee of said government.[27] Complex transactions are applications or requests submitted by applicants or requesting parties of a government office which necessitate evaluation in the resolution of complicated issues by an officer or employee of said government office.[28] While Highly Technical applications require the use of technical knowledge, specialized skills and/or training in the processing and/or evaluation thereof.[29]

Generally, if there has already been the submission of complete requirements and payment of fees by an applicant and a government official or employee fails to provide its services to the applicant within processing time provided in its Citizen's Charter, which shall not be longer than the 3-7-20 period, such will constitute a violation of Section 21 (e) for failure to render government services within the prescribed processing time without due cause. Under the law, the Head of the office or agency may also be held primarily responsible, since all transactions and processes are deemed to have been made with the permission and clearance from the highest authority having jurisdiction over the government office or agency responsible.[30] In addition, if an application for permit, license or certificate remains pending without the government office approving or disapproving the same, the Head of such office and the official or employee responsible can both be held liable under Section 21 (d), for failure to give the applicant or requesting party a written notice on the disapproval of an application or request.

Automatic Approval or Extension.

When a government office or agency fails to approve or disapprove an original application or request for issuance of license, clearance, permit, certification, or authorization within the prescribed processing time, said application or request shall be deemed approved. [31] The applicant can seek an

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[27] RA 11032, Sec. 4 (m).

[28] RA 11032, Sec. 4 (d).

[29] RA 11032, Sec. 4 (g).

[30] RA 11032, Sec. 8.

[31] Sec. 10. *Automatic Approval or Automatic Extension of License, Clearance, Permit, Certification or Authorization.* – If a government office or agency fails to approve or disapprove an original application or request for issuance of license, clearance, permit, certification or authorization within the prescribed processing time, said application or request shall be deemed approved: *Provided,* That all required documents have been submitted and all required fees and charges have been paid. The acknowledgment receipt together with

automatic approval or automatic extension from ARTA of its pending permit, license or clearance as long as the applicant shows proof that all required documents were submitted and all required fees and charges have been paid.[32] The acknowledgment receipt together with the official receipt for payment of all required fees issued to the applicant or requesting party shall be enough proof or has the same force and effect of a license, clearance, permit, certification or authorization.

Zero-Contact Policy and Limitation of Signatories

RA 11032 likewise provides for the implementation of a zero-contact policy[33] which prohibits government officer or employee from having any contact, in any manner, with any applicant or requesting party concerning an application or request, except during the preliminary assessment of the request and evaluation of sufficiency of submitted requirements or unless strictly necessary. Moreover, the law also provided a limitation on the number of signatories to aid in reducing the processing time of transactions in the government. The number of signatories in any document shall be to a maximum of three (3) signatories which shall represent officers directly supervising the office or agency concerned.[34] If the authorized signatory is on official business or official leave, an alternate signatory must be designated so as not to cause delay in the delivery of the services of the agency. The law also encourages the use of electronic signatures or pre-signed license, clearance, permit, certification or authorization with adequate security and control mechanism to facilitate faster processing of applications or requests.

Number of cases filed and Automatic approvals issued

As of this writing, ARTA has already filed Five Hundred Fifty-One (551) cases against various heads of offices and agencies, plus a number of local

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the official receipt for payment of all required fees issued to the applicant or requesting party shall be enough proof or has the same force and effect of a license, clearance, permit, certification or authorization under this automatic approval mechanism.
if a government office or agency fails to act on an application or request for renewal of a license, clearance, permit, certification or authorization subject for renewal within the prescribed processing time, said license, clearance, permit, certification or authorization shall automatically be extended.

[32] Anti-Red Tape Authority, Implementing Rules and Regulations of RA 11032, Rule VIII Section 1 par. (a) (ii) (iii) (2019).

[33] RA 11032, Sec. 7.

[34] RA 11032, Sec. 9 (d).

government officials for violations of Section 21 of R.A. 11032.[35] In addition, ARTA has recently intensified its nationwide anti-fixer campaign. In collaboration with law enforcement agencies, several entrapment operations were initiated by ARTA that led to arrest and filing of criminal charges against fixers operating in the Land Transportation Office, Bureau of Customs and Bureau of Internal Revenue, among others. As of date, there are seventeen (17) cases filed against alleged fixers in different courts.[36] Moreover, since 2019 up to present, ARTA has issued a total of Eight Thousand Five Hundred and Seven (8507) automatic approvals/renewals of permits and applications pending with government agencies such as the Land Transportation Franchising and Regulatory Board (LTFRB) and the Food and Drugs Administration (FDA).[37]

CONCLUSION

ARTA is envisioned to be a disruptor in the way government services are rendered. The public is used to lengthy waiting periods and accustomed to dealing with fixers loitering in government establishments to fast-track their applications. However, all this should change. Delays and cumbersome procedures should be a thing of the past, since the transacting public is expecting results from government offices within 3-7-20 working days. Furthermore, fixers should be out of business, as permits or licenses are regularly released within the prescribed processing time. To achieve this standard of government service, R.A. 11032 endowed ARTA with the dual function of empowerment and enforcement. The former to help government agencies streamline their processes and comply with the requirements of the law, the latter to police erring officials for violations committed. Both functions are necessary to ensure that government services to the public will be fast, efficient, convenient, and reliable. This should be the 'new normal' for our country.

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[35] Data gathered from ARTA Investigation Enforcement and Litigation Office as of December 2021.

[36] Ibid.

[37] Data gathered from ARTA Legal and Public Assistance Division as of December 2021.

THE HAGUE SERVICE CONVENTION: APPLICATION AND PROCEDURE IN THE PHILIPPINE COURTS

JUDGE MYRA B. QUILAMBAO[1]

The Hague Service Convention (The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters) was concluded on November 15, 1965. It is one of the Conventions in the Hague Conference on Private International Law (HCCH). The Philippines became a member of the HCCH on July 14, 2010. On March 4, 2020, the Republic of the Philippines deposited its Instruments of Accession to the Hague Service Convention, which took into effect on October 1, 2020. Consequently, the Supreme Court promulgated the *Guidelines In The Implementation Of The Hague Service Convention On The Service Abroad Of Judicial Documents In Civil And Commercial Matters* (*The Guidelines)***.**[2] *The Guidelines* shall be interpreted with the end in view of expeditiously granting requests for transmission or service abroad of judicial documents.[3] The Rules of Court, as amended shall have suppletory application.

The Hague Service Convention establishes a streamlined transmission of judicial and extrajudicial documents from one State Party to another; provides transnational litigants with methods for the service of documents abroad; simplifies and expedites the service of documents abroad; and guarantees that service will be brought to the notice of the recipient in sufficient time.[4] Moreover, it seeks to establish a system which, to the extent possible, brings actual notice of the document to be served to the recipient in sufficient time; to simplify the method of transmission of these documents from the requesting State to the requested State; and to facilitate proof that service has been effective abroad, by means of certificates contained in a uniform model.[5]

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[1] Presiding Judge, Regional Trial Court-Branch 203, Muntinlupa City; Faculty member, University of Santo Tomas Faculty of Civil Law and University of Perpetual Help College of Law; Lecturer, Philippine Judicial Academy (PHILJA); Member, Supreme Court Technical Working Group on the Proposed Guidelines for R.A. 11362 (Community Service Act); Member, Muntinlupa City Anti-Drug Abuse and Prevention Council; Chairperson, Task Force Katarungan at Kalayaan, Muntinlupa City.

[2] Administrative Order No. 251-2020

[3] Guidelines in the Implementation of the Hague Service Convention on the Service Abroad of Judicial Documents in Civil and Commercial Matters

[4] Ibid.

[5] Ibid., General Provisions I par. 4

Under the Guidelines, the Office of the Court Administrator (OCA) is designated as the Central Authority in the Philippines for judicial documents for purposes of Article 2 of the Hague Service Convention.[6] The Central Authority refers to the receiving authority in charge of receiving requests for service from Requesting States and executing them or causing them to be executed.[7] The Guidelines cover only judicial documents in civil or commercial matters.[8] For extrajudicial documents, the Central Authority is the Integrated Bar of the Philippines, thus, not covered by the Guidelines.

The conditions for the application of the Hague Service Convention in the Philippines are: *first*, a document is to be transmitted from one State Party for service to another State Party; *second*, the address of the intended recipient in the receiving State Party is known; *third*, the document to be served is a judicial document; and *lastly*, the document to be served relates to a civil or commercial matter.[9] The Convention shall not apply when the address of the person to be served is not known. It must be emphasized that the Convention applies only to State parties, which means those countries that had given their accession thereto.

Under Section 5, Rule 13 of the 2019 Amended Rules of Court, one of the modes for service of pleadings and other court submissions is that provided for in international conventions to which the Philippines is a party. Similarly, summons may be served through methods that are consistent with established international conventions to which the Philippines is a party.[10] Hence, pursuant to the rules and in line with the Philippines' accession to the Hague Service Convention, service of summons, pleadings, and court submissions in cases pending before the Philippine courts may now be made abroad through the framework of the Convention.

Judicial documents are orders, resolutions, judgments, and other official documents issued by courts in relation to civil or commercial proceedings, as well as pleadings and other court submissions by parties to such civil or commercial proceedings.[11] While an extrajudicial document is any private or public document not directly connected with pending or terminated lawsuits before courts.[12] These shall include, but are not limited to, demands for

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[6] Per SC Resolution dated December 4, 2018

[7] supra note 2, Definition of Terms, paragraph c

[8] Ibid., General Provisions I par. 1

[9] Article 1, Hague Service Convention; supra note 2, General Provisions, paragraph I(2)

[10] Section 9, Rule 14, 2019 Amended Rules of Court

[11] supra note 2, Definition of Terms, paragraph f

[12] Ibid., paragraph g

payment, notices to quit in connection with leaseholds, and protests in connection with bills of exchange.

Service, on the other hand, refers to the transmission and formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action, provided that it shall not be interpreted to comprise substantive rules relating to the actual service process, nor shall it determine the conditions or formalities of the service.[13]

The Central Authority (OCA) may decline the request if it does not comply with the provisions of the Hague Service Convention; or when compliance with the request would infringe upon its sovereignty or security.[14]

Procedure for Requests for Extraterritorial Service of Judicial Documents from the Philippines to other State Parties (Outbound Requests for Service)[15]

There must be a motion for leave of court of a party in a civil or commercial proceeding pending before a Philippine court, which shall be accompanied, in duplicate, of the following:[16]

a) A copy of the Model Form, including the Request, Certificate, Summary of documents to be Served, and Warning;

b) The original documents to be served or certified true copies thereof, including all annexes;

c) Certified translations of the Model Form and all accompanying documents, where necessary;

d) An undertaking to pay in full any fees associated with the service of the documents; and

e) Any other requirements of the Requested State, taking into account its reservations, declarations and notifications, which may be found in the HCCH website.

The court shall determine whether extraterritorial service is necessary under the Hague Service Convention in accordance with Rules 13 or 14 of the

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[13] Ibid., paragraph b

[14] Article 13, Hague Service Convention

[15] supra note 2, paragraph II

[16] Ibid., paragraph II (1)

2019 Amended Rules of Court. If the court finds that extraterritorial service under the Hague Service Convention is warranted, it shall issue an Order granting extraterritorial service. The Order shall include a directive to the requesting party to procure and submit a prepaid courier pouch which shall be used for transmission of documents from the court to the Central Authority of the Requested State.[17]

The Model Form[18] is the form annexed to the Hague Service Convention consisting of three parts, namely:

1) Request for service, which is sent to the Central Authority of the Requested State seeking assistance in the service of documents,
2) Certificate which confirms whether or not the documents have been served, and
3) Summary of the Document to be Served, which is delivered to the addressee and preceded by a Warning relating to the legal nature, purpose and effects of the document to be served.

The Judge, the Justice, or the Clerk of Court, as forwarding authorities, shall accomplish and sign the Request using the Model Form, check the completeness of the documents, and ensure compliance with the requirements of the Hague Service Convention and that of the Requested State. "Forwarding Authority" refers to the authority or judicial officer of the Requesting State competent to forward the request for service. All Justices and Clerks of Court of collegiate courts and Judges of lower courts are designated as Forwarding Authorities in the Philippines. "Competent Authority" refers to the authority in Article 6, Hague Service Convention, in addition to the Central Authority, designated to complete the Certificate in accordance with the Model Form. Moreover, all judges are designated as Competent Authorities under Article 6 of the Hague Service Convention in the Philippines.

The party, in accordance with his undertaking, shall settle the fees and costs for the service and submit the required proof of payment to the clerk of court. Any assessment after the execution, including any deficiency assessment, shall still be paid by the party at the appropriate time.[19] Proof of payment of the costs and fees shall be immediately sent to the clerk of court where the case is pending. Failure to settle the fees in full, whenever necessary, shall be a ground

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[17] Ibid., paragraph II (2)

[18] supra note 2, Definition of Terms, paragraph h

[19] supra note 2, paragraph II (Section 3)

for direct contempt of court, in addition to any other sanction that the judge may impose in accordance with the Rules of Court, as amended.

Once all requirements are submitted by the party requesting the extraterritorial service through the Hague Service Convention, the court shall coordinate with the Central Authority of the Requested State and transmit the following:[20]

1) The Order granting the extraterritorial service;
2) The filled-out Request and Summary of Document to be Served with Warning;
3) The blank Certificate (to be completed by the Central Authority of the Requested State);
4) The documents sought to be served; and
5) Certified translations of the Model Form and all accompanying documents, where necessary.

The court shall also furnish the OCA with a copy of the request and update the latter on the status of its request.

The Central Authority of the Requested State shall then process the request and attempt service in accordance with its domestic laws. It shall thereafter provide formal confirmation whether the service was successful or unsuccessful, using the Certificate annexed to the Hague Service Convention.[21] The completed Certificate shall then be transmitted back to the requesting court, and shall form part of the records of the case.

Requests for Extraterritorial Service of Judicial Documents in the Philippines from other State Parties (Inbound Requests for Service)[22]

All inbound requests for service of judicial documents originating from other state parties shall be referred to the OCA as the Central Authority. The following are the requirements:[23]

1) The documents sought to be served are judicial;

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[20] Ibid., paragraph II (4)
[21] Ibid., paragraph II (7)
[22] Ibid. paragraph III
[23] Ibid. paragraph III (2)

2) The Request conforms to the Model Form;

3) The document sought to be served is attached to the Request;

4) The Request and its attachments are accomplished/translated in English or Filipino;

5) The Request and its attachment/s are filed in duplicate; and

6) The address of the intended recipient is indicated with sufficient specificity. As much as practicable, it shall include the house number, building, street name, barangay, municipality/city, province, and zip code. Post office boxes shall not be allowed.

All requests must be accompanied by payment of US$100 for costs of service for each recipient to be served. For multiple recipients residing in the same address, only one fee shall be paid.[24] The Forwarding Authority of the Requesting State from which the documents originated shall transmit the request, together with all the documents, including proof of payment, to the OCA through electronic transmission (email) or physical transmission (via registered mail or courier services).[25]

Upon evaluation of the OCA, if the request fails to comply with the requirements, or there are objections for the execution of the request, the OCA shall inform the Forwarding Authority, specifying the objection/s therefor. If the objections are resolved, the processing of the request shall proceed. Otherwise, the request shall be denied, and all documents relating thereto shall be returned to the Forwarding Authority, along with a notice of objection or denial, stating the reasons therefor.[26]

When the request is sufficient in form, the OCA shall forward the request to the court having jurisdiction over the area where the intended recipient resides. Requests via email shall be transmitted to the official email accounts of the court concerned. The Executive Judge in multiple-sala courts, or the Presiding Judge in single sala courts, shall immediately assign a sheriff, process server, or any other competent personnel to serve the document in accordance with the Rules of Court.[27]

The officer assigned to serve the document shall execute a return on the service in accordance with the Rules of Court and submit the same to the judge

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[24] Ibid. paragraph III (3)

[25] Ibid. paragraph III (4)

[26] Ibid. paragraph III (5)

[27] Ibid. paragraph III (6 & 7)

of the court who directed the service of the document within five days from service. The return shall state the following:[28]

1) the document and attachment/s have been served;
2) the method, the place and the date of service; and
3) The person to whom the document was delivered.
4) If the document was not delivered successfully, the return shall state the reasons which prevented the successful service.
5) The officer shall deliver to the court the unserved document, so that it may later be returned to the Forwarding Authority.

As soon as the return on the service is submitted, whether service is successful or not, the judge shall immediately accomplish and sign the Certificate following the Model Form. In cases of unsuccessful service, the documents sought to be served shall be attached to the Certificate.

Within 30 calendar days from receipt of the request, the judge shall transmit the duly-accomplished Certificate and the Return of Service to the Forwarding Authority of the Requesting State. These shall be accompanied by a copy of the documents served, in cases of successful service, or the original documents, in cases of unsuccessful service. The judge shall furnish the OCA with a copy of all the documents transmitted for monitoring purposes. Should the compliance exceed thirty (30) calendar days, the judge shall also submit an explanation to the OCA for the delay. Expenses that may be incurred in the service of judicial documents for inbound requests shall be advanced by the concerned judge subject to the reimbursement from the Service Convention Fund.

Declaration of default

Article 15 of the Hague Service Convention provides for the protection of the defendant to a judgment by default. Where a writ of summons or equivalent document had to be transmitted abroad and the defendant has not appeared, judgment shall be stayed until two conditions are established:

1) Valid service or actual delivery; and

[28] Ibid. paragraph III (8)

2) Service or delivery was effected in sufficient time to enable the defendant to defend.

When a default judgment has been entered, Article 16 of the Hague Service Convention allows a judge to relieve the defendant from the effects of the expiration of the time for appeal. It applies when the writ of summons or equivalent document had to be transmitted abroad, the defendant has not appeared, and judgment has been entered.

Art. 16 of the Hague Service Convention requires the fulfillment of two conditions for the relief from judgment by default, as follows:

1) The defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal; and

2) The defendant has disclosed a prima facie defense to the action on the merits.

The application should also be filed within a reasonable time from knowledge of the judgment. This, notwithstanding, the 3rd paragraph of Art. 16 provides that a Contracting State may declare that "the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment." However, the Philippines has not given any declaration to that effect.

With the Philippines' accession to the Hague Service Convention, service of summons, pleadings and other court submissions abroad is now simplified and expeditious. The Convention facilitates the service of judicial documents to litigants who are outside the territorial jurisdiction of the Philippine courts, as it provides another mode sanctioned by the 2019 Amended Rules of Court, consequently precluding delay in civil proceedings involving transnational litigants.

THE CURIOUS CASE OF NUNC PRO TUNC

ARNOLD E. CACHO[1]

There is nothing more punctuating in litigation than when a decision becomes final and executory which under the *rule on finality of judgment,* once a decision attains the status of finality, the same becomes immutable and unalterable. This doctrine of finality and immutability of judgments is grounded on fundamental considerations of public policy and sound practice to the effect that, at the risk of occasional error, the judgments of the courts must become final at some definite date set by law. The reason is that litigations must end and terminate sometime and somewhere; and it is essential for the effective and efficient administration of justice that once a judgment has become final the winning party should not be deprived of the fruits of the verdict.[2]

Finality of judgment beckons the closure and signals the time when the victor would reap the fruits of his labor. A fruition, as it were, of all the tribulations, the end of the line after a long and tedious legal journey. At times, it is considered as a vindication, a final redemption, the unraveling of the truth, a closure of some sorts, wherein in life, as much as in law, the time has come to move on … *or is it*?

In the case of *Nuñal vs. CA*[3]*,* the High Court citing *Manning International Corporation v. NLRC*[4]*,* ruled that "… *nothing is more settled in the law than that when a final judgment becomes executory, it thereby becomes immutable and unalterable. The judgment may no longer be modified in any respect, even if the modification is meant to correct what is perceived to be an erroneous conclusion of fact or law, and regardless of whether the modification is attempted to be made by the Court rendering it or by the highest Court of the land*…."

The foregoing notwithstanding, the rule on finality of judgment is the general rule and just like anything else in law, and which has been always the fountain of gray areas where lawyers would always thrive on, there are

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[2] *Rolando Sofio, et. al. vs. Albeto I. Valenzuela, et. al.*, G.R. No. 157810, February 15, 2012.

[3] G.R. No. 94005. April 6, 1993.

[4] G.R. No. 83018, March 13, 1991.

exceptions, and they are: "*a) clerical errors; b) nunc pro tunc entries which cause no prejudice to any party; and c) void judgments*."[5]

There is nothing bewildering about the exceptions pertaining to clerical errors and void judgments for any well-meaning law student would easily discern when and how they are applied. It is, however, the remaining exception, i.e. *nunc pro tunc* entries which poses an enigma, somewhat like a monkey wrench, as those in the bench and the bar, frequently enough, have been most tentative on the timely and accurate application of the same which has proven itself to be ambiguous as the nomenclature of it depicts.

A Latin expression for "now for then", *nunc pro tunc* generally pertains to "the common law power of the Court to permit that to be done now which ought to have been done before."[6]

Nunc pro tunc may apply when "a judgment is entered, or document enrolled, so as to have the same legal force and effect as if it had been entered or enrolled on an earlier day."[7] The first record of an order *nunc pro tunc* seems to be of one made by Lord Clarendon in a private case, Ex parte Robert Devenish and Henry Devenish v Richard Bernford.8 Thereafter, the use of an order nunc pro tunc becomes prevalent in judicial decisions as in the case of Donne v. Lewis9 where Lord Eldon said, "The Court will enter a Decree nunc pro tunc, if satisfied from its own official documents, that it is only doing now what it would have done then".[10]

In our jurisdiction, *nunc pro tunc* judgments have been defined and characterized by the Supreme Court in the following manner:

> The office of a judgment *nunc pro tunc* is to record some act of the court done at a former time which was not then carried into the record, and the power of a court to make such entries is restricted to placing upon the record evidence of judicial action which has been actually taken. *It may be used to make the record speak the truth, but not to make it speak what it did not speak but ought to have spoken. If the court has not rendered a judgment that it might or should have rendered, or if it has rendered an imperfect or improper judgment, it has no power to remedy these errors or omissions by ordering the entry nunc pro tunc of a proper judgment. Hence a court in entering a judgment nunc pro tunc has no power to construe*

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[5] *One shipping Corp., et. al. vs. Imelda Penafiel*, G.R. No. 192406, January 21, 2015.

[6] https://www.duhaime.org/Legal-Dictionary/Term/NuncProTunc; See also Krueger v. Raccah (1981)

[7] Mozley and Whiteley's Law Dictionary (11th ed.). ISBN 9780406014207. quoted in Emanuele v Australian Securities Commission [1997] HCA 20

[8] Emanuele v Australian Securities Commission [1997] HCA 20

[9] *Id.*

[10] *Id.*

> *what the judgment means, but only to enter of record such judgment as had been formerly rendered, but which had not been entered of record as rendered***.** In all cases the exercise of the power to enter judgments *nunc pro tunc* presupposes the actual rendition of a judgment, and a mere right to a judgment will not furnish the basis for such an entry.
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> The object of a judgment nunc pro tunc is not the rendering of a new judgment and the ascertainment and determination of new rights, but is one placing in proper form on the record, the judgment that had been previously rendered, to make it speak the truth, so as to make it show what the judicial action really was, not to correct judicial errors, such as to render a judgment which the court ought to have rendered, in place of the one it did erroneously render, nor to supply nonaction by the court, however erroneous the judgment may have been.
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> A nunc pro tunc entry in practice is an entry made now of something which was actually previously done, to have effect as of the former date. Its office is not to supply omitted action by the court, but to supply an omission in the record of action really had, but omitted through inadvertence or mistake.
>
> It is competent for the court to make an entry *nunc pro tunc* after the term at which the transaction occurred, even though the rights of third persons may be affected. But entries *nunc pro tunc* will not be ordered except where this can be done without injustice to either party, *and as a nunc pro tunc order is to supply on the record something which has actually occurred, it cannot supply omitted action by the court*[11](italics supplied)

The Supreme Court, in *Briones v. CA*[12], given the foregoing characterization of a *nunc pro tunc* entry, denied petitioner's (defendant below) petition for review assailing the decision of the Court of Appeals (CA), holding that there is nothing to clarify in its final and executory decision holding that the *Pacto de Retro* Sale between the parties of a real property is actually one of equitable mortgage. However, plaintiffs, in that case, refused to withdraw the amount deposited by the petitioner in order to discharge the mortgage. Whereupon petitioner filed an Omnibus Motion to declare the mortgage to have been discharged already and ordering the plaintiffs to turn over the possession of the real property in her favor which was denied by the trial court holding that *the Court of Appeals already ruled with finality that the Pacto de Retro* Sale as one of equitable mortgage and it is beyond its competence to alter or modify the same:

> "…it is clear that the judgment petitioner sought through the motion for clarificatory judgment is outside its scope. Petitioners did not allege that the Court of Appeals actually took judicial action and that such action was not included in the Court of Appeals' Decision by inadvertence. A *nunc pro*

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[11] (Luisa Briones vs. CA, et .al. G.R. No. 144882, February 04, 2005, italics supplied)

[12] *Id.*

> *tunc* judgment *cannot correct judicial error nor supply nonaction by the court."* (italics supplied)

Since the judgment sought to be amended through the motion for clarificatory judgment is not a *nunc pro tunc* one, the general rule regarding final and executory decisions applies. In this case, no motion for reconsideration having been filed after the CA rendered its decision on June 29, 1995, and an entry of judgment having been made on July 17, 1996, the same became final and executory and, hence, is no longer susceptible to amendment. It, therefore, follows that the Court of Appeals did not act arbitrarily nor with grave abuse of discretion amounting to lack of jurisdiction when it issued the aforementioned Resolution denying petitioner's motion for clarificatory judgment and the Resolution denying petitioner's motion for reconsideration.

In the *Manning International Corporation case*[13], the Supreme Court held that the National Labor Relations Commission(NLRC) cannot modify the Decision of the POEA fixing at P12,000.00 the workmen's compensation benefit of an overseas contract worker ("OFW") who figured in a vehicular accident in Saudi Arabia. Being final and executory, the NLRC cannot modify the same by entering a new judgment approving reimbursement of actual medical expenses from September 3, 1982 up to January 26, 1985.The Court held that:

> "The alteration made by the NLRC judgment on the final and executory judgment of the POE Administrator cannot in any sense be characterized as the correction of a clerical mistake, or a nunc pro tunc entry. Nor may the latter judgment be considered as void in any aspect. It is in truth the "new judgment" of the NLRC that is void ab initio, insofar as it attempts to vary the disposition of the final and executory decision of the POE Administrator. Said "new judgment" is utterly inefficacious to work any change in the Administrator's decision."

In the case of *Ramos vs. CA*[14], the Supreme Court acceded to the motion for clarificatory judgment via a *nunc pro tunc* amendment. There, the private respondents sought to clarify the final and executory Decision of the Supreme Court, which sustained the judgment of the CA affirming *in toto* the judgment rendered by the Court of First Instance of Tarlac in Civil Case No. 4168. When possession of the real properties was wrested away from them, private respondents filed a complaint for the nullification of the titles of the petitioners. The trial court, ruling in favor of private respondents, held that ownership and possession should be reverted to the private respondents as the deeds of conditional with *pacto de retro* sale to which the subject properties were

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[13] Supra note 3.

[14] G.R. No. L-42108 May 10, 1995.

used as collaterals were actually equitable mortgages. The said judgment, albeit nullifying orders, resolutions and decisions leading to the consolidation of ownership in petitioners' names, did not include an order for the cancellation of the titles and restoration of possession to private respondents.

Thus, the Supreme Court, in acceding to the motion, held that:

> "…As correctly pointed out by the movant heirs, the declaration of nullity by the then Court of First Instance of Tarlac in its decision in Civil Case No. 4168 of the earlier orders of approval and consolidation of dominion marked as Exhibits "D", "D-1", "I", "I-1" and "I-2" necessarily carries with it the restoration by petitioners of the physical possession of the subject properties to Adelaida Ramos, now represented by her heirs...
>
> It should, of course, be emphasized and noted that the amendment now being sought by the movants, although coming long after the subject judgment had matured into finality, would not at all be unauthorized or improper considering the peculiar but compelling circumstances under and by reason of which such an amendment is necessitated. We need only to advert to what this Court emphatically pronounced in *Republic Surety and Insurance Co., Inc., et al. vs. Intermediate Appellate Court, et al.*, on which the movant heirs also rely, in support of and to demonstrate the validity and regularity of such amendment in the present situation, thus:
>
> > 'What is involved here is not what is ordinarily regarded as a clerical error in the dispositive part of the decision of the Court of First Instance, which type of error is perhaps best typified by an error in arithmetical computation. At the same time, what is involved here is not an erroneous judgement or dispositive portion of judgment. What we believe is involved here is in the nature of an inadvertent omission on the part of the Court of First Instance (which should have been noticed by private respondents' counsel who had prepared the complaint), of what might be described as a logical follow-through, or translation into, operation or behavioral terms, of the annulment of the Deed of Sale with Assumption of Mortgage, from which petitioner's title or claim of title embodied in TCT 133153 flows. The dispositive portion of the decision itself declares the nullity ab initio of the simulated Deed of Sale with Assumption of Mortgage and instructed the petitioners and all persons claiming under them to vacate the subject premises and to turn over possession thereof to the respondent-spouses.'
>
> By the same token, the legal bases for the issuance of certificates of title to the lots in favor of petitioners and third persons having been set aside by the judgment of the trial court in said Civil Case No. 4168, with its recognition of corresponding rights thereover by private respondents, this again ineluctably implies that the corresponding certificates of title thereover be issued in favor of private respondents or their successors, and

> that the certificates of title of petitioners and their transferees be consequently canceled.
>
> Stated elsewise, the Court is now being asked to merely clarify via this *nunc pro tunc* amendment, *what in fact it did actually affirm and as a logical follow through of the express or intended operational terms of said judgment* in Civil Case No. 4168. In any event, just to write *finis* to what in actuality is an unnecessary dispute between the parties and to forestall the possibility of another one, contrived or otherwise, we accede to the supplication of movants for what amounts to a clarificatory judgment explicitly articulating what was already implicitly assumed." (Italics supplied)

The *Ramos ruling* invoked by the petitioners in the case of *Rolando Sofio case* (*supra*) was, however, rejected by the Supreme Court. In that case, petitioners' Emancipation Patents were set aside by the Provincial Agrarian Reform Adjudicator ("PARAD") but was reversed on appeal by the Department of Agrarian Reform and Adjudication Board ("DARAB"). However, the CA, which decision became final and executory, reverted to the PARAD's decision holding that petitioners are not qualified agrarian beneficiaries as they were not able to prove the existence of a valid tenancy relationship. Consequently, private respondents moved for the issuance of a writ of execution which was granted by the PARAD. Petitioners, through their new counsel, filed a motion for relief from judgment, motion for reconsideration and motion to recall writ of execution grounded on the fact that they learned the May 27, 1998 decision of the CA only on December 11, 2001, through their receipt of the November 27, 2001 order of the PARAD granting the respondents' ex parte motion for execution. PARAD denied the motion for relief from judgment holding that it had no authority to grant the motion due to its subject matter being a judgment of the CA, a superior court. The petitioners then filed in the CA a motion to recall entry of judgment with motion for leave of court to file a motion for reconsideration. Finding the negligence of the petitioners' former counsel being matched by their own neglect (of not inquiring about the status of the case from their former counsel and not even taking any action against said counsel for neglecting their case), the CA denied on February 13, 2003 the motion to recall entry of judgment.

In denying petitioners' Petition for Review , the Supreme Court held that:

> "Ramos v. Court of Appeals, which the petitioners cited to buttress their plea for the grant of their motion to recall entry of judgment, is not pertinent. There, the Court allowed a clarification through a nunc pro tunc amendment of what was actually affirmed through the assailed judgment "as a logical follow through of the express or intended operational terms" of the judgment.
>
> "In this regard, we stress that a judgment *nunc pro tunc* has been defined and characterized thuswise:

> "The object of a judgment *nunc pro tunc* is not the rendering of a new judgment and the ascertainment and determination of new rights, but is one placing in proper form on the record, the judgment that had been previously rendered, to make it speak the truth, so as to make it show what the judicial action really was, not to correct judicial errors, such as to render a judgment which the court ought to have rendered, in place of the one it did erroneously render, nor to supply nonaction by the court, however erroneous the judgment may have been. (Wilmerding vs. Corbin Banking Co., 28 South., 640, 641; 126 Ala., 268.)
>
> Based on such definition and characterization, *the petitioners' situation did not fall within the scope of a nunc pro tunc amendment, considering that what they were seeking was not mere clarification, but the complete reversal in their favor of the final judgment and the reinstatement of the DARAB decision*. (Italics supplied)

In *Filipinas Palmoil Processing, Inc. et. al. vs. Joel P. Depeja, etc.*[15], the Supreme Court ruled, in no uncertain terms, that a *nunc pro tunc* amendment is not meant to resurrect what has been already factually resolved as if it is being litigated once more for the first time**.** In that case**,** petitioner was declared the employer of private respondent who was found to have been illegally dismissed, and that Tom Madula, who assigned private respondent to petitioner, is merely a labor only contractor. The dispositive portion of the final decision of the Court of Appeals which reversed the NLRC, and affirmed by the Supreme Court provides:

> "WHEREFORE, premises considered, the assailed Decision dated December 29, 1999, as well as the Resolution dated April 28, 2000 in NLRC NCR CASE No. 0005-03748-97 (NLRC NCR CA No. 016505-98) are hereby REVERSED and SET ASIDE.
>
> "Petitioner (herein respondent) is ordered REINSTATED without loss of seniority rights with payment of backwages, including his salary differentials, overtime pay, 13th month pay, service incentive leave pay and other benefits from the time his salary was withheld, or from December 1, 1997 until actual reinstatement. However, if reinstatement is no longer feasible, private respondent company is ordered to pay separation pay equivalent to one (1) month for every year of service where a fraction of six (6) months shall be considered as one whole year. Private respondent company is likewise ordered to pay ₱10,000.00 as moral damages and ₱10,000.00 as exemplary damages. In addition, private respondent company is ordered to pay attorney's fees in the amount equivalent to 10% of the total monetary award.

To implement the CA's decision, a writ of execution was issued resulting in the garnishment of petitioner's deposit with UCPB in the amount of ₱736,910.10. Petitioners moved to quash the writ arguing that it can only be

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[15] G.R. No. 167332, February 7, 2011.

held liable in so far as the reinstatement aspect and other monetary award but not to backwages.

The Motion to Quash was partially granted by the Labor Arbiter (LA)such that the liability for reinstatement and backwages is adjudged against Tom Madula. Consequently, the LA ordered the garnished account of petitioner to be released to the extent of P266,757.85.

Private respondent then filed a Very Urgent Motion for Clarification of Judgment, praying that the CA Decision be clarified to the effect that petitioner be made solely liable to the judgment award and, as a consequence thereof, to order the NLRC and the Labor Arbiter to implement the same.

On December 10, 2004, the CA rendered the assailed Resolution granting respondent's motion for clarificatory judgment, the dispositive portion of which states:

> "WHEREFORE, in view of the foregoing, in accordance with petitioner's supplications, this Court renders, nunc pro tunc, the following clarification to the decretal portion of this Court's August 29, 2002 decision.
>
> WHEREFORE, premises considered, the assailed Decision dated December 29, 1999 as well as the Resolution dated April 28, 2000 in NLRC NCR CASE NO. 0005-03748-97 (NLRC NCR CA NO. 016505-98) are hereby REVERSED and SET ASIDE.
>
> Private respondent Filipinas Palmoil Processing Inc. (Asian Plantation Phils., Inc.) is hereby ordered to REINSTATE petitioner Joey Dejapa without loss of seniority rights and to pay him his backwages including his salary differentials, overtime pay, 13th month pay, service incentive leave pay and other benefits from the time his salary was withheld or from December 1, 1997 until actual reinstatement. If reinstatement is no longer feasible, private respondent Filipinas Palmoil Processing, Inc. (Asian Plantation Phils., Inc.) is likewise ordered to pay separation pay in addition to the payment of backwages and other benefits equivalent to one (1) month pay for every year of service, where a fraction of six (6) months shall be considered as one whole year.
>
> Private respondent Filipinas Palmoil Processing Inc. (Asian Plantation Phils., Inc.) is likewise ordered to pay petitioner ₱10,000.00 as moral damages, ₱10,000.00 as exemplary damages, and attorney's fees in the amount equivalent to 10% of the total monetary award."
>
> Private respondent Tom Madula is hereby relieved from any liability under the judgment.
>
> Labor Arbiter Lilia S. Savari is hereby directed to implement the final judgment of this Court strictly in accordance with the foregoing, and to order the UCPB to release the garnished amount of ₱736,910.10 to the NLRC Sheriff for further disposition."

Hence, the petition for review on certiorari by petitioners assailing the CA Resolution dated December 10, 2004, which the CA issued upon respondent's filing of a Very Urgent Motion for Clarificatory Judgment. It bears noting that the CA Resolutions petitioners sought to annul were only issued to clarify the CA Decision dated August 29, 2002, which had already become final and executory in 2004.

The Supreme Court, finding the petition unmeritorious, held that petitioners' action is only a subterfuge to alter or modify the final and executory Decision of the CA, to wit:

> "As a general rule, final and executory judgments are immutable and unalterable, except under these recognized exceptions, to wit: (a) clerical errors; (b) nunc pro tunc entries which cause no prejudice to any party; and (c) void judgments. *What the CA rendered on December 10, 2004 was a nunc pro tunc order clarifying the decretal portion of the August 29, 2002 Decision.*
>
> *In Briones-Vazquez v. Court of Appeals*, nunc pro tunc judgments have been defined and characterized as follows:
>
> *The object of a judgment nunc pro tunc is not the rendering of a new judgment and the ascertainment and determination of new rights, but is one placing in proper form on the record, the judgment that had been previously rendered, to make it speak the truth, so as to make it show what the judicial action really was, not to correct judicial errors, such as to render a judgment which the court ought to have rendered, in place of the one it did erroneously render, nor to supply nonaction by the court, however erroneous the judgment may have been.*
>
> By filing the instant petition for review with us, petitioners would like to appeal anew the merits of the illegal dismissal case filed by respondent against petitioners raising the same arguments which had long been passed upon and decided in the August 29, 2002 CA Decision which had already attained finality.
>
> It should be sufficiently clear to private respondents (herein petitioners) that the December 10, 2004 Resolution was issued merely to clarify a seeming ambiguity in the decision but as stressed therein, it is neither an amendment nor a rectification of a perceived error therein. The instant motion for reconsideration has, therefore, no merit at all." (italics supplied)

In *Juanito Cardoza vs. Hon. Pablo S. Singson*[16], a decision was rendered by the Court of First Instance of Maasin, Leyte which was affirmed with modification in the decision of the CA promulgated on December 6, 1939, and had long become final and executory. Plaintiffs allegedly acquired knowledge of the appellate court's decision only on November 11, 1974, because before the death of their original counsel in 1944 they were not informed of the said

[16] G.R. No. L-59284, January 12, 1990.

decision. They moved for the issuance of a writ of execution but subsequently moved for the deferment of its resolution contending that during one of the hearings, they allegedly discovered that no entry of judgment had been made and that nobody could tell whether the parties or their counsel received a copy of the decision of the CA. Plaintiffs therefore, prayed for the recording of the decision of the CA in the book of entries of Judgment.

On July 6, 1981, the trial court issued an order that "*a nunc pro tunc judgment be entered pursuant to the decision of the Court of Appeals in Civil Case No. C.A. G.R. No. 3645"*. For the satisfaction of the judgment it likewise ordered the issuance of a writ of execution. On July 21, 1981, the writ of execution was issued directing the Provincial Sheriff of Southern Leyte or his deputies to enforce and execute the decision of the trial court as modified by the appellate court whereupon the subject property was delivered by the Sheriff in favor of the private respondents.

Petitioner filed a petition a petition for *certiorari*, prohibition and *mandamus* with preliminary injunction seeking (a) to annul and set aside the writ of execution issued by respondent Judge Pablo S. Singson (b) to restore to petitioner possession of the three parcels of land in controversy; and (c) to nullify the proceedings leading to the issuance of the order and writ of execution.

However, the petition proved unsuccessful as the High Court ruled that:

> "The decisive issues to be resolved in the instant case are (1) whether or not the decision of the trial court as modified by the Court of Appeals can still be enforced and (2) whether or not the trial court committed a grave abuse of discretion when it made the entry of judgment *nunc pro tunc* and issued the writ of execution…
>
> Acting not only as a court of law but also as a court of equity, the trial court correctly made the entry of a judgment nunc pro tunc pursuant to the decision of the Court of Appeals in Civil Case No. C.A. G.R. No. 3545. In so doing, the lower court merely ordered the judgment of the, Court of Appeals to be executed.
>
> The issuance of a nunc pro tunc order was recognized by this Court in *Lichauco v. Tan Pho,* where an order or judgment actually rendered by a court at a former time had not been entered of record as rendered. There is no doubt that such an entry operates to save proceedings had before it was made.
>
> Contrary to what the petitioner claims, the lower courts action—decreeing the entry of a judgment nunc pro tunc—was not done arbitrarily nor capriciously. The petitioner was allowed to oppose the motions in open court and was even required to submit a memorandum to support his position. The petitioner, however, failed to submit a memorandum. Neither

> did he adduce sufficient evidence to support his claims over the properties in question.
>
> Finally, well settled is the rule that a judgment which has become final and executory can no longer be amended or corrected by the court except for clerical errors or mistakes. In such a situation, the trial court loses jurisdiction over the case except to execute the final judgment, as in this case."

In *Hermogenes Maramba vs. Nieves de Lozano, et. al.*[17] a couple was adjudged liable for sum of money, the dispositive portion of the decision of the trial court dated June 23, 1959 provides:

> "WHEREFORE, the court hereby renders judgment, sentencing the defendants herein, Nieves de Lozano and Pascual Lozano, to pay unto the herein plaintiff, Hermogenes Maramba, the total sum of Three Thousand Five Hundred Pesos and Seven Centavos (P3,500.07), with legal interest thereon from date of the filing of the instant complaint until fully paid."

The trial court's decision became final after it was affirmed by the Court of Appeals. Consequently, the couple's property was levied on execution and during its execution sale, the wife, Nieves de Lozano, made a partial satisfaction of the judgment in the amount P2,000.00, and filed a motion requesting for an adjournment of the sale alleging that during the pendency of the case, her husband Pascual Lozano died and that the property levied *upon was her paraphernal property*. Moreover, Nieves demanded that her liability be fixed at one-half (½) of the amount awarded in the judgment and that pending the resolution of the issue, an order be issued restraining the Sheriff from carrying out the auction sale. The trial court issued the questioned order, the dispositive part of which is as follows:

> "WHEREFORE, the court hereby grants the motion of counsel for defendant Nieves de Lozano, dated October 5, 1960, which was amended on October 14, 1960, and holds that the liability of the said defendant under the judgment of June 23, 1959, is only joint, or P1,750.04, which is one-half (½) of the judgment debt of P3,500.07 awarded to the plaintiff and that the writ of execution be accordingly modified in the sense that the liability of defendant Nieves de Lozano be only P1,750.04 with legal interest from the date of the filing of the complaint on November 5, 1948 until fully paid, plus the amount of P21.28 which is also one-half (½) of the costs taxed by the Clerk of Court against the defendant spouses. Let the auction sale of the above-mentioned property of defendant Nieves de Lozano proceed to satisfy her liability of P1,750.04 with legal interest as above stated and the further sum of P21.28 representing the costs, unless she voluntarily pays the same to the judgment creditor (herein plaintiff)."

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[17] G.R. No. L-21533, June 29, 1967.

Plaintiff interposed an appeal from the above-quoted order and presented, among others, the issue of whether the decision of the lower court dated June 23, 1959 could still be questioned.

Plaintiff-appellant submits that a "*nunc pro tunc*" order should have been issued by the trial court dismissing, as of November 11, 1952, the case against the late Pascual Lozano by reason of his death, and that the lower court should have corrected its decision of June 23, 1959, by striking out the letter "s" in the word "defendants" and deleting the words "and Pascual Lozano.

In affirming the assailed order, The High Court ruled:

> "We do not think that the action suggested would be legally justified. It would entail a substantial amendment of the decision of June 23, 1959, which has long become final and in fact partially executed. *A decision which has become final and executory can no longer be amended or corrected by the court except for clerical errors or mistakes, and however erroneous it may be, cannot be disobeyed; otherwise litigations would be endless and no questions could be considered finally settled. The amendment sought by appellee involves not merely clerical errors but the very substance of the controversy. And it cannot be accomplished by the issuance of a "nunc pro tunc" order such as that sought in this case. The purpose of a "nunc pro tunc" is to make a present record of an which the court made at a previous term, but which not then recorded. It can only be made when the ordere has previously been made, but by inadvertence not been entered. In the instant case there was no order previously made by the court and therefore there is no now to be recorded.* (Italics supplied)

In *Llanes & Company vs. Hon, Juan L. Bocar*[18]**,** judgment was rendered against husband and wife as judgment debtors and were ordered to pay petitioner the sum of P16,778.94. On motion of the petitioner, the trial court issued an order for the sale of the mortgaged property, and on October 25, 1963, the Sheriff of Manila sold at public auction the real property covered by Transfer Certificate of Title No. 8814 to the petitioner for the sum of P18, 950.00. The Sheriff's Sale was confirmed by the same court on November 4, 1963.After the Sheriff's Certificate of Sale was registered in the land records of the City of Manila on January 20, 1964 and a new transfer certificate of title was issued to the petitioner, the latter moved for the issuance of the writ of possession which was opposed by the spouses but was nonetheless granted by the trial court.

About a year later, or on February 17, 1966, the petitioner filed a petition with the trial court, praying that the original decision of April 2, 1963 be amended to insert after the clause "*the Court shall order the sale at public auction of the property described in the complaint,"* the following*: "together with the building and other improvements thereon,"* and that the same clause be inserted in the Certificate of Sale dated October 25, 1963 after the words *"parcel of land."* This motion was

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[18] G.R. No. L-26992 February 12, 1976.

first granted by the trial court on February 21, 1966, but on April 13, 1966, the said court set aside its afore-mentioned order of February 21, 1966 on the ground that at that stage *"the decision of the Court could no longer be amended or corrected"*, as the same was not just a clerical error, considering that the description of the property in the complaint for foreclosure of the mortgage did not include the "building or other improvements." Similarly, in the Order of Execution, as well as in the Notice and the Certificate of Sale, "only the land is mentioned, and nothing is stated about the improvements". Petitioner's motion for reconsideration was denied by said court on June 20, 1966. In denying the petition, the Supreme Court held that:

> "The only issue is whether the non-inclusion of the "building and other improvements" in the decision of foreclosure, writ of execution, Notice of Sale and the Certificate of Sale as confirmed by the order of the court is a mere clerical error which may be corrected at any time…
>
> While courts have the power to correct errors and misprisions in final judgments, such authority is limited to the correction of clerical errors. The office of a nunc pro tunc amendment to a judgment is not to correct judicial errors, however flagrant and glaring they may be, in the judgment rendered by the court. The test to determine "whether an error in a judgments a judicial one, not open to correction on motion in the court which made it, or a mere clerical one, which may be corrected any time on application in the court where it occurred, is whether the mistake relates to something the court did not consider and pass on, or considered and erroneously decided, or whether there was a failure to preserve or correctly represent in the record, in all respects, the actual decision of the court." The phrase "clerical error" has been employed in a broad sense to cover all errors, mistakes, or omissions which are not the result of the exercise of the judicial function. The "Power to correct clerical errors in judgments, orders or decrees, does not authorize the addition of terms never adjudged, or the entry of orders never made, although the court should have made such additions or entered such orders, and any error in that regard is a judicial error. It is obvious from the foregoing that the errors which petitioner seeks to correct are not clerical errors." (Italics supplied)

As aptly held in *Filipinas Palmoil Processing, Inc. case* [19] citing *Navarro v. Metropolitan Bank and Trust Company*[20], no other procedural law principle is indeed more settled than that once a judgment becomes final, it is no longer subject to change, revision, amendment or reversal, except only for correction of clerical errors, or the making of nunc pro tunc entries which cause no prejudice to any party, or where the judgment itself is void. The underlying reason for the rule is two-fold: (1) to avoid delay in the administration of justice

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[19] Supra note

[20] G.R. No. 165697 August 4, 2009.

and thus make orderly the discharge of judicial business, and (2) to put judicial controversies to an end, at the risk of occasional errors, inasmuch as controversies cannot be allowed to drag on indefinitely and the rights and obligations of every litigant must not hang in suspense for an indefinite period of time. As the Court declared in *Yau v. Silverio*[21],

> "Litigation must end and terminate sometime and somewhere, and it is essential to an effective and efficient administration of justice that, once a judgment has become final, the winning party be, not through a mere subterfuge, deprived of the fruits of the verdict. Courts must therefore guard against any scheme calculated to bring about that result. Constituted as they are to put an end to controversies, courts should frown upon any attempt to prolong them.
>
> Indeed, just as a losing party has the right to file an appeal within the prescribed period, the winning party also has the correlative right to enjoy the finality of the resolution of his case by the execution and satisfaction of the judgment. Any attempt to thwart this rigid rule and deny the prevailing litigant his right to savor the fruit of his victory must immediately be struck down. Thus, in *Heirs of Wenceslao Samper v. Reciproco-Noble*, we had occasion to emphasize the significance of this rule, to wit:
>
> > It is an important fundamental principle in our Judicial system that every litigation must come to an end x x x Access to the courts is guaranteed. But there must be a limit thereto. Once a litigant's rights have been adjudicated in a valid final judgment of a competent court, he should not be granted an unbridled license to come back for another try. The prevailing party should not be harassed by subsequent suits. For, if endless litigations were to be encouraged, then unscrupulous litigants will multiply in number to the detriment of the administration of justice."

But then again, the foregoing judicial edict is not cast in granite, the exceptions being founded on common law based as they are on justice and equity for courts would always spawn situations wherein there is an imperative need to make corrections in order to avoid miscarriage of justice and afford full retribution to the winning party if the decision, as it is, marred by ellipsis, would not be corrected. Though, as jurisprudence enunciates, the correction through *nunc pro tunc* amendments merely clarifies what courts, in their previous decisions, merely said and does not adjudged nor adjudicate new ones since at times, *courts might be meaning to say what it has in mind but came out saying differently*

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[21] G.R. No. 158848, February 4, 2008.

as it can, for all its quest for exactitude, likewise get lost in the wilderness of its legal reverie and delusions of clarity

AN ANALYSIS OF RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO) ACT OF THE UNITED STATES OF AMERICA: A PROPOSAL FOR A POLICY ON RACKETEERING IN THE PHILIPPINES

ASHLEY FAYE S. CRUZ[1]

Introduction

Iloilo Ex-mayor Jed Patrick Mabilog was removed from office in 2017 because of his alleged unexplained wealth. The ombudsman ordered Mabilog's removal for serious dishonesty. The Court of Appeals (CA) has dismissed an administrative complaint filed against Mabilog in connection with this money. The CA's 19th Division granted Mabilog's petition challenging the Office of the Ombudsman's decision of August 27, 2019, in a 24-page judgement published on June 11, 2021. An Alberta, Canada geodetic engineering firm hired the wife of Mabilog as vice president for finance and comptroller in which boosted Mabilog's net worth, which the CA agreed with.[2]

Mabilog rejected all of the charges leveled against him. Mabilogs' residence, according to his family, cost barely P6.7 million. He contended that even if the home was completed in 2013, it could not have cost less than P6.7 million unless the Mabilogs got deep discounts from municipal vendors.[3] The Philippine Star editorial team commented that it would be easier for the government to investigate Mabilog and other officials suspected of similar infractions if the Philippines has laws against racketeering. The Racketeer Influenced and Corrupt Organizations Act, or RICO Act, which has been in effect in the United States since 1970, empowers the state to imprison even the leaders of a criminal organization who directed or participated in the commission of offenses such as murder and drug trafficking.[4]

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[1] UST Law Review Research Editor; the author would like to thank Mr. Raul Gabriel M. Manalo for his valuable efforts to construct a comprehensive history of American-Italian mafia and their impact on economy and security of the U.S.

[2] Jenifer Rendon, CA Reverses Ruling on Mabilog's Dismissal, THE PHILIPPINE STAR, 1 (July 21, 2021), https://www.philstar.com/nation/2021/07/21/2113894/ca-reverses-ruling-mabilogs-dismissal

[3] The Philippine Star, EDITORIAL - Battling racketeers, THE PHILIPPINE STAR, 1 (September 3, 2017), https://www.philstar.com/opinion/2017/09/03/1735630/editorial-battling-racketeers

[4] *Id.*

In 1970, the RICO Act was enacted by the US Congress and was termed the "ultimate hit man" in mob prosecutions. Prosecutors could only pursue mob-related crimes on a case-by-case basis before RICO. Because a different mobster committed each crime, the police were only able to investigate individual criminals rather than a criminal organization as a whole before the enactment of RICO law.

Since the legislation is so broad, it is used by both governmental and civil parties against a wide range of legitimate and unlawful businesses. RICO allows any person participating in a corrupt organization to be prosecuted. That implies the government may go after high leadership as well as hitmen and capos in mob charges. RICO created significantly increased punishments. Moreover, while the Act was created to prosecute the Mafia, prosecutors have used it to sue a wide range of organized criminal groups over the last 37 years, including street gangs, gang cartels, corrupt police agencies, and even politicians.

A person must participate in a pattern of racketeering activities tied to a business to violate RICO. The list includes mail and wire fraud, which is significant. These transgressions are referred to as "predicate" offenses.

An enterprise is necessary. A criminal family, a street gang, or a drug cartel might be involved. However, it might also be a business, a political party, or a managed care organization. The business just has to be a separate entity; nonetheless, an enterprise is not the same as a person. As a result, a corporation may be the business through which people commit crimes, but it cannot be both a human and a business.

Prosecutors may also attach assets, preventing them from being taken out of the country before a trial. Even though RICO threatens racketeers with lengthy jail sentences, the law's true force lies in its civil component. Anyone who has been harmed by a RICO violation may file a civil action and collect triple damages if they win.

A plaintiff must establish the following to win a RICO claim:

1) *There is criminal activity* – You must prove that the defendant committed one of the RICO offenses listed above, which include mail and wire fraud. However, if you file a claim based on fraud, the court will scrutinize your claim closely.

2) *Criminal Activity Pattern.* – One offense is insufficient.

3) *A pattern of at least two offenses must be shown* – A pattern demands that the crimes be connected in some way—same victim, same tactics,

> same participants—or that they are continuous, implying that they occurred over at least a year within the limitations of the law.[5]

Throughout a three-year study period, the 37 local prosecutors' offices that reported RICO prosecutions prosecuted a total of 174 cases using different State RICO statutes. The bulk of these cases (27 percent) were classed as drug cases, with trafficking/distribution as the primary offense. RICO-related activity involving gambling accounted for 16 percent of the charges. Consumer fraud was the most common kind of fraud in this study's sample, accounting for 16 percent of all cases (consumer fraud, investment fraud, and bank fraud). In ten percent of the cases, fencing/provision of illegal items was involved, with the bulk of them being automobile "chop-shop" networks.

During telephone conversations, local prosecutors offered a variety of reasons for invoking RICO. They said that one of RICO's most important features was the prospect of higher penalties than those imposed by normal state law. They believed RICO forced them to impose harsh penalties on what some may consider minor illegal behavior when viewed separately, but which, when added together, warranted more severe punishment. According to one prosecutor, RICO was more successful than aggregating individual charges for certain white-collar offenses. According to another reply, escort firms catering to prostitution networks were shut down, cash was confiscated, and the owners were sentenced to long jail terms under his state's RICO legislation.

Local prosecutors who used them often contended that state RICO provisions allowed for adjustable sanctions for a wide variety of offenses not available under other statutes. According to them, state RICO statutes might be used to obtain injunctions prohibiting RICO offenders from continuing to control a corporation where criminal activity was concentrated. (An injunction may be issued either as a result of a criminal conviction or a civil decision.)

Finally, one prosecutor's office expressed delight with his state's RICO legislation because it allowed him to make great progress in ending street gang "turf fights."[6]

Legislative background

A. Social milieu

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[5] Racketeer Influenced and Corrupt Organizations (RICO) Law, JUSTIA, https://www.justia.com/criminal/docs/rico/

[6] Donald J. Rebovich, Kenneth R. Coyle & John C. Schaaf, Local Prosecution of Organized Crime: The Use of State, U.S. DEPARTMENT OF JUSTICE OFFICE OF JUSTICE PROGRAMS BUREAU OF JUSTICE STATISTICS, 11, (October 1993), https://bjs.ojp.gov/content/pub/pdf/lpocusricos.pdf

Organized crime is a network of highly centralized businesses set up to engage in criminal operations. Cargo theft, fraud, robbery, kidnapping for ransom, and the demand for "protection" fees are all crimes committed by such groups. The sale of unlawful products and services that have a continuing public demand, such as narcotics, prostitution, loan-sharking (i.e., usury), and gambling, is the main source of income for these criminal syndicates.[7] Mafia is a hierarchical group of criminals that are mostly of Italian or Sicilian ancestry. The phrase can refer to both a traditional Sicilian criminal organization and a criminal organization in the United States.[8]

During the 60s and 70s, the majority of the source of heroin is in the United States, which were smuggled often by the Sicilian Mafia and the American Mafia, the La Cosa Nostra (LCN).[9] Sicilians would enter the United States through Canada or Mexico as they were fugitives escaping from Italy for crimes ranging from murder to trafficking.[10] Many Mafia members fled Italy to avoid arrest by the police.[11] The Pizza connection case came from the Bonnano family of the New York LCN. They were mainly responsible for the massive importation of heroin in the United States, which amounted to more than 300 million USD. Their influence originated during the prohibition era in the 1920s with the help of certain government agencies.[12]

The prohibition era during the 1920s was a catalyst for the rise of the influence of the Mafia and their involvement with government institutions.[13] The origins of organized criminal groups started during the prohibition era. Through the 20th century, examples of such groups would be the Italian Mafia, Russian Mafia, the Japanese Yakuza, and Chinese Tongs. Their activities would include gambling, loan sharking, prostitution, and narcotics trafficking. [14]The Triads and Sicilian Mafia's origins began as a simple group that provided aid and created a community for their members. Groups then formed to seek profit outside the law, which mixed with some political motives. Thus, they

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[7] The Editors of Encyclopaedia Britannica, "Organized Crime" definition, BRITANNICA, 1, (November 19, 2019), https://www.britannica.com/topic/organized-crime

[8] The Editors of Encyclopaedia Britannica, "Mafia" definition, BRITANNICA, 1, (Apr 17, 2013), https://www.britannica.com/topic/Mafia

[9] Sean McWeeney, The Sicilian Mafia and its Impact on the United States, FBI Law Enforcement Bulletin, February 1987.

[10] *Id.* at 5

[11] *Id.*

[12] *Id.* at 6

[13] George Gilligan, Organize Crime and Corrupting the Political System, Journal of Financial Crime Vol. 7 (2), 149-152, 1999.

[14] Kristin Finklea, Organized Crime in the US: Trends and Issues for Congress, Congressional Research Service, 4, December 22. 2010

would often establish enterprises with numerous connections that expanded their influence outside their local reach.[15] The Triads dominated in the importation of heroin into the United States. Since 1985, their production of other drugs such as Coca and Opium has grown through their connections in Asia. Human trafficking of illegal Chinese aliens into the United States has also been a business of the Triads.[16]

The LCN emerged in the 1930s from Sicilian immigrants in US cities. While they do not have a formal connection with the original Sicilian Mafia, they drew their traditions from such. Despite being a distinct American organization, the LCN has a large international connection for their businesses in alcohol and heroin from foreign entities.[17] Colombians were once the main suppliers of marijuana to the United States.

After WWII, Luciano (a young Sicilian Mafia) made a deal with the government wherein his family would protect US naval ships in exchange for certain favors. Luciano continued to work with the US government thus, establishing his Mafia's influence in the mid 20th century.[18] In the 70s, they have also exploited cocaine and have amassed wealth comparable to the GDPs of countries such as Bolivia, Colombia, and Peru.[19]

B. Economic and Security Impact

The US Senate discussions before RICO indicates that Congress viewed organized crime as a threat to the economy.[20] An estimate of 50 billion dollars is on illegal drug sales. Colombian cartels make a profit of about 20 billion dollars annually. By comparison, Colombia's GDP is only around 45 billion, and the combined budgets of Colombia, Bolivia, and Peru are only about 9 billion annually. Chinese Triads may not be as large as the Colombians but still dwarf other organized crime groups in terms of profit.[21]

Organized crime can weaken the US Economy through illegal activities such as cigarette trafficking and tax evasion scams. When it comes to cigarette trafficking, it results in a loss of tax revenue. This leads to businesses raising

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[15] Roy Godson and William Olson, International Organized Crime, Society 32, 19, January 1995, page 21

[16] *Id.* at 27.

[17] *Id.* at 22-23.

[18] John Davis, Mafia Dynasty: The Rise and Fall of the Gambino Crime Family, New York Harper Paperbacks, 61, 1994.

[19] Godson & Olson, *supra* note 15

[20] Extraterritorial Application of RICO: Protecting US Markets in a global economy, Kristen Neller, Univ. of Michigan Law School, Michigan Journal of Int.l Law, Vol. 14 (2), 1993

[21] Godson & Olson, *supra* note 15, at 23.

taxes for consumers and placing an increased economic burden on consumers. On the other hand, counterfeit currency is also an issue wherein organized crime groups would counterfeit fake fifty and one hundred dollar bills, thus damaging the value of the US Dollar.[22]

The provision for civil damages creates a right to recover for anyone whose business is injured due to a violation.[23] Because of the costs to enforce the RICO act, the law is not as cost-efficient, thus the probability of catching particular individuals is low, but at the very least, the penalty should be high.[24] The major cost of RICO is the efficient behavior it scares off. Many of the activities it attempts to deter are those that serve a useful purpose. If penalties are too severe, it may limit potentially advantageous activities (i.e., contracts, advertising, etc.), which could likely be the most major cost of civil RICO.[25]

Since WWII, organized crimes would include activities using violence, extortion, bribery, and murder to advance their interests. The Sicilian Mafia, in particular, has been involved with assassinations and other interferences with the government in an attempt to corrupt them.[26] Criminal organizations pose a threat to public order and businesses. The La Cosa Nostra (LCN; Sicilian families) conducts numerous activities such as penetrating unions, money laundering, prostitution, etc. that can be organized for profit.[27] Based on the chart, it follows that after the 9/11 attack, the FBI reorganized, prioritizing counterterrorism efforts over traditional crime. Thus, FBI agent utilizations for organized crime matters decreased from 2001 to 2004 for possible reasons such as terrorism being a bigger priority than organized crime and a lack of manpower.[28]

Diplomatic relations between the United States, France, and Turkey through the Drug Enforcement Administration and the French and Italian police halted the French Connection in the early 1970s.[29] The cases shown show that there has been no consistent increase or decrease in organized crime

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[22] Finklea, *supra* note 14..

[23] Economics of Civil RICO, Rubin and Zwirb, UC Davis Vol. 20, page 885

[24] *Id.* at 900.

[25] *Id.* at 910-911.

[26] Godson & Olson, *supra* note 15, at 18-29.

[27] *Id.* at 25.

[28] Finklea, *supra* note 14.

[29] Sean McWeeney, The Sicilian Mafia and its Impact on the United States, FBI Law Enforcement Bulletin, 4, February 1987.

prosecutions. This may be because of administration priorities or disproportionate statistics.[30]

C. Criminal activities

Organized Criminal groups involve themselves in the public interest for money, power, or prestige.[31] There are 4 characteristics of corruption coming from criminal organizations in public office:

1) Bribers/Kickbacks are demanded them to conduct legitimate business
2) Payments are demanded by the organizations for politicians to maintain influence
3) Payments are demanded to maintain illegitimate businesses
4) There is systemic top-down corruption to maintain the rule of top families.[32]

Activities of some criminal organizations would include gambling, loansharking, narcotics, prostitution, and bootlegging. Criminal organizations can undermine competition through ways such as price cutting and violent coercion of suppliers and customers. The acquisition of legitimate enterprises by organized criminals allows them to venture into other forms of crimes such as bankruptcy fraud.[33] In the RICO cases as of 1987, there have been 236 cases wherein 30% of which involve corruption of government officials. Nevertheless, these cases mostly involve law enforcement corruption and on a local level.[34] Today, one of the means for Asian traffickers to smuggle goods is through mules wherein heroin is placed onto their stomachs and intestines to transport the drugs into the country.[35] The Immigration and Naturalization Service (INS) apprehended more than 6k illegal immigrants from countries such as China and Hong Kong. An independent study, however, indicates that there could be as many as 50k illegal immigrants smuggled into the United States since the 90s.[36]

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[30] Finklea, *supra* note 14, at 14-55.

[31] Gilligan, supra note 13, at 147.

[32] *Id.*

[33] Gerard Lynch, RICO: The Crime of being a criminal, Parts I & II, Columbia Law Review, Vol. 87 (4), 669-670, May 1987

[34] *Id.* at 735-737.

[35] Godson & Olson, *supra* note 15.

[36] *Id.* at 28.

Corruption is needed to facilitate the operations of organized crime groups. As their establishment grew, their capability of utilizing violence also grew rampant, thus perpetuating a cycle of corruption into the system.[37] Many of the activities of organized crime groups meet consumer demand, be it legal or illegal. Thus, mafia groups tend to meet public and private roles that intersect with their criminal interests.[38]

D. Legislative history of Racketeering Influenced and Corrupt Practices Act (RICO Act)

Professor G. Robert Blakey is the leading expert on the Racketeer Influenced and Corrupt Organizations Act in the United States (RICO). The Crime Control Act of 1973, the Omnibus Crime Control Act of 1970, and the Organized Crime Control Act of 1970, Title IX of which is known as RICO, were all passed because of Blakey's vast legislative drafting experience. In 22 of the more than 30 states that have implemented racketeering statutes, he was intimately involved in the formulation and implementation of RICO-type legislation.[39] Congress determined that organized crime, notably the LCN, had penetrated and abused several legal enterprises and labor organizations across the United States, posing "a new danger to the American economic system."[40]

The Congress finds that organized crime in the United States is a sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy through unlawful conduct, the illegal use of force, fraud, and corruption; organized crime derives a significant portion of its power from money obtained from illegal endeavors such as syndicated gambling, loan sharking, property theft and fencing, and the importation and distribution of controlled substances, business and labor unions, as well as to sabotage and corrode our democratic processes. Organized criminal operations in the United States jeopardize the nation's economic system, injure innocent investors and competitors, stifle free competition, obstruct interstate and international trade, jeopardize domestic security, and jeopardize the nation's and citizens' general welfare. Because flaws in the law's evidence-gathering process prevent the development of legally admissible evidence

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[37] Gilligan, supra note 13, at 147.

[38] *Id.* at 148.

[39] Faculty Directors: G. Robert Blakey, UNIVERSITY OF NOTRE DAME, 1, https://law.nd.edu/directory/g-blakey/

[40] Staff of the Organized Crime and Gang Section U.S. Department of Justice, Washington, D.C., CRIMINAL RICO: 18 U.S.C. §§1961-1968 A Manual For Federal Prosecutors(2016), U.S. DEPARTMENT OF JUSTICE, 4, https://www.justice.gov/archives/usam/file/870856/download

necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those involved in organized crime, and because the government's sanctions and remedies are unnecessarily limited in scope and impact, organized crime continues to grow.

The goal of this Act is to eradicate organized crime in the United States by strengthening legal instruments in the evidence-gathering process, introducing new criminal prohibitions, and providing harsher punishments and new remedies to deal with individuals who engage in illegal activities.[41] RICO does not only apply to "mobsters" or "organized crime" as those words are commonly understood. Rather, it encompasses the acts that Congress deemed to be indicative of organized crime, regardless of who is involved.[42]

Salient provisions

RICO condemns

(1) any person who
    a. invests in, or
    b. acquires or maintains an interest in, or
    c. conducts or participates in the affairs of, or
    d. conspires to invest in, acquire, or conduct the affairs of
(2) an enterprise which
    a. engages in, or
    b. whose activities affect, interstate or foreign commerce
(3) through
    a. the collection of an unlawful debt, or
    b. the patterned commission of various state and federal crimes.

RICO violations carry the following criminal penalties: (a) forfeiture of any property acquired as a result of the violation and any property interest in the enterprise involved in the violation; and (b) imprisonment for not more than 20 years, or life in the case of one of the predicate offenses; and/or a fine of not more than twice the gain or loss associated with the offense, or $250,000 for individuals and $500,000 for corporations. Because RICO shares predicate crimes with the federal money laundering law and, to a lesser degree, the Travel Act, an action involving a RICO violation or a RICO predicate offense violation may also result in criminal liability under the Travel Act and money laundering provisions. Federal law also has a version of the RICO enterprise's

[41] Section 1 of Pub. L. No. 91-452 (RICO)

[42] RICO: A Brief Sketch, CONGRESSIONAL RESEARCH SERVICE, i, (August 3, 2021), https://crsreports.congress.gov

"hitman" offense, which criminalizes the commission of numerous violent acts at the direction of a RICO business.[43]

Civil liability may also be imposed for RICO offenses. The courts have the authority to award treble damages, costs, and attorneys' fees to anyone harmed in his business or property by a RICO violation, as well as to enjoin future RICO violations, order divestiture, dissolution, or reorganization, or restrict an offender's future professional or investment activities.[44]

RICO may be violated by anybody. The "person" does not need to be a mobster or even a human being; "any individual or organization capable of owning a legal or beneficial interest in property" will suffice.[45]

For enterprise, such a term encompasses two distinct types of connection. "Any person, partnership, company, organization, or other legal entity" falls within the first group. The second category encompasses "any union or group of persons who are related but are not a legal organization." Each category denotes a distinct kind of company covered by the statute—those recognized as legal entities and those not recognized as legal entities. As a result, the word "enterprise" refers to both legal and illicit businesses.

The term "enterprise" as used in sections 1962(a) and (b) [46]refers to property acquired via an illegal pattern of racketeering action or money earned

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[43] *Id.* at 2.

[44] *Id.* at 3.

[45] *Id.*

[46] In exact terms, 18 U.S.C. § 1962 declares the following:
"(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection, if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
"(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
"(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct, or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
"(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

through an unlawful pattern of racketeering activity. In comparison, the "enterprise" referred to in section 1962(c) is the vehicle used to perpetrate the illegal racketeering pattern. The Supreme Court has stated that "RICO protects both a genuine 'business' and the public against individuals who would unlawfully exploit an 'enterprise' (whether legitimate or illegitimate) as a vehicle for 'unlawful... activities." Thus, the Court accepted that a legal firm may be a "victim" of racketeering behavior under section 1962(c) and (d).[47]

Conduct, invest or use – RICO prohibits four types of illicit activity, as reflected in section 1962's four subsections: (a) acquiring or operating an enterprise using racketeering proceeds; (b) controlling an enterprise through racketeering activities; (c) conducting the affairs of an enterprise through racketeering activities; and (d) conspiring to acquire, control, or conduct an enterprise through racketeering activities.[48]

Acquire or preserve – The second proscription, 18 U.S.C. 1962(b), is similar to the first, except that it prohibits the purchase or control of an entity solely via the predicates' income rather than through the predicates' income. It is prohibited for (1) any individual (2) to acquire or retain an interest in or control of (3) a commercial company (4) via (a) the collection of an illegal debt or (b) a pattern of predicate crimes. As with subsection 1962(a), the terms "person" and "business" may be synonymous. A connection between predicate crimes and the acquisition of control must exist. What defines "interest" or "control" is determined on a case-by-case basis. The defendant must demonstrate that he or she had a major part in the operation of the firm, although total control is not required. In summary, as one court explained, "Plaintiffs must allege that '(1) the Defendants engaged in [collection of an unlawful debt]; (2) to acquire or maintain, directly or indirectly; (3) any interest or control over an enterprise; or (4) whose activities affect interstate or foreign commerce."[49]

Conduct of Affairs – Subsection 1962I makes it illegal for (1) any person, (2) any person employed by or linked with, (3) any commercial enterprise, and (4) any person to conduct or participate in the conduct of the company's business. (5) by the collection of an illegitimate debt or the commission of a sequence of predicate crimes. Subsection 1962I is the most often prosecuted substantive basis for RICO or civil action. Although subsection 1962I seems to be less onerous than subsections 1962(a) and (b), courts have not always interpreted it liberally. Thus, in any allegation of a violation of its rules, the terms "person"

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[47] RICO: A brief sketch, *supra* note 42.

[48] *Id.* at 4.

[49] *Id.* at 5.

and "business" must normally be distinguished. However, for subsection 1962, a corporate body and its single shareholder are sufficiently different (c). In the "conduct or participate in the conduct" provision of subsection 1962(c), the Supreme Court established a managerial hierarchy in which only those who control the operation or management of the firm fulfill the "conduct" element. Liability is not confined to a business's "top management," but also to individuals inside the enterprise who exercise extensive discretion in carrying out higher management orders. Conviction does not require the commission of an economic predicate crime or the commission of a predicate offense with economic motivation.

Conspiracy – Under paragraph 1962(d), conspiracy is defined as (1) an agreement between (2) two or more (3) parties to invest in, acquire, or operate the business of (4) a commercial firm (5) in a way that violates 18 U.S.C. 1962(a), (b), or (c) (c). The agreement alone constitutes the offense, not any full, coordinated violation of the other three RICO subsections. In contrast to the standard conspiracy legislation, a RICO conspiracy is complete upon agreement, even if none of the participants ever does an overt act toward the completion of the conspiracy's illegal goal. Contrary to what some lower courts formerly believed, a defendant is not required to commit or consent to conduct two or more predicate crimes. It is sufficient that the defendant planned, in collaboration with another, to pursue an activity that, if successful, would fulfill all of the RICO's requirements. Both the government and private plaintiffs may be needed to establish the existence of a RICO-qualified business in some districts. [50]A conspirator is accountable for the conspiracy itself as well as any anticipated substantive violations committed by any of the conspirators in furtherance of the common plan, until the plot's aims are accomplished, abandoned, or the conspirator withdraws. A RICO conspiracy's statute of limitations extends until the scheme's aims are achieved or abandoned, or until the defendant withdraws. As a general rule, a person must take intentional action to leave a conspiracy, either by reporting to authorities or conveying his intentions to his co-conspirators. The person is responsible for demonstrating that he has done so.[51]

Predicate Infractions – The majority of RICO infractions are motivated by a pattern of racketeering activity, defined as the coordinated conduct of two or more specified state or federal crimes. The following state and federal offenses may be used to establish a RICO violation: To establish "racketeering conduct," the predicate crime must be committed; no need exists that the defendant or anyone else has been convicted of the predicate offense. On the

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[50] *Id.* at 8

[51] *Id.* at 9

other hand, a conviction for a predicate crime does not exclude a later RICO prosecution, nor does conviction or acquittal preclude a subsequent RICO civil action.[52]

Pattern – The pattern of racketeering activities element of RICO requires (1) the commission of two or more predicate offenses, (2) that the predicate offenses be connected and not simply isolated events, and (3) that they are committed under circumstances implying either the continuation of criminal activity or the threat of such continuation.

Section 1961(5) makes the first element explicit: "To constitute a 'pattern of racketeering conduct,' at least two acts of racketeering activity are required." The last two aspects, relationship, and continuity are derived from RICO's legislative history. This history "demonstrates that Congress did have a pretty open idea of a pattern in mind. A pattern is not developed via occasional action... [A] person cannot be liable to RICO punishment only for committing two significantly dissimilar and independent criminal crimes. Rather than that, the word 'pattern' needs the demonstration of a connection between the predicates and the danger of continued behavior. It is this combination of continuity and interaction that results in a pattern." For related predicates: If "criminal acts... have the same or similar purposes, outcomes, participants, victims, or methods of commission, or are otherwise connected by distinguishing characteristics and are not isolated events," the commission of predicate offenses constitutes the requisite related pattern.

For permanence, the law distinguishes between two types of continuity: pre-existing ("closed-ended") and anticipated ("open-ended"). The first is defined as "a sequence of connected predicates that spans a significant amount of time." Precedent activities lasting a few weeks or months and posing little prospect of future criminal activity do not meet these criteria." The second occurs when a chain of related predicates has started and, without intervention, would continue indefinitely. The Supreme Court has defined a pattern that spans time but poses no danger of recurrence as having "closed-ended" continuity; and a pattern that poses a threat of recurrence as having "open-ended" continuity. In the instance of a "closed-ended" pattern, lower courts have been unwilling to determine that predicate activity lasting less than a year is adequate to show continuity. Whether the threat of future predicate behavior is sufficient to establish an "open-ended" pattern of continuity is context-dependent and relies on the nature of the predicate crimes and the company. While the number of linked predicates may be minimal and their occurrences may be close together in time, the racketeering actions themselves entail a

[52] RICO: A brief sketch, *supra* note 42.

distinct danger of recurrence that extends endlessly into the future, providing the necessary continuity. In other instances, the danger of continuity may be proved by demonstrating that the predicate actions or crimes are routinely committed by a continuing organization. The danger "is often assumed when the enterprise's primary or fundamental activity is illegal."[53]

Unlawful Debt Collection – collecting an illegitimate debt may result in criminal and civil responsibility under RICO in one of two ways. To begin, each substantive RICO violation is premised on either "a pattern of racketeering activities" or the "collection of an unauthorized debt." The collection of an illegitimate debt seems to be the only situation in which the conduct of a single predicate crime may support a RICO prosecution or cause of action. No evidence of trend seems to be required. Second, when paired with the fear of damage, the recovery of an illegitimate debt creates an extortionate credit transaction (loan sharking), a distinct criminal crime. This criminal violation fits the criteria of racketeering activity and hence may generate RICO liability as a predicate offense when committed as part of a "pattern of racketeering activity."[54]

The *Double Jeopardy Clause* bans a person from being prosecuted or sentenced for the same crime twice. Two crimes are distinct if one has an element that is not present in the other. Double jeopardy problems might arise in two ways in the context of RICO: 1) A defendant is charged with a RICO conspiracy and a substantive RICO crime; and 2) A defendant is charged with a substantive RICO offense and racketeering conduct constituting the RICO offense. The Supreme Court has long acknowledged that "in the majority of instances, distinct sentences may be imposed for the conspiracy to commit an act and for the deed itself."[55]

Violent Crimes in Aid of Racketeering (VICAR) – Under 18 US.C. 1959, violence in aid of racketeering (VICAR) is a series of RICO-related federal proscriptions that prohibit committing, attempting to commit, or conspiring to commit any of several specific violent state or federal predicate offenses with the intent of receiving a reward from a RICO enterprise. "To establish a VICAR conviction, the government must establish the following: '(1) the existence of the criminal organization; (2) that the organization is a racketeering enterprise; (3) that the defendants committed [or attempted or conspired to commit] a violent crime; and (4) that they acted with the intent

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[53] *Id.* at 14.

[54] *Id.* at 15.

[55] *Id.* at 29.

of advancing their position in [or gaining entrance to] the racketeering enterprise.[56]

A RICO breach carries a slew of criminal and civil penalties, including imprisonment, fines, restitution, forfeiture, triple damages, lawyers' fees, and a variety of equitable limitations.[57] Section 1962 of the RICO Act carries criminal penalties. A breach of section 1962 is penalized under section 1963(a) by a fine or a period of imprisonment not to exceed 20 years, or by both. If the RICO violation is founded on racketeering action that carries a maximum punishment of life imprisonment as a predicate act, the maximum sentence for the RICO violation is likewise life imprisonment. Additionally, § 1963(a) requires the forfeiture of all property to the United States, regardless of any state law requirement. This includes any property interest acquired or maintained in violation of section 1962,50 as well as any interest in, security for, claim against, or property or contract right of any kind providing a source of influence in the RICO enterprise, as well as any proceeds from racketeering activity or unlawful debt collection.

Section 1963(b) defines the type and nature of "property" subject to criminal forfeiture under the RICO Act, including real property and tangible and intangible personal property, and extends criminal forfeiture to any property transferred to a person other than the defendant, unless the transferee establishes that he or she is a bona fide purchaser.

Sections 1963(d)–(m) outline certain measures and processes that the government may take in response to a court order regarding the disposal of property forfeited under the RICO Act's criminal forfeiture provisions. For a breach of section 1962, RICO criminal forfeiture is to be imposed "in addition to any other penalty." A criminal forfeiture award is included in the offender's punishment, not in the main crime for which the defendant was convicted.[58]

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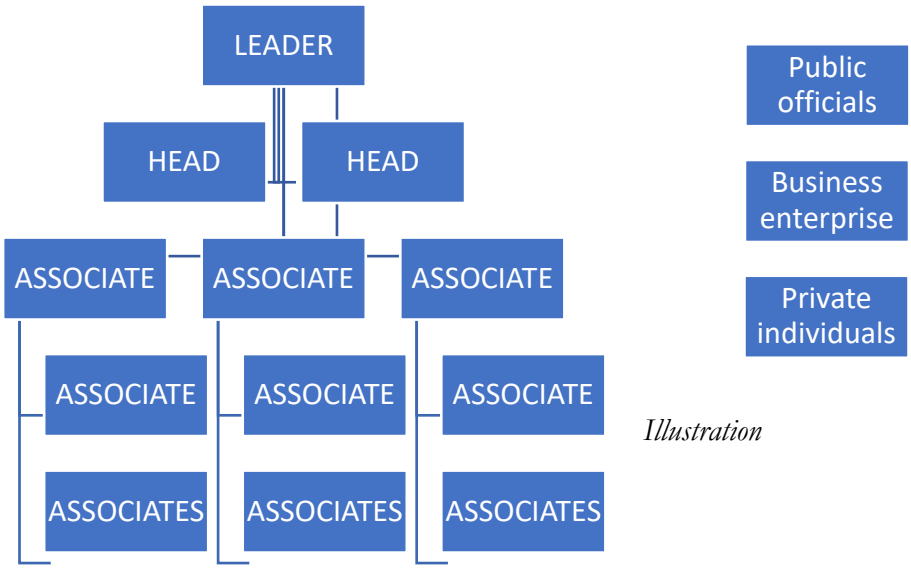
[56] RICO: A brief sketch, *supra* note 42, at 25.

[57] *Id.* at 39.

[58] Office of General Counsel, U.S. Sentencing Commission, Rico Guideline, U.S. SENTENCING COMMISSION, 7, (March 2020), https://www.ussc.gov/sites/default/files/pdf/training/primers/2020_Primer_RICO.pdf



Illustration

In this setup, the leader approves a criminal activity advised by the heads of the syndicate. The associates have their respective teams. If one would rather rely on the concept of conspiracy, at most, only the associates would be implicated. However, with the RICO law, the leaders of any group can be tried for crimes if they greenlighted others to do the crimes or help with the crimes. The public officials, business enterprises, and private individuals would be indicted as well so long as it is proven that they played a role in the organization of the crime because they are used by the group as an instrument to achieve criminal activity or they acquired such money or goods from organizations/people through illicit means.

Legislation in the Philippines

A. Conspiracy

There are no laws in the Philippines to eradicate racketeering. The nearest law would be Article 8 of the Revised Penal Code. The said provision says that conspiracy exists when two or more persons come to an agreement concerning the commission of a felony and decide to commit it. To establish conspiracy, the following elements must concur: (1) two or more persons came to an

agreement, (2) the agreement concerned the commission of the felony, and (3) the execution of the felony was decided upon. It is fundamental for conspiracy to exist that there must be unity of purpose and unity in the execution of the unlawful objective.[59] In a conspiracy, an act committed by one is considered an act committed by all. Once the prosecution establishes conspiracy beyond a reasonable doubt, all conspirators will be held equally accountable for the felony committed, even if not all conspirators engaged in the actual conduct of the crime. Thus, the prosecution needs to prove not just the offense itself, but also the conspiracy beyond a reasonable doubt.

The components of conspiracy, like the actual act constituting the crime, must be established beyond a reasonable doubt. The established rule is that proof of real assistance, rather than mere knowledge or agreement of unlawful conduct, is necessary to prove conspiracy. Positive and convincing evidence must be shown to prove a conspiracy. It must be established as unequivocally and persuasively as the conduct of the crime. A person's mere presence at the scene of a crime does not automatically qualify him as a conspirator since conspiracy transcends companionship.[60] The conspiracy to commit a crime must be conscious, and it must exceed companionship. Thus, mere attendance at the site of the crime does not constitute conspiracy in and of itself. Even knowledge of, or consent to, or willingness to collaborate with, a conspiracy is insufficient to render one a party, without direct involvement in the commission of the crime with the intent of furthering the common plan and goal.[61] Exceptions to the rule of non-prosecution of conspiracy are conspiracy and proposal to commit coup d'etat, rebellion, or insurrection.[62]

B. Senate Bill No. 1285 introduced by Senator Manny Villar

This Senate Bill titled, "Anti-Racketeering and Organized Syndicates Act" did not manage to grow into a law. The explanatory note of the law explains that the relentless growth of organized and syndicated crime has significantly harmed the government's development efforts. What is dejecting is law enforcement officers' and government officials' participation in organized crime. Consequently, a new class of criminals emerged: the criminal aristocracy. Thus, the State places a premium on implementing and executing new and harsher laws against organized crime to improve the country's peace and order situation. This proposed bill intended to end to the rule of crime

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[59] Luis Reyes, Revised Penal Code Book I, p. 131, (19th Ed. Manila, 2017)

[60] *People vs Comadre*, GR 153559, June 8, 2004

[61] *People vs Salga*, GR 233334, July 23, 2018

[62] An Act Revising The Penal Code and Other Penal Laws, Act No. 3815, article 136, (1930)

lords – abduction, vehicle theft, drug trafficking, and organized gambling — who have been laundering the revenues of these crimes into legal businesses. It is the policy of the State to give priority to enacting and enforcing new and stronger measures against organized criminality to enhance the peace and order condition of the country.[63]

"Racketeering activity" is defined in the bill as any attempt or act involving kidnapping, murder, homicide, or illegal possession of a firearm; robbery, bribery, and other anti-graft and corrupt practices, gambling and belting, misappropriation of funds or property; engaging in monetary transactions improperly derived from the bill's specified unlawful activities; and blackmail. This bill creates new offenses, including direct or indirect participation in an enterprise, engaged in a pattern of racketeering activity; using or investing money or property obtained through a pattern of racketeering activity; acquiring or maintaining interest or control in any business or enterprise through a pattern of racketeering activity, and conspiring to commit any of the aforementioned acts. Anyone who breaches the legislation receives a harsh ten- or twelve-year jail sentence. If the infringement is based on racketeering activities, the maximum punishment is life imprisonment or execution, with a fine of one hundred thousand pesos (P100,000.00) to one million pesos (P 1,000,000.00). Additionally, offenders lose any interest, security, claim, or property gained via the willful violation of the law.[64]

Prohibited Activities are:

It is criminal for any individual to associate with or participate in any company that engages in a pattern of racketeering activities, whether directly or indirectly.

It is forbidden for any person who has obtained money or property as a result of a pattern of racketeering conduct to use or invest any portion of such money or property, directly or indirectly, in any investment in the creation or operation of any company, legitimate or illegitimate.

It shall be criminal for any individual to acquire or' retain by force any stake or control of any company, enterprise, legitimate or illegitimate, via a pattern of racketeering conduct.

No person shall collude to violate any of the requirements of subsections (1), (2), or (3).[65]

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[63] Anti-Racketeering and Organized Syndicates Act, Senate Bill No. 1285, 15th Cong, 1st Sess, 2013, SEC. 2. Declaration of Policy

[64] *Id.*

[65] *Id.*

Evidence required – The Court may receive and evaluate evidence and information that would be inadmissible under the rules of evidence during the hearing on the writ of preliminary injunction. At a hearing to prosecute breaches of this statute, the solitary testimony of a participant or conspirator, if credible, may be used to convict the other defendants.[66]

Relevant U.S. Jurisprudence

The Cowboy Mafia

During the 1970s, a network of marijuana smugglers known as the Cowboy Mafia operated in the United States. They were considered the most prolific drug traffickers in Texas at the time. The group imported about 106 tons of marijuana in 1977 and 1978. The smuggling ring's 26 members were convicted in 1979. [67]

Rex C. Cauble appealed his conviction on a ten-count indictment alleging he broke the Racketeer Influenced and Corrupt Organizations Act (RICO), the Travel Act, and misapplied bank funds. Cauble, a rich Texas businessman, was suspected of being the "Cowboy Mafia's" range boss, a loosely-knit gang responsible for importing and trafficking roughly 147,000 pounds of marijuana between 1976 and 1978. Cauble was charged with substantive RICO violations based on the conduct of an enterprise through a pattern of racketeering activity and the investment of racketeering activity income in an interstate enterprise, conspiracy to violate RICO, three violations of the Travel Act, and four counts of misapplication of bank funds, according to the indictment.

The Court decided, after reviewing the sixteen-volume record, that the trial was fair, the evidence was substantial, and the claims of mistake were unfounded. Cauble Enterprises, a formal partnership comprising of Cauble, his wife, and his son, was accused in this case as the enterprise utilized in violation of both paragraphs (a) and (c) of Section 1962. The statute's Section 1962(a) forbids the use of criminally obtained cash to acquire or retain a stake in a business via legal methods. The unauthorized use of a business is prohibited under Section 1962(c). A conspiracy to violate RICO's substantive provisions is criminal under Section 1962(d), which requires the government to establish that the defendant agreed to engage in the enterprise's operations via a practice of racketeering. Each provision stipulates that the business must have an impact on interstate trade. RICO makes it illegal for a business to engage in a pattern of racketeering behavior, not only for the defendant to

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[66] *Id.* at 2.

[67] U.S. v. Hawkins, et al., 658 F.2d 279 (1981)

engage in a racketeering crime. As a result, there must be a link between the business, the defendant, and the racketeering pattern.

Cauble claims that the government failed to establish beyond a reasonable doubt that he assisted and abetted either the smuggling incidents or the acts of travel, and so the proof of the RICO predicate charges was insufficient. When assessing whether the evidence is adequate, the court considers whether a reasonable jury might have been satisfied beyond a reasonable doubt of the defendant's guilt. Hawkins and Washington both testified that Cauble was aware of the smuggling, in their judgment. Foster informed McKesson that Cauble was aware of the smuggling, according to McKesson.

Cauble's knowledge was also supported by a large amount of circumstantial evidence. This included Cauble Enterprises' large loans to Foster, including one that was to be reloaned to Hawkins, Cauble's communications with Carlos Gerdes, his trips to Las Vegas, his paying Foster to look for a boat, and his making significant changes in Cauble Enterprises' business practices during the smuggling years. There was further testimony that only Cauble had the authority to allow the usage of the plane. One of the pilots was fired for flying the plane without Cauble's approval to get it cleaned. This evidence lent credence to the theory that Cauble was aware of the plane's many purposes. Cauble claims that the government failed to establish that he was in any manner culpably linked with any firm, hence all of his RICO convictions must be overturned. The Court sees this as a challenge to the government's proof of both a RICO enterprise and a link between the enterprise, racketeering acts, and Cauble.

Cauble claims that the government's evidence only established that the racketeering actions were undertaken by and linked to a business—in reality, the "Cowboy Mafia," and that the government, therefore, failed to adduce sufficient evidence to show that Cauble Enterprises was the RICO enterprise. The existence of an enterprise is "proven by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit," according to the Supreme Court in Turkette. In cases where the government alleges that a legal entity is an enterprise, proof that the entity has a legal existence satisfies the enterprise element. This is because, by definition, a legal entity, such as a partnership, has a discernible structure, functions as a continuous unit, and serves a single purpose for its members and workers.

Cauble Enterprises is a limited partnership created under Texas law, according to the government's documentation. It demonstrated that the partnership has a structured organization and has been in operation since 1972 to maximize long-term capital appreciation for the participants. It showed that

Cauble Enterprises is distinct from both the person, Rex C. Cauble, and the racketeering activities it was attempting to prosecute. The government accomplished its burden of showing the enterprise aspect after demonstrating the existence of this entity.

Cauble claims that the government's evidence showed a link between smuggling and the "Cowboy Mafia," rather than Cauble Enterprises. As a result, he claims that the evidence was inadequate to show that he "conducted" Cauble Enterprises' activities "via" racketeering crimes. Because the Court believes a reasonable jury may infer Cauble assisted and abetted the commission of the accused racketeering activities, they want to know if his position in Cauble Enterprises helped the crimes' commission and if the acts harmed Cauble Enterprises. A reasonable jury may find, based on the evidence, that none of the acts of travel would have occurred if Cauble had not been able to send the Cauble Enterprises jet and utilize the assets of Cauble Enterprises to pay for commercial flights. Furthermore, a jury may plausibly find that Cauble's position in Cauble Enterprises enabled him to make monies available for loans, ranches, and other assets of the company that the smugglers exploited. As a result, the government's proof was adequate to show that the defendant's position in the company aided in the conduct of the racketeering offenses.

Cauble was charged with ten felonies, including three charges of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), three counts of violating the Travel Act, and four counts of misapplication of bank money. In 1982, a jury found him guilty on all counts. Cauble was sentenced to consecutive five-year terms on each count and compelled to renounce his interest in Cauble Enterprises. Cauble was freed from jail after spending five years based on time served and good behavior. Cauble pled not guilty and maintained his innocence until his death. He was charged with ten charges, including three counts of violating the Racketeer Influenced and Corrupt Organizations (RICO) law, three counts of violating the Travel Act, and four counts of misapplication of bank money. He was convicted on all charges in 1982 by a jury. He was sentenced to five years in prison on each count and his stake in Cauble Enterprises was forfeited. He was freed from jail following a five-year sentence based on time served and good behavior. Cauble maintained his innocence throughout his life.[68]

Gambino crime family

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[68] *U.S. v. Rex C. Cauble, Individually and Doing Business As Cauble Enterprises,* 706 F.2d 1322 (5th Cir. 1983), Aug. 11, 1983

Gambino crime family is a mafia in the U.S. Its illicit activities include labor and construction racketeering, gambling, loansharking, extortion, money laundering, prostitution, fraud, hijacking, and fencing. LoCascio rose to prominence in the 1950s as a bookmaker and loanshark for the Gambino family. He was then raised to the rank of caporegime of a crew in the Bronx, New York. After leader Paul Castellano's assassination in December 1985, Gotti became the new Gambino boss, and LoCascio became a member of his inner circle. When underboss Joseph Armone was imprisoned in 1987, LoCascio assumed the role of acting underboss; subsequently, when Gotti reorganized his administration, appointing Salvatore "Sammy the Bull" Gravano to Armone's post, LoCascio assumed the role of acting consigliere. Gotti was one of the most powerful and violent criminal leaders in the United States during his heyday. Gotti was convicted of five murders, murder conspiracy, racketeering, obstructing justice, tax evasion, unlawful gambling, extortion, and loansharking in 1992.[69]

The indictment's first and second counts accused Gotti and Locascio of substantive and conspiracy RICO offenses. Numerous offenses alleged as racketeering actions in the RICO charges were also charged separately in the indictment. Gotti was charged with the following predicate acts: conspiracy to kill and murder Paul Castellano, Thomas Bilotti's murder, conspiracy to murder and murder Robert DiBernardo, conspiracy to murder and murder Liborio Milito, and obstruction of justice during the Thomas Gambino trial. Gotti and Locascio were charged with the following predicate acts: conspiracy to murder and murder Louis DiBono, conspiracy to murder Gaetano Vastola, operating an illegal gambling business in Queens, New York, operating an illegal gambling business in Connecticut, conspiracy to make extortionate credit extensions, and obstructing justice in the investigation of the Castellano murder. Gotti and Locascio were additionally charged with conspiracy to impede grand jury investigations, bribery of a public official, and conspiracy to defraud the United States on separate charges. On April 2, 1992, John Gotti and Frank Locascio were convicted of RICO violations and eventually sentenced to life in prison.

The Gambino family was regarded as the most powerful American mafia family at the time of his takeover, with annual revenue of $500 million.[70]

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[69] *U.S. v. Locascio,* 6 F.3d 924, 2d Cir., October 8, 1993

[70] Susan Heller Anderson and David W. Dunlap, NEW YORK DAY BY DAY; Seeking Castellano's Killers, THE NEW YORK TIMES, 1, (December 30, 1985), https://web.archive.org/web/20130501190153/http://www.nytimes.com/1985/12/30/nyregion/new-york-day-by-day-seeking-castellano-s-killers.html

The Chicago Outfit

The Chicago Outfit (alternatively referred to as the Outfit, the Chicago Mafia, the Chicago Mob, the Chicago crime family, the South Side Gang, or The Organization) is a 19th-century Italian-American organized criminal organization headquartered in Chicago, Illinois. The Outfit grew to prominence in the 1920s under the leadership of Johnny Torrio and Al Capone, and the decade was characterized by deadly gang fights over control of illegal alcohol distribution during Prohibition. The Outfit has been involved in a variety of criminal activities since then, including loansharking, illicit gaming, prostitution, extortion, political corruption, and murder. Capone was convicted of income tax cheating in 1931, and Paul Ricca took over as leader of the Outfit. From 1943 until he died in 1972, he shared authority with Tony Accardo; with Ricca's death, Accardo assumed total control of the Outfit and was one of the longest-serving bosses of all time until his death in the early 1990s. Though it never completely dominated organized crime in Chicago, the Outfit has long been the most powerful, brutal, and biggest criminal organization in the city and the Midwest in general. Unlike other mafia groups, such as the Five Families of New York City, the Outfit has always been a united group.[71]

Apart from murder, the indictments include extortion of financial payments from multiple persons as "street tax" to enable them to conduct different companies, as well as providing usurious loans dubbed "juice loans." These loans bore interest rates ranging from 1 to 10% every week, equating to 52 to 520 percent per year. When the conspirators made juice loans, they relied on the borrower's understanding that delaying or failing to repay the loans could result in the use of violence or other crimes against the borrower, and indeed, the conspirators used violence, intimidation, and threats to collect these debts; conducting, managing, and owning all or part of illegal gambling businesses in violation of Illinois law, including illegal sports betting and video gambling machines. Members and associates of the Outfit collected debts incurred in connection with these illegal gambling businesses; using violence, intimidation, and threats to instill discipline within the Outfit by requiring adherence to its edicts and instructions; and punishing behavior by Outfit members, associates, and others that the Outfit's hierarchy believed was detrimental to the Outfit's interests; obstructing justice by intimidating,

[71] Family Secrets Of the Murderous Kind, FEDERAL BUREAU OF INVESTIGATION, 1, (October 1, 2007), https://archives.fbi.gov/archives/news/stories/2007/october/famsecrets_100107

harming, and killing witnesses and potential witnesses and; keeping detailed documents and ledgers of their loansharking and bookmaking operations.[72]

Government officers

A civil RICO complaint filed in federal court in Hartford against two Connecticut attorneys has survived the lawyers' summary judgment arguments and is scheduled to enter trial next week. Leonard A. Fasano and Todd R. Bainer face charges of wire, mail, and bankruptcy fraud in connection with a scheme to conceal their client's assets from a judgment creditor. Fasano is a partner in Fasano, Ippolito & Lee in New Haven. He is also a former Republican state senator and assistant minority leader. Bainer is a Branford attorney. Their alleged misbehavior stretches back to 1998, when Cadle Company, a nationwide debt collection firm, attempted to collect a $90,747 federal judgment against Fasano's client Charles Flanagan for defaulting on a $75,000 loan. Bainer served as general attorney for Thompson & Peck Inc., a New Haven-based insurance firm that Flanagan co-owned with Stanley Prymas, another co-defendant in Cadle's civil Racketeer Influenced and Corrupt Organizations Act complaint.[73] In 2005, a federal jury fined Fasano $500,000 under the RICO statute for fraudulently assisting a client in concealing assets during a bankruptcy lawsuit.[74]

Another case is that a federal grand jury indicted and Michael Conahan on Wednesday, charging the former Luzerne County judges with racketeering, extortion, bribery, money laundering, fraud, and tax evasion. According to a press release issued by U.S. Attorney Dennis Pfannenschmidt, the indictment alleges Conahan and Ciavarella received millions of dollars in illegal payments in connection with improper actions they took to facilitate the construction and operation of the PA and Western PA Child Care juvenile detention centers. Prosecutors are also seeking forfeiture of at least $2.8 million, which

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[72] Patrick J. Fitzgerald, 14 Defendants Indicted For Alleged Organized Crime Activities;"Chicago Outfit" Named As Rico Enterprise In Four-Decade Conspiracy Alleging 18 Mob Murders And 1 Attempted Murder, U.S. DEPARTMENT OF JUSTICE UNITED STATES ATTORNEY NORTHERN DISTRICT OF ILLINOIS, 1, (April 25, 2005), https://www.justice.gov/archive/usao/iln/chicago/2005/pr0425_01.pdf

[73] Lawyers Face Civil RICO Charges, LAW, 1, https://www.law.com/ctlawtribune/almID/900005429159/Lawyers-Face-Civil-RICO-Charges/?slreturn=20211118035346

[74] Perception Not Reality Is What Counts, LAW, 1, (July 4, 2005), http://www.ctlawtribune.com/id=900005432056/Perception-Not-Reality-Is-What-Counts?mcode=0&curindex=0

they claim is the profits of illegal behavior, according to the announcement.[75] Former Luzerne County Court of Common Pleas Judges Michael Conahan and Mark Ciavarella were indicted by a federal grand jury in the Middle District of Pennsylvania on 48 counts. Many local and national press termed the situation the "Kids for Cash Scandal." Mark Ciavarella was found guilty of racketeering by a federal jury on February 18, 2011, for his role in taking illicit payments from Robert Mericle, the creator of PA Child Care, and Attorney Robert Powell, a co-owner of the institution. In federal court, Ciavarella is charged with 38 further charges.[76]

Other pending cases

Several persons have filed a class-action lawsuit against a group that they claim pushed a bogus land transaction that promised tax benefits but ended up costing the participants money while generating millions of dollars for the promoters and their associates. It was filed in the U.S. District Court for the Northern District of Georgia on behalf of the individuals who were victims of land fraud. The lawsuit was filed against promoters of certain syndicates, which are defined as a group of partnerships under federal law but limited liability companies under state law. To the best of their ability and with the intent of claiming tax deductions for granting a conservation easement on the land—in which the landowner gives up the right to develop the land—the promoters persuaded the participants to acquire stakes in the syndicates, according to the lawsuit. If a taxpayer meets the conditions of Section 170 of the Internal Revenue Code, he or she may be entitled to claim a charitable deduction equal to the value of the easement that was donated (h). However, if the IRS disallows the deduction or determines that the value of the donated rights was artificially inflated, the taxpayer may lose the deduction as well as incur hefty financial penalties. The Internal Revenue Service has been attempting to limit the use of syndicated conservation easements for some years.

It was alleged by the taxpayers in their lawsuit that the defendants engaged in organized crime by persuading hundreds, if not thousands, of clients to follow the approach even though they were aware that it was "fatally defective." In the complaint, it is stated that "this racketeering enterprise injured Plaintiffs and the Class by causing Plaintiffs and the Class to pay

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[75] Terrie Morgan-Besecker, Ex-judges hit with 48 counts, TIMES LEADER, 1, (September 10, 2009), https://www.timesleader.com/archive/264043/stories-ex-judges-hit-with-48-counts118222

[76] Distraught mother confronts Ciavarella outside courthouse – VIDEO, TIMES LEADER, 1, (February 19, 2011), https://web.archive.org/web/20110220000624/http://www.timesleader.com/news/Deliberations-resume-in-CIavarella-trial.html

substantial fees and transaction costs, be subjected to interest and penalties from the IRS, and incur additional accounting and legal fees and expenses to deal with the IRS fallout."[77]

Another case is healthcare fraud. Federal prosecutors say that eleven persons, including the mayor of Socorro, two lawyers, and numerous current and former public officials, utilized a bribery and kickback scheme to acquire contracts for Access HealthSource, a local healthcare provider. The inner workings of the company were revealed in a 27-page indictment made public on Thursday. They are all charged with six counts of bribery and fraud in the indictment. The majority of them are also accused of breaking the Racketeer Influenced and Corrupt Organizations Act (RICO). Access "manipulated" public authorities to gain contracts worth up to $150 million, according to David Cuthbertson, the FBI special agent in charge in El Paso. Other firms that competed for health-care and legal contracts in school districts and the county, he continued, were also victims of these charges. Cuthbertson stated, "There are genuine vendors who have been denied of their rights to compete fairly and truthfully." For many years, Access served as a third-party administrator for local governments' healthcare programs. Access held contracts with the city, county, and three major school districts between 1998 and 2007. This is the eighth indictment in a long-running FBI investigation that began in 2004. 13 people have pled guilty to criminal activity as a result of the inquiry thus far. A total of 17 suspects are included in the seven indictments.[78]

Critique on the RICO Law

A. Questions of Constitutional Law

Various sections of RICO have been challenged on several constitutional grounds throughout the years. Most of them go after the RICO scheme in general or the forfeiture component in particular. Vagueness, ex post facto, and double jeopardy have all been used as broad challenges. The right to counsel, high penalties, cruel and unusual punishment, and estate forfeiture have all been used to challenge the legitimacy of RICO forfeiture.

1. *Double Jeopardy* – Even a broad explanation of RICO raises concerns about double jeopardy and ex post facto issues. RICO is built on the backs of

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[77] Aysha Bagchi, Participants in IRS-Targeted Land Deals Sue Alleged Promoters, BLOOMBERG TAX, 1, (March 28, 2020), https://news.bloombergtax.com/daily-tax-report/participants-in-irs-targeted-land-deals-sue-alleged-promoters

[78] Ramon Bracamontes and Gustavo Reveles Acosta, Public corruption: Feds allege bribery, kickbacks, EL PASO TIMES, 1, (September 3, 2020), https://archive.md/20120729165544/http://www.elpasotimes.com/news/ci_15979435

other crimes. At first look, double jeopardy seemed to bar any attempt to prosecute someone with RICO for a crime for which they had previously been tried. Similarly, ex post facto appears to exclude a RICO accusation based on a predicate offense committed before RICO was adopted or before the felony was added to the RICO predicates list. On closer inspection, neither creates insurmountable challenges in the vast majority of cases. The Constitution's double jeopardy provision states that no one "should be subjected to being twice put in peril of life or limb for the same offense." It criticizes numerous prosecutions or penalties for the same offense in general terms. Multiple penalties are prohibited as a preventive measure. Unless otherwise stated, it is assumed that Congress does not intend to impose numerous penalties for the same offense. Nonetheless, the courts have determined that Congress intended to allow "consecutive sentences for both predicate conduct and the RICO offense," as well as the substantive RICO offense and the RICO conspiracy to commit the substantive RICO offense. [79]

Multiple prosecutions face an even higher hurdle. The Supreme Court has traditionally followed the so-called Blockburger rule, which holds that offenses are considered similar if they have the same features unless one demands proof of an element that the other does not. According to the courts, the Double Jeopardy Clause does not preclude repeated RICO prosecutions of the same defendants on counts involving different predicate acts, enterprises, or patterns. In the instance of several prosecutions of the same business, they have been more open to double jeopardy arguments. They have used a totality of the circumstances test, which looks at things like "(1) the time of the various activities charged as parts of [the] separate patterns; (2) the identity of the persons involved in the activities under each charge; (3) the statutory offenses charged as racketeering activities in each charge; (4) the nature and scope of the activity the government seeks to punish under each charge; and (5) the places where the activities took place under each charge." The Supreme Court's affirmation of the dual sovereign doctrine's ongoing validity in *Gamble v. United States* shows that the Double Jeopardy Clause does not bar further state-federal prosecutions.

If the law would be legislated in the Philippines, absorption of crimes can be applied. There is a rule known as "Hernandez doctrine" that states that the elements of a crime are integrated into the overall offense and cannot be punished separately or by applying Article 48 of the Revised Penal Code to the individual elements.

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[79] RICO: A Brief Sketch, supra note 42, at 30.

2. *Ex post facto clause* – Ex post facto clauses prohibit punishment for past conduct that was not a crime at the time it was committed, increased punishment over that which accompanied a crime at the time it was committed, and punishment made possible by the removal of a defense that existed at the time the crime was committed. However, because RICO offenses are thought to continue from the beginning of the first predicate offense to the commission of the last, a RICO prosecution can be challenged ex post facto even if it is based on pre-enactment predicate offenses if the pattern of predicate offenses spans the legislative action date. Furthermore, prosecutions are becoming less likely to rely on pre-RICO enactment predicate charges as time goes on.[80]

In the Philippines, Ex post facto clause is written in the 1987 Constitution. However, to guarantee against the punishment for past conduct that was not a crime at the time it was committed, legislators could insert a provision in the law to further flesh out the Constitutional mandate.

3. *Ambiguity* – The void-for-vagueness theory mandates that criminal legislation specify the criminal crime in such a way that ordinary people may grasp what activity is forbidden while also avoiding arbitrary and discriminatory enforcement. After Justice Scalia and three other Justices hinted at its vulnerability to such a challenge, vagueness became a more popular constitutional target for RICO critics. Following that, the courts appear to have consistently rejected the argument that RICO is unconstitutionally vague, either in general or as applied to the facts at hand.[81]

In the Filipino setting, void-for-vaguness doctrine is usually discussed only for free speech or defamation laws. However, legislators could be more specific in definition of terms and enumerating the prohibitions in the bill. An Implementing Rules and Regulation would be a good accompaniment to the bill. The DOJ, in its enforcement of the law, may release internal rules regarding its enforcement, stating further the specifics of the law.

4. *Cruel and Unusual Punishment* – The Cruel and Unusual Punishment Clause of the Eighth Amendment prohibits the imposition or execution of punishment that is disproportionate to the offense of conviction. As a result, it prohibits the imposition of an obligatory life sentence without the possibility of parole for homicides committed when the accused was under the age of 18,

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[80] *Id.* at 31.

[81] *Id.*

but only if the sentencing authority has the discretion to impose a less harsh punishment.[82]

This is also guaranteed by the 1987 Constitution. This problem, if this would be present in the Philippines's RICO bill, is easily remedied by inserting a provision on penalties and computation thereof. The Department of Justice also releases internal rules for computation of penalties to flesh out crime legislations and the corresponding punishments.

B. Commentaries

In a criminal RICO case, the judge and jury are prohibited from inferring an adverse inference from a defendant's use of the Fifth Amendment privilege against self-incrimination. In a civil RICO lawsuit, however, there is no such prohibition. Critics argue that forcing a party in a civil RICO case who is concerned about future criminal responsibility to renounce his or her fifth amendment privilege to mount an effective civil defense is unjust. Once a party gives testimony in a civil lawsuit, the privilege against self-incrimination is essentially forfeited, and the testimony can be utilized in a future criminal prosecution. Critics argue that the RICO Act should be changed to allow a civil RICO case to be stayed (delayed) until a criminal RICO proceeding is completed.

The punishments are so severe that they may be disproportionate to the seriousness of the offense. Crtics have compared the employment of RICO to stomping on a bug with a sledgehammer. The statute stipulates a 20-year jail sentence for each conviction of racketeering, as well as the forfeiture of the defendant's full stake in the "racketeering business," even if only a small portion of the money was obtained via illicit means.

Because RICO allows for asset freezing before trial, firms or people accused of RICO offenses may face financial devastation before even going to trial. The Princeton/Newport defendants' attorneys argue that the firm was put out of business before the trial due to the freezing of millions of dollars in assets.

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[82] RICO: A Brief Sketch, supra note 42, at 32.

in the "racketeering business," even if only a small portion of the money was obtained via illicit means.[83]

Similar Situation in the Philippines

If a similar law, more or less patterned after the RICO law, is enacted in the Philippines, it would help eradicate various criminal organizations in both the private and public sectors. Below are some of the notorious syndicates and scams that gripped the nation:

A. Gangs

Bahala Na Gang

Divino Talastas, a native of Bulacan born in the early 1920s and subsequently relocated to Sampaloc with his siblings, founded the Bahala Na Gang in Sampaloc, Manila, Philippines, in the early 1940s. The Bahala Na Gang grew in popularity among Filipino immigrants in the United States, particularly in California. Sets of Bahala Na Gang appeared in the San Diego, Los Angeles, San Jose, San Francisco Bay Area, Stockton, Sacramento, and Las Vegas areas of Nevada. Older members, who are often in their 50s, make up the majority of the organization's membership.

The Bahala Na Gang has been one of the most sought-after criminal gangs in the fight since President Rodrigo Duterte launched his drug campaign in 2016. On August 17, 2017, 25 accused criminals, including one gang member, were slain in separate police shootouts and narcotics raids. On April 18, 2019, a gang member was shot and killed in Manila street. Nio Baccay, a member, was apprehended in a buy-bust operation in Quezon City in 2017. He was found guilty of illegally selling methamphetamine. After a tip and diligent observation, BNG member Crisanto Maguddatu was apprehended by the Manila Police District in Sampaloc, Manila, in 2018. During the raid, a packet of shabu and a .38 caliber pistol were discovered with him. Robert Yabut y Marmol and Raymart Yabut y Marmol, members of the Sigue Sigue Sputnik (gang), Sputnik gang, were apprehended in a buy-bust operation in June 2020. Gerald Agustin and May Junio were also apprehended in late October 2020 for three sachets of shabu valued at 81,600 pesos.[84]

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[83] Shannon P. Duffy, HMOs Can't be Sued Under RICO Without Claims of Actual Injuries, THE LEGAL INTELLIGENCER, 1, (August 14, 2000). https://law.jrank.org/pages/9629/Racketeering-RICO-IN-NEED-FEFORM.html

[84] Richard C. Paddock, Tahoe Towns Grapple With a Big City Problem—Gangs, LA TIMES, 1, (March 14, 1993), http://articles.latimes.com/1993-03-14/news/mn-907_1_lake-tahoe

The precise translation of this gang's name (Come what may) reveals its political leanings. The Bahala Na's appeared to have the least organization and were constrained by the fewest regulations, other than allegiance, of the four gangs. These gang members were almost "psychopathic" in their outlook, often referring to "thrill kills" or raiding rivals merely for the fun of it.[85]

Sigue Sigue Sputnik Gang

The Sigue Sigue Spitnik Gang is one of the most powerful and well-known gangs in Manila, with influence and territory extending across the slums of Tondo. They are also one of the gangs that operate in Manila's biggest prisons, such as Manila City Jail and New Bilibid Prison. This group was perhaps the most structured and well-organized combat gang in the Manila City Jail at the time of this investigation. The gang's slogan indicates the organization's combative nature: "He who comes to destroy us will be annihilated himself." This is an obvious allusion to the Sputniks' belief that "Province Mates" such as the Visayan OXO group had "invaded" Manila's Tagalog region. There appears to be a complex value system at work here that revolves around loyalty and involves at least four Filipino concepts: Pakikisama (friendship), Napasubo (a circumstance from which one cannot withdraw once committed), Hiya (shame), and Utang Na Loob (gratitude).[86]

There are the joint operatives of the Regional Intelligence Division, NCRPO; MPD Police Station 4 (Sampaloc, Manila Police District; and Manila District Field Unit for the successful arrest of the leader of the Sigue-Sigue Sputnik Gang and Nonoy Robbery/Snatching Group along Loreto St. Sampaloc, Manila on July 27, 2020, at around 4:00 PM. The operation was part of the "OPLAN PAGTUGIS," in which operators undertook a manhunt for a wanted individual, which culminated in the suspect's capture. Rolando Loyola a.k.a Eduardo Loyola Jr. y Quinagoran & a.k.a. Nonoy, male, 29 years old, unmarried, jobless, and a resident of no. 87 Loreto St. Sampaloc, Manila, according to the investigation report. The above-mentioned suspect is wanted for violating Republic Act 7610, as evidenced by a pending warrant of arrest issued by HON. Judge Silverio Q. Castillo of Regional Trial Court, Branch 48, Manila on December 14, 2016, with a bail recommendation of Php 80,000.00.

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[85] Franklin G. Ashburn, Some Recent Inquiries Into The Structure-Function Of Conflict Gangs In The Manila City Jail, UNIVERSITY OF THE PHILIPPINES ASIAN STUDIES, 138

[86] *Id.* at 134.

Before the warrant was returned to the originating court, the apprehended suspect was sent to MANILA DFU for appropriate paperwork and disposal.[87]

OXO Gang

The OXO Gang: The OXO brand, which was created in the National Penitentiary in Muntinlupa in 1956 in reaction to "maltreatment by the Tagalogs," was the other significant combat gang imprisoned. It was among the OXO's that a strong lingual and cultural rivalry developed. According to the members questioned, the Tagalogs see them (the Sigue Sigue Sputniks, both in and out of jail) as members of a lower socioeconomic level and as "dumb." As a result, the Visayans had to band together to "defend themselves against mistreatment."

All of the OXO members interviewed insisted on having "good employment" and being diligent workers. When the "Manila Boys" (described as "pure Tagalogs") refuse to let them live and work in peace, conflict ensues. They must then protect their dignity, pride, and "territories." The requirements for leadership, as well as the position and function of individual gang members, were hazy, except for group devotion and an almost obsessive passion for "friendship" and brotherhood. The "regulations" are passed down down the generations by word of mouth, and there appears to be no complex or sophisticated ritual of trial and punishment for those who violate social standards.[88]

B. Political issues

Hello Garci Scandal (Gloriagate)

Former President Gloria Macapagal Arroyo was implicated in the controversy for allegedly rigging the 2004 national election in her favor. Arroyo and Noli de Castro were elected to the presidency and vice presidency, respectively, according to the official election results. During this election, hundreds of national and municipal offices were also up for grabs. The controversy and crisis began in June 2005, when audio recordings of President Arroyo and then-Election Commissioner Virgilio Garcillano on the phone,

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[87] Leader Of Sigue-Sigue Sputnik Gang And Nonoy Robbery/Snatching Group Arrested In Sampaloc, Manila, PHILIPPINE NATIONAL POLICE, 1, (July 28, 2020), https://ncrpo.pnp.gov.ph/leader-of-sigue-sigue-sputnik-gang-and-nonoy-robbery-snatching-group-arrested-in-sampaloc-manila/

[88] ASHBUM, supra note 85, at 137.

purportedly discussing the manipulation of the 2004 national election results, were made public.

Arroyo conceded that it was her voice on the tapes in a statement released on June 27, 2005, but argued that the talk was not about cheating the polls. Despite this, she apologized to the country and stated that the call was a "mistake of judgment." Garcillano made his first public appearance in July 2005, denying suspicions of cheating. Arroyo's Cabinet members resigned, including those who persuaded her to perform the "I am sorry" broadcast. They also asked for the president's resignation. Arroyo did not resign.

When the minority in the lower chamber of Congress sought to impeach Arroyo, the situation became even worse. In September 2005, the Arroyo-led majority coalition prevented this, and no trial was held. Electoral fraud and its purported cover-up were among the allegations leveled against Arroyo and her suspected government allies. Some of the charges were refuted by the Arroyo government, while others were disputed in court. Attempts to impeach Arroyo were blocked by the House of Representatives, which was dominated by Arroyo's coalition. Virgilio Garcillano, Arroyo's most well-known suspected electoral commission collaborator, went AWOL for a few months before returning to the capital in late 2005. There are still allegations of suspected government conspirators who assisted in his escape, as well as another alleged cover-up. Garcillano denied any misconduct both before and after his abduction. The Department of Justice exonerated Garcillano of perjury allegations in December 2006.[89]

Pharmally Contract Deal Controversy

The Senate blue ribbon committee hearings revealed that Pharmally amassed P10 billion in pandemic deals between 2020 and 2021 although it was a small, newly formed firm lacking the financial resources, track record, and credibility necessary to handle large-ticket government procurement. What began as a probe on state auditors' findings that the Department of Health (DOH) misappropriated P67 billion in pandemic funding in 2020 morphed into a full-fledged dual congressional investigation of the Duterte administration's pandemic contracts. Among the officials implicated in the scandal are Bong Go, a former Duterte aide who became a senator, and Lloyd Christopher Lao, a former budget undersecretary who served as a volunteer election lawyer for the President and eventually headed the Department of

[89] Pauline Macaraeg, LOOK BACK: The 'Hello, Garci' scandal, RAPPLER, 1, (January 5, 2021), https://www.rappler.com/newsbreak/iq/look-back-gloria-arroyo-hello-garci-scandal/

Budget and Management's Procurement Service (PS-DBM). Lao had approved the Duterte administration's contracts with Pharmally.[90]

Maguindanao massacre

Fifty-eight people were killed in Ampatuan town, Maguindanao province, on Nov. 23, 2009. The dead included 32 journalists and media personnel, two attorneys, six motorists traveling the same road, and the wife and sisters of Esmael "Toto" Mangudadatu, who was deputy mayor of Buluan town in Maguindanao at the time. The Mangudadatu ladies were their route to Shariff Aguak to register Toto's candidacy for the 2010 gubernatorial elections. The convoy featured media professionals and members of the community press, including television and radio broadcasters.

The media practitioners and employees —mostly from General Santos City and Koronadal City — were covering the submission of Mangudadatu's certificate of candidacy, which his wife, Genalin, would handle. Additionally, the case epitomized the violence that has tarnished the country's electoral record. The Ampatuans were Maguindanao's governing clan: Andal Ampatuan Sr. was the province's governor, while Andal Jr., or Datu Unsay, was the mayor of Ampatuan town. Mangudadatu's challenge was newsworthy, a story that captivated not only the local community but the entire country. The Ampatuans became major partisans in national politics after then-President Gloria Macapagal Arroyo openly recognized them as significant friends. Genalin Mangudadatu's caravan drove via a route guarded by police checkpoints.

Personnel of the Philippine National Police (PNP) were charged in connection with the killings, including P/Cinsp. Sukarno Dicay, the 15th Regional Mobile Group's head at the time, as well as at least 60 other police officers and numerous members of the Ampatuan clan. Datu Unsay was arrested on suspicion of murder. This meant that the prosecution had to establish not only that he murdered the victims, but also that he did it in a manner that ensured his impunity. Additionally, the prosecution charged conspiracy.

On Jan. 5, 2010, the hearings began. Identifying such a large number of suspects required time. And some were not located. Only 81 of the 98 apprehended individuals had been arraigned by early 2013 With the number of defendants listed on the same charge sheet, no one can anticipate a speedy trial. Eight of the defendants died throughout the trial. Andal Ampatuan Sr. died of

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[90] Mara Cepeda, LIST: Everything you need to know about the Pharmally pandemic deals scandal, RAPPLER, 1, (December 17, 2021), https://www.rappler.com/newsbreak/iq/list-everything-need-to-know-pharmally-covid-19-pandemic-deals-scandal/

a heart attack in prison on July 17, 2015. Suwahid Upham, a prospective witness, was assassinated in June 2010. Upham stated in a media interview that he was one of those responsible for the victims' deaths and that Datu Unsay shot Genalyn Mangudadatu, Esmael "Toto" Mangudadatu's wife.

Witness – Esmael Enog was assassinated after testifying in court that he had been ordered by his employer, Alijol Ampatuan, to transport armed men to Barangay Malating, the location of the slaughter. Although only 31 people were initially charged with the massacre, the number of suspects was boosted to 197 after the Philippine National Police's Criminal Investigation and Detection Group (CIDG) added additional names to the list of suspects.[91]

C. Business scams

Aman Futures pyramid scam case

The Aman Group is a swindling gang that defrauded the investing public with an investment hoax dubbed "Ponzi Plan". The Aman Group established a shell corporation, the "Aman Futures Inc" purports to be allowed by the Securities and Exchange Commission to participate in future stock trading when, in reality, it is not. The firm collected investments from over 10,000 individuals and compensated them with significant interest rates within a short period. When the Aman Group learned that the NBI was investigating, the responders refused to cash out the investors' money, claiming that the investment was automatically reinvested.[92]

KAPA Investments Scam

Kapa Community Ministry International (Kapa) asserts that it has aided in the financial development of millions of Filipinos. It assured Filipinos that if they made a single gift, they would get 30% of the total for the rest of their lives. Despite the warning signs, Kapa's investors defended the organization and accused the government of being "anti-poor" for demanding the closure of the ostensible religious group. The organization's head, Pastor Joel Apolinario, claims to have as many as 5 million investors, making it one of the greatest hoaxes in Philippine history. The SEC said that although no one has come forward to file a complaint, they do have witnesses who can assist in

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[91] Center For Media Freedom And Responsibility (Cmfr) And Freedom For Media, Freedom For All Network, The Ampatuan Massacre: Summary of Case Trial, PHILIPPINE CENTER FOR INVESTIGATIVE JOURNALISM, 1, (December 18, 2019), https://pcij.org/article/3503/the-ampatuan-massacre-summary-of-case-trial

[92] Another Syndicated Estafa Case to be Filed Against Manuel Amalilio, Samuel Co and Other Respondents in Aman Futures Scam, DEPARTMENT OF JUSTICE, 1, (July 22, 2013), https://www.doj.gov.ph/news_article.html?newsid=207

building the case. To join Kapa, investors must complete a brief form and contribute a minimum of P10,000 and a maximum of P2 million. According to the contract, the contribution would be utilized to further Kapa's purpose of "religious faith promotion and creation of livelihood initiatives for the benefit of its members." Kapa guarantees that the money contributed will increase at a rate of 30% per month for the rest of the donor's life.

An individual who "donates" P10,000 per year would earn P36,000 per year, a return of 360 percent. In comparison to other forms of investing, mutual funds typically grow at a rate of between 5% and slightly more than 9%. According to the SEC, Kapa's money-taking activities constituted a Ponzi scheme, a kind of investment program that promises impossibly high returns and compensates investors using funds given by subsequent investors. Members from the beginning defend Kapa and testify to their financial gain. The issue is that the money they obtained was gained through the efforts of others. Without new members and further public investment, the pooled funds will expire after three months. Kapa combined traditional con artistry with cutting-edge technology. Due to social media, disinformation spreads more quickly this time. Kapa's method worked with a religious veneer and contemporary technologies. The SEC issued a warning against Kapa as early as 2017. The commission issued a halt and desist order in February 2019, followed by an order of revocation in April. Kapa's assets were frozen by the Court of Appeals on June 4. Simultaneous searches by the National Bureau of Investigation on many Kapa regional offices have already taken place.[93]

Legacy Group scam

The P14.1 billion fraud, which was initially disclosed by the Philippine Daily Inquirer in 2008, involves the defunct Legacy Group acquiring many financially ailing thrift and rural banks. It persuaded consumers to deposit their monies in these banks with high rates, after which the bank owner would siphon off cash, leaving the Philippine Deposit Insurance Corp. to pay up the insured deposits of the banks' clients that ultimately folded. The PDIC said in a statement that the Court of Appeals' 11th Division in Manila upheld the Monetary Board of the Bangko Sentral ng Pilipinas' decision to administratively indict Andrew Jereza, former manager of the Rizal

[93] Ralf Rivas, EXPLAINER: How Kapa Ministry took advantage of investors, RAPPLER, 1, (June, 11, 2019), https://www.rappler.com/newsbreak/iq/232805-explanation-how-kapa-community-ministry-took-advantage-investors/

Commercial Banking Corp.'s Bacolod branch, for "conducting banking business in an unsafe and unsound manner."[94]

Rigen scam

The Securities and Exchange Commission (SEC) has advised the public against investing in Davao-based Rigen Marketing, which has been soliciting investments with high-yielding claims of quick returns. Rigen, situated in Tagum City, Davao del Norte, entices investors with a guaranteed 400 percent return in as little as a month, the SEC stated in a May 24 alert. Rigen, for example, guarantees a P20,000 return on a P5,000 investment and a P150 registration fee. Meanwhile, a P50,000 investment plus a P1,500 registration cost might generate P200,000.[95]

The benefits and criticism of the US's RICO law weighed and analyzed; it is proposed that a law patterned after the RICO law be enacted in the Philippines. Considering the constitutional questions, the following guidelines taken from the United States Institute of Peace research policy on reforming criminal laws:

1. Assess the existing laws and criminal justice system - gathering all applicable laws, such as the state constitution, legal codes, legislation, rules, bylaws, standard operating procedures, relevant and binding precedents, and even executive or presidential edicts or decrees, is part of the legal framework assessment. This analysis will aid in determining which sections should be repealed, changed, or replaced, as well as which new ones should be included. To maintain conformity with international human rights or criminal law treaties to which the state is a signatory, new measures are often required. In the Philippines, it is better to assess first our Revised Penal Code and our special penal laws, identify the parts which are problematic, and which are redundant. It is also better if we skim through our international treaties such as human rights. It should be a relevant step because we need to comply with the agreements with the international treaty and at the same time avoid conflicting laws that most of the time are sources of judicial flip-flopping. Lawmakers should strive to harmonize our penal laws.

2. Criminal law reform is a holistic endeavor; changes to one part of the law may have unintended consequences in other areas - When actors choose the small-scale or focused, approach, they should be aware that changes in one area of the law

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[94] Jess Diaz & Aurea Calica, Legacy pyramiding bared, THE PHILIPPINE STAR GLOBAL, 1, (February 3, 2009), https://www.philstar.com/headlines/2009/02/03/436666/legacy-pyramiding-bared

[95] Doris Dumlao-Abadilla, Avoid Rigen Marketing, SEC tells public, INQUIRER, 1, (May 25, 2019) https://business.inquirer.net/271224/avoid-rigen-marketing-sec-tells-public

sometimes have unintended consequences in other areas. Reformers should evaluate the link between new, revised, and existing provisions throughout the criminal justice continuum and the larger legal framework when revising or adding new provisions to the law. Changes in criminal procedure laws, for example, may have ramifications for police powers or detention laws; changes in the criminal code, such as the addition of new criminal offenses, may necessitate changes in criminal procedure laws. In the Philippines, the best way for legislators to create this law is to construct an ad hoc committee in Congress. That way, they will have their own set of the team that will dedicate to studying such complex legislation.

3. Set realistic time boundaries for large-scale transformation; the process will take years, not months. - Given the flaws in domestic legislation in certain post-conflict nations, the urge to make large-scale changes quickly is understandable. However, a feeling of haste may lead to legislation being drafted so rapidly that they are unworkable when implemented. Given the time limits, prioritizing the areas that need improvement and focusing on the most crucial first is critical. In the Philippines, hurriedly adopted legislation, such as the Bayanihan Act for the COVID-19 outbreak, has caused uncertainty among law enforcement officials. It would be smart to study and design our RICO law carefully and deliberately to identify problematic areas.

4. Examine various legal models, but use caution when transferring laws from one state to another. - Legal provisions being transferred from one legal system to another is uncommon. In legal writing, references to past models are often employed, which may save the drafter from having to reinvent the wheel. The technique, on the other hand, is critical in deciding whether a transplant will be successful. Local conditions and culture, among other things, must be carefully addressed, as should several various legal frameworks that may be implemented. Foreign sources of law used in the development of new legislation will almost certainly need to be adapted for use in the new environment. It is far more practical for our legislators to pattern our RICO bill from the US RICO law, however, some considerations should be taken in the creation such as the social background of the people, culture, laws, and religion.

5. The procedure should be as comprehensive and wide as feasible - Police officers, judges, attorneys, paralegals, prosecutors, prison officials, court administrators, the staff of civil society organizations and victims' groups that specialize in criminal justice problems, law professors, and other criminal justice actors should all be consulted.

6. Calculate the impact of legislative changes on resources and finances – since RICO is a very complex law that involves multiple branches of the government cooperating and mobilizing the police forces in the best way possible to

eradicate criminal syndicates, it should be imperative to at least provide a budget for the implementation of such a law. New legislation should be examined in terms of resource consequences both before and throughout the drafting process. To allow drafters to assess the theoretical advantages of new legislation against its practical practicality, a financial study of the expected costs of proposed changes must be conducted, among other things.

7. Once laws have been adopted, the process of law reform does not cease - The application of new legislation should be prioritized during and after its formulation and approval. The most critical factor in ensuring efficient implementation is ensuring that criminal justice actors are informed of the new legislation and are trained in its provisions before it takes effect. Curricula at training institutions and universities will also need to be updated. It is also critical to raise people's knowledge of their new legal duties and rights; public education initiatives are critical in this respect.

Conclusion

This paper proposes to legislate criminalizing racketeering activity in the Philippines and to create a law more or less patterned after the US RICO law, an improved version that can better serve our problems with crime syndicates and corrupt politicians. The history and social milieu of racketeering and RICO law are discussed to provide a social context on why this law was enacted and its purpose for implementation such a rigid law. The cases have been discussed to measure the effectiveness of the law in purging criminal syndicates that have long plagued the US streets, such as the Cowboy Mafia, Gambino crime family, and corruption of taxes. To balance the proposal, the constitutional criticisms and critiques are tackled for it to be a consideration in creating such a complex law, as well as the pertinent recommendations for Philippine setting. Ex post facto laws, cruel and unusual punishment, and void-for-vagueness doctrine, and other constitutional doctrines are discussed as criticisms against the RICO law. Examples of situations in the Philippines that can be corrected by RICO law are also discussed to provide an application in the Filipino context, among which are Filipino crime gangs, business scams, and political scandals. As a product of this study, guidelines are created that will serve as a framework for our RICO bill if it were to be proposed.

ANG BATAS AT ANG BALAI (THE LAW AND THE HOME): ESTABLISHING THE RIGHT TO THE CITY AS A PATH TOWARDS LIBERTY AND SUSTAINABLE PROSPERITY*

*JYRUS B. CIMATU***

ABSTRACT

As globalization continues to entrench itself as the impetus in which political systems, economic trade, and sociocultural norms are hinged upon in various jurisdictions, cities have become the locus and hubs from which this operates. Cities became the spaces from which this global order is realized wherein political power is wielded and exercised, and also where business and economic trade is centered which leads to the massive exodus from one place and a continuous influx to the city which links, connects, and in turn provides the person to access the wider and greater society, market, and eventually – to the world.

With the influx of the people towards the physical terrain of the city comes the need for effective management of the resources in order to sustain the security, health, and economy to those accessing and utilizing the space of the city, whether working, residing, or even sojourning therein. Urban agglomeration, however, essentially grounds the discussion on land and the allocation of spaces which seeks to espouse sustainable development that caters all stakeholders in the city.

Through critical analysis, political economy analysis and Black Letter approach, this paper seeks to firstly investigate and elaborate the legal framework and foundations upon which urban planning – the discipline of land use planning and allocation of spaces, is operated in the Philippines which reveals that the authorities, empowered by the enabling laws, is entangling and mired with political and private motives to further ulterior purposes over public interests which only serves to widen the gap of inequality which can be illustrated through the gentrification of spaces, having lack of access to political discourse and government service, and the accumulation through

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dispossession of land – turning the discipline of allocation of spaces to an allocation and expansion of powers.

Ultimately, this paper seeks to advance sustainable urban development by putting forward that there exists within the penumbra of laws, from international covenants and rights to domestic statutes and rulings a Right to the City – a right of holistic participatory governance wherein different stakeholders, is equipped with the right to be in the political discourse concerning the allocation of spaces in the city – thereby protecting and securing their political freedoms (liberty) and promoting their economic liberation (prosperity) – a virtuous cycle that nurtures democracy and freedom.

I. INTRODUCTION

"The Constitution does not contemplate palliatives as the solution to our economic woes… What the spirit and letter of the Constitution demands is the institutionalization of social justice… The systematic exclusion of any social group from the blessings of prosperity constitutes social injustice."

Chief Justice Artemio Panganiban[1]

A. Background of the Study

As globalization continues to be the driving force that shapes structural and systemic changes in world order, cities serve as the sites from which the arena of "development" is realized as it is in this physical locus of the State wherein political power is consolidated, the economic backbone – where capital, labor, and trade is produced and accessed, and the sociocultural center continues to be fabricated is manifested. Due to this confluence of factors, the

[1] PANGANIBAN, ARTEMIO C.J., Vol. II Liberty and Prosperity, 2006

spaces of the cities are constantly transformed and shaped in accordance with the ebb and flow of globalization and modernization.

Along with the integration of the free market continues to command the systems of society, the urbanization of the spaces within the city continues to be relevant, if not significant, in the transformation of the community – and eventually of the State, as it is within these places where discourse is held about how the development of society is to transpire. It is within the *agora* of Greece which proved to be the fertile place where free discourse among men gave birth to the seeds of democracy which in turn shaped the course of history and humankind[2]; the *salons* of France where the ideals of political philosophy and aesthetics flourished proving it to be a space from which art could be exhibited and freely produced and manufactured[3]; and the *plazas* globally where it became the sites not only of and for free speech and expression but of revolutions and social movements.[4]

Due to the development of the city that connects it to globalization and the free market, the city has become immeasurably essential not only in the functioning of the State, as it is from where it exercises and flexes it political power to compel order, but also since it possesses the economy, services and resources, and the places of production which people access for their livelihood, education, and welfare.[5] Because of the concentration and further accumulation of resources in the city, the natural phenomenon would be the rural exodus and urban agglomeration due to job creation and income generation.[6]

With the unprecedented urban agglomeration due to the driving force of capitalism within the cities, the spaces to which the public traditionally has access is undergoing a period of reckoning as it continues to be shaped, modified, altered, removed, and dispossessed from utilization in favor of wealth-generating developments and infrastructures such as malls, industries, and businesses in favor of the State, local government, and corporations. As the spatial allocation of the city tends to favor these developments, this subsequently affects the means of not only how the public as a collective can participate in the discourse and formulation of policies but as to who has the

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[2] ARENDT, HANNAH, The Human Condition, 1958

[3] HABERMAS, JURGEN. The Structural Transformation of the Public Sphere, 1991

[4] HART, DONN The Philippine Plaza Complex: A Focal Point in Culture Change, 1955

[5] HENRI LEFEBVRE, State, Space, World 2009

[6] ASIAN DEVELOPMENT BANK, Fostering Growth and Inclusion in Asia's Cities 2019, September 2019

authority that can influence as to how development is to be made and consequently, how the city and its spaces is to be designed.[7]

Therefore, the control and allocation of space in the city is equivalent to the allotment of resources which is tantamount to a designation of power in the public sphere thus restructuring the relationships in the system and thereby establishing that there exists a nexus or cycle between the structural formation of the society and the urban design.[8] This merely echoes that there is an intimate relationship as to how the material space of cities affect power relations among social classes and vice versa.[9] The imperative for development however continues to reverberate, but as the access to the public sphere is limited and/or too much regulated, such prosperity is at the prejudice of resource/s and would be extractive and hence not sustainable that would provide as social justice to all which begs the question[10:] How should cities – the space for which the blueprint of society is established – be designed so as to afford social justice and provide sustainable development?

As the political center of the Philippines, Metro Manila constitutes the economic center and trade capital of the country[11] leading all regions in production as manifested by its 32% share in the Gross Domestic Product (GDP)[12], an econometric measurement that identifies a country's economic health and status. Other metropolitan cities in the Philippines such as Metro Cebu and Metro Davao are comprised as business hubs that foster economic growth.

Modernization and development promote gradual economic growth as indicated in the GDP. This is manifested by the urban agglomeration and the concentration of resources and production in the city, illustrated by massive real estate developments which is mostly characterized by malls, commercial establishments, high-rise condominiums, and residential gated communities whose economic profiles belong to the upper middle class and upwards. While the rising economy tends to indicate that the society as a whole is doing better, income inequality is prevalent in the urban and rural regions, as evidenced by

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[7] Anna Domaradzka, *Urban Social Movements and the Right to the City: An Introduction to the Special Issue on Urban Mobilization*, International Society for Third Sector Research, 608 – 616, (2018)

[8] Philip F. Kelly, *Urbanization and the Politics of Land in the Manila Region*, The ANNALS of the American Academy of Political and Social Science, 170 – 187 (2003)

[9] LEFEBVRE, HENRI, The Production of Space, 1974

[10] Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243, 1243 – 1248, (1968)

[11] Lambino, John XXV Paragas, *The Economic Role of Metro Manila in the Philippines: A Study of Uneven Regional Development Under Globalization*, 79 No. 2 The Kyoto Economic Review, 67 – 106, (2010)

[12] Philippine Statistics Authority, 2017 – 2019 Gross Regional Domestic Product Report, accessible at https://psa.gov.ph/content/gross-regional-domestic-product, last accessed on April 08 2021, 2020

the Gini coefficient, a statistical measurement that determines economic inequality in a given population, which remains high, denoting that while wealth is generated in the cities, the distribution of resources is bottlenecked and concentrated in the hands of the few and the quality of life remains impoverished and dismal.[13]

While economic growth is imperative to have a stable fiscal capacity to readily address public interest, urban agglomeration and development only maintains the image of economic progress and generation of wealth in which the towering heights of skyscrapers in business districts, expansion of gated communities and privatized real estate developments serves as the façade of growth in and around the metropolis as fabricated by the urban skyline. This conglomeration of spaces however effectively conceals the urban landscape comprising mainly of informal and public spaces which oftentimes literally stretches along the margins of the developed area which are typically comprised and occupied by the urban slums, disenfranchised workers peddling their goods and services thru pushcarts and makeshift stalls that informally forms as the annexes of sidewalks and pedestrian stretches, oftentimes in derelict conditions and operate devoid of sanitary regulations, which accurately depicts the genuine condition of the economy and the communities that is constricted by the urban design that is underpinned by the tenets of development through liberalization of the economy shaped by privatization.[14]

Unraveling the spatial blueprint of cities in the Philippines, in particular Metro Manila and its peri-urban fringe, reveals the nexus of land use and the operation of development brought about by liberalizing the economy, privatization, and deregulation. This brings to life the stark inequality of urban living which is captured by the statistics of economic development wherein even though there is a progressive GDP, poverty, inequality, and the uneven distribution of wealth continues continues to fester the communities and the persons living and accessing the city, hampering the exercise of civil and political freedoms made evident by the gentrification of spaces.[15] This begs the question, if sustainable development is the anthem of economic progress, which seeks to be inclusive and beneficial for all, – how was the city unequally developed?

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[13] Tuano, Philip Arnod and Cruz, Jerik, *Structural Inequality in the Philippines: Oligarchy, (Im)mobility, and Economic Transformation*, 36 No. 3 Journal of Southeast Asian Economics 304, 304 – 328, (2019)

[14] Ortega , Arnisson Andre, *Manila's Metropolitan Landscape of Gentrification: Global Urban Development, Accumulation by Dispossession, and Neoliberal Warfare Against Informality,* 70 Geoforum 35, 35-50, (2018)

[15] Michel, Boris, *Going Global, Veiling the Poor: Global City Imaginaries in Metro Manila*, 58 Philippine Studies 383, 383 – 406, 2010

Scrutinizing the blueprint of the city reveals the urban transformation in accordance with the dictum of globalization and studying the system and structures of urban governance and land use planning in the Philippines exposes further the dark underbelly of privatized and exclusive developments in the cities which is dominated by socio-political elite landowners during the colonial period and corporate entities which seeks to diversify and expand their estates through properties more inclined with global development such as rental and commercial establishments.[16] This is fueled by the fact that it is enabled by the policies of decentralization from the governing law which allowed them to hold more influence in the planning process and that the public officials responsible belong to the landowning elite.[17] The result of ownership and development blurred the distinction between public and private sphere where albeit accessible by the public, the design of the space is limited wherein its usage and access is designed to primarily generate wealth acquired through the access and use of the property and funnel it to the ones who developed and also who effectually beneficially owns the property, with general utility of the spaces also being regulated by management policies.

The design of the cities and urbanization thus forms an integral part of the of the society wherein it dictates not only the people's right but also its access to life, liberty, property, health, and exercise of their civil, political, economic, and sociocultural freedoms.[18] It is then realized that the design of the city and the makeup of its spaces has its foundations on the policies of decentralization, deregulation, privatization and ultimately, liberalization of the economy, originally meant for the general welfare has been exploited by the private interests of the few who centered its development in accordance with their perceived profitable aspirations.

The emphasis in creating and promoting resilient, sustainable, and socially just communities is made even more imperative and crucial during the COVID-19 pandemic wherein cities became the central theater of the health crisis. While there is a national emergency powers law enacted[19], local autonomy and responsibility, as dictated by the policy of the Local Government Code[20], remains to be the name of the game as the resources and capability of the cities in handling the public health crisis are scarce and reveals

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[16] Murphy, Peter and Hogan, Trevor Laurence, *Discordant Order: Manila's Neo-Patrimonial Urbanism*, 112 Thesis Eleven 10, 11 – 34, (2012)

[17] ORTEGA, ARNISSON ANDRE, Neoliberalizing Spaces in the Philippines, 2018

[18] HARVEY, DAVID, Justice, Nature, and the Geography of Difference, 1996

[19] Bayanihan To Heal As One Act (BaHO Act), R.A. No. 11469, (2020)

[20] Local Government Code (LGC), R. A. No. 7160, (1991)

the lapses of its powers in providing its services to curb the tide of transmission and prevent casualties of the virus.

The incapacity of the city to properly operationalize services justifies the assumption that spatial design of the city revolves around commercial development and gentrification of communities by not considering the sustainability of its policies with regard to other facets of its public in exchange for development promised by the corporations and the socio-political elite, thereby creating a bottleneck and logistical concern in manifesting good governance.[21] To solve modern challenges which determines the life, liberty, and security of the people, new tools and policies must be developed in light of the constraints that impedes the formulation of a solution. The increasing growth and expansion of urbanization under the current status quo not only threatens food security, but also resiliency of the communities against natural calamities, and therefore incapacitated to be economically free. Necessitous men cannot be free men.

The rise of community pantries[22] being established by the community divulges such incapacity and gentrification wherein the city has not been able to fully access its communities as it is literally left at the margins and fringes of the city, which is illustrated in the fiasco of distributing *ayuda* (aid) and the social amelioration program (SAP)[23]. It highlighted the essential nature of the cities as when the public health crisis soon also contemplated a food shortage crisis, further cementing the interdisciplinary significance the city which serves as the space where power, rights, and the access to a person's rights fundamental to their existence is lived. The city serves as the critical space which determines the people's *guho* (ruin) or *ginhawa* (prosperity) vindicating the importance of the spatial design and land use planning of the city in institutionalizing social justice.[24]

By recognizing the transcendental importance of the cities and communities, this paper seeks to explore legal innovations in the Philippine jurisdiction with regard to the Right to the City – wherein it seeks to

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[21] Porio, Emma, *Citizen Participation and Decentralization in the Philippines* in Citizenship and Democratization in Southeast Asia, 2017

[22] Calonzo, Andreo, *Free Food Pantries Sprout in Philippines as Aid Delayed*, BLOOMBERG, 19 April 2021, https://www.bloomberg.com/news/articles/2021-04-19/free-food-pantries-sprout-in-philippines-as-state-aid-delayed

[23] Aceron, Joy*, [ANALYSIS] Challenges facing the Social Amelioration Program for the Coronavirus*, RAPPLER, 2 April 2020, https://www.rappler.com/voices/thought-leaders/analysis-challenges-government-social-amelioration-coronavirus

[24] MITCHELL, DON, The Right to the City: Social Justice and the Fight for Public Space, 2003

institutionalize social justice through systematic inclusion[25] of the people in urban governance thereby sharing with them the gifts of genuine freedom, as affirmed and resonated by the twin beacons of liberty and prosperity as espoused by enacted statutes and established jurisprudence.[26]

The paper navigates the tumultuous landscape of establishing the Right to the City by grounding and orienting the reader in the basic concepts of urban planning and spatial design and how it shapes not only the terrains of the city but also the people making use of it and eventually the systems and society upon whom it serves and answers to. It will proceed to situate the *status quo* locally where it will tackle how the regulation of spaces serves as a weaponization of policies and the law to establish social order and behavior the system wants to legitimize. This will take a brief tour and analysis on Spain's method of *reduccion* formalized by the legal instruments enacted through the *Leyes de Indias* and how it was integral in the makeup of the cities and communities in its pursuit to proselytize the faith and colonial interests.[27] It will then transition to the American period which radically transformed the design of the cities to serve and expand its own colonial interests in instituting the City Beautiful project enabled by the ideals of "Benevolent Assimilation" and "Manifest Destiny".[28] It will transition to the post-war development and subsequently the current state of the city being shaped by amalgamation of political policies and dominated by market forces which eventually led to the fractured state of the city.[29]

The paper will then tackle the Right to the City which began with French philosopher Henri Lefebvre[30] where it will tackle the roots and *ethos* behind the concept of such right that seeks to be recognized and how it has evolved today. It will take into consideration legal instruments which has recognized the Right to the City in the international jurisdiction and tackle the effects of its enactment to the holistic development and progress of the society.

The paper will then proceed with a critical analysis of the legal foundations of land use planning and city design in the Philippines which reveals that the

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[25] PANGANIBAN, ARTEMIO C.J., Vol. II Liberty and Prosperity, 2006

[26] Panganiban, Artemio C.J., *Unleashing Entrepreneurial Ingenuity*, FOUNDATION FOR LIBERTY AND PROSPERITY, 26 February 2015, https://libpros.com/2015/03/03/unleashing-entrepreneurial-ingenuity/

[27] RAFAEL, VICENTE, Contracting Colonialism: Translation and Christian Conversion in Tagalog Society Under Spanish Rule, 1988

[28] WISE, EDWIN, Manila, City of Islands: A Social and Historical Inquiry Into the Built Forms and Urban Experience of an Archipelagic Megacity, 2019

[29] *Ibid.*

[30] LEFEBVRE, HENRI, *Le Droit a la ville* (The Right to the City), 1996

fragmented design of the cities owes it ailments due to the incohesive and fractured policies established in law[31] which either failed to address possible loopholes[32], overlapping mandates of authorities and policies,[33] or did not provide incentives or support for capacity-building which would enable the local government to initiate public interest-centered development, or all of the above.[34]

The paper will situate the Right to the City under the lens of the twin beacons of justice as the classic legal philosophy under Philippine jurisdiction. In navigating the tumultuous landscape in establishing the Right to the City, it must first be recognized that our altar of democracy enshrines the twin beacons of justice[35], namely – liberty and prosperity. The discussion in this portion of the paper advocates that the Right to the City is bestowed by the twin beacons of justice as enshrined in our altar of rights, and not only within the umbrella of enacted statute and jurisprudential pronouncements, as the Right to the City is a human right which contemplates both liberty and prosperity wherein its genuine operation and exercise depends upon the virtuous cycle and synergy of both to properly institutionalize social justice.

This virtuous cycle exhibits that the Right to the City secures social justice holistically wherein it provides not merely security of political freedoms but economic ones as well wherein the deprivation of the other causes the impairment and hampering of the exercise of rights. Genuine social justice and the fulfilment of the *ethos* of liberty and prosperity contemplate the full exercise of our political freedoms without the presence of hunger, poverty, and inequality, and the exercise of socio-economic and cultural rights without threat of deprivation and arbitrariness which only enslaves the individual in a tyrannical and repressive system.[36]

Finalization of the study involves discussing as to how the Right to the City can be operationalized in the Philippine context and concomitant proposals in legislation to formally recognize such right through the

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[31] SEROTE, ERNESTO, Property, Patrimony, and Territory: Foundation of Land Use Planning in the Philippines, 2004

[32] ORTEGA, *supra* note 17

[33] WISE, *supra* note 28

[34] SEROTE, *supra* note 31

[35] Panganiban, Artemio C.J., *Visionary Leadership by Example*, FOUNDATION FOR LIBERTY AND PROSPERITY, 7 February 2009, https://cjpanganiban.com/2007/02/07/visionary-leadership-by-example-2/

[36] Panganiban, Artemio C.J., *Safeguarding the Liberty and Nurturing the Prosperity f the Peoples of the World*, FOUNDATION FOR LIBERTY AND PROSPERITY, 18 October 2006, https://cjpanganiban.com/2006/10/18/safeguarding-the-liberty-and-nurturing-the-prosperity-of-the-peoples-of-the-world/

amendment of city charters, or by legislating a National Land Use Act, taking into account the factors affecting the ineffective strategizing of sustainable development in the Philippines.

As a final approach to provide for the legal mechanics of the Right of the City, the paper proposes that mere enactment of the law by the participation and initiative of the political branches is not enough as the full operation of the right also entails the engagement from the judiciary who is mandated under the Constitution to protect fundamental liberties and rights. Foraging into the jurisprudence of the judicial branch reveals that the Supreme Court of the Philippines was pro-active in its approach and judicialized the Right of the City in the case of *Bayan v. Ermita*[37] where it decreed the establishments of freedom parks for the exercise of the Constitutional right of the freedom of expression and assembly without impediment. Taking further into account the multi-faceted characteristic of the Right to the City as embracing human right which contemplates liberty and prosperity also qualifies the Supreme Court to promulgate rules and writs necessary for the right to be immediately protected and promoted when threatened.

B. Research Design and Statement of the Problem

The study is focused in exploring and establishing evidence and literature collected from international and domestic sources whereby the technical, political, and social dimension of land use planning is intimately linked with its legal perspective as can be found from established laws, policies, and jurisprudence.

This approach allows for a critical analysis[38] and political economy analysis[39] of the Right to the City to transpire which by its nature is interdisciplinary, interdisciplinary, and transdisciplinary, wherein its concept and evolution is discussed which can be solidified further and can be established as a uniform concept by contextualizing it in the Philippine jurisdiction wherein the laws, policies, and jurisprudence is analyzed using Black Letter Approach and Law-In-Context.[40]

To duly support and solidify the definition of the Right to the City in the Philippine context, a holistic review of the related literature will be made which

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[37] *Bayan v. Eduardo Ermita*, G.R. No. 169838, 25 April 2006

[38] WODAK, RUTH AND MEYER, MICHAEL, Methods for Critical Discourse Analysis, 2009

[39] Australian Government – Department of Foreign Affairs and Trade, Guidance Note – Political Economy Analysis, January 2016

[40] MCCONVILLE, MIKE and WING CHONG HUI, Research Methods for Law, 2007

shall utilize multiple sources including but not limited to descriptive, critical analysis, and quantitative investigation.

To duly aid the study in its endeavor, the following questions will serve as a light post which will be discussed and answered by the paper:

1) Are there existing or perceived problems on sustainable land use that threatens liberty and prosperity?

2) How is the *Right to the City* understood under the context of existing legal system?

3) How does the *Right to the City* fall within the penumbra of the twin beacons of justice – liberty and prosperity?

4) How does/will the *Right to the City* manifest and operationalize in international and Philippine jurisdiction?

The paper seeks to holistically formulate a legal mechanism wherein the Right to the City may be rightfully realized in the Philippine jurisdiction, taking into account its interdisciplinary nature which hopefully is adequately provided for in this study.

1. REVIEW OF RELATED LITERATURE

A. Geography v. Design is Destiny: How Shaping Lands Shape Society

Primordial consideration first lies in understanding the essential concepts surrounding urbanization. This section provides the basic premise and purpose of urban planning wherein it will define and explore the various dimensions of land, exploring the concept of land use, and tackling the rationale and importance of land use planning and its relationship in shaping not only the architecture of the city but the people and systems it is bound to.

Undertaking to arrest the concept of land in a single definition is illusory as it partakes of many perspectives. Traditional conceptions of land begin with its legal definition where it is ordinarily defined and perceived with regard to property in relation to right of ownership. The legal interpretation is restrictive in a sense that it merely defines land as any ground, soil, or earth that can be capable of ownership and everything annexed to it whether by nature or by labor of man, which also includes the bundle of rights by virtue of such

ownership which contemplates the right to possess, abuse and consume, alienate, or even destroy[41] everything within its breadth, depth, and height and contemplates basically anything vertically upwards or downwards.[42]

Corollary to the discussion on property is the inherent nature of land to be an economic resource as it may be perceived traditionally as a space for consumption of goods or either as a site and factor in generation of wealth through production, or both.[43] Land contains either natural resources that can be consumed and utilized by whoever owns or has access but still maintain its raw form such as when it is a natural park or nature reserve.[44] On the other hand, land in the economic sense may be perceived as a site for production and generation of wealth wherein it is transformed to be a space where goods, services, and others may be produced, consumed, and exchanged.[45]

It is land as the site of production in the economic perspective which is of vital importance to be discussed since characterizing land as such would entail its physical transformation according to the use it is designated with, whether it be commercial where goods and services are exchanged and consumed, residential – for the occupation of its inhabitants, industrial – for the production of goods, or otherwise institutional – which, instead of producing goods or services, generates economic power such as universities and academic institutions which spurs knowledge and innovation also centers of government, etc. This perception of land as a site of production contemplates the designation of estates of land according to different uses specified above[46] which is why it is colloquially associated with urbanization since the idea revolves around the participation of the public in the free market which is composed of different industries that is much more incentivized to participate and thus better integrated in the world economy and trade which thus, comprise the economic makeup of the country.[47]

As land is an economic resource, the issue that arises when it comes to its appropriation concerns with scarcity and sustainability. The topography and type of land limits the type of development or modernization that may be

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[41] Pangalangan, Raul, *Property as a "Bundle of Rights": Redistributive Taking and the Social Justice Clause*, 71 Philippine Law Journal 141, (1996)

[42] SEROTE, *supra* note 31

[43] *Ibid.*

[44] *Ibid.*

[45] *Ibid.*

[46] SEROTE, *supra* note 31

[47] Annez, Patricia Clarke & Buckley, Robert, *Urbanization and Growth: Setting the Context*, Urbanization and Growth, 1 – 46, (2009)

undertaken. Its exploitation is limited to sustain the increased influx of people who makes use of the land. Studies and analysis must be undertaken in order that the exploitation of the terrain is safe for human use and continued access.[48] Also taken into account is the development of land are factors which determines land values that contributes to the sustainability of urban living in the cities, such that if unequal development of land is made, the resources inside the city may only be accessible to the few who are privileged and hence may only foster inequality and unsustainable growth.[49]

Finally, land is most importantly viewed with reference to its socio-political dimension which recognizes that the land is the site and space which links the people and stakeholders to the market and system. It is political due to a myriad of reasons. Firstly, the land, as established by law, signifies the territorial jurisdiction of the authority which demarcates the exercise of sovereignty and government powers.[50] A subject beyond the metes and bounds of the land of a given authority is not within the realm of jurisdiction and as such, cannot be subjected to the powers of the government. Conversely speaking, the operation of a government's law is valid when it is within its territorial jurisdiction.[51]

The political dimension of land with regard to territory is furthermore revealed through the tensions with regard to boundary disputes between and among different local governments[5253] as a large portion of the Internal Revenue Allotment – the share of local government units in the revenue of the national government which is largely comprised of taxes – is hinged upon the size of the territory and its population as provided by Sec. 284 of the Local Government Code of 1991.[54] The size of the territory is crucial as it also determines the budget allocation to the local government unity wherein rectification or resolution of territorial boundaries is usually not resorted to as it may only reduce the current allotment of the national government to the

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[48] SEROTE, *supra* note 31, at 7

[49] Brigham, Eugene, *The Determinants of Residential Land Values*, No. 4 Vol. XLI Land Economics 324, 324 – 334

[50] GOROSPE, RENE B., POLITICAL LAW, 2016 citing *Magallona v. Ermita* 655 SCRA 476 (2011)

[51] *Reagan v. Commissioner of Internal Revenue* 30 SCRA 968 (1969)

[52] Bacungan, VJ*, Court rules in favor of Taguig in Bonifacio Global City territorial dispute*, CNN PHILIPPINES, 9 March 2017, https://cnnphilippines.com/news/2017/03/09/court-of-appeals-taguig-makati-bonifacio-global-city-dispute.html

[53] *City of Makati, et. al. v. City of Taguig, et. al.*, G.R. No. 208393, 15 June 2016

[54] An Act Providing for a Local Government Code of 1991, Republic Act 7160, Sec. 284 & 285, (1991)

LGUs. This is evident from the fact that the aggregate of all land area of local government units exceed the land area of the country.[55]

Finally, the political dimension of land is primordial as it is the architectural design of the city which largely influences the behavior of its citizens and inhabitants. City design, as the material space, which includes matters regarding provisions of public spaces, development of transport infrastructure, network accessibility, market connectivity, water and food service, housing programs which form part of the cities effective and productive circuits and structures dictate the social order among people, lifestyle, culture, and overall development of its citizens.[56]

In this regard, it is the local government who is tasked under the law to demarcate and design the city by delineating the use of lands within its territories to pursue its goals and agendas in its development projects to raise revenues while also balancing the economic and social interest of the persons who are interested in the spaces being the sites of goods, services, and resources being utilized and accessed by the people.[57]

The political dimension of land reveals the rationale of land use planning in the context of globalization and further modernization of the city. Land use planning, albeit defined in many ways is firstly defined as "proper management of land resources to promote public interest" wherein the definition of "public interest" is an elastic concept that can be hammered to fit modern standards where it may be subject to the wisdom and discretion of the authorities.[58]

Land use planning is one of the legal toolkits of the State, via its police powers, to institutionalize social justice and general welfare as established by the Constitution.[5960] Following the observations made earlier where the material space occupied in the land has an intimate relationship with the structures and relationship of the people which has a reciprocal effects with each other, land use planning can be specifically interpreted to be the method by which the authorities seek to balance relationships and networks of power

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[55] SEROTE, *supra* note 31, at 16

[56] LEFEBVRE, HENRI, The Production of Space, 1974

[57] R.A. 7160, Sec. 16

[58] *Planters Products, Inc., v. Fertiphil Corporation*, 548 SCRA 485 (2008)

[59] SEROTE, *supra* note 44, at 31

[60] 1987 CONSTITUTION, Art. XIII, Sec. 1

– thereby influencing society and its sociocultural fabric through the transformation of the material space which is represented by the land.[61]

While the traditional dictum holds that "geography is destiny" – wherein the determinant of what makes and breaks societies' economic development is dictated by their physical environment,[62] a criticism however refutes such analysis by stating that topography and characteristics of the place is merely a factor and that the creation and promotion of solid institutions that respects basic human rights fosters innovation and participation not only in the political discourse but also in the market, engineering a stable political climate and prosperous economic development.[63]

The legal toolkit of land use planning captures both the dilemma posed by the constraints of the physical terrain, and the cultivation of a climate that fosters participatory governance in the creation of strong institutions as impediments towards economic development and solves it by transforming material territory and built forms to calibrate not only the allocation of resources contained in the city but also provide support for challenges to established power relations to promote and incentivize stakeholders in taking an active part in the architecture of spaces.[64]

B. **[DIS]Place-Me(a)nt: Weaponization of the Law and Regulation of Spaces**

The general perception and empirical evidence states that law and legal institutions are significant factors in providing basic human rights, economic growth, development, and access and security of justice.[65] [66] While such is the case, wherein the law is meant to be exercised in the pursuit of public interest and social justice, legal-historical scholarship shows that the law is a double-

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[61] van Dijk, Terry & Beunen, Raoul, *Laws, People, and Land Use: A Sociological Perspective on the Relations Between Laws and Land Use*, Vol. 17 No. 12 European Planning Studies 1812, 1797 – 1815, 2009

[62] DIAMOND, JARED, Guns, Germs, and Steel: The Fates of Human Societies, 1999

[63] ROBINSON, JAMES & ACEMOGLU, DARON, Why Nations Fail: The Origins of Power, Prosperity, and Poverty, 2012

[64] WORLD BANK GROUP, Governance and the Law, 2017

[65] BESLEY, TIMOTHY and PERSSON, TORSTEN, Pillars of Prosperity: The Political Economics of Development Clusters, 2014

[66] La Porta, Rafael, Lopez-de-Silanes, Florencio, Shleifer, Andrei, and Vishny, Robert, *Legal Determinants of External Finance*, Vol. 52, No. 3 Journal of Finance, 1131-1150, (1997)

edged sword which can be also weaponized wherein it may function as a State apparatus to obtain the government's interests – instead of justice.[67]

The following would illustrate how law in the regulations of spaces was weaponized in pursuit of its political and ulterior interests which shall correspondingly tackle how it was an instrument of policy that weaves the social fabric of its subjects to attain its aim: either thru its coercive or coordination.

Reduccion **and Bajo de las Campanas: Geopolitics and the Christianization of the Spanish Empire**

Long before the Spaniards conquered the Philippines, there was already an existing civilization in the Philippines characterized by different *rahajanates, sultanates,* and *barangays* engaging in maritime trade with different countries such as China, Malaysia, and Brunei.[68] Prior to colonization, there was no centralized or uniform policy of planning human settlements; indigenous people like the Igorots who are situated in the mountains of the Cordilleras live together as a community wherein spaces for communal activities, mediation of disputes among and between different tribes, and other events of significant importance are manifested in the built form of *bugnay* and *luccong*.[69]

As one of the thrusts of the Spanish empire is strongly focused on the proselytization of the Catholic faith, the sparse and scattered settlements of different communities which are situated in the mountains is proving to be a Herculean task as the topography is proving to be a big constraint in the exercise of its political powers. This also means that the administration and enforcement of laws is only limited to where the resource of the empire is connected and thus, the rest of the Philippines is disconnected from Spanish rule.[70]

Drawing from their colonial experiences in Latin America, the Spanish Crown enacted *Leyes de Burgos* (Laws of Burgos) in 1512 which was the first codified set of laws that seeks to regulate the relations and interactions between

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[67] Lund, Christian, *Access to Property and Citizenship: Marginalization in a Context of Legal Pluralism*, Legal Pluralism and Development: Scholars and Practitioners in Dialogue, 197 – 214, (2012)

[68] SCOTT, WILLIAM HENRY. Barangay: Sixteenth-Century Philippine Culture and Society, 1997

[69] SCOTT, WILLIAM HENRY, Cordillera Architecture of Northern Luzon, 1962

[70] RAFAEL, VICENTE, Contracting Colonialism, 1988

the colonialists and the natives and the subsequent *Leyes Nuevas* (New Laws)[71] in 1542 which were instituted reforms by King Charles I of Spain that sought to introduce humane laws which was culminated in the overall codified law known as the *Recopilacion de las leyes de los reinos de Indias* (Laws of the Indies) in 1684 by King Phillip II.[72] It was in these laws that instituted the system of *reduccion* that formed as the foundation of city planning in the Philippines so that the exercise of authority in the Philippines would be effective.[73]

Reduccion as a system of city planning, seeks to establish the authority of the Spanish Crown by conquering the communities from far-flung areas and organize them under the administration of the government where they belong to a *pueblo* (township) or *cabecera* (capital). The *poblacion* is laid out into a grid pattern and the urbanization of spaces was an administrative and military-political necessity to make up for the lack of resources and manpower in ensuring the security and vise-like grip of the Crown on its colony.[74] Urbanization and the arrangement of the public space was utilized by the Spaniards in reconfiguring the social order. The forcible re-arrangement of the public space meant that there will be a modification of the barangay social structure within a colonial administrative hierarchy wherein social hierarchies are determined by the spaces of the city. This spatio-political structure is illustrated in that if one is closer to the *pueblos* it symbolizes the social status of the person as part of the *principalia* who holds massive influence and is taken in the colonial social fabric as an *alcalde*, *cabeza de barangay, etc.,* and the people living near or within the peripheries (*barrios*) indicate low social stature which may be subject to *polo y servicios* (forced labor), wherein if one is outside the administrative space, one is branded as a *remontado* or uncivilized, an enemy of the Church and State, being an infidel.[75]

In implementing *reduccion*, natives residing in the mountains and countryside are uprooted and displaced from their homes to live in settlements that are planned and established by the government in the lowlands or near ports and forts that are military bases of the Spanish Crown to easily quell dissent. Thus, establishment of the social order became easier as subjects are

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[71] *Recopilacion de Leyes de los Reynes de las Indias* (4th edition) (1791)

[72] LICO GERARD AND DE VIANA, LORELEI D. C., Regulating Colonial Spaces: A Collection of Laws, Decrees, Proclamations, Ordinances, Orders and Directives on Architecture and the Built Environment During the Colonial Eras in the Philippines, 2017

[73] Pilar, Chias and Abad, Tomas, *Colonial Urban Planning and Land Structures in the Philippines*, 1521 – 1898, Journal of Asian Architecture and Building Engineering, (2012)

[74] WISE, *supra* note 28

[75] ORTEGA, ANDRE ARNISSON. Neoliberalizing Spaces in the Philippines: Suburbanization, Transnational Migration, and Dispossession, 130-131, 2018

under the close guard of authorities and the Church who holds influential power. The *Leyes de Burgos* has thirty-five (35) decrees most of which are related to the planning of spaces which is key in the governing of public affairs and civil relations. Pertinent to which are the forced, albeit "voluntary" displacement of natives into *encomiendas*, mandatory erection of Church structures, and that in the establishment of an estate, it is imperative that a church must be built which must be equidistant and thus being the center of the town or city.[76]

Of significant importance is the concept of *bajo de las campanas*. In the establishment of cities, *bajo de las campanas* or "under the reign of the bells", wherein every inhabitant is within hearing range of the bell, symbolizing church authority, civic life and social interaction is centered around the church which serves as the focal point of interactions with and among the people. Everything - from the material space to the personal relationship - revolved around the Church as an institution and the church as a built form. It was the built structure and as an institution from which authority was exerted and articulations of rights and powers were exercised. It was the tolling of the bells that indicated the state or activity of a community which may signal not only ecclesiastical activities such as the hearing of mass or recitations of the Novena or Angelus, but also civic affairs such as the ringing of the bells along with the singing of *Te Deum* at the sailing of the ships due to the Manila Galleon trade.[77] [78]

It is clear that the Spaniards utilized the law in planning of spaces to consolidate their power over its subjects to further its colonial grip. *Reduccion* as a law allowed the Spanish Crown to exert their sovereignty and political power by reconfiguring the social makeup community by transforming the topography and material spaces of the land. It allowed the colonial power to efficiently manage their limited resources within cities and compel social obedience from the masses wherein they were able to enact edicts and *bandos* that regulated the use of spaces within.

The nature of the role of law was coercive in this regard wherein it is the traditional rationale for people to obey policies. Coercive nature of the law either incentivizes the people in limiting their freedom to act or making such option too costly. Cost-benefit analysis of the law provides that people will

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[76] *LEYES DE BURGOS* (1512-1513)

[77] *The Galleon Trade*, http://www.thegaleon.ph/the-galleon-trade/ (last accessed February 26, 2020)

[78] Ocampo, Ambeth, *When people lived 'bajo de la campana'*, Inquirer.net, (May 27, 2016), https://opinion.inquirer.net/94927/when-people-lived-bajo-la-campana

systematically adhere to the law if the cost of non-compliance is higher than its benefits wherein it depends on the capacity of the State to operationalize with commitment its regulatory powers and the standards by which non-compliance is regulated is tight wherein eluding it would be only futile and the benefit of following the law is much more favorable.[79]

In contextualizing the coercive role of *reduccion* and regulation of spaces, non-compliance with the system imposed identifies the individual as a *remontado* or enemy of the Crown wherein they can be subject to punishment. *Reduccion* reveals the interdependence of spaces and how it creates a symbiotic relationship with social order, either by enabling or making each other prosper or by providing security and exerting authority thereof in order to impose social order, with the ultimate objective of proselytizing the faith, exploitation of resources to fulfill the mandate of the Church and Crown. It is also apparent that not only are spaces and built forms interdependent with each other but also multi-sectoral as the modification of spaces spills over and affects norms, ethics, traditions and thus dictates social order.

Benevolent Assimilation and the City Beautiful: Designing the Imperial American Empire

After more than 300 years of subjugation by the Spanish Empire, the Philippines was subsequently colonized by the United States of America after Spain relinquished sovereignty and control when it signed the Treaty of Paris.[80]

The *casus belli* or justification of the United States in its expansion of territory is known as "Manifest Destiny" which holds that it is their utmost obligation, as the foremost model of a democracy that has perfected civil liberties, to indoctrinate the world and spread the principles of governance of the people, by the people, and for the people with the concomitant obligation of espousing the values of equality and liberty.[81]

Seeking to disassociate the actions of the State from the oppressive image of colonialism which received a negative backlash in the mainland, President McKinley espoused Benevolent Assimilation which attempts to persuade that the building of the American empire is justified by fulfilling their Manifest

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[79] SCHAUER, FREDERICK, The Force of Law, 2015

[80] KALAW, MAXIMO MANGUIAT The Political Constitution of the Philippine Republic, 430-445, 1927

[81] STRONG, JOSIAH Our Country: Its Possible Future and Present Crisis, 107-108, 1885

Destiny as harbingers of democracy and sages of self–governance, and American governance is the best power to govern the islands as it is guided by principles that respect private property, assurance of their labor and employment, guarantees freedom from displacement and trespass in homes, wherein the overall objective is to perceive American rule as the champion of rights and justice instead of the arbitrary exercise of power which is attributed to the traditional notion of colonialist expansion.[82]

The building of the American empire was legitimized by the Supreme Court of the United States in what are known as the Insular Cases wherein the High Court, ruled in favor of the legitimacy of the acts of State in its policy of colonial expansion, treaties executed which necessitated the relinquishment, transfer, exchange, and accumulations of land, and the administrative policies that governs the operations and continued exploitation of the territories.[83]

In justifying its reasons that the Philippines is not yet politically mature to govern itself and function as a democratic country, the United States ratiocinated its grounds based on the economic despondency of the Philippines which is materialized in the spaces and facilities which, in the context of the times, was unfit for sustaining lives within the frame of the American lens that is primarily focused on the efficient and effective operations of the market to accumulate wealth, promote industrialization, and mass production of goods.[84]

The discussion and analysis below portray the general agenda of Benevolent Assimilation wherein contrasted against Spanish rule, the Americans did not only enact a single defining code of law but myriad of policies that strategically created a system that supplanted institutions and power relations towards the development of a market-driven economy empowered by exploitation of resources and labor and the production of goods which is pacified and legitimized by urban design.

The blueprint behind Manifest Destiny is titled as the City Beautiful by its proponent Daniel Burnham, which is the aestheticization of space and city living wherein it is grounded on the belief that transforming the physical terrain of the city is essential in not only pacifying social unrest and promoting civic spirit but to ultimately make the city function as an effective apparatus of the State wherein it shall be the physical locus of the free market for the colonial

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[82] ILETO, REYNALDO, Knowledge and Pacification: On the U.S. Conquest and the Writing of the Philippine History, 10-11, 2017

[83] Torruella, Juan. *Ruling America's Colonies: The Insular Cases*, 32 YALE LAW & POLICY REVIEW, 57 – 95 (2013)

[84] ILETO, *supra* note 82

aspiration of America to gain profits and resources would be accessed.[85] The cholera epidemic which plagued the country after the Philippine-American war however loomed over such project wherein the outbreak wreaked havoc and is blamed on the deplorable state of public space wherein it revealed itself as one of the methods by which America will legitimize its rule by the transformation of space wherein it introduced mass housing, improvements in sanitary infrastructure.[86]

By politicizing the public health crisis wherein solving the epidemic is the utmost importance, spaces became targets wherein it allowed them to also quell social disorder. Control allowed custodians of the public space to conduct surveillance due to public health and monitor socio-spatial conduct of the citizens to quell social disorder that is disruptive to colonial rule. This includes the enactment of ordinances which regulates acts and practices may be done in the public space. The extent of politicizing the health crisis reached its peak when under the premise of public health, officials are authorized to declare premises and facilities infested with rats as menace to public safety wherein an enacted ordinance ordered remodeling of such facilities in accordance with the standard set. This in turn led to the remodeling of almost six hundred facilities and buildings (600). In exercising its police powers, the Americans destroyed the Farola District by arson when it was determined to be a site of infestation thereby displacing many residents and inhabitants therein.[87]

Daniel Burnham envisioned the aestheticization of the City Beautiful and patterned the layout of the city after Paris and installed public works such as sewage systems, clean water supply, electricity networks, and transportation infrastructure which increased mobility within the city. He sought to maintain and promote its beauty through zonification which delineated the uses and limitations in the specific area. Institutions and programs like the *pensionado* were established to supervise and have oversight of the erection of buildings and facilities which would serve as vital cogs in the engineering of the market, preservation of colonial social order, and the successful conditioning and institutionalization of America's legitimacy to rule over the Philippines.[88]

America formulated policies that is not directly relating to the formation of the city but is nevertheless significant in shaping the social order in that is

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[85] Lico, Gerard, *Spatial Regulation as Prophylaxis: Urban Hygiene and Colonial Architecture in the Age of American Imperialism in the Philippines,* Regulating Colonial Spaces, (2017)

[86] *Ibid.*

[87] *Ibid.*

[88] *Ibid.*

primordial in the entrenchment of the concepts of private property, labor, and free trade which are the essential ingredients of the market and capitalism, the impetus behind America's working democracy.

The role of law in this regard is a coordinative and legitimizing wherein the law on zonification and policies regarding socio-spatial practices reflect that the institutionalization of the free market and capitalism brought urban transformation which radically changed social order in favor of the ruling class. By successfully integrating circuits of the market in the public sphere through laws wherein it promotes culture and behavior, citizens are more inclined to comply with the law in order to yield greater benefits from it. The more who follows and coordinate with the law tends to legitimize its use as a toolkit for later development.[89]

C. Crisis of Neo-liberalization of Spaces and the Archipelagic Cities

While previous sections discussed the role of law as wielded by the State, the post-war chapter up to the present period shifted the spotlight from the national government to the local government and private sector as chief developers in the design of the city due to the tide of globalization which has brought up the ideas of neo-liberalism to be entrenched in legal frameworks to pursue the various economic outcomes sought to be attained.[90] Preliminary considerations must first be discussed on the neoliberal restructuring to understand how the spaces of the cities has been shaped and carved up by the private sector as enabled by the State which in turn blurs the distinction between the private-public sphere.

Neoliberalism as generally espoused is a concept wherein general welfare can be best advanced by liberating entrepreneurial freedoms and skills within an institutionalized framework characterized by strong private property rights, free markets, and free trade.[91] The ideological tenets of neoliberalism lies in establishing the market that shall be the central space where man would be able to exercise freedom and realize their potential which commands that the market is the highest good as it becomes the social order of the society.[92] Man in the pursuit of happiness is centered around the idea of *homo economicus* where he is self-interested and incentivized to contribute to the development of the

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[89] SCHAUER, *supra* note 85

[90] Arnisson Andre, *Manila's Metropolitan Landscape of Gentrification: Global Urban Development, Accumulation by Dispossession, and Neoliberal Warfare Against Informality,* 70 Geoforum 35, 35-50, (2018)

[91] HARVEY, DAVID, New Imperialism, 2005

[92] BROWN, WENDY, Edgework: Critical Essays on Knowledge and Politics, 2005

society by being productive in order to gain profits.[93] This mandates the authorities that in the creation of neo-liberal order it is imperative that it be preserved and promoted by policies and law so that every member of society would be interested to participate and take part in its further development.[94]

The onset of globalization during the late 80's which opened the world for borderless boundaries and free trade fanned the flames of neo-liberalization to spread across countries which principally advocated for the free flow of goods and services, decentralization and devolution of powers, deregulation of the market, state minimalism, and privatization of public facilities.[95]

As it can be observed during the previous discussions, the establishment of social order in the Philippines required the articulation of consent to legitimize the placement of laws which binds freedoms and conditions behavior. In the case of Spanish rule, the system of *reduccion* and *bajo de las campanas* coerced the citizens to adhere to live in the cities – uprooting them from their homes and appropriating lands and resourced under the control unless they suffer pain of punishment while in America, it managed to articulate consent and legitimize rule over the colonized in its installation of public facilities and institutions as it not yet ready to manage democracy due to the deplorable conditions of living wherein the ruling power is obligated to benevolently assimilate itself being the prime example of democracy – all the while exploiting natural resources in exchange for the administration of the colony.[96]

In the case of post-war development and current period, the Philippines managed to articulate consent and plant the seeds of the need to undertaking neo-liberal restructuring during the aftermath of Martial Law wherein urgent rehabilitation of the economy is necessary due to the plunder made by President Marcos. It conflated the ideals of freedom and democracy in the political arena with a competitive market that harkens to the call of its successful neighbors and allies in the international community.[97]

By framing together the image of the Philippines as a country in the Global South thereby needing economic rehabilitation and the revival of freedom and democracy through liberalization and opening of the markets, the country then undertook neoliberal restructuring as a policy to get rid of political and

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[93] FOUCAULT, MICHEL, The Foucault Effect: Studies in Governmentality, 1991

[94] BROWN, *supra* note 96

[95] Kingfisher, Catherine and Maskovsky, Jeff, *Introduction: The Limits of Neoliberalism*, Vol. 28, No. 2 Critique of Anthropology, 115 – 126, (2008)

[96] RAFAEL, VICENTE, White Love and Other Events in Philippine History, 2000

[97] ORTEGA, ARNISSON ANDRE, Neoliberalizing Spaces in the Philippines, 2018

economic ills which saw the concepts of neoliberalism permeating in our laws such as the decentralization of powers – where powers of the national government is devolved to the local government is present in the Local Government Code[98], deregulation of businesses is found in the Oil Deregulation Act of 1988[99], and privatization of public facilities – most notable of which is the establishment of the National Grid Corporation of the Philippines which privatized the operation of the country's electronic power grid[100] and the granting of concessionaires which privatized the distribution of water to Maynilad and Manila Water.[101]

The neoliberal restructuring in the legal framework is abstract but has its revelation in the spatial design of cities which has been transformed wherein the circuits of effective production (residential, commercial, industrial, and institutional zones) that contributes to the economy and market are integrated. As labor and capital are concentrated into the cities which has allowed it to become engines for economic development due to its contribution to the GDP[102], further accumulation of capital and urban agglomeration has brought the need for urban expansion where city clusters and the development of mega-regions now become machines for further economic growth.[103]

While neo-liberal restructuring has alleviated economic concerns brought about by the 2008 Wall Street Crash and made the country more globally competitive in the market where the government relied heavily on real estate developments and investments from Overseas Filipino Workers (OFWs) making the State capable and more fiscally viable due to its rapid growth, [104] political-economy analysis uncovers that the spatial make-up of the cities on which these industries are based offers a dim perspective as increased privatization of State obligations are mostly controlled by the landowning

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[98] R.A. 7160, Sec. 2

[99] Downstream Oil Industry Deregulation Act of 1998, Republic Act 8479, 1998

[100] An Act Granting The National Grid Corporation Of The Philippines A Franchise To Engage In The Business Of Conveying Or Transmitting Electricity Through High Voltage Back-Bone System Of Interconnected Transmission Lines, Substations And Related Facilities, And For Other Purposes, Republic Act No. 9511(2008)

[101] Dumol, Mark, *The Manila Water Concession: A Key Government Official's Diary of the World's Largest Water Privatization*, Directions in Development, (2000)

[102] KELLY, PHILIP, Landscapes of Globalisation: Human Geographies of Economic Change in the Philippines, 2000

[103] Ortega, A. A., Acielo, J. M. A. E., & Hermida, M. C. H., *Mega-regions in the Philippines: Accounting for Special Economic Zones and Global-Local Dynamics*. Cities, 48, 130–139. (2015)

[104] Tomacruz, Sofia *Philippines overtakes China in economic growth again*, RAPPLER, 16 November 2017, https://www.rappler.com/business/gross-domestic-product-philippines-q3-2017-economic-growth-asean-china

political elite dating back during the colonial period and business *taipans* which only increased inequality and regressive development such as capital outflows and exploitation of labor.[105] Due to the extent of their estates and land owned, private individuals were able to consolidate and establish political and economic power which they used to further expand their profits and network.[106] Diversification of assets by the modern *principalia* in capital-generating business ventures coupled with their election or appointment in key political positions and the neoliberal fever allowed for the design of vast tracts of land used by the public according to their private aspirations which primarily focuses on capital accumulation and profits, all the more maintaining their vise-like grip on power relations and social order.[107]

Although conceived of as a panacea to solve the economic woes of the State, the institutionalization of neoliberalism comes into question as the public interest is held hostage by the capitalist accumulation of the private sphere with little to no focus on public space. The development of cities focused on the generation of profits by promoting real estate developments is now reckoned with issues of distinction with the public sphere as its private nature, being a development of a non-State actor directly restricts or places constraints on the exercise of fundamental rights enshrined in the Constitution – which only protects infringement done by the State.[108]

The development and expansion of the cities and its design towards generation of profits exposes its own issues on sustainability where capitalist tendencies to develop space is limited to different cyclical crises such as boom-bust, accumulation-over-accumulation, which is continued urban expansion, construction-destruction, or rather the extreme form of accumulation by dispossession or accumulation of space by displacing its inhabitants.[109]

The continued urban sprawl reveals myriad of contemporary legal issues first concerning with the right to life as urban tensions with regard to development enable private developers in the militarization of space leading to killings in communities.[110] Also, in connection with regard to the neo-liberalization of spaces, issues concerning the right of liberty of the person

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[105] Beja, Edsel Jr., *Capital Flight and the Hollowing Out of the Philippine Economy in the Neoliberal Regime*, Vol. 21 No. 1 Kasarinlan: Philippine Journal of Third World Studies, 55 – 74, (2006)

[106] ORTEGA, ARNISSON ANDRE, Neoliberalizing Spaces in the Philippines, 2018

[107] Murphy, Peter and Hogan, Trevor Laurence, *Discordant Order: Manila's Neo-Patrimonial Urbanism*, 112 Thesis Eleven 10, 11 – 34, (2012)

[108] *Serrano v. National Labor Relations Commission*, G.R. No. 167614, 27 January 2000 (Panganiban, J., *separate opinion*)

[109] LEFEBVRE, HENRI, The Production of Space, 1991

[110] ORTEGA, *supra* note 106

wherein areas undergoing development or of interest has its communities subject to surveillance and militarization[111], akin to that of community surveillance during colonial period.

Due to the asphyxiation of available space in the cities, where commercial establishment, industrial complexes along with establishment of central business districts thrive, issues surrounding the right to freedom of expression, assembly, and self-organization [112]are also questioned as areas developed although accessible by the public is developed by private non-State actors where spaces developed are regulated and places constraints on the full exercise of such rights under the Constitution. Fortunately, however, the author posits that the Supreme Court has repeatedly resolved this issue in its jurisprudence which will be discussed later.

Issues surrounding the status of socio-economic and cultural rights are also put into question. As the operation of society devolved the power of governance mostly to the private sector due to neoliberalism where the market is enshrined as the highest good, must these rights such as the right to housing be viewed as justiciable in the same status and level as those of civil and political rights as this determines continued dignified living wherein uneven development and gentrification affects the quality of life and capability of the citizen to participate in political discourse[113] and also as in the case of continued urban expansion which threaten food security.[114] Interlinked to such right is the right to a balanced and healthful ecology as recognized in our legal system.[115]

In sum, while neoliberalism is touted to be the panacea to the economic woes of the State to distribute prosperity to advance the general welfare of man, it merely served to facilitate distribution of wealth and capital to the modern *principalia* and private corporations which allowed them to not only consolidate their political and economic powers but to also reinforce their interlinkages within and among each other.[116] The funneling of wealth to the elite class reveals itself in the uneven and unequal development of cities which is filled with commercial and industrial complexes geared towards the optimum operation of the market and profitability but littered with gentrified communities and asphyxiated informal spaces not within the circuits of

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[111] *Ibid.*

[112] 1987 CONSTITUTION, Art. III, Sec. 4

[113] HARVEY, DAVID, Justice, Nature & the Geography of Difference, 1996

[114] Szabo, Sylvia, *Urbanisation and Food Insecurity Risks: Assessing the Role of Human Development*, Vol. 44 No. 1 Oxford Development Studies, 28 – 48, 2016

[115] 1987 CONSTITUTION, Art. II, Sec. 16; *Oposa v. Factoran*, G.R. No. 101083, 30 July 1993

[116] ORTEGA *supra* note114

production – which limits the exercise of fundamental freedoms and impedes the institutionalization of social justice thru spatial inequality.

What differentiates neo-liberalism from the previous policies which shaped the space of cities is that colonial policies sought to establish social order and reconfigure instituted power relations by the transformation of space.[117] The inverse is applicable in the case of neo-liberalization of spaces which highlighted establishment of power relations which eventually transformed and developed sites that consolidated their political and economic power. This then begs the question: As the private and public sphere distinctions are blurred by the neo-liberalization, what protections or State interventions must be instituted for the people in light of violations of fundamental rights by private wrongs?

D. Right to the City: Origins and Practices

The Right of the City is the philosophy and rallying cry espoused by French philosopher Henri Lefebvre to reclaim the city from being dictated by capitalism and the effects of commodification of living which reduces the value of human dignity.[118]

In coming up with the Right to the City, it is important to understand Lefebvre's conception of space as not merely reduced into a single physical plane which is conceived as a *tabula rasa* or empty receptacle in geometric terms and subject to the intervention of man where all ideas and goods interact, exchanged, and built upon. Lefebvre refuses to acknowledge such conception of space and denounces its simplistic analysis which brought about different disciplines and practice of profession in subjugating terrains according to human will – utilized by capitalism to optimally extract profits and gains therefrom and also leaving lapses of law with does not substantially thresh out issues of public-private distinction and contractual relations.[119] Instead, Lefebvre posits that space is constituted of three dimensions which acknowledges the social dimension of space and bridges it with the physical and mental characteristic of the space.[120]

Dissecting the composition of space reveals that it is made up of *spatial practices* which is composed of the various ways as to how the social life is

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[117] SCHAUER, FREDERICK, The Force of Law, 2015

[118] BUTLER, CHRIS, Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City, 2012

[119] LEFEBVRE, HENRI, The Production of Space, 1991

[120] *Ibid.*

produced and reproduced in the space. This is generally perceived as the thesis of the space which comprises the conventional uses and practices within the area and its accessories. The second dimension are *representations of space* which comprise the institutional apparatus of powers involved in spatial design such as architects and developers. This dimension determines what and how the space should be use. Finally, the third dimension of space involves in acknowledging its anti-thesis which are *representational spaces* which are the actual and lived experience in the space. It molds the social imagination of the space, whether it conforms to the traditional conceptions of space and allows the space to be dictated by the product of human experience.[121]

Acknowledging the dimensions of space allows one to recognize that space is comprised of relationships that establish social order in each community or society. Recognizing the multiple facets and functions reveals its interdisciplinary aspect wherein it is a means of production; space is a commodity and resource in itself in where it may be extracted or goods manufactured or labor utilized; space is a political-legal tool to establish social order; space as rationale in itself that orders for its classifications through legal systems; and space as a means for human expression and sites of social resistance.[122] With this in mind, the design of spaces contemplates not only the balancing of economic resources and power relations but of different disciplines wherein it interdisciplinary and transdisciplinary, and that the *Right to the City* is a key component in fully realizing this as it gives the power to "transform life by transforming the city.[123]

The Right to the City has evolved and has taken on a different meaning and has been reclaimed by social movements around the world. It was given international recognition via the New Urban Agenda during the United Nations Habitat III process which recognized the strategic importance of cities in sustainable development.

This is especially so of the movements in Latin America where the Right is associated with the concept of *buen vivir* (good life) where the development of the economy must firstly take into consideration the conditions of living of its citizens. While the Right as conceived by Lefebvre continues to prevail, cities and states co-opted such right within their own context such as in the case of Brazil which enacted a statute that provided for legal mechanisms for urban governance to provide equitable land access which provided residents with affordable housing. It prioritized the social function of land which

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[121] *Ibid.*

[122] *Ibid.*

[123] LEFEBVRE, HENRI, *Le Droit a la ville* (The Right to the City), 1996

focused on its use value – the capability to be utilized by the public instead of its exchange or market value. The same is copied by the Ecuadorian Constitution and the enactment of the Mexican City Charter which recognizes the different responsibilities of stakeholders in the development of cities which recognizes that sustainable development would only be possible if there is support towards just urban governance and democratization of spaces.[124] Following the institution and recognition of these rights saw the decrease of inequality and overall economic development in the cities.[125]

In the context of the Philippines, the city is a space for urban and sociological transformation and holds a paramount importance where it is not only concerned with the concept of *buen vivir* or living the good life. It contemplates the interplay of multiple facets of liberty and prosperity which forms a symbiotic relationship with each other as essential ingredients for true social justice. As the free expression of fundamental freedoms which can be done only if there is a viable structure and space to which this may be communicated remains asphyxiated by the physical space and social order established by private non-State actors, access to economic prosperity is thwarted which prevents the institutionalization of social justice. As such, the Right to the City in the Philippines concerns itself with the right to life, liberty, and prosperity in urban living whereby it seeks to holistically democratize living in the cities through reforms which can cure the abused political-legal order set in stone by our policies. The Right to the City thus principally involves the right to envision it through sustainable, inclusive, and capable urban governance that tempers the policies of decentralization and private wrongs.

2. DISCUSSION AND ANALYSIS

A. Legal Foundations of Philippine Land Use Planning

Deconstructing the legal framework of spatial design begins with acknowledging that the State is the supreme owner of all public lands and national resources located within its territorial jurisdiction by virtue of the Regalian Doctrine as manifested in Sec. 2, Art. XII of the 1987 Constitution:

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[124] Deboulet, Agnes, et. al., *Competitive Metropolises and the Prospects for Spatial Justice*, Laboratoire Architecture Ville Urbanisme Environnement, (2018)

[125] Zarate, Lorena, *The Right to the City: Struggles and Proposals for the Urban Reform* in Claiming the City: City Mobilisation by the Urban Poor, 2014

> "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."[126]

The Regalian Doctrine as interpreted by the Supreme Court states that all public lands belong to the State and occupation of such does not ripen to title unless it is shown that it belongs to private dominion.[127] Interpreting the Regalian Doctrine also reveals that there is generally a dual classification of land – one is it belongs to the public dominion which is subject to State supervision or by private ownership, which is subject to limitations on property set by law.

The Constitution in recognizing the role of property in institutionalizing social justice established in Sec. 1, Art. XIII that it mandates the Congress with the enactment of laws that would regulate the acquisition, ownership, and use of property and increments:

> The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good.
>
> To this end, the State shall regulate the acquisition, ownership, use, and disposition of property and its increments.[128]

Thus, the enabling law in institutionalizing social justice by spatial design is enacted through the Local Government Code of 1991 which tasks the respective local government unit (LGU) which is either municipality or city. It banks its rationale in decentralizing and devolution of powers as an important instrument in nation-building which primarily empowers communities by giving them local autonomy and thereby the power to forge their own

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[126] 1987 CONSTITUTION, Art. XII. Sec. 2

[127] *Republic v. Sps. Benigno*, G.R. No. 205492, 11 March 2015

[128] 1987 CONSTITUTION, Art. XIII, Sec. 1 par. 2

development and gets rids of the perils of bureaucracy and dependency on a central authority which delays progress.[129]

In the creation of a city, the Local Government Code mandates under Sec. 448 that "… it shall serve as a general-purpose government for the coordination and delivery of basic, regular, and direct services and effective governance of the inhabitants within its territorial jurisdiction."[130]

The legal toolkit which operates as the local government's aid in the creation of the city is the Comprehensive Land Use Plan (CLUP) [131] as mandated under Sec. 20 (c) which states that:

> "The local government units shall, in conformity with existing laws, continue to prepare their respective comprehensive land use plans enacted through zoning ordinances which shall be the primary and dominant bases for the future use of land resources: Provided. That the requirements for food production, human settlements, and industrial expansion shall be taken into consideration in the preparation of such plans.

In the establishment of the Comprehensive Land Use Plan of the city or municipality, the task primarily falls on the *Sanggunian Bayan* in the case of municipalities or *Sanggunian Panlungsod* in the case of cities, which acts as its legislative body that must duly enact the CLUP as an ordinance. The legislative clause is hereby reproduced which are identical regarding the functions of the *Sanggunian Bayan* and *Sanggunian Panglungsod* in the formulation of the CLUP:

> "(vii) Adopt a comprehensive land use plan for the municipality/city: Provided, That the formulation, adoption, or modification of said plan shall be in coordination with the approved provincial comprehensive land use plan;"[132]

The CLUP is essentially described as an ordinance which prescribes the use of land in the LGUs territorial jurisdiction. Pursuant thereto, the LGU is tasked with delineating whether the land should be classified as residential, agricultural, commercial, industrial, mineral, timberland, or special.[133] Conversely speaking, the *Sanggunian's* exercise of enacting a zoning ordinance constitutes a limitation on a private person's property and his bundle of rights

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[129] *Alvarez v. Guingona, Jr.,* 252 SCRA 695, (1996)

[130] R.A. 7160, Sec. 448

[131] SEROTE, ERNESTO, Rationalized Local Planning System in the Philippines, 2008

[132] R.A. 7160, Sec. 447 (2) (vii) & Sec. 458 (2) (vii)

[133] R.A. 7160, Secs. 215 – 216

and they may only use such lands in accordance with the prescriptions set by the CLUP.

In the overall formulation of the CLUP, it must adhere to the higher policy framework as embodied in the National Framework for Physical Planning (NFPP) provided by the National Economic and Development Authority (NEDA) and Regional Physical Framework which is subject to the approval of the *Sangguniang Panlalawigan* due to its regulatory powers and oversight of the *Sangguniang Panlalawigan* – in case of municipalities and regions covered by it under Sec. 468 (2) (vii) in relation to Sec. 56 which reads:

> "(vii) Review the comprehensive land use plans and zoning ordinances of component cities and municipalities and adopt a comprehensive provincial land use plan, subject to existing laws."[134]

Also exercising supervisory and oversight over the LGUs creation of CLUPs is the newly established Department of Human Settlements and Urban Development which is provided with the task of formulation of policies and strategies on urban development which shall follow the National Framework for Physical Planning provided by NEDA, providing technical expertise and guidance, and creating measures and assessment to standardize formulation of CLUPs.[135]

An exception to the power of establishing CLUP however exists. Zoning ordinance and the powers of the LGU however does not fall entirely in the jurisdiction within its territorial jurisdiction wherein it may only coordinate as when it is an ecozone which is within the authority of the administrator duly appointed by the Philippine Economic Zone Authority by virtue of the Special Economic Zone Act[136]; or if it is an enterprise zone duly delineated by the Tourism Infrastructure and Enterprise Zone Authority[137]. Estates falling within such national government agencies shall be developed in accordance with their own plan and separate from the CLUP which is formulated by the LGU although the latter still retains local autonomy in keeping peace and order.

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[134] R.A. 7160, Sec. 468 (2) (vii)

[135] An Act Creating the Department of Human Settlements and Urban Development, Defining its Mandate, Powers and Functions, and Appropriating Funds Therefore, Republic Act 11201, Sec. 5 (2018)

[136] An Act Providing For The Legal Framework And Mechanisms For The Creation, Operaton, Administration, And Coordination Of Special Economic Zones In The Philippines, Creating For This Purpose, The Philippine Economic Zone Authority (Peza), And For Other Purposes, Republic Act 7916 (1994)

[137] An Act Declaring A National Policy For Tourism As An Engine Of Investment, Employment, Growth And National Development, And Strengthening The Department Of Toumsm And Its Attached Agencies To Effectively Efficiently Implement That Policy, And Appropriating Funds Therefor, Republic Act 9593 (2008)

B**. Analysis**

Combining Black Letter analysis and political-economy analysis reveals the main hindrance in the implementation of land use planning of cities in the Philippines. The Black Letter analysis firstly reveals the lack of obligatory consultation on the part of the *Sanggunian* in the formulation of the CLUP which goes against the very nature of CLUP as comprehensive which is not limited to geographical boundaries but is meant as multi-sectoral and inclusive.

Sectoral committees are only recognized but not mandatory in the creation of Comprehensive Development Plans (CPD) which are the socio-economic projects to be implemented by the LGU as allocated within the CLUP.[138] Sectoral committees that comes from different sectors of society has technical expertise on data gathering, analysis, and policy recommendations can veer the LGU towards a holistic development of the city which incentivizes public participation in the public sphere instead of mostly being dependent on commercial expansion and private development which limits their capacity to control the resources within the city and relegates the citizens' capacity to exercise fundamental freedoms by making urban living and aspects only secondary to private gains.

With no capacity building efforts that can equip the LGU with the necessary expertise in crafting its own spatial design and institutionalization of social justice, it is left crippled and left to depend on private developers equipped with technical expertise instead. This is realized in the case of several private developments where the LGU, seeking to modernize its territorial jurisdiction, centered its land use and development around a private estate duly studied and prepared for by the private developer which usually comes from the modern *principalia* or landed elite as it lacks the capacity to undertake studies in the first place.[139] Without sectoral participation in the land use planning process, holistic development would not be possible as the interest pursued are mainly the private developer's profits and the local officers who exercise political control over the area – to the prejudice of solving water shortage, traffic congestion, etc.[140]

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[138] R.A. 7160, Sec. 109

[139] Cruz, Jerik, *Great Transformations: The Political Economy of City-Building Megaprojects in the Manila Peri-Urban Periphery* in Making Sense of the City: Public Spaces in the Philippines, 2019

[140] Magno-Ballesteros, *Land Use Planning in Metro Manila and the Urban Fringe: Implications on the Land and Real Estate Market*, Philippine Institute for Development Studies, (2000)

Critical discourse analysis would also uncover that the decentralization of powers as manifested through the law is not coordinated with each other wherein institutional overlaps only engrain bureaucracy and that there is no uniformity in the spatial design of the city-region leaving the city in a fractured state. The Marcos era saw the institution of Metro Manila as one province which centralized its power under Imelda Marcos who oversaw the capital region's development.[141] The Metro Manila Council is vested with police power and is allotted with share in the taxes of different cities that enable to enact ordinances that significantly affected the uniform design of Metro Manila – thus crowning it the City of Man. The fall of the dictatorship however saw the fall of centralization of powers which was largely blamed for the downfall of democracy. This saw the rise of decentralization of powers which empowered local autonomy to local governments but at the same time led to the fractured city design of highly urbanized regions.

In contrast with the Metro Manila Council then, Metro Manila Development Authority (MMDA) is not vested with police power that would enable it to establish a cohesive and uniform city design. It is only limited to carrying out metropolitan-wide services as long as it does not interfere with the local autonomy of the LGU. With the widespread development of the mega-regions and the inter-dependence of cities with each other, the lack of a unifying city design that links basic services and infrastructures tends to only compound the problems of accessing the communities wherein it contributes to uneven development that contributes to promotion of community resiliency, traffic congestion, mobility, etc.[142]

Black Letter analysis of the legal foundations of land use planning gives the view that there planning process which are inter-dependent on each other are not aligned with each other as in the case where the National or Regional Physical Framework Plan is not submitted nor the Barangay Development Plan which reveals vertical frictions in its enactment as a zoning ordinance which is cited often as the bureaucratic problem in the formulation of CLUPs which causes housing unaffordability and threatens sustainable growth.[143] As cited by a study, the absence of either, especially the Barangay Development Plan renders nugatory the aims of the Local Government Code when the

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[141] Presidential Decree 824 of 1975

[142] WISE, *supra* note 28

[143] Helble, Matthias, and Kwan Ok Lee, and Arbo, Ma. Adelle Gia, *How (Un)affordable is housing in Developing Asia*, Vol. 25 International Journal of Urban Sciences, (2021)

enactment of the CLUP by the LGU only assumes the development of the barangay which does not fully reflect local representation.[144]

A glaring loophole is also exploited wherein the CLUP is not synergized with the Comprehensive Development Plans (CPD). Analogically speaking, as the CLUP is the spatial allocation of land and resources, the CPD comprises the socio-economic programs the LGU has in store and to be implemented. Due to the long-term development of the CLUP however, LGUs most often resort to merely relying on the CPD and injecting facets of the CLUP that are oftentimes inconsistent. This leads to more politicized decisions as when allies of the ruling administration will justify the allocation and updating of the CLUP and pertinent zoning ordinances due to the established plans of the CPD.[145]

This confluence of factors, decentralization of powers coupled with lack of State mechanism and support and the increased privatization of spaces due to developments undertaken by politico-landowners led to the creation of a privatized city which is characterized by the importance of market value and profitability with the rise of malls, gated communities, and industrial estates without much priority to the social function of space. Due to the creation of the privatized city, there is little to no public realm left[146] that would serve as the sites for negotiation and challenges for power relations to clamor for social justice. The continued rise and expansion of privatized development in the cities and the lack of participation in the spatial design, access or provision of public spaces wherein the city becomes the space upon rights intersect, is left to the whims and discourse of the few which restricts and threatens our fundamental freedoms including the rights to which the public can freely exercise.

The author therefore proposes that due to the strategic importance of the city as the space where democracy is at its fringes due to different interests and where the exercise of rights and freedoms is underpinned, the Right of the City is the right to a sustainable and inclusive urban governance[147] which seeks to include multiple sectors from the public to genuinely determine public interest

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[144] Lech, Malte and Leppert, Gerald, *Current Issues of the Philippine Land Use Planning and Management System*, German Institute for Development Evaluation, (2018)

[145] Porio, Emma, *Citizen Participation and Decentralization in the Philippines* in Citizenship and Democratization in Southeast Asia, 2017

[146] Hogan, Trevor, et. al., *Asian Urbanisms and the Privatization of Cities*, 29 Cities 59, 59 – 63, (2012)

[147] Karaos, Anna Marie, *Urban Governance and Poverty Alleviation in the Philippines*. In E.Porio (ed.), Urban Governance and Poverty Alleviation in Southeast Asia: Trends and Prospects (1997)

in the formulation of land use planning and ultimately the institutionalization of social justice.

C. Justiciability of the Right to the City Under the Lens of Liberty and Prosperity

The author advocates that the Right to the City is not only ideologically parallel and consistent with the twin beacons of justice, but it is also justiciable and is found within the penumbra of Philippine statutes, jurisprudence, and treaty obligations.

To begin with, the author posits that the Right to the City has already been championed by the Supreme Court in the case of *Bayan v. Ermita*[148] wherein due to the lack of public spaces or freedom parks where rallies may be held, noting that only *Fuente Osmena* of Cebu City is the only established park, acted as the vanguard of fundamental rights and mandated the Department of Interior and Local Government to take steps for the immediate compliance with the Public Assembly Act which sought to erect public and freedom parks and ultimately imposing that unless *suitable* parks are built, no permit to rally is needed to exercise the right to peaceably assemble, acknowledging the impossibility that such is only futile in the absence of public spaces to cater to such right. As the Court has said in *Ynot v. Intermediate Appellate Court*, "The vitality of democracy lies not in the rights it guarantees but in the courage of the people to invoke them whenever they are ignored or violated."[149] If there is no democratic space to exercise such and is only possible if done by surveillance in private properties as this needs to have the consent of the owner, such only impedes and constricts the essence of democracy.

A plain reading of the law readily indicates that the Right to the City is already recognized in the Philippine statutory framework. The main enabling provision in the design of the city is enshrined in Sec. 20 (c) which provides that, "The local government units shall, *in conformity with existing laws*, continue to prepare their respective comprehensive land use plans enacted through zoning ordinances which shall be the primary and dominant bases for the future use of land resources…"

By virtue of necessary implication, the formulation of the CLUP therefore implies that it shall adhere to existing laws and policies of the government.

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[148] *Bayan v. Eduardo Ermita*, G.R. No. 169838, 25 April 2006

[149] *Restituto Ynot v. Intermediate Appellate Court*, G.R. No. 74457, 20 March 1987

Tracing the landscape connotes that the CLUP shall conform to the mandate under Sec. 5 (I) (A) of R.A. 11201 or the Department of Human Settlements and Urban Development (DHSUD)Act which states that the DHSUD shall "Formulate a national housing and urban development policies, strategies and standards that are consistent with the Philippine Development Plan…" which is further reinforced by the fact that the Department is tasked to provide for standards and regulation in the LGUs formulation of the CLUP under Sec. 5 (II) (e) of the same law. The current policy guidebook still effective is the CLUP Guidebook[150] released by the defunct Housing and Land Use Regulatory Board by virtue of Executive Order 648 which exhorts the command of the law that it adheres to the Philippine Development Plan.

The mandate of the law being crystal clear that the CLUP shall adhere to the Philippine Development Plan (PDP), a cursory reading of the PDP formulated by NEDA reveals that it adheres to the Sustainable Development Goals and localized it into Philippine context under *Aksyon 2030*.[151] The PDP initially recognizes the importance of land use rationalization, but it is within its National Framework for Physical Planning 2001 – 2030 which reveals the essential function of the city as a site that merges disciplines together as it fuses issues on sustainability on food security, environmental concerns and resiliency, production and industrialization, etc. and that to secure proper sustainable development, recognizes the importance of citizen participation in urban governance and empowerment of private and public sector partnership.[152]

A more challenging test that needs to be overcome however is the status that the Right to the City merely advocates for urban governance is the justiciability of socio-economic right that is traditionally relegated below than that of civil and political rights, and that the Right is not enforceable as against the State as the evil sought to be rectified is done by a private non-State actor which does not meet the standards set by State action doctrine which restricts actions governing public interest to only infringements done by the State or through its agents.

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[150] HOUSING AND LAND USE REGULATORY BOARD, CLUP Guidebook: A Guide to Comprehensive Land Use Plan Preparation (2013)

[151] NATIONAL ECONOMIC AND DEVELOPMENT AUTHORITY, Philippine Development Plan 2017 - 2022

[152] NATIONAL ECONOMIC AND DEVELOPMENT AUTHORITY, National Framework for Physical Planning 2001 - 2030

A criticism in Philippine legal theory is that there are two classifications of rights, one being the civil and political and the other as the socio-economic rights. These are enshrined in Philippine legal thought and is recognizable through the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESR) – known under our jurisdiction as liberty and prosperity. However, treatments of these rights under Philippine law are varying and inconsistent[153] wherein liberty is traditionally held as justiciable as it flows from natural law while prosperity needs an enabling law from which it must operate.[154]

It is argued by the author however that socio-economic rights are justiciable even in the absence of a positive act as it forms an intimate relationship with civil and political rights as recognized by law and jurisprudence.

By virtue of the doctrine of incorporation, the rights enshrined in the ICESR are deeply embedded in our constitutional framework. Notwithstanding such, the author advocates the idea that the principles established in the ICESR has been realized into law in the enactment of various statutes that centers on social justice.[155]

Most importantly, the Court has noted that socio-economic rights are justiciable as is deeply intertwined with that of civil and political rights and that both forms a virtuous cycle wherein it recognized not only the right to property and right to health, but that it acknowledged that the right to labor – characterized as the right to property that must adhere to due process.[156] Ultimately, the justiciability of socio-economic rights is settled in the case of *Oposa v. Factoran* which recognized that the right to a balanced and healthful ecology is self-executing and does not mean to equate that it is any less than civil and political rights.[157]

On the other hand, issue on the State action looms which casts a cloud on the enforceability of the Right to the City. Traditional conceptions of the State Action Doctrine is delineated in the case of *People v. Marti* which proclaimed

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[153] Pangalangan, Raphael, *Enforcing Liberty and Prosperity through the Courts of Law: A Shift in Legal though from Juridification to Judicialization*

[154] GRIFFIN, JAMES, On Human Rights, 2008

[155] PANGALANGAN, *supra* note 153, at 14 – 15

[156] *Wallem Maritime Services, Inc., v. NLRC*, G.R. No. 108433, 15 October 1996

[157] *Oposa v. Factoran*, G.R. No. 101083, 30 July 1993

that the Bill of Rights serves as the vanguard of protection only as against the State and does not find application to wrongs done by private persons.[158]

Modern jurisprudence shows the tension between the application of the traditional doctrine against new phenomena where violations of fundamental rights are committed by private non-State actors rendering protection futile. The catena of cases ruled upon by the Supreme Court illustrates these as in the case of *Vivares v. St. Theresa's College* – which ruled upon the issue of privacy.

The blurring of the public sphere with violations of the private sector continues to be a dilemma which the State Action Doctrine is ineffective against. As stated by Pangalangan, exhorting the case of *Duncan v. Glaxo Wellcome Philippines*:

> "Private threats to public rights are all-the-more pervasive in the advent of government deregulation and privatization. Where the state has ceded its powers to the market forces, it opens the floodgates to new sources of abuse and threats to liberty and prosperity. Corporate powers have been used to subvert principles of individual autonomy and impair relationships of transcendental importance. What is more, the inherent economic inequality between labor and management has been given statutory and jurisprudential recognition. Today, the evil sought to be avoided—government abuse—has well passed on to the invisible yet coercive hand of the market forces.

With the private sphere empowered by neoliberalism posing a real threat to the people's freedoms and the State Action doctrine proving incapable to answer for the legal lacuna, an innovation in legal thought must be conceived. As stated by Chief Justice Panganiban:

> "Constitutions are designed to meet not only the vagaries of contemporary events. They should be interpreted to cover even future and unknown circumstances… The Constitution must be quintessential rather than superficial, the root and not the blossom, the base and framework only of the edifice that is yet to rise. It is but the core of the dream that must take shape, not in a twinkling by mandate of our delegates, but slowly in the crucible of Filipino minds and hearts, where it will in time develop its sinews and gradually gather its strength and finally achieve its substance. [It] must grow with the society it seeks to re- structure and march apace with the progress of the race, drawing from the vicissitudes of history the dynamism and vitality that will keep it, far from becoming a petrified rule, a pulsing, living law attuned to the heartbeat of the nation."[159]

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[158] *People v. Andre Marti*, G.R. No. 81561, 18 January 1991

[159] *Tanada v. Angara*, G.R. No. 118295, 2 May 1997

To this end, judicial action may subject issues regarding private wrongs entangling with State involvement in various ways such as framing it by virtue of Public Interest – which mandates State intervention to protect and promote public policy and those impressed with public interest.[160]

The Right to the City being a matter impressed with public interest certainly qualifies for the Supreme Court to take cognizance of this issue as the inclusive participation of urban governance determines the scope and extent of not only the development but also the exercise of freedoms of the people within the city, which by modern standards is largely dictated by the monopoly of the market.

1. RECOMMENDATIONS

Juridification: Enactment of Statutes and City Charters

Traditional methods on the recognition of rights typically stems from the enactment of a statute by Congress. As such, the author posits that the Right to the City, that is the right to sustainable and inclusive urban governance can be institutionalized by the passing of a National Land Use Act (NaLUA) which comprehensively addresses all logistical and legal pitfalls that the CLUP fails to address wherein citizen participation in the process of land use planning will be integrated into said law.

While decentralization has reaped benefits for mega-regions, it certainly cannot be said to other cities which lack the capacity and technical skills to undertake studies to have better data analysis and policy recommendations. In the enactment of the NLUA, it is hoped that it embodies the comprehensive use of all lands as it generally relates to one another.

The right to urban governance can also follow the movement in Latin America wherein respective city charters are enacted or ordinance passed by their local legislative body provided for the inclusion of sectoral committees in order to be consulted prior to the making of any policies or zoning ordinances.[161]

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[160] PANGALANGAN, *supra* note 153, at 14 – 15

[161] DEBOULET, *supra* note 127

Judicial Activism: Supreme Court as the Paragon Protector of Liberty and Promoter of Prosperity

While the conventional method of recognizing rights is by transforming them into duly enacted law by the legislature, the Supreme Court as the paragon protector of liberty and promoter of prosperity, by virtue of its rule-making power under the Constitution[162] may enact writs, which the author may suggest as the *Writ of Balai* which shall seek to protect people facing immediate threat to life, liberty, or property or seeks to restrain the exercise of their civil and political rights and socio-economic rights in the city under the Constitution to which it has validated in *Bayan v. Ermita*.

2. CONCLUSION

Reforms of urban governance – the formulation of zoning ordinance through the Comprehensive Land Use Plan does not only contemplate the territorial breadth and extent of the cities, the different sectors involved in its operation, but the comprehensive support and affordability of protection given by the State itself.

Present phenomenon indicates the turbulent phenomenon the evolution of the market has given wherein it can determine the life, liberty, property, and freedoms of a person. To this end, a break from traditional legal thought and shift towards a new approach is needed. But perhaps, in solving contemporary issues, we need only look back from previous legal thinking and innovate upon the backs of giants and legal luminaries.

By protecting liberty, we are nurturing the seeds of prosperity, and by promoting prosperity, we allow opportunities for liberty to better develop. As aptly stated by Chief Justice Enrique Fernando, "Liberty does not consist solely in the absence of restraint. That is to view it in the negative sense. It has a positive aspect as well. It is not only freedom from but freedom for. It is not enough that one is let alone. It is equally important that one should have opportunity for achievement, to make something of himself. It thus becomes an aspect of right of self-realization

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[162] 1987 CONSTITUTION, Art. VIII Sec. 5 (5)

RECENT JURISPRUDENCE

POLITICAL LAW

LUIS RAYMUND VILLAFUERTE, JR. *v.* COMMISSION ON AUDIT

G.R. NO. 246053, 27 APRIL 2021, *EN BANC*, (ZALAMEDA, *J.*)

DOCTRINE OF THE CASE

The Court, in the recent case of Torreta v. Commission on Audit, formulated the guidelines for the return of disallowed amounts in cases involving disallowance in government contracts, to wit:

1. If a Notice of Disallowance is set aside by the Court, no return shall be required from any of the persons held liable therein.

2. If a Notice of Disallowance is upheld, the rules on return are as follows:

> *a. Approving and certifying officers who acted in good faith, in the regular performance of official functions, and with the diligence of a good father of the family are not civilly liable to return consistent with Section 38 of the Administrative Code of 1987.*
>
> *b. Pursuant to Section 43 of the Administrative Code of 1987, approving and certifying officers who are clearly shown to have acted with bad faith, malice, or gross negligence, are solidarily liable together with the recipients for the return of the disallowed amount.*
>
> *c. The civil liability for the disallowed amount may be reduced by the amounts due to the recipient based on the application of the principle of quantum meruit on a case-to-case basis.*

d. These rules are without prejudice to the application of the more specific provisions of law, COA rules and regulations, and accounting principles depending on the nature of the government contract involved.

The above guidelines were a recalibration of the rules of return in Madera v. Commission on Audit after taking into consideration the peculiarity of cases involving government procurement contracts for goods or services.

Villafuerte, Jr.'s actuations were grossly negligent amounting to bad faith when he approved the transaction despite noncompliance with procurement laws and the glaring deficiencies in the requirements needed to process the transaction. Gross inexcusable negligence has been defined as negligence characterized by the want of even slight care, acting or omitting to act in a situation where there is a duty to act, not inadvertently, but willfully and intentionally with a conscious indifference to consequences insofar as other persons may be affected. It may become evident through the noncompliance of an approving or authorizing officer of clear and straightforward requirements of laws or rules, which because of their clarity and straightforwardness, only call for one reasonable explanation.

FACTS

The PG-CamSur determined the need for the procurement of a shipping vessel for the promotion of the tourism industry in the province. The Provincial General Services Officer (PGSO) Bernardo A. Prila prepared a purchase request (PR) recommending the purchase of a shipping vessel with a minimum carrying capacity of 82 passengers and an estimated cost of Php8,500,000.00. The PR was signed by PGSO Prila, certified by Provincial Treasurer Mario T. Alicaway, and approved by Luis Raymund Villafuerte, Jr. (Villafuerte, Jr.) as Provincial Governor.

The Provincial Bids and Awards Committee (BAC) issued a Resolution adopting direct contracting as the alternative mode of procurement for the shipping vessel. The PG-CamSur chose the offer made by Regina Shipping Lines, Inc. (Regina Shipping) for the sale of its vessel, MV Princess Elaine, in the amount of Php8,500,000.00. After issuance of a purchase order, the PG-CamSur made a partial payment to Regina Shipping in the amount of Php4,250,000.00.

On post-audit, the Audit Team Leader and Supervising Auditor of Camarines Sur Province (auditors) found that vital documents evidencing the transaction for the sale of the shipping vessel were not attached to the

disbursement voucher. As a result thereof, a Notice of Suspension (NS) was issued requesting the submission of several requirements. Subsequently, a Notice of Disallowance (ND) was issued disallowing the partial payment because of the failure of the PG-CamSur to settle the deficiencies noted, as well as to sufficiently answer the issues in the assailed transaction. The transaction was considered an illegal and irregular transaction because it was an advance payment on the shipping vessel. Furthermore, PG-CamSur failed to provide the necessary documents to warrant the use of direct contracting as the mode of procurement.

Aggrieved by the issuance of the ND, Villafuerte, Jr., among others, filed an appeal with the COA Regional Office (COA RO). The COA RO denied the appeal on November 5, 2012. The COA Proper, on December 29, 2015, dismissed the petition for review filed by Villafuerte, Jr. for being filed out of time. It ruled that while the first motion for extension for 60 days was granted, the second motion for extension they filed was denied. Accordingly, the period to file their petition for review was set until January 14, 2013. However, the petition for review was filed through registered mail only on February 11, 2013 and was received by the COA Proper only on February 27, 2013. The motion for reconsideration was subsequently denied.

Villafuerte, Jr. contends that the present case is the third time he has been vexed over the same allegations of facts and issues on the purchase of MV Princess Elaine. The Ombudsman (OMB) issued a Joint Resolution finding no probable cause against him for violation of Sections 3(e) and (g) of RA 3019. The same Resolution also dismissed the administrative charges against him for said purchase. Also, the OMB rendered a Consolidated Resolution dismissing criminal and administrative charges against him over the alleged advance payment for MV Princess Elaine.

ISSUES

(1) Should the case be dismissed following Villafuerte, Jr.'s release of liability from cases filed before OMB?
(2) Did Villafuerte, Jr., timely file their petition for review before the COA Proper?
(3) Was Villafuerte, Jr. able to justify the act of direct contracting?
(4) Should Villafurte, Jr. be held personally liable for the Notice of Disallowance?

RULING

(1) **NO.** Well-settled is the rule that administrative, civil, or even criminal liability, as the case may be, may attach to persons responsible for unlawful expenditures, as a wrongful act or omission of a public officer. According to this "threefold liability rule," a public officer may be held civilly liable to reimburse the injured party if his wrongful acts or omissions result in damages. If the law violated attaches a penal sanction, the erring officer may also be punished criminally. Lastly, such violation may also lead to administrative sanctions if disciplinary measures are warranted based on evaluation of the conduct of the public official. Actions resulting from each of these liabilities may proceed independently of one another, as in fact, the quantum of evidence required in each case is different.

Thus, there is no merit in Villafuerte, Jr.'s contention that the present case should be dismissed following his release of liability from the cases filed before the OMB covering the same factual milieu.

(2) **NO.** According to The Revised Rules of Procedure of the Commission on Audit, an appeal from an order, decision or ruling by the Auditor may be taken to the Director within six (6) months after notification to the party of the report, notice of disallowance and charges, Certificate of Settlement and Balances, order or decision complained of, by filing with the Auditor a Notice of Appeal. With respect to an appeal from Director to Commission Proper, the appeal shall be taken within the time remaining of the six (6) months period.

As correctly pointed out by the COA Proper, Villafuerte, Jr. failed to appeal within the reglementary period as can be seen in the following timeline:

Date of receipt of Notice of Disallowance	September 27, 2010
Date the appeal was filed before the Regional Director (COA RO)	March 25, 2011
Number of days elapsed	178 days
Date of receipt of COA RO Decision	November 13, 2012

Date of original deadline to file a Petition for Review	November 15, 2012
Date of filing of Motion for a 60 days (sic) Extension	November 14, 2012
Date of new deadline for filing a Petition for Review	January 14, 2013

Villafuerte, Jr. filed his petition for review before the COA Proper on February 11, 2013, which was after the new deadline for filing the petition. While such filing is argued to have been within the extended period prayed for in the second motion for extension, they should not have expected for an automatic grant of the extension.

Generally, the perfection of an appeal in the manner and within the period permitted by law is not only mandatory but also jurisdictional. The failure to perfect the appeal renders the assailed judgment final and executory. This is in alignment with the doctrine of finality of judgment or immutability of judgment.

While there are some instances allowing for the relaxation of procedural rules, such as: (a) matters of life, liberty, honor or property, (b) the existence of special or compelling circumstances, (c) the merits of the case, (d) a cause not entirely attributable to the fault or negligence of the party favored by the suspension of the rules, (e) a lack of any showing that the review sought is merely frivolous and dilatory, and (f) the other party will not be unjustly prejudiced thereby, none of these recognized exceptions are present in this case.

At any rate, even if the Court brushes aside the procedural rules surrounding the perfection of its appeal, the case of Villafuerte, Jr. will still fail.

(3) **NO.** Under Section 50 of RA 9184, direct contracting may only be resorted to in any of the following conditions: (a) Procurement of Goods of proprietary nature, which can be obtained only from the proprietary source; (b) When the Procurement of critical components from a specific manufacturer, supplier or distributor is a condition precedent to hold a contractor to guarantee its project performance, in accordance with the provisions of his contract; or, (c)

Those sold by an exclusive dealer or manufacturer, which does not have sub-dealers selling at lower prices and for which no suitable substitute can be obtained at more advantageous terms to the government.

None of the above requisites are extant in this case. The ship or vessel procured is not of a proprietary nature obtained only from a proprietary source. There are no patents, trade secrets or copyright prohibiting other suppliers of a ship. Procuring the vessel from Regina Shipping is also not a condition precedent to hold any contractor to guarantee project performance. Lastly, Regina Shipping is not an exclusive dealer or manufacturer not having sub-dealers selling at lower prices and for which no suitable substitute can be obtained at more advantageous terms to the government. Hence, the COA did not act with grave abuse of discretion in sustaining the Notice of Disallowance disallowing the partial payment amounting to Php4,250,000.00 as the resort to the alternative mode of direct contracting was unjustified.

(4) **YES.** The Court, in the recent case of *Torreta v. Commission on Audit*, formulated the guidelines for the return of disallowed amounts in cases involving disallowance in government contracts, to wit:

1. If a Notice of Disallowance is set aside by the Court, no return shall be required from any of the persons held liable therein.

2. If a Notice of Disallowance is upheld, the rules on return are as follows:

> a. Approving and certifying officers who acted in good faith, in the regular performance of official functions, and with the diligence of a good father of the family are not civilly liable to return consistent with Section 38 of the Administrative Code of 1987.
>
> b. Pursuant to Section 43 of the Administrative Code of 1987, approving and certifying officers who are clearly shown to have acted with bad faith, malice, or gross negligence, are solidarily liable together with the recipients for the return of the disallowed amount.

> c. The civil liability for the disallowed amount may be reduced by the amounts due to the recipient based on the application of the principle of quantum meruit on a case-to-case basis.
>
> d. These rules are without prejudice to the application of the more specific provisions of law, COA rules and regulations, and accounting principles depending on the nature of the government contract involved.

The above guidelines were a recalibration of the rules of return in *Madera v. Commission on Audit* after taking into consideration the peculiarity of cases involving government procurement contracts for goods or services.

Villafuerte, Jr.'s actuations were grossly negligent amounting to bad faith when he approved the transaction despite noncompliance with procurement laws and the glaring deficiencies in the requirements needed to process the transaction. Gross inexcusable negligence has been defined as negligence characterized by the want of even slight care, acting or omitting to act in a situation where there is a duty to act, not inadvertently, but willfully and intentionally with a conscious indifference to consequences insofar as other persons may be affected. It may become evident through the noncompliance of an approving or authorizing officer of clear and straightforward requirements of laws or rules, which because of their clarity and straightforwardness, only call for one reasonable explanation.

No badge of good faith can also be appreciated in Villafuerte, Jr.'s favor despite his claim of application of the doctrine in *Arias v. Sandiganbayan* considering the blatant disregard of procurement laws and rules he himself invoked. The flagrant deficiencies in the requirements and the patent disregard of the general rule for competitive bidding constitutes extraordinary circumstances that should have prompted him to look more closely at the legal and documentary requirements for the transaction. Instead, he readily approved the transaction without so much as an inquiry on the use of an alternative mode of procurement and without demanding for the completeness of the documentary requirements. The sheer number of missing supporting documents should have alerted him to require further verification from his subordinates.

Undoubtedly, there is a clear showing of gross negligence on the part of Villafuerte, Jr. for his failure to exercise the slightest care and with a conscious

indifference in the discharge of his duties coupled with the lack of any badge of good faith available to his case. Hence, his solidary liability for the disallowed amount should remain.

The principle of quantum meruit cannot likewise apply in this case to reduce their liability.

In *Lazaro v. Commission on Audit*, the Court held that when asserting limited or absence of liability based on the principles of quantum meruit and good faith, petitioners, in good diligence, must clearly allege and support the factual basis for their claims. It is not the Court's burden to construe incomplete submissions and vague narrations of petitioners to determine if their assertions have merit.

In the case at bar, there was no sufficient proof adduced to show how the purchase of MV Princess Elaine actually redounded to the benefit of the PG-CamSur allowing for the application of the principle of quantum meruit to reduce the liability of the persons named in the assailed ND. Coupled with the finality of the Decision rendered by the COA RO V for failure to timely file an appeal, as well as the finding of gross negligence, the Court saw no reason to reverse or modify the assailed Decision and Resolution without disregarding the doctrine of immutability of judgment.

DEVELOPMENT BANK OF THE PHILIPPINES VS. COMMISSION ON AUDIT

G.R. NO. 247787, 02 MARCH 2021, *EN BANC*, (M.V. LOPEZ, *J.*)

DOCTRINE OF THE CASE

The doctrine of immutability of a final judgment places emphasis on the fact that no other action can be taken on a Decision except to order its execution. Meaning, the Courts cannot modify a judgment to correct perceived errors of law or fact. There are, however, exceptions to the rule, such as the correction of clerical errors, nunc pro tunc entries, void judgments, and supervening events. Absent any exception, the rule stands that every litigation must come to an end at the risk of occasional errors.

Here, the COA lifted the notice of disallowance on February 1, 2012 and the DBP received the copy of the said Decision on February 6, 2012 and it has 30 days or until March 7, 2012 to move for a reconsideration or file a petition to the Supreme Court. Pagaragan's letters which were treated by COA as motion for reconsideration were filed only on March 27, 2012 which was well beyond the 30-day reglementary period. Hence, the COA has no jurisdiction to entertain Pagaragan's letters given that the Decision dated February 1, 2012 has become final and executory absent a timely motion for reconsideration or appeal.

FACTS

In 2006, the Board of Directors of the Development Bank of the Philippines (DBP) granted salary increases to its eight senior officers pursuant to its 1999 compensation plan. Later, the supervising auditor disallowed the amount because the DBP's compensation plan lacked prior approval from the Office of the President. On appeal of the notice of disallowance, the Commission on Audit (COA) Cluster Director denied the same.

As a result, the DBP filed a petition for review before the COA and invoked the memorandum where former President Macapagal-Arroyo approved the implementation of its compensation plan from 1999 onward. The COA granted the petition and lifted the notice of disallowance in a Decision dated February 1, 2012 (subject decision).

The DBP received a copy of the COA Decision but did not file any motion for reconsideration or a petition to the Supreme Court. Mario P. Pagaragan (Pagaragan), the Vice President/Officer-in-Charge of DBP's Program Evaluation Department, submitted confidential letters to the COA asking to reconsider the

Decision invoking that Section 261 (g) (2) of the Omnibus Election Code prohibits the grant of salary increase within 45 days before a regular election. As such, President Arroyo's post facto approval of DBP's compensation plan was deemed void as it was made within the 45-day period before the May 10, 2010 elections.

The COA reversed its prior Decision, treating the letter sent by Pagaragan as a motion for reconsideration pursuant to Section 10, Rule X of the 2009 Revised Rules of Procedure of COA. The DBP sought reconsideration on the ground that the subject Decision of COA has become final and executory and that Pagaragan was neither a party to the case nor entitled to any remedy. The COA party granted the motion but sustained the disallowance. Hence, the DBP filed a Petition for *Certiorari* before the Court.

ISSUES

(1) Is Pagaragan a real party in interest or an aggrieved party in the case?
(2) Is the COA guilty of unjustified delay?
(3) Is the COA's Decision dated February 1, 2012 already final and executory?

RULING

(1) **NO.** The Court provided that judicial review may be exercised only when the person challenging the act has the requisite legal standing, which pertains to a personal and substantial interest in the case such that he has sustained, or will sustain, direct injury as a result of its enforcement.

The Court has previously ruled that taxpayers, legislators, or concerned citizens filing suits in tax cases must claim some kind of injury-in-fact and allege that the continuing act has denied them some right or privilege to which they are entitled. In line with this, Rule VII, Sec. 1 of the COA Rules defines an aggrieved party as "the party aggrieved by a decision of the Director or the ASB who may appeal to the Commission Proper." Such presupposes that the movant or appellant is a party to the original proceedings that gave rise to the assailed decision, order or ruling.

Here, the Court ruled that Pagaragan is not a real party in interest or an aggrieved party who is entitled to file a motion for reconsideration. To begin with, the Court also indicated that the allowance or disallowance of the salary increases will not affect Pagaragan in that the lifting of such notice will not prejudice him as the money given to the senior officers did not come from his personal funds but from DBP.

Conversely, if the disallowance is sustained, the senior officers will bear the consequence of returning the remunerations.

More importantly, Pagaragan was not a party to the original proceedings and merely came into the picture when the COA lifted the notice of disallowance. In effect, he is not an aggrieved party who may appeal the COA Decision or Resolution as gleaned from the COA Rules.

(2) **YES.** Sec. 16, Art. III of the 1987 Constitution is clear that all persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies. In other words, any party, regardless of the nature of the case, may demand expeditious action on all officials who are tasked with the administration of justice.

The Court noted that the right to a speedy disposition of a case is deemed violated only when vexatious, capricious, and oppressive delays attended the proceedings. As such, several factors must be considered, including the length of the delay, the reasons for the same, the assertion or failure to assert such right, and the prejudice it caused by the delay.

In this case, the COA is guilty of unjustified delay. In relation to the submission of confidential letters in March 2012 to the COA for reconsideration, the latter took more than three years or until April 2015 to act on the letters and reverse its February 1, 2012 Decision. In July 2015, the DBP filed a motion for reconsideration, which took COA almost four years or until June 14, 2019 to resolve the motion. There was no justification for both delays. On its part, the DBP was able to assert the right to speedy disposition of the case. The delay caused by COA prejudiced the rights of DBP as an institution and that of the senior officers whose salary increases are suspended and the possibility of being required to reimburse the amount has been hanging over their head like a sword of Damocles.

(3) **YES.** The doctrine of immutability of a final judgment emphasizes that no other action can be taken on a Decision except to order its execution. Meaning, the Courts cannot modify a judgment to correct perceived errors of law or fact. However, there are exceptions to the rule, such as the correction of clerical errors, *nunc pro tunc* entries, void judgments, and supervening events. Absent any exception, the rule stands that every litigation must come to an end at the risk of occasional errors.

The COA Rules of Procedure is explicit that the Commission's Decision or Resolution shall become final and executory after 30 days from notice unless a motion for reconsideration or an appeal to the Supreme Court is filed. This is in line with the 2009 Rules and Regulations on the Settlement of Accounts and P.D. No. 1445.

Here, the COA lifted the notice of disallowance on February 1, 2012 and the DBP received the copy of the said Decision on February 6, 2012 and it has 30 days or until March 7, 2012 to move for a reconsideration or file a petition to the Supreme Court. Pagaragan's letters which were treated by COA as motion for reconsideration were filed only on March 27, 2012 which was well beyond the 30-day reglementary period. Hence, the COA has no jurisdiction to entertain Pagaragan's letters given that the Decision dated February 1, 2012 has become final and executory absent a timely motion for reconsideration or appeal.

EQUITABLE PCI BANK, INC. (NOW BANCO DE ORO UNIBANK, INC.) *v.* SOUTH RICH ACRES, INC., ET AL.

G.R. NO. 202384, 04 MAY 2021, *EN BANC*, (INTING, *J.*)

DOCTRINE OF THE CASE

In police power, while the regulation affects the right of ownership, none of the bundle of rights which constitute ownership is appropriated for use by or for the benefit of the public. However, when there is already a taking or confiscation of private property for public use, the State is no longer exercising police power, but eminent domain for which just compensation must be paid.

In this case, before the enactment of the city ordinance, SRA and Top Service retained ownership of the parcels of land. There is nothing in the records to show that the subject lots have been donated or conveyed to, or legally acquired by the City of Las Piñas. In fact, the City of Las Piñas did not contest SRA and Top Service's ownership of the parcels of land prior to the city ordinance's enactment.

FACTS

In 1997, the Sangguniang Panlungsod of the City of Las Piñas enacted a City Ordinance, which declared the whole length of Marcos Alvarez Avenue from Congressman Felimon C. Aguilar Avenue to the boundary of the Municipality of Bacoor, Province of Cavite as a public road.

South Rich Acres, Inc. (SRA) and Top Service, Inc. (Top Service) filed a Petition for Declaratory Relief and Damages with a Prayer for Preliminary Injunction with the Regional Trial Court (RTC) against the City of Las Piñas, seeking to annul City Ordinance. SRA alleged to be the present legal owner of the seven parcels of land mentioned in the City Ordinance, having acquired the subject lots from Top Service through a legal assignment. It further alleged that other landowners and developers whose properties would necessarily make access through Marcos Alvarez Avenue had secured a right of way authority and paid compensation to them.

In its Answer, the City of Las Piñas did not deny that the subject lots were private properties. However, it asserted that Marcos Alvarez Avenue was already government property, having been withdrawn from the commerce of man as an open space. Royal Asia Multi-Properties, Inc. (RAMPI) filed a Motion for Leave

of Court to File Answer in Intervention on the ground that it has legal interest in the upholding of the validity and constitutionality of City Ordinance because SRA and Top Service had been unjustifiably demanding payment from them for the use of Marcos Alvarez Avenue. During the proceeding, Equitable PCI Bank, Inc. (EPCIB) substituted RAMPI because all the rights and interests over the Royal South Subdivision had already been transferred, conveyed, and assigned by RAMPI to EPCIB. Likewise, the Register of Deeds of Las Piñas was directed to annotate a notice of *lis pendens* in all the titles of Royal South Subdivision project.

The RTC, first, declared the City Ordinance as invalid and unconstitutional for taking the property without just compensation; and second, denied the claim of SRA and Top Service for damages against EPCIB for lack of merit. It also denied the motion of BDO, formerly EPCIB, to lift or cancel the notice of *lis pendens* on all certificates of title covering the affected subdivision properties

On appeal, the CA affirmed the RTC's decision and found that the lots of SRA and Top Service were neither expropriated nor date in favor of the City of Las Piñas. Hence, there was a violation of the right against confiscation of property without just compensation. The CA also dismissed the invocation of BDO, formerly EPCIB, that the city ordinance is constitutional since it was an exercise of police power which does not require the payment of just compensation. According to the CA, the taking and confiscation of private property for public use is not the use of police power but of eminent domain. As for the *lis pendens,* the CA found the annotation of notice of *lis pendens* improper to all the properties. Only the particular properties may be covered by the notice of *lis pendens* and not all.

Hence, this petition.

ISSUES

(1) Is the City Ordinance enacted by Sangguniang Panlungsod of the City of Las Piñas constitutional?
(2) Is the cancellation of the Notice of *Lis Pendens* on all the TCTs of the Royal South Subdivision Project of BDO proper?

RULING

(1) **NO.** The Court found the City Ordinance as unconstitutional for being an invalid exercise of police power.

Police power is defined as "the inherent power of the State to regulate or to restrain the use of liberty and property for public welfare." Thus, "under the police power of the State, 'property rights of individuals may be subjected to restraints and burdens in order to fulfill the objectives of the government.'" However, "police power does not involve the taking or confiscation of property, with the exception of a few cases where there is a necessity to confiscate private property in order to destroy it for the purpose of protecting peace and order and of promoting the general welfare; for instance, the confiscation of an illegally possessed article, such as opium and firearms."

On the other hand, eminent domain is defined as "the inherent power of the State to take or appropriate private property for public use." It must be emphasized, however, that as provided under Section 9, Article III of the 1987 Constitution, "private property should not be taken for public use without just compensation." Thus, the exercise of eminent domain requires the payment of just compensation to the owner.

In police power, while the regulation affects the right of ownership, none of the bundle of rights which constitute ownership is appropriated for use by or for the benefit of the public. However, when there is already a taking or confiscation of private property for public use, the State is no longer exercising police power, but eminent domain for which just compensation must be paid.

In this case, before the enactment of the city ordinance, SRA and Top Service retained ownership of the parcels of land. There is nothing in the records to show that the subject lots have been donated or conveyed to, or legally acquired by the City of Las Piñas. In fact, the City of Las Piñas did not contest SRA and Top Service's ownership of the parcels of land prior to the city ordinance's enactment.

Given the foregoing, the Court found that the declaration of the entirety of Marcos Alvarez Avenue as a public road despite the fact that the subject lots are owned by SRA is an act of unlawful taking of SRA's property. While BDO argued that the enactment of City Ordinance is for the benefit of the public particularly the residents of Las Piñas and Cavite, the constitutional prohibition

on the taking of private property for public use without just compensation prevented the City of Las Piñas from doing so.

(2) **YES.** A litigant may avail himself of the notice of *lis pendens* in any of the following case: (a) an action to recover possession of real estate; (b) an action to quiet title thereto; (c) an action to remove clouds thereon; (d) an action for partition; and (e) any other proceedings of any kind in Court directly affecting the title to the land or the use or occupation thereof or the building thereon.

A litigant may avail himself of the notice of *lis pendens* in any of the following case: (a) an action to recover possession of real estate; (b) an action to quiet title thereto; (c) an action to remove clouds thereon; (d) an action for partition; and (e) any other proceedings of any kind in Court directly affecting the title to the land or the use or occupation thereof or the building thereon.

SRA's argument that the order of the RTC to annotate the notice of *lis pendens* on BDO's titles has attained finality, and thus, can no longer be cancelled, is erroneous. As expressly provided under Section 77 of PD 1529, before final judgment, the notice of *lis pendens* may be cancelled upon order of the court after proper showing that the notice is for the purpose of molesting the adverse party, or that it is not necessary to protect the rights of the party who caused it to be recorded. On the other hand, after final judgment, the notice of *lis pendens* is rendered functus officio. Thus, under Section 77 of PD 1529, in cases where there is already a final judgment, the notice of *lis pendens* may be cancelled upon the registration of a certificate of the clerk of court in which the action or proceeding was pending stating the manner of disposal thereof.

The Court found that the annotation of the notice of *lis pendens* on BDO's titles is improper because the lots owned by BDO are not the properties subject of litigation in this case and the annotation of the notice of *lis pendens* on BDO's titles is not necessary to protect the rights of SRA. As correctly ruled by the CA, the issue involved in this case is the constitutionality of the City Ordinance which declared Marcos Alvarez Avenue as a public road. Thus, the properties in litigation in this case are the subject lots where Marcos Alvarez Avenue is situated and not the lots in the Royal South Subdivision project which are owned by BDO.

EFRAIM C. GENUINO *v.* COMMISSION ON AUDIT (COA)

G.R. NO. 230818, 15 JUNE 2021, *EN BANC*, (DELOS SANTOS, *J.*)

DOCTRINE OF THE CASE

As it stands, since Section 15 of P. D. No. 1869 has yet to be amended, repealed, or declared unconstitutional, the Court held that it is left with no recourse except as to apply the law as presently written, that is, any government audit over PAGCOR should be limited to its 5% franchise tax and 50% of its gross earnings pertaining to the Government as its share. Resultantly, any audit conducted by COA beyond the aforementioned is accomplished beyond the scope of its authority and functions.

Here, the P2,000,000.00 financial assistance granted by PAGCOR to PVHA was sourced from PAGCOR's operating expenses, in particular, its marketing expenses. It is, thus, clear that the audit conducted by COA in this case was not made in relation to either the 5% franchise tax or the Government's 50% share in its gross earnings and therefore, beyond the scope of COA's audit authority. As pointed out by Genuino, the limitation imposed on COA's authority to audit PAGCOR is further bolstered by the fact that there are bills in Congress that have been filed precisely to expand COA's audit jurisdiction beyond the said franchise tax and the Government's share in its gross earnings. By implication, these bills would have been unnecessary had COA been empowered to conduct a general audit on all of PAGCOR's funds.

FACTS

In 2010, Philippine Amusement and Gaming Corporation (PAGCOR) approved a project for the construction of a flood control and drainage system for Pleasant Village Subdivision (Pleasantville), and donated an amount of P2,000,000 to Pleasant Village Homeowners Association (PVHA).

However, in 2013 the Commission on Audit (COA) issued a Notice of Disallowance disapproving the financial assistance to PVHA. According to COA, it violated the Government Auditing Code for being used for a private purpose, since Pleasantville is a private property. The disallowance was made after COA received confirmation that neither the whole nor part of Pleasantville had been donated to the Municipality of Los Banos, Laguna. Thus, Mr. Efriam C. Genuino (Genuino), among others, was held liable as the Chairman and CEO and for approving the payment.

Genuino filed an appeal, but the COA-Corporate Government Sector denied the same and held him solidarily liable as the official who approved the grant and payment of the financial assistance.

Aggrieved, Genuino filed a Petition for Review based on the following grounds: (1) the subject roads covered by PAGCOR's P2,000,000.00 financial assistance was public property, and, thus, met the public purpose requirement; (2) the financial assistance was extended pursuant to PAGCOR's corporate social responsibility; (3) the Minutes of the Meeting of the Sangguniang Barangay Tuntungin-Putho effected the turn-over of the subject roads to the barangay as early as August 2009, and, thus, the subject roads were public property; (4) the Minutes of the Meeting of the Sangguniang Barangay was executed by public officials in the performance of their official functions, and, thus, enjoys the presumption of regularity; and (5) the approval of the financial assistance was a collegial act of the Board of Directors and petitioner merely exercised his duties in approving the same.

The COA maintained the propriety of the disallowance ruling that the area covered by the donation P2,000,000.00 financial assistance is not public property, nor is the donation for a public purpose, contrary to Section 4(2) of Presidential Decree No. 1445. The subject property is still considered private until the local government of Los Baños, Laguna acquires the property by donation, purchase or expropriation. A mere acceptance in a Sangguniang Barangay meeting cannot produce a legal transfer and turnover of a property.

Genuino repleaded all his prior arguments. In addition, he averred that COA's audit jurisdiction over PAGCOR is limited to 5% franchise tax remitted to the Bureau of Internal Revenue (BIR) and 50% of its gross earnings remitted to the National Treasury. Since the P2,000,000 financial assistance to PVHA was sourced from PAGCOR's operating expenses, particularly its marketing expenses, it was beyond COA's audit jurisdiction.

Hence, this petition.

ISSUE

Did COA exceed its audit jurisdiction over PAGCOR?

RULING

YES. The Court found that COA acted with grave abuse of discretion when it exceeded its audit jurisdiction over PAGCOR. By law, COA's audit jurisdiction over PAGCOR is limited to the latter's remittances to the BIR as franchise tax and the National Treasury with respect to the Government's share in its gross earnings.

COA's limited audit jurisdiction over PAGCOR is based on its very own Charter. Section 15 of P.D. No. 1869 states that the COA's audit jurisdiction is limited to the 5% franchise tax and 50% share of the Government in its gross earnings. As it stands, since Sec. 15 of P. D. No. 1869 has yet to be amended, repealed, or declared unconstitutional, the Court held that it is left with no recourse except as to apply the law as presently written, that is, any government audit over PAGCOR should be limited to its 5% franchise tax and 50% of its gross earnings pertaining to the Government as its share. Resultantly, any audit conducted by COA beyond the aforementioned is accomplished beyond the scope of its authority and functions.

Here, the P2,000,000.00 financial assistance granted by PAGCOR to PVHA was sourced from PAGCOR's operating expenses, particularly, its marketing expenses. It is, thus, clear that the audit conducted by COA in this case was not made in relation to either the 5% franchise tax or the Government's 50% share in its gross earnings and, therefore, beyond the scope of COA's audit authority.

Despite COA's general mandate to ensure that "all resources of the government shall be managed, expended or utilized in accordance with law and regulations, and safeguard against loss or wastage through illegal or improper disposition, the same cannot prevail over a special law such as P.D. No. 1869 or the "PAGCOR Charter." In granting a special charter to PAGCOR, legislature is presumed to have specially considered all the relevant factors and circumstances in granting the same, being mindful of PAGCOR's dual role: first, to operate and to regulate gambling casinos and second, to generate sources of additional revenue to fund infrastructure and socio-civic projects, and other essential public services.

It remains a basic fact in law that the decision of a court or tribunal without jurisdiction is a total nullity. It is, thus, apparent that COA's actions in this case, from the issuance of Notice of Disallowance and, correspondingly, the assailed Decision and Resolution, are null and void. They create no rights and

produce no legal effect. To stress, the disposition of this case rests solely on the fact that COA acted with grave abuse of discretion in conducting an audit of PAGCOR's accounts beyond the 5% franchise tax and 50% of the Government's share in its gross earnings as stated in Sec. 15 of P.D. No. 1869. The Court, therefore, made no pronouncement whether the financial assistance granted to PVHA was violative of the public purpose requirement under P.D. No. 1445 and the propriety of holding Genuino civilly liable therefore, for having been rendered moot and academic.

MORE ELECTRIC AND POWER CORPORATION *v.* PANAY ELECTRIC COMPANY, INC.

G.R. NO. 248061, 09 MARCH 2021, *EN BANC RESOLUTION* (CARANDANG, *J.*)

REPUBLIC OF THE PHILIPPINES, MORE ELECTRIC AND POWER CORPORATION *v.* PANAY ELECTRIC COMPANY, INC. G.R. No. 249406, 09 March 2021, *EN BANC RESOLUTION*(Carandang, *J.*)

DOCTRINE OF THE CASE:

The following are the requisites for the valid exercise of the power of eminent domain: (1) the property taken must be private property; (2) there must be genuine necessity to take the private property; (3) the taking must be for public use; (4) there must be payment of just compensation; and (5) the taking must comply with due process of law. The requirement of "public use" is now synonymous with "public interest," "public benefit," and "public convenience.".

In this case, expropriation under Sections 10 and 17 of R.A. No. 11212 is for the general purpose of electricity distribution which affects the public welfare. The assailed provisions ensure uninterrupted supply of electricity in the city during the transition from the old to the new franchisee. MORE, as the new franchisee, is mandated under Section 2 of R.A. No. 11212 to operate and maintain the distribution system in the best manner possible. To do so, its right to expropriate the distribution system in Iloilo City to ensure uninterrupted supply of electricity should not be hampered by unfounded allegations of undue benefit and corporate takeover. In the end, the net public benefit generated from the exercise of the right of eminent domain outweighs any incidental and secondary benefit any private entity, including MORE, may acquire.

FACTS

On 23 July 2018, Republic Act No. 11212 (R.A. No. 11212) was enacted to grant More Electric and Power Corporation (MORE) a franchise to establish, operate, and maintain an electric power distribution system in Iloilo City. Sec. 10 of R.A. No. 11212 confers on MORE the authority to exercise the right of eminent domain. The distribution system presently used in Iloilo City was owned by Panay Electric Company, Inc. (PECO), the franchise holder since 1922, which expired on 18 January 2019. Given that no new franchise has been issued in favor

of PECO and MORE has not established its service yet, Sec. 17 of R.A. No. 11212 permits PECO to continue operating the existing distribution system during the interim period. This same provision also stated that the interim arrangement shall not prevent MORE from acquiring the system through the exercise of the right of eminent domain.

PECO filed a Petition for Declaratory Relief assailing the constitutionality of Sections 10 and 17 of R.A. No. 11212 and argued that these provisions encroach on its constitutional right to due process and equal protection. According to PECO, the authority granted to MORE to takeover PECO's business by seizing its assets under the veil of expropriation cannot be done without violating its right to substantive due process. Meanwhile, MORE filed a Complaint for Expropriation with the Regional Trial Court (RTC), which was enjoined by a Temporary Restraining Order issued by the trial court. Upon motion by PECO for judgment on the pleadings, RTC decided that the assailed provisions were void and unconstitutional because of want of the element of public use. MORE filed a petition for review on *certiorari* under Rule 45 before the Supreme Court. On 15 September 2020, the Court rendered its Decision reversing and setting aside the Decision of the RTC. Hence, this Motion for Reconsideration filed by PECO.

ISSUE

May the assets of a power distribution company whose franchise has expired be acquired, through expropriation, by another power distribution utility with a new franchise?

RULING

YES. Sections 10 and 17 of R.A. No. 11212, giving MORE the power to expropriate the distribution system of PECO, are but integral parts of the grant of the franchise by Congress. Since the exercise of eminent domain is necessary to carry out the franchise, it is prudent that the Court accords respect to the legislative will.

The Court upheld the constitutionality of Sections 10 and 17 of R.A. No. 11212 recognizing the following requisites for the valid exercise of the power of eminent domain: (1) the property taken must be private property; (2) there must be genuine necessity to take the private property; (3) the taking must be for public use; (4) there must be payment of just compensation; and (5) the taking must

comply with due process of law. The requirement of "public use" is now synonymous with "public interest," "public benefit," and "public convenience."

In this case, expropriation under Sections 10 and 17 of R.A. No. 11212 is for the general purpose of electricity distribution which affects public welfare. The assailed provisions ensure uninterrupted supply of electricity in the city during the transition from the old to the new franchisee. Iloilo City's public space is already burdened by PECO's existing distribution system and yet, the distribution system cannot continue to operate under PECO's franchise as this has not been renewed by Congress. The Court emphasized that in carrying out the obligations of MORE in its legislative franchise, time is of the essence in that MORE is only given two years from the grant of the legislative franchise to either establish its own distribution system or acquire the existing distribution system through the exercise of eminent domain. This aligns with the State's objective of ensuring uninterrupted supply of electricity in the city. MORE considered it practical to exercise its power of eminent domain as there are already existing structures that would facilitate the unimpeded transition from PECO to MORE.

In granting MORE the right to exercise eminent domain, the primordial concern of Congress is the welfare of the residents of Iloilo City who rely on the distribution system of PECO. There is no question that PECO's franchise was not renewed. Thus, it can no longer operate the distribution system in Iloilo City. MORE, as the new franchisee, is mandated under Section 2 of R.A. No. 11212 to operate and maintain the distribution system in the best manner possible. To do so, its right to expropriate the distribution system in Iloilo City to ensure uninterrupted supply of electricity should not be hampered by unfounded allegations of undue benefit and corporate takeover. In the end, the net public benefit generated from the exercise of the right of eminent domain outweighs any incidental and secondary benefit any private entity, including MORE, may acquire.

Moreover, the incidental benefit enjoyed by MORE does not render its legislative franchise unconstitutional because the same does not override the paramount public interest on which the right of eminent domain is hinged. It would be unfair for the public to be deprived of access to uninterrupted supply of electricity, an important tool to economic growth, simply because of some incidental benefit MORE may gain from its legislative franchise.

OFFICE OF THE OMBUDSMAN *v.* OSCAR MALAPITAN

G.R. NO. G.R. NO. 229811, APRIL 28, 2021, THIRD DIVISION (LEONEN, *J.*)

DOCTRINE OF THE CASE

The condonation doctrine was abandoned on April 12, 2016, when Carpio Morales v. Court of Appeals attained finality. Nonetheless, despite its abandonment, the doctrine can still apply to pending administrative cases provided that the reelection is also before the abandonment. As for cases filed after April 12, 2016, the impleaded public official can no longer resort to the condonation doctrine.

FACTS

Malapitan was the Caloocan City First District Representative from 2004 to 2007. He was reelected from 2007 to 2010 and again from 2010 to 2013. In 2013, he became the Caloocan City mayor, and was reelected in 2016. He was reelected again in 2019 which makes him the incumbent mayor of Caloocan.

On February 16, 2015, the Office of the Ombudsman's Public Assistance and Corruption Prevention Office filed a criminal complaint for violation of R.A. No. 3019 or the Anti-Graft and Corrupt Practices Act, against Malapitan. The complaint arose from the allegedly anomalous use of Malapitan's Priority Development Assistance Fund (PDAF) worth P8,000,000.00 committed in 2009 during his reign as district representative.

The criminal complaint also contained an administrative charge for grave misconduct, gross neglect of duty, and conduct prejudicial to the best interest of service against three officials. Malapitan was not impleaded in the administrative complaint. On January 22, 2016, the Public Assistance and Corruption Prevention Office filed a Motion to Admit Attached Amended Complaint, asking that Malapitan be impleaded in the administrative complaint after he had been inadvertently left out as a respondent. On February 22, 2016, the Office of the Ombudsman's Task Force PDAF granted the motion.

The denial of Malapitan's Motion for Reconsideration prompted him to file a Petition for *Certiorari* and Prohibition before the Court of Appeals (CA). On August 31, 2016, the CA granted the Petition. It revisited the history of the condonation doctrine in jurisprudence until it was abandoned in *Carpio Morales v.*

Court of Appeals on November 10, 2015. It pointed out that such abandonment applied prospectively. It then ruled that since Malapitan's alleged misconduct was committed in 2009, the condonation doctrine is applicable.

The Office of the Ombudsman contends that the condonation doctrine was not applicable to Malapitan since it was already abandoned in Carpio Morales. Furthermore, the said doctrine should no longer be applied to cases that are still pending before its abandonment.

Hence, this petition.

ISSUES

(1) Did the CA err in ruling that the condonation doctrine is applicable to Malapitan?

(2) Did the CA err in ruling on the administrative liability of Malapitan when the latter raised the issue of grave abuse of discretion on the part of the Office of the Ombudsman when it grated the Motion to Admit Attached Amended Complaint?

RULING

(1) **NO.** Since the act constituting the administrative offense was allegedly committed in 2009, and he was reelected in 2010, the condonation doctrine would still apply.

In *Crebello v. Office of the Ombudsman,* the Supreme Court declared the exact date of the abandonment of the condonation doctrine:

> "The abandonment of the doctrine of condonation took effect on April 12, 2016, when the Supreme Court denied with finality the OMB's Motion for Reconsideration in *Morales v. Court of Appeals."*

Here, the amended administrative complaint was admitted on February 22, 2016; hence, the condonation doctrine was not yet abandoned. The alleged acts imputed to respondent were supposedly committed in 2009. He was reelected as member of the House of Representatives in 2010. This immediately succeeding victory is what the condonation doctrine looks at. That respondent was later reelected in 2013, 2016, and 2019 would be irrelevant.

Although the administrative complaint was filed against respondent after the 2010 elections, it would not change the fact that the alleged act was committed in 2009, and the electorate reelected him in 2010, the immediately succeeding election.

The Court took the opportunity to clarify the effect of *Carpio Morales.* In *Crebello,* the Court upheld the Office of the Ombudsman's argument that since the abandonment became effective only on April 12, 2016, "it would no longer apply the defense of condonation starting on April 12, 2016 *except for open and pending administrative cases."* Thus, after *Carpio Morales* became final, the condonation doctrine's applicability now depends *on the date of the filing of the complaint,* not the date of the commission of the offense. Had the case been filed against Malapitan on April 13, 2016, for instance, he could no longer rely on the condonation doctrine.

However, since the case was filed in January 2016, and was admitted in February 2016, *it was already an open case by the time the condonation doctrine was abandoned.*

(2) **NO.** Generally, courts are limited to the issues raised by the parties before it. However, since Malapitan invoked the condonation doctrine, and it was ruled that the doctrine is applicable in his case, then there the CA did not err.

For administrative cases filed after April 12, 2016, the date when the condonation doctrine was abandoned, the rule is that courts should refrain from interfering with investigations conducted by the Office of the Ombudsman, being an independent body authorized by no less than our Constitution and Republic Act No. 677077 to handle complaints against public officials and civil servants.

For clarity, Malapitan is absolved only of administrative liability based on the condonation doctrine. The Court makes no pronouncement on the criminal complaint against him.

PHILIPPINE CHAMBER OF COMMERCE AND INDUSTRY, SAN BEDA COLLEGE ALABANG INC., ATENEO DE MANILA UNIVERSITY, AND RIVERBANKS DEVELOPMENT CORPORATION *v.* DEPARTMENT OF ENERGY, HON. ALFONSO G. CUSI, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF ENERGY, ENERGY REGULATORY COMMISSION AND HON. JOSE VICENTE B. SALAZAR, IN HIS OFFICIAL CAPACITY AS CHAIRPERSON OF THE ENERGY REGULATORY COMMISSION, AND HON. ALFREDO J. NON, HON. GLORIA VICTORIA C. YAPTARUC, HON. JOSEFINA PATRICIA M. ASIRIT, AND HON. GERONIMO D. STA. ANA, IN THEIR OFFICIAL CAPACITY AS INCUMBENT COMMISSIONERS OF THE ENERGY REGULATORY COMMISSION

G.R. NO. 228588, 229143 & 229453, 02 MARCH 2021, *EN BANC*, (LEONEN, *J.*)

DOCTRINE OF THE CASE

All that is required for the valid exercise of the power of subordinate legislation is that the regulation must be germane to the objects and purposes of the law and in conformity with the standards prescribed by the law.

In the case at bar, the Court finds that the contested Department Circular supports the voluntary transfer to the contestable market by emphasizing customer choice, with the contestable customer at liberty to source its electricity supply from as it reflects the EPIRA's underlying objective of creating a free and competitive market that will provide reliable electricity at reasonable prices. Clearly, the voluntary participation or migration of contestable customers to the contestable market in Department Circular is contrary to the directive of mandatory migration contained in the assailed issuances.

FACTS

Republic Act No. 9136 or the Electric Power Industry Reform Act of 2001 (EPIRA) was enacted in 2001 and it sought to provide a framework for the restructuring of the electric power industry, including the privatization of the assets of National Power Corporation, the transition to the desired competitive structure, and the definition of the responsibilities of the various government

agencies and private entities to attain its underlying objective of creating a free and competitive market that will provide reliable electricity at reasonable prices.

In line with the EPIRA, the Department of Energy (DOE) and the Energy Regulatory Commission (ERC) (Department of Energy, *et al.*) issued several administrative issuances allowing electricity end-users in the contestable market to freely choose from the qualified retail electricity suppliers, including local retail electricity suppliers and distribution utilities within their franchise area. Moreover, DOE issued a Department Circular, which provided policies for the full implementation of Retail Competition and Open access.

However, Philippine Chamber of Commerce and Industry, San Beda College Alabang Inc., Ateneo De Manila University, and Riverbanks Development Corporation (Philippine Chamber of Commerce and Industry, *et al.*), the electricity end-users and electric cooperatives under EPIRA, filed petitions against such administrative issuances. Specifically, they claimed that the Department of Energy Circular and Energy Regulatory Commission Resolution Nos. 5, 10, 11, and 28, all series of 2016, are unconstitutional for usurping legislative authority, violating the right to due process, equal protection clause, and non-impairment clause, as well as being an unreasonable exercise of police power.

In 2017, the Court issued a Temporary Restraining Order enjoining the Department of Energy, *et al.* from implementing the assailed issuances. The Department of Energy, *et al.* asserted that the migration is mandatory, as supported by the EPIRA itself and posited that the assailed issuances providing for mandatory migration fall under DOE's power and function under the EPIRA to formulate rules and regulations to implement the objectives of the law and that they do not violate the non-impairment clause because a franchise is in the nature of a grant, which is not covered by the non-impairment clause.

In 2018, DOE filed a separate Comment to the consolidated Petitions and Petitions-in-Intervention, with motion for early resolution as it found the Department Circular to be inconsistent with the EPIRA, particularly with its requirement for the mandatory migration to the contestable market. However, the Office of the Solicitor General said it would maintain its original position and would only represent respondent ERC in the case from thereon.

ISSUES

(1) Should the assailed issuances be struck down for being ultra vires?
(2) Would the petitions have been mooted by DOE's revocation of its assailed Department Circular?

RULING

(1) **YES.** As held by the Court in *Equi-Asia Placement, Inc. v. Department of Foreign Affairs*:

> All that is required for the valid exercise of the power of subordinate legislation is that the regulation must be germane to the objects and purposes of the law; and that the regulation be not in contradiction to, but in conformity with, the standards prescribed by the law. Under the first test or the so-called completeness test, the law must be complete in all its terms and conditions when it leaves the legislature such that when it reaches the delegate, the only thing he will have to do is to enforce it. The second test or the sufficient standard test, mandates that there should be adequate guidelines or limitations in the law to determine the boundaries of the delegate's authority and prevent the delegation from running riot.

Thus, to be a valid delegation of legislative power, subordinate legislation from specialized administrative agencies must be germane to the objects and purposes of the law and in conformity with the standards prescribed by the law.

Here, DOE, with its mandate of supervising the restructuring of the electricity industry, is the agency tasked with formulating rules and regulations to give life to EPIRA's policy objectives. Respondent ERC, for its part, is tasked with implementing the rules and regulations formulated and issued by respondent DOE.

After thorough scrutiny, the Court finds that the contested Department Circular supports the voluntary transfer to the contestable market by emphasizing customer choice, with the contestable customer at liberty to source its electricity supply from as it reflects the EPIRA's underlying objective of creating a free and competitive market that will provide reliable electricity at reasonable prices.

Clearly, the voluntary participation or migration of contestable customers to the contestable market in Department Circular is contrary to the directive of mandatory migration contained in the assailed issuances. Moreover, with the assailed Department Circular having been repealed, the assailed ERC Resolutions, which were regulatory guidelines to the Department Circular, have become bereft of legal basis.

(2) **NO.** A case is rendered moot when there is no longer a conflict of legal rights which would entail judicial review. The Court is precluded from ruling on moot cases, where no justiciable controversy exists. However, exceptions do exist. In *David v. Arroyo*:

> Courts will decide cases, otherwise moot and academic, if: first, there is a grave violation of the Constitution; second, the exceptional character of the situation and the paramount public interest is involved; third, when constitutional issue raised requires formulation of controlling principles to guide the bench, the bar, and the public; and fourth, the case is capable of repetition yet evading review.

Here, while the repealing Department Circulars may have modified or repealed portions of the assailed Department Circular, respondent ERC continues to assert that distribution utilities should be prohibited from participating in the contestable market, and that the migration of qualified end-users to the contestable market is mandatory. Clearly, there remains a continuing controversy which requires judicial resolution. Thus, the Court may not consider the case as moot and academic as of yet.

SECURITIES AND EXCHANGE COMMISSION *v.* COMMISSION ON AUDIT

G.R. NO. 252198, 27 APRIL 2021, *EN BANC* (LAZARO-JAVIER, *J.*)

DOCTRINE OF THE CASE

GAA 2010, Special Provision No. 1 clearly limits the use of income for augmenting only the MOOE and CO allocations of the SEC. Special Provision No. 1 did not repeal Section 75 of the SRC but simply imposed a limitation on how the SEC could use its retained income.

To elucidate, a provident fund "is a type of retirement plan where both the employer and employee make fixed contributions. Out of the accumulated fund and its earnings, employees receive benefits upon their retirement, separation from service or disability." Thus, when SEC utilized its retained income to pay for its counterpart in the provident fund, it was not for the purpose of paying for "expenses necessary for the regular operations of an agency like, among others, traveling expenses, training and seminar expenses, water, electricity, supplies expense, maintenance of property, plant and equipment, and other maintenance and operating expenses." Nor was the payment used for the "purchase of goods and services, the benefits of which extend beyond the fiscal year and which add to the assets of Government."

In this case, the COA correctly classified contributions to the provident fund within the category of "personal services." SEC failed to comply with the law when it used its retained income to pay for its counterpart contribution to the provident fund, which is neither and MOOE or a CO item. Consequently, the disbursement of the SEC's retained income warrants its disallowance.

FACTS

In 2002, the Securities and Exchange Commission (SEC) established a provident fund for its officials and employees pursuant to Section 7 of the Securities Regulation Code (SRC). Thereafter, SEC *En Banc* approved an across-the-board 15% increase of its counterpart contribution to the provident fund. The said 15% increase will be taken from the SEC'S retained income.

In 2004, SEC received a letter from the Department of Budget and Management (DBM) informing the SEC that the utilization of retained income is left to the discretion of the Commission subject to the usual accounting rules and regulations. Encouraged by this pronouncement, the SEC *En Banc* approved the

annual allocation of its provident fund contribution from its retained income starting 2004.

When the SEC submitted auditing requirements to the DBM it was shown that around P19 million was disbursed as counterpart contribution to the provident fund. COA-SEC Audit Team disallowed the disbursement made under Notice of Disallowance. The basis of the disallowance are the following: *First,* the disbursement from the retained income is not in accord with Section 1 of the Special Provisions for the SEC – GAA for Fiscal Year 2010. *Second*, the granting of personnel benefits authorized by law but not supported by specific appropriations is deemed unauthorized under Sec 37 of Presidential (PD) 1177. *Third,* the compensation plan was subject to the approval of the Office of the President, which in this case was absent. Hence, the approving, certifying, and authorizing officers, including the SEC employees, were solidarily liable for the total disallowance.

Aggrieved, SEC appealed before the COA-National Government Sector (COA-NGS). However, it affirmed the disallowance. It was also affirmed with modification by COA *En Banc,* where only the approving, certifying, and authorizing officers were held liable.

SEC argues that COA overlooked the fact that the disbursement was part of its retained income under Section 75 of the SRC. As such, it was an off-budget fund, did not need appropriation, and was not included in the coverage of GAA 2010. Further, Section 75 of the SRC grants SEC exclusive discretion on how it should be used. The Office of the Solicitor General (OSG) contends that the authority of SEC is still subject to auditing requirements, standards, and procedures; and that it violated Special Provision No. 1 for SEC in GAA 2010, Section 37 of PD 1177, and Sections 34 and 25 of the Administrative Code.

Hence, this petition.

ISSUES

(1) Did the COA validly disallow the allocation and payment from SEC's retained income to the provident fund?
(2) Are the approving, certifying, and authorizing officials of the SEC liable to refund the disallowed amount?

RULING

(1) **YES.** The disallowance of the disbursement is valid.

"Section 75 of the SRC states:

> SEC. 75. Partial Use of Income. — To carry out the purposes of this Code, the Commission is hereby authorized, in addition to its annual budget, to retain and utilize an amount equal to one hundred million pesos (P100,000,000.00) from its income.
>
> The use of such additional amount shall be subject to the auditing requirements, standards and procedures under existing laws."

The first paragraph grants the SEC the authority to retain and utilize P100,000,000.00 from its income, in addition to its annual budget, while the second imposes a restriction to this authority "subject to the auditing requirements, standards and procedures under existing laws." One such law is the GAA 2010, Special Provision No. 1 of which provides that:

> "Use of Income. In addition to the amounts appropriated herein, One Hundred Million Pesos (P100,000,000) sourced from registration and filing fees collected by the Commission pursuant to Section 75 of R.A. 8799 shall be used to augment the MOOE and Capital Outlay requirements of the Commission."

This provision clearly limits the use of income for augmenting only the MOOE and CO allocations of the SEC. Special Provision No. 1 did not repeal Section 75 of the SRC but simply imposed a limitation on how the SEC could use its retained income. The two provisions are, therefore, supplementary; not contradictory.

But the SEC failed to comply with the plain letter of Special Provision No. 1 when it used its retained income to pay for its counterpart contribution to the provident fund, which is neither an MOOE nor a CO item.

Section 7.b, The Chart of Accounts, Volume III of the Manual on the New Government Accounting System for National Government Agencies (MNGAS-NGA) defines MOOE as follows:

> Sec. 7. Classification of Expenses. The expense accounts are classified into:
> xxxx b. Maintenance and Other Operating Expenses (MOOE) - These accounts include expenses necessary for the regular operations of an agency like, among others, traveling expenses, training and seminar expenses, water, electricity, supplies expense, maintenance of property, plant and equipment, and other maintenance and operating expenses.

As for "capital outlay" or capital expenditure, it is defined as:

> Capital Outlays or Capital Expenditures. An expenditure category/expense class for the purchase of goods and services, the benefits of which extend beyond the fiscal year and which add to the assets of Government, including investments in the capital stock of GOCCs and their subsidiaries.

To elucidate, a provident fund "is a type of retirement plan where both the employer and employee make fixed contributions. Out of the accumulated fund and its earnings, employees receive benefits upon their retirement, separation from service or disability."

Verily, the COA correctly classified contributions to the provident fund within the category of "personal services". SEC failed to comply with the law when it used its retained income to pay for its counterpart contribution to the provident fund, which is neither and MOOE or a CO item. Consequently, the disbursement of the SEC's retained income warrants its disallowance.

(2) **NO.** The approving, certifying, and authorizing officers are not liable to return the entire disapproved amount in the absence of malice, bad faith or gross negligence.

In determining whether they are liable, the ruling in *Madera et al. v. COA* is controlling:

If a Notice of Disallowance is upheld, the rules on return are as follows:

> (a) Approving and certifying officers who acted in good faith, in regular performance of official functions, and with the diligence of a good father of the family are not civilly liable to return consistent with Section 38 of the Administrative Code.
> (b) Approving and certifying officers who are clearly shown to have acted in bad faith, malice, or gross negligence are, pursuant to Section 43 of the Administrative Code of 1987, solidarily liable to return only the net disallowed amount which, as discussed herein, excludes amounts excused under the following Section 2c and 2d.
>
> (c) Recipients — whether approving or certifying officers or mere passive recipients — are liable to return the disallowed amounts respectively received by them, unless they are able to show that the amounts they received were genuinely given in consideration of services rendered.
>
> (d) The Court may likewise excuse the return of recipients based on undue prejudice, social justice considerations, and other bona fide exceptions as it may determine on a case to case basis.

In this case, there is no showing that the approving, certifying, and authorizing officers of the SEC acted with malice or bad faith or gross negligence in approving the payment of its counterpart contribution to the provident fund using its retained income. On the contrary, their actions invariably carry the badge of good faith.

First, there was no prior disallowance of payment of the SEC's contribution to the provident fund using its retained income. The SEC had already been making payments of its counterpart contribution for about five years under the same restriction before the same was disallowed.

Second, the DBM itself, by Letter dated August 19, 2004, assured the SEC that "the utilization of the retained income is left to the discretion of the Commission subject to the usual accounting and auditing rules and regulations." Notably, the letter was issued at a time when Special Provision 1 was not yet in the GAA.

Finally, the approving, certifying, and authorizing officers honestly believed that they were giving effect to Section 7.2 of the SRC, mandating the SEC to adopt a compensation plan comparable with the prevailing compensation plan in the Bangko Sentral ng Pilipinas and other government financial institutions. They simply found a way to do this, albeit mistakenly, was to utilize the retained earnings granted in Section 75 of the SRC to augment its personal service items.

GOVERNOR EDGARDO TALLADO *v.* COMMISSION ON ELECTIONS, NORBERTO VILLAMIN, AND SENANDRO JALGALADO

G.R. NO. 246679, 2 MARCH 2021, *EN BANC,* (GESMUNDO, *J.*)

DOCTRINE OF THE CASE

When an appointive official is initially dismissed by the Ombudsman (OMB) and his penalty eventually judicially modified and reduced, the rules of the OMB declare his period of dismissal, by fiction of law, as a period of preventive suspension with payment of backwages and other emoluments. This means that for the appointive official, it is as if he was never removed and all the vestiges of his removal were reversed. There is nothing wrong with this conversion because his removal only affected his wages which were eventually given to him. But this is not the same for elective local government officials, like Tallado, because dismissal of an elective local government official does not only affect receipt of salaries but also affects his term, which would effectively be interrupted – an interruption which has constitutional consequences.

When an elective local public officer is administratively dismissed by the OMB and his penalty subsequently modified to another penalty, like herein Tallado, the period of dismissal cannot just be nonchalantly dismissed as a period for preventive suspension considering that, in fact, his term is effectively interrupted. During said period, Tallado cannot claim to be Governor as his title is stripped of him by the OMB despite the pendency of his appeal. Neither does he exercise the power of the office. Said title and power are already passed to the Vice Governor. He also cannot claim that the exercise of his power is merely suspended since it is not. Hence, the Court cannot turn a blind eye on the interruption of his term despite the ex post facto redemption of his title following the OMB rule.

FACTS

The Supreme Court (Court) promulgated its September 10, 2019 Decision and dismissed the consolidated petitions for the cancellation of Governor Edgardo Tallado's (Tallado) Certificate of Candidacy for the position of Provincial Governor of Camarines Norte in the 2019 Local Elections. The Court also ordered Norberto Villamin and Senandro Jalgalado (Villamin and Jalgalado) to pay the costs of suit. The Commission on Elections (COMELEC) and Villamin and Jalgalado (COMELEC, *et al.*) filed their respective motions for reconsideration.

In unison, COMELEC, *et al.* argued that the Court erred in ruling that Tallado's removal constitutes as valid interruption of his term sufficient to break the three-term limit rule imposed on local candidates. They pointed out that Tallado's resort to appeal and the eventual modification of the administrative penalty imposed on him shows the lack of permanence of his ouster as governor and should be insufficient to warrant as an interruption of his term. Further, COMELEC, *et al.* urged the Court to consider Tallado's absence in office as preventive suspension in accordance with the Ombudsman (OMB) Rules. Lastly, they claim that for the Court to allow such construction to continue would reward corrupt and unscrupulous politicians to escape the grasp of the three-term prohibition.

ISSUE

Did Governor Tallado's dismissal from office amount to an interruption of his term in office?

RULING

YES. The Court reiterated its September 10, 2019, Decision where it ruled that:

Interruption of term entails the involuntary loss of title to office, while interruption of the full continuity of the exercise of the powers of the elective position equates to failure to render service. In this regard, *Aldovino Jr., et al. v. COMELEC and Asilo* is instructive, as follows:

> From all the above, we conclude that the "interruption" of a term exempting an elective official from the three-term limit rule is one that involves no less than the involuntary loss of title to office. The elective official must have involuntarily left his office for a length of time, however short, for an effective interruption to occur. This has to be the case if the thrust of Section 8, Article X and its [strict] intent are to be faithfully served, i.e., to limit an elective official's continuous stay in office to no more than three consecutive terms, using "voluntary renunciation" as an example and standard of what does not constitute an interruption.

> An interruption occurs when the term is broken because the office holder lost the right to hold on to his office, and cannot be equated with the failure to render service. The latter occurs during an office holder's term when he retains title to the office but cannot exercise his functions for reasons established by law. Of course, the [term] "failure to serve" cannot be used once the right to office is lost; without the right to hold office or to serve, then no service can be rendered so that none is really lost.

In the same Decision, the Court ruled that the dismissal orders of the OMB against Tallado served as permanent removal from office and was not merely temporary. From his dismissal until the Court of Appeals' modification of his penalty to suspension, Tallado neither had title nor powers to wield as Governor of Camarines Norte. As evidence of this lack of title by Tallado, Camarines Vice Governor Jonah Pedro G. Pimentel was sworn as Governor, and not as Acting Governor.

The nomenclature used here by the Department of the Interior and Local Government (DILG) is important because it recognizes that the vacancy is not temporary but a permanent one. To rule otherwise would result in the absurd situation where a public office is occupied by two persons when basic law on public officers is that in single constituency positions, like the Office of the Provincial Governor, only one person can occupy a public office at a given time.

The fact that the DILG has now clarified its position that it should have applied Section 46 of the Local Government Code, rather than Sec. 44, is irrelevant. As stated earlier, it is not the position of the DILG to characterize the nature of the dismissal of public officers being merely the implementer of the law.

Further, the OMB Rules placing Tallado in preventive suspension upon modification of his penalty cannot be applied, considering the constitutional consequences of his prior authorized removal, as compared to other public officers subject to the OMB's administrative jurisdiction.

Thus, when an appointive official is initially dismissed by the OMB and his penalty eventually judicially modified and reduced, the rules of the OMB declare his period of dismissal, by fiction of law, as a period of preventive suspension with payment of backwages and other emoluments. This means that

for the appointive official, it is as if he was never removed and all the vestiges of his removal were reversed. There is nothing wrong with this conversion because his removal only affected his wages which were eventually given to him. But this is not the same for elective local government officials, like Tallado, because dismissal of an elective local government official does not only affect receipt of salaries but also affects his term, which would effectively be interrupted – an interruption which has constitutional consequences.

When an elective local public officer is administratively dismissed by the OMB and his penalty subsequently modified to another penalty, like herein Tallado, the period of dismissal cannot just be nonchalantly dismissed as a period for preventive suspension considering that, in fact, his term is effectively interrupted.

During the said period, Tallado cannot claim to be Governor as his title is stripped of him by the OMB despite the pendency of his appeal. Neither does he exercise the power of the office. Said title and power are already passed to the Vice Governor. He also cannot claim that the exercise of his power is merely suspended since it is not. Hence, the Court cannot turn a blind eye on the interruption of his term despite the ex post facto redemption of his title following the OMB rule.

LABOR LAW AND SOCIAL LEGISLATION

DOLORES GALLEVO RODRIGUEZ, SUBSTITUTING HER LATE HUSBAND EDGAR A. RODRIGUEZ *v.* PHILIPPINE TRANSMARINE CARRIERS, INC., NORWEGIAN CREW MANAGEMENT A/S, AND MR. CARLOS SALINAS

G.R. NO. 218311, *SECOND DIVISION*, 11 OCTOBER 2021, (HERNANDO, *J.*)

DOCTRINE OF THE CASE

A claim for permanent and total disability benefits may prosper after the lapse of the 120-day period, but less than 240 days, from the time the seafarer reported for medical treatment if the company-designated physician failed to declare within the 120-day period that the seafarer requires further medical attention.

FACTS

Edgar Rodriguez was employed as an ordinary seaman by respondent Philippine Transmarine Carriers, Inc. (PTC).

Upon reaching a convenient port in Taiwan in 2012, he underwent a medical examination and was initially diagnosed with *Hepatomegaly; L5 Spondylosis with Lumbar Spondylosis.* He was repatriated on October 2, 2012. Two days later, he reported to PTC and was immediately referred to the Metropolitan Medical Center under the care of the company-designated physician, Dr. Robert D. Lim.

Rodriguez was subsequently diagnosed with *Antral Gastritis; H Pylori Infection; Non-Specific Hepatic Nodule; L2-S1 Disc Protrusion and incidental finding of Specific Colitis Cholecystitis.*

Dr. Lim issued a medical report indicating Rodriguez's final disability assessment as equivalent to Grade 8.

Rodriguez subsequently consulted his personal orthopedic surgeon, Dr. Cesar H. Garcia (Dr. Garcia) who found him to be afflicted with multiple disc profusion. In his Medical Certificate, Dr. Garcia assessed the seafarer to be

permanently unfit for sea duty in whatever capacity with a corresponding Grade 1 disability or a permanent total disability. In view of Dr. Garcia's assessment, Rodriguez claimed from PTC permanent total disability benefits. However, PTC insisted that as per Dr. Lim's findings, Rodriguez was only suffering from a Grade 8 disability, and thus, he was only entitled to partial and permanent disability benefits. Thus, Rodriguez filed a complaint for permanent total disability benefits, sickness allowance, medical reimbursement, damages and attorney's fees.

The Labor Arbiter (LA) awarded the seafarer permanent and total disability benefits. PTC filed an appeal with the National Labor Relations Commission (NLRC). The NLRC modified the arbiter's ruling by deleting the award of moral damages, but affirming the award of total and permanent disability benefits and attorney's fees.

PTC then appealed with the Court of Appeals (CA), which partly found their petition meritorious. It noted that, from October 5, 2012 when Rodriguez underwent MRI up to April 26, 2013 when Dr. Lim issued the final assessment, only 203 days had lapsed, and therefore, within the 240-day period.

ISSUE

Is Rodriguez entitled to permanent and total disability?

RULING

NO. The Court dismissed the petition. It is undisputed that the illness of Rodriguez, osteoarthritis, is an occupational disease, and thus, compensable under Section 32-A(21) of the Philippine Overseas Employment Administration's Standard Employment Contract, series of 2010 (20 l O POEA-SEC).

Disability claims of seafarers are governed by the Labor Code, its implementing rules and by contract such as the 2010 POEA-SEC, which governed Rodriguez's period of employment.

Article 192(c)(l) of the Labor Code defines permanent and total disability of laborers, to wit:

> ART. 192. Permanent Total Disability...

> (c) The following disabilities shall be deemed total and permanent:
>
> (1) Temporary total disability lasting continuously for more than one hundred twenty days, except as otherwise provided in the Rules;

The rule referred to in the foregoing provision, i.e., Rule X, Section 2 of the Amended Rules on Employees' Compensation, which implemented Book IV of the Labor Code (IRR), states:

> Sec. 2. Period of entitlement. -(a) The income benefit shall be paid beginning on the first day of such disability. If caused by an injury or sickness it shall not be paid longer than 120 consecutive days except where such injury or sickness still requires medical attendance beyond 120 days but not to exceed 240 days from onset of disability in which case benefit for temporary total disability shall be paid. However, the System may declare the total and permanent status at any time after 120 days of continuous temporary total disability as may be warranted by the degree of actual loss or impairment of physical or mental functions as determined by the System.

The foregoing provisions should be read together with Section 20(A) of the 2010 POEA-SEC:

xxxx

> 2. xxx However, if after repatriation, the seafarer still requires medical attention arising from said injury or illness, he shall be so provided at cost to the employer until such time he is declared fit or the degree of his disability has been established by the company-designated physician.
>
> 3. In addition to the above obligation of the employer to provide medical attention, the seafarer shall also receive sickness allowance from his employer in an amount equivalent to his basic wage computed from the time he signed off until he is declared fit to work or the degree of disability has been assessed by the company-designated physician. The period within which the

> seafarer shall be entitled to bis sickness allowance shall not exceed 120 days. Payment of the sickness allowanc;e shall be made on a regular basis, but not less than once a month

Prior to 2008, the prevailing rule then, as enunciated in *Crystal Shipping, Jnc. v. Natividad* (Crystal Shipping), was that "permanent and total disability consists mainly in the inability of the seafarer to perform his customary work for more than 120 days." However, *Vergara v. Hammonia Maritime Services, Inc.* (Vergara) was promulgated which modified the ruling in Crystal Shipping such that the doctrine laid down in the latter cannot be simply applied as a general rule for all cases in all contexts. In Vergara, the Court harmonized the abovementioned provisions. The Court clarified that even though the 120-day period for medical evaluation was exceeded, the seafarers may not automatically claim permanent and total disability because it was possible to extend the evaluation or treatment period until 240 days.

Therefore, the prevailing rule is that, "if the complaint for maritime disability compensation was filed prior to October 6, 2008, the 120-day rule enunciated in Crystal Shipping applies. However, if such complaint was filed from October 6, 2008 onwards, the 240-day rule as clarified in the case of Vergara applies.

A claim for permanent and total disability benefits may prosper after the lapse of the 120-day period, but less than 240 days, from the time the seafarer reported for medical treatment if the company-designated physician failed to declare within the 120-day period that the seafarer requires further medical attention.

The court found Dr. Lim's assessment as sufficient justification to extend the seafarer's medical treatment beyond the 120-day period, since the latter still had to undergo further treatment and evaluation in view of his persistent back problems. Since Dr. Lim's final medical assessment was justifiably issued beyond the 120-day period but within 240 days from the time Rodriguez first reported to him, the Court found Rodriguez not entitled to his claim for permanent and total disability benefits.

SANTOS VENTURA HOCORMA FOUNDATION, INC. *v.* DOMINGO M. MANLANG, RENATO D. GARCIA, RONALDO D. GARCIA and JESUS M. GALANG, represented by Attorney-in-fact LUCENA M. DE LEON

G.R. No. 213499, *FIRST DIVISION*, 13 October 2021, (Lopez, *J.*)

DOCTRINE OF THE CASE

Simply put, the prerogative and authority with regard to the classification and identification of lands included or exempted from coverage under the CARP vests exclusively in the DAR Secretary and no one else. Applying this to the present case, it cannot be said that the DARAB encroached on the authority of the DAR Secretary in the latter's determination of which lands fall under the coverage of the CARP.

FACTS

Santos, Ventura, Hocorma Foundation, Inc. (SVHFI) is the registered owner of a parcel of land in Pampanga, identified as Lot No. 554-D-3 and covered by Transfer Certificate of Title (TCT).

In 2002, Lot No. 554-D-3 was placed under the coverage of the CARP. The Department of Agrarian Reform (DAR) caused the annotation of Subdivision Plan on certain TCTs, including the title covering Lot No. 554-D-3. Domingo Manalang, Renato Garcia, Ronaldo Garcia and Jesus M. Galang (Domingo Manalang, *et al.*) then applied as beneficiaries of the land.

In 2004, SVHFI and the Bases Conversion Development Authority (BCDA) executed a Deed of Absolute Sale for the acquisition of two portions of Lot No. 554-D-3 for the construction of Clark North 2 interchange of the Subic-Clark-Tarlac Expressway (SCTEX).

In 2005, Certificates of Land Ownership (CLOA) were issued to Domingo Manalang, *et al.* The Registry of Deeds thereafter registered TCTs in favor of Domingo Manalang, *et al.*

Domingo Manalang, *et al.* filed a petition for Nullification of Sale before the Office of the Regional Agrarian Reform Adjudicator (RARAD). According to them, the parcels of land sold by SVHFI were under the coverage of the CARP

pursuant to Republic Act (RA) No. 6657 and they are the farmer beneficiaries thereof.

SVHFI filed before the RARAD a petition for the Cancellation of the CLOAs issued to Domingo Manalang*, et al.*. The DAR Secretary granted the application for exemption filed by SVHFI. According to the Secretary, Domingo Manalang, *et al.* could not have derived any vested rights over the property despite the CLOAs awarded to them because the subject property was reclassified into non-agricultural land before June 15, 1988, thus, it is exempt from coverage of the CARP. The Motion for Reconsideration filed by Domingo Manalang, *et al.* was likewise denied.

Meanwhile, in 2007, the RARAD upheld the validity of the CLOAs issued to Domingo Manalang*, et al.* and declaring the sale between SVHFI and BCDA as null and void ab initio. SVHFI and BCDA thereafter filed a Joint Motion for Reconsideration. In the said motion, they informed the RARAD that the DAR Secretary had already granted their application for exemption. Their efforts, however, were futile as the RARAD denied their motion.

In a Resolution in 2011, the DARAB reversed its earlier ruling and granted SVHFI's motion. It declared the subject property exempt from the coverage of the CARP and consequently ordered the cancellation of the CLO As issued in the name of Domingo Manalang, *et al.*. Later, the Office of the President issued an Order where it affirmed the findings of the DAR Secretary concerning SVHFI's Application for Exemption.

Domingo Manalang, *et al.* appealed to the Court of Appeals (CA). They argued that the DARAB committed an error when the latter set aside its own Decision and rendered a Resolution which effectively caused the cancellation of the CLO As awarded to them.

ISSUE

Is Lot No. 554-D-3 covered by CARP pursuant to R.A. 6657?

RULING

YES. The Court granted the petition. In cases involving the implementation of agrarian laws, the determination of the land's classification as agricultural or non-agricultural (e.g., industrial, residential, commercial, etc.) and,

in turn, whether or not the land falls under agrarian reform exemption, must be preliminarily threshed out before the DAR, particularly, the DAR Secretary, pursuant to DAR Administrative Order No. 6, Series of 1994.

Citing Section 3, Rule II of the DARAB 2003 Rules of Procedure, the CA correctly explained that the DAR Secretary has exclusive jurisdiction over matters involving the classification and identification of landholdings for coverage under the CARP, as well as applications for exemptions. Issues of exclusion or exemption partake the nature of Agrarian Law Implementation (ALI) cases which are well within the competence and jurisdiction of the DAR Secretary. Towards this end, the latter is ordained to exercise his legal mandate of excluding or exempting a property from CARP coverage based on the factual circumstances of each case and in accordance with the law and applicable jurisprudence. Thus, considering his technical expertise on the matter, courts cannot simply brush aside his pronouncements regarding the status of the land in dispute, i.e., as to whether or not it falls under CARP coverage.

Simply put, the prerogative and authority with regard to the classification and identification of lands included or exempted from coverage under the CARP vests exclusively in the DAR Secretary and no one else. Applying this to the present case, it cannot be said that the DARAB encroached on the authority of the DAR Secretary in the latter's determination of which lands fall under the coverage of the CARP.

As correctly explained by the CA, the DARAB merely relied on and adopted the Order of the DAR Secretary which granted SVHFI's previous Application for Exemption of Lot No. 554-D-3 from the coverage of the CARP.

It is, however, essential to point out that the CA erred when it stated that the DARAB committed an error when the latter reversed its earlier Decision on the basis of the Orders of the DAR Secretary.

A closer scrutiny of the records shows that the revocation orders cited by the CA and on which it based the assailed decision, pertain to a different Order of Exemption which covers an entirely different lot (Lot 530), albeit originating from the same certificate of title.

Generally speaking, agricultural lands, although reclassified, have to go through the process of conversion. As succinctly explained in Department of Justice (DOJ) Opinion No. 44, the DAR must approve the conversion of agricultural lands covered by R.A. No. 6657 to non-agricultural uses. The exceptions to this rule are agricultural lands which have already been reclassified prior to the effectivity of R.A. No. 6657 on June 15, 1988. These lands are exempt from coverage of the CARP and no longer require a conversion clearance, provided that the reclassification and resulting exemption do not defeat vested rights of tenant-farmers under Presidential Decree (P.D.) No. 27.

In *Natalia Realty, Inc. v. Department of Agriculture*, the Court held that undeveloped portions of a subdivision that were intended for residential use pursuant to a special law ceased to be agricultural lands upon approval of their reclassification by competent authorities. In other words, land already classified for residential, commercial or industrial use, as approved by the HLURB and its precursor agencies prior to June 15, 1988, as in this case, are exempt from the coverage of RA No. 6657.

Apropos herein is the Court's pronouncement in *Heirs of Deleste v. Land Bank of the Philippines*, where it explained that a valid classification of land from agricultural to non-agricultural by a duly authorized government agency before June 15, 1988 shall exempt the land from coverage under the CARP, notwithstanding lack of a conversion clearance. Nevertheless, it emphasized that *Natalia* should be cautiously applied in light of A.O. No. 04, Series of 2003, which outlines the rules on the Exemption of Lands from CARP Coverage under Section 3 of R.A. No. 6657, and DOJ Opinion No. 44, Series of 1990.

With regard to the claim of Domingo Manalang, *et al.* that they have been tilling the land since 1960, it must be emphasized that eligibility to be considered for benefits under the CARP, by itself, does not automatically make farmer-beneficiaries' bona fide owners of the land under P.D. No. 27 or R.A. No. 6657.

In *Del Castillo v. Orciga*, the Court explained that land transfer under P.D. No. 27 is affected in two stages. The first stage is the issuance of a Certificate of Land Transfer to a farmer-beneficiary as soon as the DAR transfers the landholding to the farmer-beneficiary in recognition that said person is its "deemed owner." At this stage, what the tenant-farmers have, at most, is an inchoate right over the land they are tilling. The second stage refers to the issuance

of an Emancipation Patent (EP) as proof of full ownership of the landholding upon full payment of the annual amortizations or lease rentals by the farmer-beneficiary.

Under R.A. No. 6657, the procedure has been simplified. Only CLOAs are issued, in lieu of EPs, after compliance with all prerequisites. Upon presentation of the CLOAs to the Register of Deeds, TCTs are issued to the designated beneficiaries.

Here, as discovered by the CLUPPI Inspection Team during the ocular inspection, the CLOAs were distributed to Domingo Manalang, et al. only in 2005. Therefore, it was only in 2005 that Domingo Manalang, et al., as farmer-beneficiaries, were recognized to have a right over the subject property. Considering that the land had been reclassified by the local government of Mabalacat, Pampanga through its CLUP/ZO and subsequently ratified by the HSRC (now HLURB) in a Resolution in 1980, Domingo Manalang, et al. clearly had no vested rights to speak of during said period, as the CLOAs were issued only in 2005. Since reclassification had taken place before the passage of RA No. 6657 and more than 20 years prior to issuance of the CLOAs, no vested rights accrued.

Consequently, the subject property, particularly Lot No. 554-D-3, is outside the coverage of the agrarian reform program. To the Court's mind, the resolution of the DAR Secretary in DARCO Order No. EX-0712-489 was precisely the reason why the DARAB reversed its earlier decision and upheld the exemption granted to SVHFI. As correctly found by the DAR Secretary, Domingo Manalang, et al. could not have derived any vested right over the subject property despite the issuance of CLOAs in their favor because the coverage of the property was erroneous to begin with. SVHFI, as original owner of Lot No. 554-D-3, was never divested of its rights over the same, including the right to apply for exemption. What is more, the results of the ocular inspection revealed that majority of the portions of Lot No. 554-D-3 have already been developed into what is now known as the SCTEX. This, in itself, is a clear indication that the land had indeed been reclassified into non-agricultural purposes and was no longer feasible for agricultural production. To hold otherwise would not only be a waste of government resources, but also expand the scope of the agrarian reform program which has been limited to lands devoted to or suitable for agriculture.

CIVIL LAW

ROSANNA L. TAN-*ANDAL v. MARIO* VICTOR M. ANDAL
G.R. NO. 196359, 11 MAY 2021, *EN BANC* (LEONEN, *J.*)

DOCTRINE OF THE CASE

Psychological incapacity consists of clear acts of dysfunctionality that show a lack of understanding and concomitant compliance with one's essential marital obligations due to psychic causes. It is not a medical illness that has to be medically or clinically identified; hence, expert opinion is not required.

Considering the foregoing, this Court finds Mario psychologically incapacitated to comply with his essential marital obligations.

FACTS

Mario Victor Andal (Mario) and Rosanna Tan (Rosanna) married in 1995. A year later, Rosanna and Mario gave birth to a child, Ma. Samantha.

In 2000, Mario and Rosanna separated. Subsequently, Mario filed a petition for custody of Ma. Samantha before the Regional Trial Court (RTC).

Rosanna then filed a petition to nullify her marriage with Mario. Rosanna alleged that Mario is psychologically incapacitated to fulfill his marital duties. Rosanna stated that Mario's drug habit caused detriment to their family. Mario experienced paranoia from his drug habit. In one instance, Mario threatened Rosanna and her family for the custody of Ma. Samantha. Mario was committed for drug rehabilitation at the National Bureau of Investigation Treatment and Rehabilitation Center and, eventually, at the Seagulls Flight Foundation (Seagulls). However, Mario escaped Seagulls and continued his drug use.
Furthermore, Rosanna gave Mario the responsibility of managing a construction firm she set up. However, Mario's drug use depleted the company's funds and caused its closure.

Rosanna presented the testimony of Dr. Fonso Garcia (Dr. Garcia), stating that Mario has narcissistic antisocial personality disorder and substance

abuse disorder with psychotic features. The RTC granted Rosanna's petition and declared the marriage between Mario and Rosanna as void.

The Court of Appeals (CA) reversed the ruling of the RTC. It held that the expert testimony given by Dr. Garcia was not credible as Mario was not interviewed personally.

ISSUE

Is the marriage between Mario and Rosanna void due to psychological incapacity?

RULING

YES. The Court concluded that Rosanna proved with clear and convincing evidence that Mario was psychologically incapacitated to comply with his essential marital obligations. Their marriage, therefore, is void under Article 36 of the Family Code.

Psychological incapacity as a ground for voiding marriages is provided in Article 36 of the Family Code:

> ARTICLE 36. A marriage contracted by any party who, at the time of the celebration, was psychologically incapacitated to comply with the essential marital obligations of marriage, shall likewise be void even if such incapacity becomes manifest only after its solemnization.

Psychological incapacity consists of clear acts of dysfunctionality that show a lack of understanding and concomitant compliance with one's essential marital obligations due to psychic causes. It is not a medical illness that has to be medically or clinically identified; hence, expert opinion is not required. As an explicit requirement of the law, the psychological incapacity must be shown to have been existing at the time of the celebration of the marriage, and is caused by a durable aspect of one's personality structure, one that was formed before the parties married. Furthermore, it must be shown caused by a genuinely serious psychic cause. To prove psychological incapacity, a party must present clear and convincing evidence of its existence.

The Court abandoned the second Molina guideline. Psychological incapacity is neither a mental incapacity nor a personality disorder that must be proven through expert opinion. There must be proof, however, of the durable or enduring aspects of a person's personality, called "personality structure," which manifests itself through clear acts of dysfunctionality that undermines the family. The spouse's personality structure must make it impossible for him or her to understand and, more importantly, to comply with his or her essential marital obligations. Proof of these aspects of personality need not be given by an expert. Ordinary witnesses who have been present in the life of the spouses before the latter contracted marriage may testify on behaviors that they have consistently observed from the supposedly incapacitated spouse. From there, the judge will decide if these behaviors are indicative of a true and serious incapacity to assume the essential marital obligations.

The psychological incapacity contemplated in Article 36 of the Family Code is incurable, not in the medical, but in the legal sense; hence, the third Molina guideline is amended accordingly. This means that the incapacity is so enduring and persistent with respect to a specific partner, and contemplates a situation where the couple's respective personality structures are so incompatible and antagonistic that the only result of the union would be the inevitable and irreparable breakdown of the marriage. "[A]n undeniable pattern of such persisting failure [to be a present, loving, faithful, respectful, and supportive spouse] must be established so as to demonstrate that there is indeed a psychological anomaly or incongruity in the spouse relative to the other." With respect to gravity, the requirement is retained, not in the sense that the psychological incapacity must be shown to be a serious or dangerous illness, but that "mild characterological peculiarities, mood changes, occasional emotional outbursts" are excluded. The psychological incapacity cannot be mere "refusal, neglect[,] or difficulty, much less ill will." In other words, it must be shown that the incapacity is caused by a genuinely serious psychic cause.

The Court found Mario psychologically incapacitated to comply with his essential marital obligations. Rosanna discharged the burden of proof required to nullify her marriage to Mario. Clear and convincing evidence of Mario's psychological incapacity consisted mainly of testimony on Mario's personality structure and how it was formed primarily through his childhood and adult experiences, well before he married Rosanna.

It is true that Dr. Garcia gave the expert opinion — which, the Court reiterated, is no longer required but is considered here given that it was offered in evidence — without having to interview Mario. Even Dr. Garcia herself admitted during cross examination that her psychiatric evaluation would have been more comprehensive had Mario submitted himself for evaluation. However, the Court of Appeals erred in discounting wholesale Dr. Garcia's expert opinion because her methodology was allegedly "unscientific and unreliable."

SPOUSES FULALIO CUENO AND FLORA BONIFACIO CUENO *V.* SPOUSES EPIFANIO AND VERONICA BAUTISTA *ET AL.*

G.R. NO. 246445, 02 MARCH 2021, *EN BANC*, (CAGUIOA, *J.*)

DOCTRINE OF THE CASE

Article 166 of the Civil Code indicates that "the husband cannot alienate or encumber any real property of the conjugal partnership without the wife's consent" and in relation thereto, Article 173 of the Civil Code provides that "the wife may, during the marriage and within ten years from the transaction questioned ask the courts for the annulment of any contract of the husband entered into without her consent." Contrary to the nature of void contracts, transactions that fail to comply with Article 166 produce effects and when read with Article 173, said provision leads to the inescapable conclusion that a contract disposing or encumbering conjugal real property without the wife's consent is not void but merely voidable.

Applying the foregoing principles, the Court held in this case that Sps. Cueno's claim that the second sale was void and imprescriptible lacks merit. The Court had previously ruled that the ten-year prescriptive period under Article 173 of the Civil Code is counted from the execution of the deed of sale of the property. In the present case, the Escritura de Venta between Eulalio and Luis which was executed without Flora's consent was on 04 December 1963. Pursuant to Article 1973, Flora's action to annul the contract accrued upon the execution of the sale in 1963 and had 10 years or until 1973 to question said transaction. Unfortunately, the action commenced in 2009 was filed out of time which only meant that Sps. Cueno lacked the right to question the subsequent sale by Luis in favor of Sps. Bautista.

FACTS

Lot No. 2836 was owned by the two sons of Ramon Bonifacio: Luis Bonifacio (Luis) and Isidro Bonifacio (Isidro), who sold part of their interest to the City of Zamboanga and became co-owners of the retained lot (subject property). Flora Bonifacio Cueno (Flora) is the daughter of Luis and is married to Eulalio Cueno (Eulalio). In 1961, Spouses Eulalio and Flora Cueno (Sps. Cueno) bought the *pro indiviso* share of Isidro in the subject property as reflected in an *Escritura de Venta* (first sale), which led to the issuance of a Transfer Certificate of Title (TCT) in the names of Luis and Eulalio.

Prior to the issuance of the TCT, Eulalio supposedly sold his and Flora's share of the lot to Luis without Flora's consent as covered by another *Escritura de Venta* (second sale). The second sale was registered and another TCT was issued

in the names of Luis and Eulalio, which was later cancelled for another TCT issued solely in the name Luis, married to Juana.

In a Deed of Absolute Sale (third sale), Luis allegedly sold the property to Spouses Epifanio and Veronica Bautista (Sps. Bautista) leading to the registration of a TCT in their name. Thereafter, the Sps. Bautista took possession of the property and built improvements on the same. Years later, Sps. Bautista donated the subject property to their four children: Rizaldo, Dionilo, Jessibel, and Mercedita to which TCTs were issued in their names. Sps. Cueno filed a complaint in 2008 for recovery of the subject property on the ground that they were allegedly deprived of their share through fraud. On the other hand, Sps. Bautista claimed that they acquired the subject property in good faith and for value from the registered owner, Luis, as evidenced by the third sale.

The Regional Trial Court (RTC) granted the complaint and declared the second sale between Eulalio and Luis void. Although the fraud and/or forger was not proven, the RTC invalidated the sale for lack of the spousal consent of Flora. On appeal, the Court of Appeals (CA) reversed the decision of the RTC and held that the Sps. Bautista had a better right over the subject properties.

ISSUE

Was the second sale void for lack of spousal consent pursuant to Article 166 of the Civil Code?

RULING

NO. Article 166 of the Civil Code indicates that "the husband cannot alienate or encumber any real property of the conjugal partnership without the wife's consent" and in relation thereto, Article 173 of the Civil Code provides that "the wife may, during the marriage and within ten years from the transaction questioned ask the courts for the annulment of any contract of the husband entered into without her consent."

Based on various jurisprudence, two conflicting views in the interpretation of the above-mentioned provisions emerged:

(a) The first view treats such contracts as void:
    (i) on the basis of lack of consent of an indispensable party; and/or

(ii) because such transactions contravene mandatory provisions of law; and

(b) The second view holds that the absence of such consent indicated under Article 166 does not render the entire transaction void but merely voidable in accordance with Article 173 of the Civil Code.

Here, the Court adopted the second view and declared that the same is the prevailing and correct rule thus abandoning all cases contrary thereto. The Court held that a sale that fails to comply with Article 166 is not void but merely voidable in accordance with Article 173 of the Civil Code.

The Court differentiated a void or inexistent contract from that of a voidable contract. On one hand, a void or inexistent contract is one which lacks, absolutely either in fact or in law, one or some of the elements which are essential for its validity and is one which has no force and effect from the very beginning as if it had never been entered. On the other hand, a voidable contract is one where consent is vitiated by lack of legal capacity of one of the contracting parties or by mistake, violence, intimidation, undue influence, or fraud. Unlike void contracts, voidable or annullable contracts are existent, valid, and binding between parties. The same may still be ratified and may be barred by prescription.

Contrary to the nature of void contracts, transactions that fail to comply with Article 166 produce effects and when read with Article 173, said provision leads to the inescapable conclusion that a contract disposing or encumbering conjugal real property without the wife's consent is not void but merely voidable. Insofar as the phrase "lack of consent" under Article 166 is concerned, the same does not give rise to a no contract situation as such phrase contemplates a situation akin to an incapacity to give consent under Article 1390 of the Civil Code. Hence, contracts falling under Article 166 are considered as a special type of voidable contract which are deemed valid until annulled.

Applying these principles, the Court held that Sps. Cueno's claim that the second sale was void and imprescriptible lacks merit. The Court had previously ruled that the ten-year prescriptive period under Article 173 of the Civil Code is counted from the execution of the deed of sale of the property. In the present case, the *Escritura de Venta* between Eulalio and Luis, which was executed without Flora's consent, was on 04 December 1963. Pursuant to Article 1973, Flora's

action to annul the contract accrued upon the execution of the sale in 1963 and had 10 years or until 1973 to question said transaction. Unfortunately, the action commenced in 2009 was filed out of time which only meant that Sps. Cueno lacked the right to question the subsequent sale by Luis in favor of Sps. Bautista. Hence, the Court denied the petition.

NICXON L. PEREZ, JR. *v.* AVEGAIL PEREZSENERPIDA, ASSISTED BY HER HUSBAND MR. SENERPIDA

G.R. NO. 233365, 24 MARCH 2021, *FIRST DIVISION*, (CAGUIOA, *J.*)

DOCTRINE OF THE CASE

It is true that Article 147 provides that the property acquired during the cohabitation shall be governed by the rules on co-ownership and pursuant to Article 493 of the Civil Code, in a co-ownership: "Each co-owner shall have the full ownership of his part and of the fruits and benefits pertaining thereto, and he may therefore alienate, assign or mortgage it, and even substitute another person in its enjoyment, except when personal rights are involved; but the effect of the alienation or the mortgage, with respect to the co-owners, shall be limited to the portion which may be allotted to him in the division upon the termination of the co-ownership."

However, Article 493 of the Civil Code cannot supersede, and must yield to, Article 147 of the Family Code, which expressly mandates that: "Neither party can encumber or dispose by acts inter vivos of his or her share in the property acquired during cohabitation and owned in common, without the consent of the other, until after the termination of their cohabitation."

While the Court found merit in Nicxon's contention that the lower courts in the present case erred in finding that the property regime between Adelita and Eliodoro was governed by the ACP as their marriage subsisted until Eliodoro died, the Deed of Donation to him of the subject property is, nonetheless, void as this is a prohibited disposition under Article 147 of the Family Code.

FACTS

Spouses Eliodoro Q. Perez (Eliodoro) and Adelita M. Perez (Adelita) were the registered owners of a parcel of land in Olongapo City. They were married on December 10, 1975, and had two children, Avegail and Adonis Perez (Adonis). Before his marriage with Adelita, Eliodoro was married and had several children, one of whom was Nicxon Perez, Sr. The latter, in turn, is the father of Nicxon L. Perez, Jr. (Nicxon).

Adelita executed a sworn statement denominated as Renunciation and Waiver of Rights (RWR) in favor of Eliodoro on October 29, 1995, which was inscribed on the Transfer Certificate of Title (TCT) of the subject parcel of land. Eliodoro donated said land to Nicxon on July 27, 2004. However, the donation

was without the conformity of Adelita. Subsequently, a Real Estate Mortgage was executed by Nicxon in favor of Rolando Ramos.

On February 1, 2005, Eliodoro filed against Adelita a petition for declaration of nullity of marriage under Article 36 of the Family Code before the Regional Trial Court Branch 73 (RTC-Branch 73). The RTC declared the marriage void ab initio. Such decision became final and executory as of July 6, 2005 pursuant to an entry of judgment dated July 11, 2005.

Eliodoro died on June 28, 2008. An Extrajudicial Settlement Among Heirs with Waiver was executed and signed by his legitimate and compulsory heirs.

On September 30, 2010, Avegail Perez-Senerpida (Avegail) brought an action for Annulment of Donation and Title against Nicxon. Avegail alleged that she is one of the children of the late Eliodoro and Adelita and that Deed of Donation solely executed by Eliodoro was based on the alleged RWR executed by her mother Adelita. She claimed that the RWR and the Deed of Donation were prejudicial to her interest because it affected her future inheritance or legitime.

Nicxon answered by denying Avegail's allegation that Adelita is a part owner of the subject land and that assuming she was, she has no more right thereon when she executed the RWR.

Avegail reiterated that Adelita, was a part owner of the subject property. Furthermore, she countered that RWR was null and void as it was not supported by any valid consideration.

In the meantime, On July 5, 2011, six years after the Marriage Nullity Decision had become final and executory, Adelita filed before the Court of Appeals (CA) a petition for annulment of judgment (Annulment of Judgment Petition) against the heirs of Eliodoro, who are the children of Eliodoro by his first marriage, on the ground of lack of jurisdiction over her person.

With respect to the annulment of judgement petition, the CA, on March 5, 2012, referred the case to the Executive Judge for assignment to a judge for further reception of evidence. The RTC-Branch 75 received the respective evidence of Adelita and Nicxon and subsequently ordered the transmission thereof to the CA.

On February 24, 2015. The RTC-Branch 73 ruled in favor of Avegail and ordered the annulment of the RWR and the Deed of Donation in favor of Nicxon. It further ruled that the Marriage Nullity Decision had not yet attained finality at the time of Eliodoro's death considering that the same has been assigned for further reception of evidence. Thus, it deemed the marriage between Eliodoro and Adelita to be valid and subsisting from the time of its celebration up to Eliodoro's death on June 28, 2008.

On September 22, 2015, the CA denied the petition for annulment of judgement. The Motion for Reconsideration was also denied. The petition for review on certiorari filed by Adelita before the Supreme Court was also denied.

As to the appeal filed by Nicxon, the same was denied by the CA on April 7, 2017. It ruled that at the time of the donation, Eliodoro was still legally married to Adelita. As such, Eliodoro should have first secured the conformity of his wife, Adelita, as expressly required under Article 98 of the Family Code.

As to the RWR, the CA ruled that the RWR is a prohibited waiver because the property regime of Eliodoro and Adelita was the absolute community property (ACP), there being no marriage settlement between them, and under Article 89 of the Family Code (FC), which provides that: "No waiver of rights, interests, shares and effects of the absolute community property during the marriage can be made except in case of judicial separation of property".

The CA further agreed with the RTC the RWR partook the nature of a donation or grant of gratuitous advantage between spouses, there being no material consideration given by Eliodoro to Adelita in exchange for the execution of the RWR, which consequently is prohibited under Article 87 of the FC which provides: "every donation or grant of gratuitous advantage, direct or indirect, between the spouses during the marriage shall be void."

Nicxon contends that Article 147 of the FC applies to the present case. Thus, the RWR is valid on the ground that Eliodoro and Adelita, being mere co-owners of the subject property, either of them could donate or waive their respective shares therein provided that the consent of either partner was obtained.

Hence, this petition.

ISSUES

(1) Was the marriage between Eliodoro and Adelita valid and subsisting at the time of the former's death?
(2) Did the property regime of ACP apply to the marriage of Eliodoro and Adelita?
(3) Is the RWR valid?
(4) Is the Deed of Donation valid despite the absence of consent of Adelita?

RULING

(1) **NO.** The Court had the occasion to correct the factual findings of the RTC and the CA in the present case in which it both ruled that the marriage of Eliodoro and Adelita was still valid and subsisting at the time of the former's death. The Court deemed it necessary to correct such because the date of the finality of the Marriage Nullity Decision is the fact determinative of the case.

While the RTC Decision was rendered on February 24, 2015, or prior to the CA Decision in the Annulment of Judgment Petition dated September 22, 2015, the RTC-Branch 73 could not have mistaken the March 5, 2012 Resolution of the CA to mean reception of further evidence in the second petition for declaration of nullity of the marriage between Eliodoro and Adelita that was filed by the former because that Resolution emanated from the CA in its disposition of the Annulment of Judgment Petition. In other words, if the RTC-Branch 73 entertained any doubt, it should have verified from Branch 75 what the hearing for reception of further evidence was all about.

Another option of the RTC-Branch 73 would have been to await the outcome of the Annulment of Judgment Petition filed by Adelita with the CA inasmuch as the resolution of the issue in the said petition — the annulment of the Marriage Nullity Decision — was inextricably linked with the instant case.

On the part of the CA in the present case, at the time it rendered its Decision on April 7, 2017, the other CA's Decision in the Annulment of Judgment Petition had already been rendered more than a year earlier, or on September 22, 2015. A mere perusal of the March 5, 2012 Resolution of the CA issued in connection with the Annulment of Judgment Petition would have made the CA to be circumspect and make a verification as to whether the RTC-Branch 73's

finding in this case in relation to that March 5, 2012 Resolution was factually accurate.

Since the Marriage Nullity Decision became final and executory on July 6, 2005, as confirmed with finality in the CA Decision in the Annulment of Judgment Petition, prior to Eliodoro's death, then the marriage between him and Adelita, was null and void ab initio pursuant to Article 36 of the Family Code as declared in the Marriage Nullity Decision.

(2) **NO.** Since the marriage between Adelita and Eliodoro was judicially decreed to be void ab initio or from the beginning, the RTC and the CA erred in ruling that the ACP regime governed their property relations.

Even if their marriage was not declared void from the beginning, the RTC and the CA would still have erred because the applicable property regime should have been the conjugal partnership of gains (CPG). Pursuant to Article 105 of the Family Code, the provisions of Chapter 4, Conjugal Partnership of Gains, shall apply to CPG already established before the effectivity of the Family Code, without prejudice to vested rights.

Since the marriage between Eliodoro and Adelita was celebrated on December 10, 1975 and the CPG was then the applicable property regime between validly married spouses, absent any contract executed before the marriage, then that property regime continued.

Consequently, since the property regime is CPG, Article 89 of the FC which provides in part: "No waiver of rights, interests, shares and effects of the absolute community property during the marriage can be made except in case of judicial separation of property", does not apply and it cannot justify the nullification of Adelita's RWR since Adelita and Eliodoro were not validly married.

(3) **NO.** The RWR is void pursuant to Article 87 of the FC, which provides: "Every donation or grant of gratuitous advantage, direct or indirect, between the spouses during the marriage shall be void, except moderate gifts which the spouses may give each other on the occasion of any family rejoicing. The prohibition shall also apply to persons living together as husband and wife without a valid marriage."

While both the CA and the RTC correctly ruled in this case that the RWR is void based on Article 87 of the Family Code, their reliance on that provision of the Article referring to "every donation or grant of gratuitous advantage, direct or indirect, between the spouses during the marriage shall be void" is incorrect — borne out by the fact that they erroneously believed that the marriage between Eliodoro and Adelita was valid and subsisting until Eliodoro's death. To be clear, therefore, the provision of Article 87 that squarely applies to the case is: "The prohibition shall also apply to persons living together as husband and wife without a valid marriage."

Assuming the marriage between Eliodoro and Adelita was valid at the time the RWR was executed and it had valuable or material consideration the RWR would still be void because the sale between the spouses during their marriage is proscribed under Article 1490 of the Civil Code, which provides:

> ART. 1490. The husband and the wife cannot sell property to each other, except:
>
> (1) When a separation of property was agreed upon in the marriage settlements; or
> (2) When there has been a judicial separation of property under Article 191.

In the landmark case of *Matabuena v. Cervantes* in 1971, which involved a donation between common law spouses before their marriage, it was ruled that the prohibition of donations between spouses was intended to avoid possible transfer of property from one spouse to the other due to passion or avarice. The intimate relations of the spouses during the marriage places the weaker spouse under the will of the stronger, whatever the sex, so that the former might be obliged, either by abuse of affection or by threats of violence, to transfer some properties to the latter. The law seeks to prevent such exploitation in marriages which might have been contracted under this stimulus of greed. It also ruled that the prohibition also applies to the parties in what are called "common law" marriages; otherwise, the condition of those who incurred guilt would turn out to be better than those in legal union.

It was further ruled therein that:

While Art. 133 of the Civil Code considers as void a "donation between the spouses during the marriage," policy considerations of the most exigent character as well as the dictates of morality require that the same prohibition should apply to a commonlaw relationship.

> xxx If the policy of the law is, in the language of the opinion of the then Justice J.B.L. Reyes of the Court, "to prohibit donations in favor of the other consort and his descendants because of fear of undue and improper pressure and influence upon the donor, a prejudice deeply rooted in our ancient law. xxx then there is every reason to apply the same prohibitive policy to persons living together as husband and wife without benefit of nuptials. xxx 'it would not be just that such donations should subsist, lest the condition of those who incurred guilt should turn out to be better.' So long as marriage remains the cornerstone of our family law, reason and morality alike demand that the disabilities attached to marriage should likewise attach to concubinage."

Thus, the jurisprudence on the nullity of donations between the parties of a common-law relationship or exclusive cohabitation or union of a man and a woman without a valid marriage found its way into the present Article 87 of the Family Code.

Given the express prohibition under Article 87 of the Family Code, the RWR executed by Adelita in favor of Eliodoro in respect of the subject property is void.

(4) **NO.** The Court ruled first ruled that Article 147 of the FC applied which provides:

When a man and a woman who are capacitated to marry each other, live exclusively with each other as husband and wife without the benefit of marriage or under a void marriage, their wages and salaries shall be owned by them in equal shares and the property acquired by both of them through their work or industry shall be governed by the rules on co-ownership.

In the absence of proof to the contrary, properties acquired while they lived together shall be presumed to have been obtained by their joint efforts, work or industry, and shall be owned by them in equal shares. For purposes of this Article, a party who did not participate in the acquisition by the other party of any property shall be deemed to have contributed jointly in the acquisition thereof if the farmer's efforts consisted in the care and maintenance of the family and of the household.

Neither party can encumber or dispose by acts *inter vivos* of his or her share in the property acquired during cohabitation and owned in common, without the consent of the other, until after the termination of their cohabitation.

When only one of the parties to a void marriage is in good faith, the share of the party in bad faith in the co-ownership shall be forfeited in favor of their common children. In case of default of or waiver by any or all of the common children or their descendants, each vacant share shall belong to the respective surviving descendants. In the absence of descendants, such share shall belong to the innocent party. In all cases, the forfeiture shall take place upon termination of the cohabitation.

Since the subject property was registered in the names of Eliodoro and Adelita, as spouses, and there being no proof to the contrary, the subject property is presumed to have been obtained by their joint efforts, work or industry, and was owned in equal shares by them pursuant to Article 147.

Under Article 147 of the Family Code, which covers the exclusive cohabitation of a man and woman as husband and wife without the benefit of marriage or under a void marriage, there is unfortunately no direct prohibition on donation of any property acquired during the cohabitation by one party without the consent of the other.

It is true that Article 147 provides that the property acquired during the cohabitation shall be governed by the rules on co-ownership and pursuant to Article 493 of the Civil Code, in a co-ownership: "Each co-owner shall have the full ownership of his part and of the fruits and benefits pertaining thereto, and he may therefore alienate, assign or mortgage it, and even substitute another person in its enjoyment, except when personal rights are involved; but the effect of the alienation or the mortgage, with respect to the co-owners, shall be limited to the

portion which may be allotted to him in the division upon the termination of the co-ownership."

With Article 493 of the Civil Code as basis, Eliodoro could have alienated onerously or gratuitously his part or share in the subject property to Nicxon without the consent of Adelita.

However, Article 493 of the Civil Code cannot supersede, and must yield to, Article 147 of the Family Code, which expressly mandates that: "Neither party can encumber or dispose by acts *inter vivos* of his or her share in the property acquired during cohabitation and owned in common, without the consent of the other, until after the termination of their cohabitation." The reason for this amendment to Article 144 of the Civil Code rule, as it is now expressed in the Family Code, is this:

> x x x If the parties are allowed to dispose of their shares in said properties like in a true co-ownership, it will destroy their relationship. The Family Code, as already stated, would like to encourage the parties to legalize their union some day and is just smoothing out the way until their relationship ripens into a valid union.

Given the above express prohibition of a party to the cohabitation to encumber or alienate by acts *inter vivos* even his or her share in the property acquired during the cohabitation and owned in common, without the consent of the other party until after the termination thereof under Article 147, then the donation of any property acquired during the cohabitation by one party without the consent of the other can only be but void. The rules on ordinary co-ownership cannot apply to vest validity on the undivided share of the disposing party.

If a disposition of a party's share in the property under special co ownership created by virtue of Article 147 without the consent of the other party is proscribed by law, then, and with more reason, should the disposition of the entire property under such special co-ownership by a party without the other party's consent be considered void as well.

While the Court found merit in Nicxon's contention that the lower courts in the present case erred in finding that the property regime between Adelita and

Eliodoro was governed by the ACP as their marriage subsisted until Eliodoro died, the Deed of Donation to him of the subject property is, nonetheless, void as this is a prohibited disposition under Article 147 of the Family Code.

TAXATION LAW

GLOBAL MEDICAL CENTER OF LAGUNA, INC. *v.* ROSS SYSTEMS INTERNATIONAL, INC.

GR NO. 230112, 11 MAY 2021, *EN BANC,* (CAGUIOA, *J.*)

ROSS SYSTEMS INTERNATIONAL, INC *v* GLOBAL MEDICAL CENTER OF LAGUNA, INC.

GR NO. 230112 & 230119, 11 MAY 2021, *EN BANC,* (CAGUIOA, *J.*)

DOCTRINE OF THE CASE

The Expanded Creditable Withholding Tax (CWT), as defined under Section 2.57(B) of Revenue Regulation (RR) No. 2-98 reads:

(B) Creditable Withholding Tax. - Under the CWT system, taxes withheld on certain income payments are intended to equal or at least approximate the tax due of the payee on said income. The income recipient is still required to file an income tax return, as prescribed in Sec. 51 and Sec. 52 of the NIRC, as amended, to report the income and/or pay the difference between the tax withheld and the tax due on the income.

Taxes withheld on income payments covered by the expanded withholding tax (referred to in Sec. 2.57.2 of these regulations) and compensation income (referred to in Sec. 2.78 also of these regulations) are creditable in nature.

The income of the payee subject to the CWT is still reported in the income tax return upon the filing of the income tax return, for the computation of the income tax due on it. In the event that the income tax computed is more than the CWT paid earlier, the difference shall be paid by the payee in order for his income tax to be paid in full. Conversely, in case the income tax calculated is less than the CWT paid, the overpayment of CWT shall either be carried over to the next taxable period for the payee, or refunded in his favor. The CWT's design for tax creditability stands on the twin conditions of (1) the withholding agent's withholding the CWT and (2) the payee's crediting of the said amount in its income tax return.

The black letter of the law is demonstrably clear and, as applied to the present case, prescribing that GMCLI should have remitted the 2% CWT as soon as each Progress Billing

was paid and accordingly should have also issued the corresponding BIR Form 2307 to RSII in order for the latter to have had a tax credit claim on the same. GMCLI should therefore issue to RSII the pertinent BIR Form 2307 for all its belated withholding of CWT, so that RSII may exhaust the remedies available to it in the law.

FACTS

Global Medical Center of Laguna, Inc. (GMCLI) engaged the services of Ross Systems International, Inc. (RSII) for the construction of its hospital in Cabuyao, Laguna, in accordance with a Construction Contract (Contract) which value the entire construction project at ₱248,500,000.00, with 15% of the said contract price to be paid to RSII as down payment, and the remaining balance to be paid in monthly installments based on the percentage of work accomplished. Under Section 9 of the Contract, it stated that all taxes on the services rendered are for the account of RSII and that the parties may resort to arbitration in the event of a dispute.

RSII submitted to GMCLI its Progress Billing No. 15, indicating it had already accomplished 79.31% of the project, equivalent to ₱9,228,286.77, inclusive of VAT. After receipt and upon evaluation of GMCLI, however, it estimated that the accomplished percentage was only at 78.84% of the entire contract price or equivalent to ₱7,043,260.00 for Progress Billing No. 15.

After its internal audit, GMCLI learned that it was unable to withhold and remit 2% Credible Withholding Tax (CWT) not only from Progress Billing No. 15 or from the amount of ₱7,043,260.00 but from the cumulative amount of all Progress Billings Nos. 1-15 or from the amount of ₱197,088,497.00, equivalent to the submitted 79.31% accomplishment of RSII.

For RSII's Progress Billing No. 15 priced at ₱7,043,260.00, GMCLI only paid a total of ₱3,101,491.00, with computation as cited by the Construction Industry Arbitration Commission (CIAC).

RSII sent two demand letters to GMCLI, claiming that it still had a balance of ₱4,884,778.92 to collect from the latter. RSII alleged GMCLI's outstanding obligation under Progress Billing No. 15 should have been P8,131,474.83 and not P7,042,260.00 as well as GMCLI belatedly withholding the 2% CWT on Progress Billings Nos. 1 to 14, when it should only have withheld

the 2% CWT from Progress Billing No. 15. With its demand unheeded, RSII filed a complaint and request for arbitration before the CIAC.

After both parties submitted their respective affidavits and pieces of documentary evidence, and presented their respective witnesses, CIAC promulgated its decision in favor of GMCLI. Although the CIAC held that GMCLI lacked authority to withhold the 2% CWT on the cumulative bill, RSII was still not entitled to the release of P4,884,778.92, or the amount equivalent to the 2% CWT withheld on the cumulative billings.

Apart from observing that there was actually no dispute as to the computation as the same was not contested by GMCLI, the CIAC held that RSII was no longer entitled to the said amount because at the time the same was remitted to the Bureau of Internal Revenue (BIR), RSII had not yet paid income taxes on the payments from Progress Billings Nos. 1 to 15. Moreover, the CIAC held that the fact that RSII did declare the income taxes on those payments on March 22, 2016, or after GMCLI remitted the cumulated 2% CWT to BIR, was of no moment.

Applying the doctrine of Last Clear Chance analogously, the CIAC held that RSII, having knowledge of GMCLI's prior remittance, had the last clear opportunity to avoid the loss through a double payment of the 2% CWT. It held that RSII's failure to avert the effective double payment could only be held on its own account.

Aggrieved, RSII filed a petition for review under Rule 43 of the Rules before the Court of Appeals (CA) and assailed the CIAC arbitral award on CIAC's ruling that it was not entitled to the release of P4,884,778.92. The CA partially granted the petition, ruling that the amount of P3,815,996.50, equivalent to the 2% CWT on Progress Billings Nos. 1 to 14, was already remitted to the BIR, and it would be unjust to require GMCLI, as the withholding agent, to effectively shoulder the amount of tax which RSII had the legal duty to pay.

With respect to granting RSII's entitlement to P1,088,214.83, the CA reasoned that RSII is still entitled to collect the amount as GMCLI did not contest RSII's computation for the amount due for Progress Billing No. 15. Both parties filed for their respective Motions for Reconsideration, which were both denied by

the CA. Hence, the separated, now consolidated, petitions for Review on *Certiorari* filed by GMCLI and RSII before the Court.

ISSUES

(1) Is RSII entitled to the release of P3,815,996.50 or the equivalent of 2% CWT on Progress Billings Nos. 1 to 14, in addition to the award of P1,088,214.83?

(2) May GMCLI be ordered to issue BIR Form 2307 to RSII?

RULING

(1) **NO**. The Expanded CWT, as defined under Section 2.57(B) of Revenue Regulation (RR) No. 2-98178 reads:

> (B) *Creditable Withholding Tax*. - Under the CWT system, taxes withheld on certain income payments are intended to equal or at least approximate the tax due of the payee on said income. The income recipient is still required to file an income tax return, as prescribed in Sec. 51 and Sec. 52 of the NIRC, as amended, to report the income and/or pay the difference between the tax withheld and the tax due on the income.
>
> Taxes withheld on income payments covered by the expanded withholding tax (referred to in Sec. 2.57.2 of these regulations) and compensation income (referred to in Sec. 2.78 also of these regulations) are creditable in nature.

The CWT is a withholding tax imposed on certain income payments and is creditable against the income tax due of the payee for the taxable quarter/year in which the particular income was earned. Essentially, the CWT is an advance income tax on the payee. Prior to the actual filing of income tax return, the taxpayer already pays a portion of its foreseeable income tax liability in the form of the creditable income tax, withheld and remitted for him on his behalf by the withholding agent.

The income of the payee subject to the CWT is still reported in the income tax return upon the filing of the income tax return, for the computation of the

income tax due on it. In the event that the income tax computed is more than the CWT paid earlier, the difference shall be paid by the payee in order for his income tax to be paid in full. Conversely, in case the income tax calculated is less than the CWT paid, the overpayment of CWT shall either be carried over to the next taxable period for the payee, or refunded in his favor. Section 2.57.3 of RR No. 2-98 further recites the persons required to be withholding agents, under which GMCLI falls:

> Agents, employees or any person purchasing goods or services, paying for and in behalf of the aforesaid withholding agents shall likewise withhold in their behalf, provided that the official receipts of payments/sales invoice shall be issued in the name of the person whom the former represents and the corresponding certificates of taxes withheld (BIR Form No. 2307) shall immediately be issued upon withholding of the tax.

In relation, Section 2.57.4 of the same RR likewise appoints the time when the 2% CWT should be withheld, which is "at the time an income payment is paid or payable, or the income payment is accrued or recorded as an expense or asset, whichever is applicable, in the payor's books, whichever comes first. The terms "payable" refers to the date the obligation becomes due, demandable or legally enforceable."

The Court finds that the CIAC, as affirmed by the CA, correctly found GMCLI to be without the authority to belatedly withhold the 2% withholding tax. That despite the lack of authority of GMCLI to belatedly withhold and remit the 2% CWT, RSII is nevertheless still not entitled to the release of the amount equivalent to that withheld in the cumulative. The CWT's design for tax creditability stands on the twin conditions of (1) the withholding agent's withholding the CWT and (2) the payee's crediting of the said amount in its income tax return.

(2) **YES**. The black letter of the law is demonstrably clear and, prescribing that GMCLI should have remitted the 2% CWT as soon as each Progress Billing was paid and accordingly should have also issued the corresponding BIR Form 2307 to RSII in order for the latter to have had a tax credit claim on the same. GMCLI should therefore issue to RSII the pertinent BIR Form 2307 for all its

belated withholding of CWT, so that RSII may exhaust the remedies available to it in the law.

COMMERCIAL LAW

KOLIN ELECTRONICS CO., INC. *v.* KOLIN PHILIPPINES INTERNATIONAL, INC.

G.R. NO. 228165, 09 FEBRUARY 2021, *EN BANC*, (CAGUIOA, *J.*)

DOCTRINE OF THE CASE

According to jurisprudence, the Dominancy Test and the Holistic Test are used in assessing the resemblance of marks to determine the existence of likelihood of confusion. Out of the two tests, only the Dominancy Test has been incorporated in the IP Code. It also held that the legislative intent in explicitly adopting the Dominancy Test was to abandon the Holistic altogether. This was done by the Congress to finally resolve the conflicting doctrines regarding what constitutes colorable imitation of a registered mark.

Considering the adoption of the Dominancy Test and the abandonment of the Holistic Test, as confirmed by the IP Code and the legislative deliberations, the Court made it crystal clear that the use of the Holistic Test in determining the resemblance of marks has been deemed abandoned. As such, the Taiwan Kolin case, which used the Holistic Test, is improper precedent because the Dominancy Test is what is prescribed in the IP Code.

Applying the Dominancy Test, KPII's mark resembles KECI's mark because the word "KOLIN" is the prevalent feature of both marks. Phonetically or aurally, the marks are exactly the same.

FACTS

Two antecedent facts are involved in the present case: the KECI Ownership case and; the Taiwan Kolin case.

Under the *KECI Ownership case*, on August 17, 1993, KECI filed an application for Trademark Appilcan for ***KOLIN***, covering the following products under Class 9: automatic voltage regulator, converter, recharger, stereo booster and others. The KOLIN mark was used by KECI since 1989.

On February 29, 1996, Taiwan Kolin Co., Ltd. (TKC) filed its own application for **KOLIN** initially covering the following goods: color television, refrigerator, window-type air conditioner, split-type air conditioner, electric fan, and water dispenser. All of which are under Class 9 as well.

On July 22, 1998, TKC filed an opposition against KECI's trademark application claiming that it was the owner of Taiwan registrations for KOLIN and KOLIN SOLID series and that it has a pending application for **KOLIN.** It claimed that it would suffer damage if KECI's application because both marks is identical, if not confusingly similar.

Ultimately, without reaching the Supreme Court, the case was resolved in favor of KECI on July 31, 2006. Thus, KECI was considered as the owner of the ***KOLIN*** mark under the Trademark Law, the law applicable at that time, as against TKC.

However, in the *Taiwan Kolin case*, the registration of another KOLIN mark not owned by KECI was allowed. Such case was promulgated by the Supreme Court's Third Division on March 25, 2015. In that case, the **KOLIN** mark was resolved in favor of TKC but only with respect to Television and DVD players. The Court therein ruled that identical marks may be registered for products from the same classification. Moreover, it held that the emphasis should be on the similarity of the products involved and not on the arbitrary classification or general description of their properties or characteristics.

Furthermore, it held that the products covered by TKC's application and that of KECI's were unrelated. Also, it held that the list of products under Class 9 can be subcategorized into five different classifications and that the products covered by TKC's and KECI's marks fall under different sub-categories. The Court applied the Holistic Test. As a result, the Court gave due course to TKC's Trademark Application for KOLIN.

For the present case, Kolin Philippines International Inc., (KPII), an affiliate of TKC, filed a Trademark application for the **kol*i*n** mark under Class 9 covering "Televisions and DVD players". KPII filed this application on September 11, 2006, or more than a month after the promulgation of the *KECI ownership case.*

Thus, KECI filed an opposition thereto claiming that it was the registered owner of the ***KOLIN*** mark and registration of KPII's mark will cause confusion among consumers.

KPII contended that, among others, the *KECI ownership case* specifically clarified that KECI's ownership over the mark is limited only in connection with goods specified in KECI's registration and those related thereto. "Television and DVD players" are not related to the goods covered by KECI's mark.

ISSUE

Is KPII allowed to register its **kol*i*n** mark?

RULING

NO. The Court ruled that KPII's Trademark application is not registrable because it will cause damage to KECI.

Section 123.1(d) of the Intellectual Property Code (IP Code) states that:

> SECTION 123. *Registrability*. - 123.1. A mark cannot be registered if it:
>
> (c) Is identical with a registered mark belonging to a different proprietor or a mark with an earlier filing or priority date, in respect of:
>
> i. The same goods or services, or
> ii. Closely related goods or services, or
> iii. If it nearly resembles such a mark as to be likely to deceive or cause confusion;

In determining likelihood of confusion — which can manifest in the form of "confusion of goods" and/or "confusion of business" several factors may be taken into account, such as:

> a) the strength of plaintiff's mark;
> b) the degree of similarity between the plaintiff's and the defendant's marks;
> c) the proximity of the products or services;
> d) the likelihood that the plaintiff will bridge the gap;
> e) evidence of actual confusion;
> f) the defendant's good faith in adopting the mark;

g) the quality of defendant's product or service; and/or
h) the sophistication of the buyers.

These criteria may be collectively referred to as the multifactor test. Out of these criteria, there are two which are uniformly deemed significant under the Trademark Law and the IP Code: the resemblance of marks (the degree of similarity between the plaintiff's and the defendant's marks) and the relatedness of goods or services (the proximity of products or services).

According to jurisprudence, the Dominancy Test and the Holistic Test are used in assessing the resemblance of marks to determine the existence of likelihood of confusion.

The Dominancy Test focuses on the similarity of the prevalent features of the competing trademarks which might cause confusion or deception, and thus infringement. If the competing trademark contains the main, essential or dominant features of another, and confusion or deception is likely to result, infringement takes place. Duplication or imitation is not necessary; nor is it necessary that the infringing label should suggest an effort to imitate.

On the other hand, the Holistic Test requires that the entirety of the marks in question be considered in resolving confusing similarity. Comparison of words is not the only determining factor. The trademarks in their entirety as they appear in their respective labels or hang tags must also be considered in relation to the goods to which they are attached. The discerning eye of the observer must focus not only on the predominant words but also on the other features appearing in both labels in order that he may draw his conclusion whether one is confusingly similar to the other.

However, the Court held that out of the two tests, only the Dominancy Test has been incorporated in the IP Code. It also held that the legislative intent in explicitly adopting the Dominancy Test was to abandon the Holistic altogether. This was done by the Congress to finally resolve the conflicting doctrines regarding what constitutes colorable imitation of a registered mark.

Considering the adoption of the Dominancy Test and the abandonment of the Holistic Test, as confirmed by the IP Code and the legislative deliberations, the Court made it crystal clear that the use of the Holistic Test in determining the resemblance of marks has been deemed abandoned. As such, the *Taiwan Kolin* case, which used the Holistic Test, is improper precedent because the Dominancy Test is what is prescribed in the IP Code.

Applying the Dominancy Test, KPII's mark resembles KECI's mark because the word "KOLIN" is the prevalent feature of both marks. Phonetically or aurally, the marks are exactly the same.

The Court further held that since the type of mark of KECI was a word mark, the word "KOLIN" itself is what is protected by the registration. That word marks protect the word itself stands to reason. Since there are no special characteristics to be shown in the reproduction of the mark in the application, the word itself is the subject of protection.

Thus, minor differences between the mark of KPII's and KECI's mark should be disregarded. The fact that KPII's application possesses special characteristics (e.g., italicized orange letter "i") not present in KECI's mark makes no difference in terms of appearance, sound, connotation, or overall impression because the "KOLIN" word itself is the subject of KECI's registration.

The Court held that goods covered by KPII and KECI are related. With respect to Relatedness of goods/services as a factor in determining confusion, jurisprudence laid down several factors in determining whether goods are related:

(a) the business (and its location) to which the goods belong
(b) the class of product to which the goods belong
(c) the product's quality, quantity, or size, including the nature of the package, or container
(d) the nature and cost of the articles
(e) the descriptive properties, physical attributes or essential characteristics with reference to their form, composition, texture or quality
(f) the purpose of the goods

(g) whether the article is bought for immediate consumption, that is, day-to-day household items
(h) the fields of manufacture
(i) the conditions under which the article is usually purchased and
(j) the channels of trade through which the goods flow, how they are distributed, marketed, displayed and sold.

The Court ruled that the factor "the class of product to which the goods belong" is inconsistent with the law and creates problems with making precedents in legal relatedness. The Nice Classification (NCL), used in classifying products, was made for purely administrative purposes, that is, to organize the thousands of applications filed worldwide with trademark offices. Thus, the classification of products/services should not have been included as one of the factors in determining relatedness because there was no legal basis for its inclusion.

It emphasized that the classes in the NCL undergo several changes each year. As such, judicial pronouncements regarding nature of certain goods/services and their legal relatedness/non-relatedness – which pronouncements would, in turn, affect substantive rights over marks and affect future cases involving the same goods/services – should not be made to depend on a constantly changing list. Therefore, the Court abandoned the use of product or service classification as a factor in determining relatedness or non-relatedness.

As such, the *Taiwan Kolin case* is once again inapplicable not only because it did not comprehensively consider all the jurisprudential factors in determining relatedness, but it also included an inapposite discussion on subcategories in the NCL as an additional rationale for its conclusion on non-relatedness.

In this case, the nature and cost of the articles are related. The goods covered by KPII and KECI are electronic in nature and expensive. The goods, being electronic, are likely made of metal. Furthermore, the goods cannot be easily carried around. As such, the descriptive properties, physical attributes or essential characteristics with reference to their form, composition, texture or quality are also related.

Both goods of the parties may be used for entertainment purposes, thus satisfying the factor of "purpose of goods". Furthermore, since both goods are not bought for immediate consumption, the factor "whether the article is bought for immediate consumption, that is, day-to-day household items" is also satisfied.

Both goods are rarely bought because they are relatively expensive and they last for a long time, goods covered by KOLIN and kolin are rarely bought. They are non-essential goods. Thus, satisfying the factor of "the conditions under which the article is usually purchased".

With respect to "the channels of trade through which the goods flow, how they are distributed, marketed, displayed and sold", both goods are offered in the same channels, that is, department or appliance stores.

Clearly, the goods covered by KPII and KECI are related and this legal relatedness impacts a finding of likelihood of confusion.

Another ground for finding relatedness of goods/services is their complementarity. The reasoning used in the case of *Hewlett-Packard Development Company, L.P. v. Vudu, Inc.* is also logical and persuasive. In said case, the opposer Hewlett-Packard registered its "VOODOO" mark for, inter alia, "personal and gaming computers" under Class 9. Meanwhile, Vudu, Inc. sought to register its "VUDU" mark for, inter alia, "computer software for use in computers for the transmission, storage and playback of audio and video content" also under Class 9. The tribunal therein pointed out that "the goods of the parties may be used together for the same purposes, may be found in the same channels of trade, and may appeal to the same purchasers. x x x by their descriptions, VUDU's particular type of software for computers and Hewlett-Packard's personal and gaming computers are complementary goods", thus, it granted Hewlett-Packard's opposition of the "VUDU" mark based on the finding that the goods under Class 9 covered by the marks are related and confusion is likely.

Applying this reasoning to the herein dispute, it is clear that the goods covered by KECI's KOLIN are complementary to the goods covered by KPII's **kol*i*n** and could thus be considered as related. This increases the likelihood that consumers will at least think that the goods come from the same source. In other words, confusion of business will likely arise.

The Court also held that there was actual confusion because the consumers of KPII sent complaints, concerns and other information to KECI, instead of KPII.

The presence of actual confusion is not an insignificant circumstance. The evidence of actual confusion is often considered the most persuasive evidence of likelihood of confusion because past confusion is frequently a strong indicator of future confusion. Actual confusion should be considered as strong evidence of likelihood of confusion, especially when there are concurrent findings of resemblance of marks and/or relatedness of the goods/services.

Parenthetically, the presence of this criterion in ascertaining the existence of likelihood of confusion in the multifactor test is yet another reason why the *Taiwan Kolin case* should not be held as a binding precedent here. In the *Taiwan Kolin case*, while there was evidence of actual confusion presented in the IPO-BLA, this was ultimately not considered in resolving the issue of likelihood of confusion.

The factor involving the "likelihood that the plaintiff will bridge the gap" pertains to the possibility that the plaintiff will expand its product offerings to cover the product areas of the defendant. Since the goods covered by KECI and KPII are related, it is likely that the goods of KPII falls within the normal potential expansion of business of KECI.

As stated in *Philip Morris, Inc. v. Fortune Tobacco Corporation*, "the general impression of the ordinary purchaser, buying under the normally prevalent conditions in trade and giving the attention such purchasers usually give in buying that class of goods, is the touchstone."

The goods in this case are not inexpensive goods and consumers may pay more attention in buying these goods. However, this does not eliminate the possibility of confusion, especially since most consumers likely do not frequently purchase Automatic Voltage Regulators, stereo boosters, TV sets, DVD players, etc. Unless they have jobs or hobbies that allow them to frequently purchase these electronic products, it is not farfetched to suppose that they may only encounter the marks in the marketplace itself once they are about to buy said goods once every five years or so.

Even if sophisticated consumers are making a repeat purchase years after they first bought a "KOLIN" product, confusion is still possible because of the degree of similarity of the subject marks. As mentioned above, KECI's mark is a word mark. Stated simply, the goodwill over the products will likely be associated with the "KOLIN" word among consumers' minds, regardless of their sophistication. Thus, these consumers who prefer KECI' s products will likely go into stores asking and looking for the "KOLIN" brand, regardless of its stylization or additional figurative features. If they happen to see KPII's "KOLIN" -branded products, they may not readily know that the products come from another source and mistakenly purchase those products thinking that these products are from KECI. Any perceived visual differences between KECI' s and KPII's "KOLIN" mark will likely be disregarded, especially considering that it is not unusual for companies to rebrand and overhaul their "brand image", including their logos, every so often.

Ultimately, there is no need to speculate and imagine how an average consumer would think and act in this hypothetical situation because, as discussed, there is actual proof of confusion among consumers between the KOLIN and kolin goods, it is clear that consumers have actually associated KPII's "KOLIN"-branded products with KECl's business.

With respect to the factor of "strength of plaintiff's mark", this pertains to the degree of distinctiveness of marks, which can be divided into five categories enumerated in decreasing order:

1) Coined or fanciful marks - invented words or signs that have no real meaning (e.g., Google, Kodak). These marks are the strongest and have the greatest chance of being registered.

2) Arbitrary marks - words that have a meaning but have no logical relation to a product (e.g., SUNNY as a mark covering mobile phones, APPLE in relation to computers/phones).

3) Suggestive marks - marks that hint at the nature, quality or attributes of the product, without describing these attributes (e.g., SUNNY for lamps, which would hint that the product will bring light to homes). If not considered as bordering on descriptive, this may be allowed.

> 4) Descriptive marks - describe the feature of the product such as quality, type, efficacy, use, shape, etc. The registration of descriptive marks is generally not allowed under the IP Code.
>
> 5) Generic marks — words or signs that name the species or object to which they apply (e.g., CHAIR in relation to chairs). They are not eligible for protection as marks under the IP Code.

KECI's KOLIN mark is a fanciful or coined mark. Considering that it is highly distinctive, confusion would be likely if someone else were to be allowed to concurrently use such mark in commerce.

The Court also held that KPII was in bad faith. KPII knew about KECI's registration when it made a trademark application. To recall, the KECI ownership case on July 31, 2006 ruled that KECI is the owner of the ***KOLIN*** mark. Thereafter, KPII (TKC's affiliate) filed a trademark application for **kol*i*n** covering the same goods.

KPII is an instrumentality of TKC and TKC directly participates in the management, supervision, and control of KPII. Furthermore, KPII filed a trademark application for barely **kol*i*n** two months after KECI was declared as the owner of the ***KOLIN*** mark. Also, KECI and KPII may be considered as being in the same line of business and it would have been highly improbable that KPII did not know an existing KOLIN mark owned by KECI, especially since it is an affiliate of TKC.

Thus, there exists relevant evidence and factual findings that a reasonable mind might accept as adequate to support the conclusion that KPII was in bad faith.

BANCO DE ORO UNIBANK, INC. *v.* INTERNATIONAL COPRA EXPORT CORPORATION, INTERCO MANUFACTURING CORPORATION, ICEC LAND CORPORATION, AND KIMEE REALTY CORPORATION

G.R. NOS. 218485-86, 218487, 218488-90, 218491, 218493-97, 218498-503, 218504-07, 218508-13, & 218523-29, 28 APRIL 2021, *THIRD DIVISION*, (LEONEN, *J.*)

DOCTRINE OF THE CASE

Section 9, Article III of the 1987 Constitution provides that "no law impairing the obligation of contracts shall be passed." This refers to the non-impairment clause, which ensures that the integrity of contracts is protected from any unwarranted State inference. It ensures that the terms of a contract mutually agreed upon by the parties are not tampered with or modified by a subsequent law.

This constitutional limitation guarantees non-interference of the State in purely private transactions. However, the non-impairment clause yields to the State's police power. This principle, which shows that the non-impairment clause is not absolute, was reiterated in Victorio-Aquino v. Pacific Plans, Inc. There, the petitioner's invocation of the non-impairment clause in questioning the rehabilitation court's approval of the modified rehabilitation plan was brushed aside. It was held therein that: "the non-impairment clause under the Constitution applies only to the exercise of legislative power. It does not apply to the Rehabilitation Court which exercises judicial power over the rehabilitation proceedings."

FACTS

Anticipating the impossibility of meeting their debts, International Copra Export Corporation (Interco), Interco Manufacturing Corporation (Interco Manufacturing), ICEC Land Corporation (ICEC Land), and Kimee Realty Corporation (Kimee), on September 9, 2010, filed a Petition for Suspension of Payments and Rehabilitation before the Regional Trial Court (RTC).

The RTC issued a Stay Order after finding the Petition sufficient in form and substance. It also appointed Atty. Julio Elamparo (Atty. Elamparo) as the rehabilitation receiver.

Development Bank of the Philippines (Development Bank), Banco De Oro Unibank, Inc. (BDO), Rizal Commercial Banking Corporation (Rizal

Commercial Banking), Allied Banking Corporation (Allied Banking), and Philippine National Bank, Bank of the Philippine Islands (BPI), some of creditors-claimants filed their rejoinders and comments pursuant to the order of the RTC. The RTC also declared that the 2008 Rules on Corporate Rehabilitation would apply to the case.

The RTC gave due course to the Petition and directed Atty. Elamparo to submit his recommendation. The latter complied and sent a Letter, to the creditors-claimants, requiring them to submit documents evidencing their claims and their proposed commercial terms on the rehabilitation plan. He likewise informed the creditors of a general creditors' meeting to be held on April 6, 2011.

After the April 6, 2011 meeting, Atty. Elamparo submitted to the rehabilitation court the modified version of the proposed rehabilitation plan wherein he found that Interco, et al.'s rehabilitation was "very viable."

Subsequently, the RTC granted the Petition and approved the modified rehabilitation plan. This prompted the creditor-claimants to file their petitions for review in the Court of Appeals (CA).

The CA partially granted the petitions but remanded the case to the rehabilitation court for the purpose of convening the creditors to vote on the Rehabilitation Plan in accordance with the Financial Rehabilitation and Insolvency Act (FRIA). In ruling this, the CA first held that petitions for financial rehabilitation are like proceedings for suspension of payments, and were properly lodged with the RTC, which FRIA did not take away or modify.

It also held the RTC's jurisdiction over petitions for financial rehabilitation was not affected despite the absence of rules implementing FRIA as every law is presumed to be complete and self-executing. Furthermore, FRIA applies to Interco, et al.'s Petition, it being filed after the law had taken effect. It clarified that the discretion to not apply FRIA only applies to cases already pending prior to FRIA's effectivity. It added that while the rehabilitation court erred in declaring that the proceedings would be governed by the 2008 Rules on Corporate Rehabilitation, only acts performed contrary to FRIA should be nullified, while those consistent with FRIA should be sustained.

As a result, the rehabilitation court suspended the implementation of the rehabilitation plan pending the finality of the decision of the CA.

Interco, et al., argued that the CA erred in ruling that FRIA is applicable since the rehabilitation court's decision to apply the 2008 Rules on Corporate Rehabilitation has become the law of the case. They insist that FRIA gives the rehabilitation court a wide latitude to decide whether to apply its provisions. Furthermore, FRIA is inapplicable since its provisions are not self-executory. They allege that this is confirmed by the fact that the law directed the Supreme Court to promulgate rules of procedure governing rehabilitation proceedings.

Interco, et al., add that, assuming that FRIA is self-executory, the voting requirement under Section 64 could not be properly implemented due to the absence of governing rules of procedure. They further assert that supposing that the voting requirement has not been complied with, the creditors were accorded due process when they filed their comments or oppositions to the Petition for Suspension of Payments and Rehabilitation in the April 6, 2011 creditors' meeting, which inputs were considered in the modified rehabilitation plan. Finally, Interco, et al., aver that the CA erred in ruling that Section 146 of FRIA applies only to petitions filed before the law took effect.

The creditor-claimants maintained that the CA correctly applied FRIA, as that the absence of rules and regulations do not render its provisions inoperative. They further contend that the 2008 Rules on Corporate Rehabilitation is rendered inapplicable because the Financial Rehabilitation Rules of Procedure, the implementing rules and regulations of FRIA apply retroactively.

They also alleged that the terms and conditions of the proposed rehabilitation plan are burdensome and prejudicial, depriving them of their contractual rights and claims against Interco, et al. They maintain that the rehabilitation court has no power to modify the contractual stipulations agreed upon by the parties.

Furthermore, they contend that the CA should have dismissed the petition because no commencement order was issued by the rehabilitation court, in disregard of the mandatory language of Section 16 of FRIA. Thus, the rehabilitation proceeding never began. They also claim April 6, 2011 creditors'

meeting does not equate to the voting requirement, thus, there is non-compliance with the conditions under Section 64 of FRIA.

ISSUE

(1) Does FRIA apply despite the absence of its Implementing Rules and Regulations (IRR) at the time of the filing of the petition?
(2) Did the CA err in not dismissing the petition despite the absence of a commencement order?
(3) Does the non-impairment clause apply to rehabilitation proceedings?
(4) Should the rehabilitation plan be approved despite the absence of the voting requirement under FRIA?

RULING

(1) **YES.** The FRIA took effect on August 31, 2010, but its implementing rule, the Financial Rehabilitation Rules of Procedure (FR Rules), was only promulgated on August 27, 2013.

Here, the Petition for Suspension of Payments and Rehabilitation was filed before the rehabilitation court on September 9, 2010, after FRIA had taken effect. Nonetheless, Interco, et al., cannot insist that FRIA cannot apply absent its implementing rules.

At the outset, Interco, et al., themselves filed the Petition pursuant to the provisions of FRIA. By invoking FRIA, they should be deemed estopped from contending that its provisions are inapplicable to their case. Furthermore, the absence of an implementing rule alone cannot render a law inoperative. Every law is presumed valid, until and unless judicially declared invalid. The mere absence of implementing rules cannot effectively invalidate provisions of law, where a reasonable construction that will support the law may be given.

Furthermore, Interco, et al., misread Section 146 of FRIA in insisting that the law's provisions do not apply to their case. Section 146 provides: "This Act shall govern all petitions filed after it has taken effect. All further proceedings in insolvency, suspension of payments and rehabilitation cases then pending, except to the extent that in the opinion of the court their application would not be feasible or would work injustice, in which event the procedures set forth in prior laws and regulations shall apply."

As the CA correctly found, the discretion given to rehabilitation courts in applying the 2008 Rules on Corporate Rehabilitation instead of FRIA pertains only to petitions for rehabilitation filed before and are pending at the time FRIA took effect. In cases involving petitions for rehabilitation filed after FRIA's effectivity, the rehabilitation court has no option and is mandated to apply the provisions of FRIA.

In addition, if the promulgation of the rules of procedure is a precondition for the effectivity of FRIA, it would confer on the judiciary the power to suspend the effectivity of a legislative act by simply refusing to promulgate guidelines for its implementation.

Besides, even if some of FRIA's provisions require an implementing rule for its proper execution, the Court has already applied the 2008 Rules on Corporate Rehabilitation to support and supply the wordings of FRIA. In *Philippine Asset Growth Two, Inc. v. Fastech Synergy Philippines, Inc.*, the Court used the 2008 Rules on Corporate Rehabilitation despite the petition for rehabilitation having been filed on April 8, 2011.

The 2008 Rules on Corporate Rehabilitation's suppletory application is reinforced by Rule 1, Section 2 of the 2013 FR Rules, which states:

> SECTION 2. Scope. — These Rules shall apply to petitions for rehabilitation of corporations, partnerships, and sole proprietorships, filed pursuant to Republic Act No. 10142, otherwise known as the Financial Rehabilitation and Insolvency Act (FRIA) of 2010.
>
> These Rules shall similarly govern all further proceedings in suspension of payments and rehabilitation cases already pending, except to the extent that, in the opinion of the court, its application would not be feasible or would work injustice, in which event the procedures originally applicable shall continue to govern.

Rule 1, Section 2 reveals that the discretion given to courts in deciding not to apply the FR Rules pertains to cases for suspension of payments and rehabilitation already pending before FRIA took effect. The first paragraph

mandates that the FR Rules shall apply to petitions for rehabilitation filed pursuant to FRIA. The second paragraph provides that rehabilitation courts may still apply the FR Rules to cases filed before FRIA took effect, except when its application would work injustice to the parties.

Accordingly, the rehabilitation court correctly applied FRIA and, suppletorily, the 2008 Rules on Corporate Rehabilitation in Interco, et al.'s Petition for Suspension of Payments and Rehabilitation. The 2008 Rules shall apply to the Petition, provided that it is not inconsistent with FRIA.

(2) **NO.** FRIA provides that after a petition is found to be sufficient in form and substance, the rehabilitation court shall issue a commencement order to signify the beginning of the rehabilitation proceedings. The commencement order shall include "a declaration that the debtor is under rehabilitation, the appointment of a rehabilitation receiver, a directive for all creditors to file their verified notices of claim, and an order staying claims against the [petitioning] debtor."

Here, after the rehabilitation court had found the Petition to be sufficient in form and substance, it issued a Stay Order which provided for, among others, the appointment of Atty. Elamparo as rehabilitation receiver, the suspension of all claims against Interco, et al., and the date of the initial hearing. Its denomination as "Stay Order" is immaterial, since it provided the basic requirements of a commencement order required by FRIA.

To clarify, the liberality in the nomenclature of the commencement order should apply only in cases where such order was issued before the FR Rules' promulgation. This is an aspect of equity; otherwise, strict adherence to procedural niceties would prevent substantive relief. **However, for cases where the commencement order is issued after the effectivity of the FR Rules, the order must be properly designated as a "commencement order."** (Emphasis supplied)

(3) **NO.** Section 9, Article III of the 1987 Constitution provides that "no law impairing the obligation of contracts shall be passed." This refers to the non-impairment clause, which ensures that the integrity of contracts is protected from any unwarranted State inference. It ensures that the terms of a contract mutually agreed upon by the parties are not tampered with or modified by a subsequent law.

This constitutional limitation guarantees non-interference of the State in purely private transactions. However, the non-impairment clause yields to the State's police power. *In Pryce Corporation v. China Banking Corporation:*

In *Pacific Wide Realty and Development Corporation v. Puerto Azul Land, Inc.* which similarly involved corporate rehabilitation, this court found no merit in Pacific Wide's invocation of the nonimpairment clause, explaining as follows:

> xxx Section 10, Article III of the Constitution mandates that no law impairing the obligations of contract shall be passed. This case does not involve a law or an executive issuance declaring the modification of the contract among debtor PALI, its creditors and its accommodation mortgagors. Thus, the non-impairment clause may not be invoked. Furthermore, as held in *Oposa v. Factoran, Jr.* even assuming that the same may be invoked, the nonimpairment clause must yield to the police power of the State. Property rights and contractual rights are not absolute. The constitutional guaranty of non-impairment of obligations is limited by the exercise of the police power of the State for the common good of the general public.
>
> Successful rehabilitation of a distressed corporation will benefit its debtors, creditors, employees, and the economy in general. The court may approve a rehabilitation plan even over the opposition of creditors holding a majority of the total liabilities of the debtor if, in its judgment, the rehabilitation of the debtor is feasible and the opposition of the creditors is manifestly unreasonable.

This principle, which shows that the non-impairment clause is not absolute, was reiterated in *Victorio-Aquino v. Pacific Plans, Inc.* There, the petitioner's invocation of the non-impairment clause in questioning the rehabilitation court's approval of the modified rehabilitation plan was brushed aside. It was held therein that: "the non-impairment clause under the Constitution applies only to the exercise of legislative power. It does not apply to the Rehabilitation Court which exercises judicial power over the rehabilitation proceedings."

(4) **YES.** One of the salient changes introduced by FRIA is the rehabilitation receiver's duty to notify the creditors of the petitioning debtor that

the rehabilitation plan is ready for examination. Section 64 and 65 of FRIA provides:

> SECTION 64. Creditor Approval of Rehabilitation Plan. — The rehabilitation receiver shall notify the creditors and stakeholders that the Plan is ready for their examination. Within twenty (20) days from the said notification, the rehabilitation receiver shall convene the creditors, either as a whole or per class, for purposes of voting on the approval of the Plan. The Plan shall be deemed rejected unless approved by all classes of creditors whose rights are adversely modified or affected by the Plan. For purposes of this section, the Plan is deemed to have been approved by a class of creditors if members of the said class holding more than fifty percent (50%) of the total claims of the said class vote in favor of the Plan. The votes of the creditors shall be based solely on the amount of their respective claims based on the registry of claims submitted by the rehabilitation receiver pursuant to Section 44 hereof.
>
> Notwithstanding the rejection of the Rehabilitation Plan, the court may confirm the Rehabilitation Plan if all of the following circumstances are present:
>
> > (a) The Rehabilitation Plan complies with the requirements specified in this Act;
> > (b) The rehabilitation receiver recommends the confirmation of the Rehabilitation Plan;
> > (c) The shareholders, owners or partners of the juridical debtor lose at least their controlling interest as a result of the Rehabilitation Plan; and
> > (d) The Rehabilitation Plan would likely provide the objecting class of creditors with compensation which has a net present value greater than that which they would have received if the debtor were under liquidation.
>
> SECTION 65. Submission of Rehabilitation Plan to the Court. — If the Rehabilitation Plan is approved, the rehabilitation

> receiver shall submit the same to the court for confirmation. Within five (5) days from receipt of the Rehabilitation Plan, the court shall notify the creditors that the Rehabilitation Plan has been submitted for confirmation, that any creditor may obtain copies of the Rehabilitation Plan and that any creditor may file an objection thereto.

If the plan is rejected by the creditors, the rehabilitation court may still confirm the rehabilitation plan, subject to certain conditions provided under Section 64. This power to override the creditor's disapproval of the rehabilitation plan refers to the rehabilitation court's "cram-down" power.

However, as the CA pointed out, the exercise of the cram-down power is not absolute. The rehabilitation court must ensure that all circumstances provided under the second paragraph of Section 64 are present. Failure to comply with these conditions violates the creditors' right to due process.

Notably, one of the requirements provided under Section 64 is the rehabilitation receiver's act of convening the creditors for purposes of voting on the proposed rehabilitation plan. Yet, here, the rehabilitation court confirmed the rehabilitation plan despite the creditors' failure to vote. Thus, the CA decreed that the confirmation was premature and ordered the remand of the case to the rehabilitation court to convene the creditors and comply with the voting requirement.

Here, the CA did not definitively conclude whether the rehabilitation plan was viable. It did not decide the matter on the merits. On the contrary, and as expressly provided in the dispositive portion of its Decision, the CA remanded the matter to the rehabilitation court, for the rehabilitation receiver to convene the creditors for the purpose of complying with the voting requirement under FRIA.

However, the Court noted that Interco, et al., filed the Petition for Suspension of Payments and Rehabilitation in 2010. The case has been pending ever since. In the interest of judicial economy and efficiency, and given that the creditors were given ample opportunities to raise their objections to the Petition and the viability of the proposed rehabilitation plan, the Court found a remand of the case unnecessary.

To recall, during the rehabilitation proceedings, Interco, et al.'s creditors filed their notice of claims and Comments or Oppositions to the Petition. Some of them likewise submitted their letter-compliance in response to the March 3, 2011 letter of the rehabilitation receiver.

Further, the creditors admitted that a general creditors' meeting was held on April 6, 2011. The creditors do not deny that during this meeting, they conveyed their comments and suggestions on the proposed rehabilitation plan.

Finally, the creditors filed before the rehabilitation court their comment or opposition to the revised rehabilitation plan submitted by the rehabilitation receiver. Notwithstanding the creditors' oppositions, the rehabilitation court found "the petition to be well grounded, proper and in order" and the rehabilitation of Interco, et al., feasible.

The Court stressed that the rehabilitation court can best decide on the rehabilitation plan's feasibility and viability. Owing to its technical expertise and in-depth knowledge on rehabilitation proceedings, the rehabilitation court is in the most advantageous position to receive and scrutinize the evidence submitted by the parties. Having witnessed firsthand the manner and decorum of the parties involved, the rehabilitation court has insight on nonverbal cues exhibited during the proceedings.

CRIMINAL LAW

LUISITO G. PULIDO *v.* PEOPLE OF THE PHILIPPINES

G.R. NO. 220149, 27 JULY 2021, *EN BANC*, (HERNANDO, *J.*)

DOCTRINE OF THE CASE

The prevailing rule under Art. 40 of the Family Code is that even if the marriage is void, a final judgment declaring it void for purposes of remarriage is required. However, in a criminal prosecution for Bigamy, the parties may still raise the defense of a void ab initio marriage even without obtaining a judicial declaration of absolute nullity if the first marriage was celebrated before the effectivity of the Family Code in line with the principle that procedural rules are only given retroactive effect insofar as they do not prejudice or impair vested or acquired rights. Consequently, a judicial declaration of absolute nullity of the first and/or subsequent marriages obtained by the accused in a separate proceeding, irrespective of the time within which they are secured, is a valid defense in the criminal prosecution for bigamy.

Here, Pulido's marriage with Arcon was celebrated when the Civil Code was in effect while his subsequent marriage with Baleda was contracted during the effectivity of the Family Code. Insofar as the bigamy case is concerned, Pulido may raise the defense of a void ab initio marriage even without obtaining a judicial declaration of absolute nullity.

FACTS

In 1983, Luisito Pulido (Pulido) married his then teacher Nora Arcon (Arcon) in a civil ceremony and the following year, their marriage was blessed with a child born in 1984. In 2007, Pulido stopped going home to their conjugal dwelling and when confronted by Arcon, Pulido admitted to his affair with Rowena Baleda (Baleda). Moreover, Arcon learned that Pulido and Baleda entered marriage in 1995 through a Marriage Certificate indicating Pulido's civil status as single.

Subsequently, Arcon charged Pulido and Baleda with Bigamy. In his defense, Pulido argued that he cannot be held criminally liable for bigamy because both his marriages were null and void in that his 1983 marriage with Arcon was null and void for lack of valid marriage license while his 1995 marriage with Baleda was null and void for lack of a marriage ceremony. For her part, Baleda claimed

that she only knew of Pulido's prior marriage with Arcon sometime in April 2007 and that she already filed a Petition to Annul her marriage with Pulido before the Regional Trial Court (RTC) of Imus, Cavite.

The RTC convicted Pulido of Bigamy and acquitted Baleda. The RTC dismissed Pulido's claim that both of his marriages were void. As to his first marriage, the marriage certificate reflecting on its face the marriage license number of Pulido and Arcon's marriage has a higher probative value than those issued by the Civil Registrar. Insofar as the second marriage is concerned, Pulido's witness showed only irregularities in the formal requisites of Pulido's second marriage, which did not affect its validity.

On appeal, the Court of Appeals (CA) sustained Pulido's conviction on the ground that all the elements of bigamy were present since Pulido entered into a second marriage with Baleda while his prior marriage with Arcon was subsisting.

ISSUES

(1) Can Pulido validly interpose the defense of a void *ab initio* marriage even without obtaining a judicial declaration of absolute nullity in a criminal prosecution for bigamy?

(2) Is Pulido's conviction of bigamy warranted?

RULING

(1) **YES**. The prevailing rule under Art. 40 of the Family Code is that even if the marriage is void, a final judgment declaring it void for purposes of remarriage is required. Without a judicial declaration of absolute nullity of the first marriage having been obtained, the second marriage is rendered void *ab initio* eve if the first marriage was also considered void *ab initio*.

However, in a criminal prosecution for bigamy, the parties may still raise the defense of a void *ab initio* marriage even without obtaining a judicial declaration of absolute nullity if the first marriage was celebrated before the effectivity of the Family Code. Such is still governed by the rulings in *People v. Mendoza* and *People v. Aragon* as it is more in line with the rule that procedural rules are only given retroactive effect insofar as they do not prejudice or impair vested or acquired rights.

The Court emphasized as well that the judicial declaration of absolute nullity of the first and/or subsequent marriages obtained by the accused in a separate proceeding, irrespective of the time within which they are secured, is considered a valid defense in the criminal prosecution for bigamy.

Here, Pulido's marriage with Arcon was celebrated when the Civil Code was in effect while his subsequent marriage with Baleda was contracted during the effectivity of the Family Code. Insofar as the bigamy case is concerned, Pulido may raise the defense of a void *ab initio* marriage even without obtaining a judicial declaration of absolute nullity.

(2) **NO**. A void marriage is *ipso facto* void without need of any judicial declaration of nullity except in cases of remarriage because the same is deemed inexistent, *i.e.,* no marriage existed from the beginning. When the first marriage is void *ab initio*, one of the essential elements of bigamy which is a valid prior marriage is absent. Hence, there can be no crime when the very act which was penalized by law, the contracting of another marriage during the subsistence of a prior legal or valid marriage, is not present.

Here, Pulido and Arcon's marriage lacks a valid marriage license. As provided by Pulido, the Municipal Registrar issued the Certification dated December 8, 2008, stating that there was no record of entry of bot the date of issuance of the marriage license and the marriage license number in the record book for marriage application in relation to Pulido's first marriage.

The Court stressed that the fact the Registrar found no entry of the date of issuance and license number in its record book likely explains why the original document of the marriage license could not be found in its custody. With the absence of a valid marriage license, a reasonable doubt arises as to the existence of a prior valid marriage which is one of the elements of bigamy. More importantly, during the pendency of this case, a judicial declaration of absolute nullity of Pulido's marriage with Arcon due to the absence of a valid marriage license was issued and attained finality in 2016.

Lacking an essential element of the crime of bigamy *i.e.,* a prior valid marriage as per Certification dated December 8, 2008 and the subsequent judicial of nullity of Pulido and Arcon's marriage, the prosecution failed to prove that the crime of bigamy is committed. Thus, the Court acquitted Pulido of bigamy charge.

DANTE LOPEZ Y ATANACIO *v.* PEOPLE OF THE PHILIPPINES

G.R. NO. 249196, 28 APRIL 2021, *FIRST DIVISION*, (ZALAMEDA, *J.*)

DOCTRINE OF THE CASE

Without proper factual foundation, the presumption of fencing must be upended in favor of the presumption of innocence enjoyed by the accused. No prima facie evidence or case shall arise in the absence of the required facts on which the same must operate. The prosecution cannot, and should not, merely depend on the operation of the presumption of fencing to establish moral certainty for convicting the accused. More importantly, the courts should be mindful in applying such presumption, subject to a careful scrutiny of the facts of each case. This, considering that unjust convictions result to forfeiture of life, liberty, and property.

The presumption under Section 5 of PD 1612 which states that mere possession of any object which has been the subject of robbery or thievery shall be prima facie evidence of fencing was overcame by Atanacio upon presentation of the notarized affidavits of the President and Chief Mechanic of Bicycle Works that indeed, Atanacio bought the bicycle subject of the case from their store.

FACTS

Dante Lopez y Atanacio (Atanacio) was charged with the crime of fencing for allegedly stealing the mountain bike of complainant Rafael Mendoza y Dela Paz (Dela Paz).

Dela Paz alleged that he is the owner of the bike, it having been bought from abroad. However, it was stolen on January 15, 2011. He further alleged that on February 23, 2014, he saw his bicycle being ridden by Magno Lopez (Lopez), Atanacio's brother. Subsequently, when asked by Dela Paz on where Lopez got the bicycle, the latter answered that it was given by Atanacio. A blotter of the incident was made in the barangay.

Lopez testified that he got the bicycle from Atanacio in 2002. He further described the bike as, among others, a blue Araya-made model.

Atanacio insisted that he is the owner of the bicycle. He alleged that he bought it from Bicycle Works and presented evidence of the existence of said

bicycle shop including its SEC Registration, Articles of Incorporation, and ByLaws. While he was not able to present a receipt for the purchase of the bicycle, it being bought 20 years ago, he was able to present two (2) notarized affidavits from Bicycle Works as proof of his purchase.

The Regional Trial Court (RTC) found Atanacio guilty. It gave credence to the police blotter stating that on January 15, 2011, two (2) unidentified persons unlawfully and feloniously entered Dela Paz's garage and took his Mountain Bike colored blue with frame name "ARAYA" made in Japan and worth Php100,000.00. It further ruled that since the ownership of Dela Paz was established, Atanacio now had the burden of overcoming the presumption of fencing. Moreover, it ruled that the affidavit did not specify that the bicycle subject of the case was the same item that Atanacio brought from Bicycle Works.

The Court of Appeals (CA) affirmed the RTC.

ISSUE

Was the Atanacio's guilt proven beyond reasonable doubt?

RULING

NO. Without proper factual foundation, the presumption of fencing must be upended in favor of the presumption of innocence enjoyed by the accused. No prima facie evidence or case shall arise in the absence of the required facts on which the same must operate. The prosecution cannot, and should not, merely depend on the operation of the presumption of fencing to establish moral certainty for convicting the accused. More importantly, the courts should be mindful in applying such presumption, subject to careful scrutiny of the facts of each case. This, considering that unjust convictions result to forfeiture of life, liberty, and property.

Fencing is the act of any person who, with intent to gain for himself or for another, shall buy, receive, possess, keep, acquire, conceal, sell or dispose of, or shall buy and sell, or in any other manner deal in any article, item, object or anything of value which he knows, or should be known to him, to have been derived from the proceeds of the crime of robbery or theft. The essential elements of the crime of fencing are:

(a) A crime of robbery or theft has been committed;

> (b) The accused, who is not a principal or an accomplice in the commission of the crime of robbery or theft, buys, receives, possesses, keeps, acquires, conceals, sells or disposes, or buys and sells, or in any manner deals in any article, item, object or anything of value, which has been derived from the proceeds of the said crime;
> (c) The accused knows or should have known that the said article, item, object or anything of value has been derived from the proceeds of the crime of robbery or theft; and
> (d) There is on the part of the accused, intent to gain for himself or for another.

Apart from the police blotter of the alleged robbery, no evidence was presented to prove Dela Paz's ownership of the bicycle in issue. The photos presented did not show any distinctive features to identify the bike. Worse, the evidence at hand did not establish that the bicycle given by Atanacio to Lopez is the same bicycle stolen from Dela Paz.

The features of the bicycle allegedly stolen from Dela Paz and the one owned by Atanacio are principally different from each other. The color of the fork of the bike owned by Dela Paz is aluminum or silver, while that of Atanacio is blue. The composition or the material used for the frame is also different. Dela Paz's is magnesium while Atanacio's is aluminum.

The presumption under Section 5 of PD 1612 which states that mere possession of any object which has been the subject of robbery or thievery shall be prima facie evidence of fencing was overcame by Atanacio upon presentation of the notarized affidavits of the President and Chief Mechanic of Bicycle Works that indeed, Atanacio bought the bicycle subject of the case from their store.

In law, a presumption is an inference of the existence or non-existence of a fact which courts are permitted to draw from proof of other facts, and is mandatory unless rebutted. The application of disputable presumptions on a given circumstance must be based on the existence of certain facts on which they are meant to operate. Since "presumptions are not allegations, nor do they supply their absence," disputable presumptions apply only in the absence of contrary evidence or explanations. They do not apply when there are no facts or allegations to support them, as in this case.

Without establishing beyond reasonable doubt that the item which has been the subject of theft is the same object in the possession of petitioner, the presumption under Section 5 of PD 1612 would not operate.

Further, the prosecution failed to prove the remaining elements of fencing. There is no evidence shown that Atanacio is neither the principal nor an accomplice of the alleged thievery reported by Dela Paz, and that he possessed or disposed of the latter's alleged bicycle. No proof was offered to show that Atanacio had knowledge that the bicycle he gave to Lopez was stolen, or that he had intent to gain therefrom. It is necessary to remember that in all criminal prosecutions, the burden of proof is on the prosecution to establish the guilt of the accused beyond reasonable doubt. It has the duty to prove each and every element of the crime charged in the information to warrant a finding of guilt for the said crime.

To be sure, the prosecution has failed to discharge its onus of proving, beyond reasonable doubt, the guilt of petitioner for violation of PD 1612. For settled is the rule that in every criminal prosecution, the accused is presumed innocent until the contrary is established by the prosecution.

The prosecution, at all times, bears the burden of establishing an accused's guilt beyond reasonable doubt. No matter how weak the defense may be, it is not and cannot be the sole basis of conviction if, on the other hand, the evidence for the prosecution is even weaker.

Further, it is well-settled, to the point of being elementary, that when inculpatory facts are susceptible to two or more interpretations, one of which is consistent with the innocence of the accused, the evidence does not fulfill or hurdle the test of moral certainty required for conviction.

REMEDIAL LAW

UCPB GENERAL INSURANCE CO., INC. *v.* PASCUAL LINER, INC.

G.R. NO. 242328, 26 APRIL 2021, *THIRD DIVISION*, (LOPEZ, *J.*)

DOCTRINE OF THE CASE

(1) *Timely objection made by a party against the evidence presented by the other party is significant since the Rules mandates that objections to evidence must be made as soon as the grounds therefor become reasonably apparent. In the case of testimonial evidence, the objection must be made when the objectionable question is asked or after the answer is given if the objectionable features become apparent only by reason of such answer, otherwise, the objection is waived and such evidence will form part of the records of the case as competent and complete evidence and all parties are thus amenable to any favorable or unfavorable effects resulting from the evidence. In the case of documentary evidence, offer is made after all the witnesses of the party making the offer have testified, specifying the purpose for which the evidence is being offered. It is only at this time, and not at any other, that objection to the documentary evidence may be made. When a party failed to interpose a timely objection to evidence at the time they were offered in evidence, such objection shall be considered as waived. This is true even if by its nature the evidence is inadmissible and would have surely been rejected if it had been challenged at the proper time.*

Poring over the pleadings submitted in support of the arguments raised by the parties, the Court found that no timely objection was made by Pascual Liner on the admissibility of the Traffic Accident Report.

(2) *The doctrine of res ipsa loquitor is an exception to the rule that hearsay evidence is devoid of probative value. This is because the doctrine of res ipsa loquitor establishes a rule on negligence, whether the evidence is subjected to cross-examination or not. It is a rule that can stand on its own independently of the character of the evidence presented as hearsay.*

The elements of res ipsa loquitur are: (1) the accident is of such character as to warrant an inference that it would not have happened except for the defendant's negligence; (2) the accident must have been caused by an agency or instrumentality within the exclusive management or control of the person charged with the negligence complained of; and (3) the accident must not have been due to any voluntary action or contribution on the part of the person injured.

In the instant case, the Traffic Accident Report of P03 Quila and the Traffic Accident Sketch showed that all three vehicles involved in the accident were traversing the same direction. Being at the rear end of the vehicles, it was Cadavido who had a clear view of the traffic direction and the presence of the vehicles in front of him. It was him who had the responsibility to observe the proper distance between vehicles and had the last opportunity to take the needed maneuvers to avoid a collision. As he failed to take the necessary precautions, it was Cadavido who set into motion the vehicles that caused the vehicular accident, hitting the insured vehicle in the rear and the latter vehicle in turn hitting the rear of the aluminum van that was in front. There was also no evidence adduced to show contributory negligence on the part of the insured vehicle.

FACTS

UCPB General Insurance Co., Inc. (UCPB) issued a Comprehensive Car Insurance Policy to its assured, Rommel B. Lojo (Lojo), over the latter's vehicle. The insured vehicle was cruising northbound along the South Luzon Expressway when it was bumped at the rear portion by Pascual Liner, Inc.'s bus driven by Leopoldo L. Cadavido *(Cadavido)*. As a result of the impact, the insured vehicle was pushed forward, causing it to hit a van.

The vehicular accident was investigated by the Traffic Management and Security Department of the Philippine National Construction Corporation Skyway Corporation, for which Solomon Tatlonghari (Tatlonghari) prepared a Traffic Accident Sketch. Thereafter, the matter was endorsed to the Philippine National Police, for which PO3 Joselito Quila (Quila) prepared a Traffic Accident Report.

Lojo filed a claim with UCPB under his insurance policy. The claim was found to be compensable by UCPB. In turn, UCPB paid Lojo the amount of P520,000.00, while Lojo issued a Release of Claim.

UCPB filed a complaint for sum of money against Pascual Liner Inc. (Pascual Liner) and Cadavido alleging that as a result of Lojo's receipt of the insurance indemnity it paid arising from the damage caused on the insured vehicle, it was subrogated to the rights of Lojo. It asked the court to order Pascual Liner and Cadavido to pay the amount of P350,000.00 equivalent to the amount it paid to Lojo minus the salvage value.

Upon Motion for Reconsideration, the Metropolitan Trial Court (MeTC) set aside its Decision and rendered an Order, this time finding Pascual Liner liable to pay P350,000.00, plus interest at the rate of 6% *per annum* and attorney's fees. In rendering such judgment, the MeTC applied the doctrine of *res ipsa loquitor,* which creates a presumption of negligence on the part of Cadavido who was in control of the bus, without which, the insured vehicle would not have been bumped. Such negligence gave rise to the obligation to pay the insured.

The Regional Trial Court (RTC) affirmed *in toto* the MeTC order. The Court of Appeals (CA) reversed the RTC decision and held that the Traffic Accident Sketch and the Traffic Accident Report were inadmissible in evidence as they failed to comply with the requisites of Entries in Official Records as an exception to the Hearsay Rule.

It found that since neither the police officer who prepared the report nor the traffic enforcer who prepared the sketch gave a testimony in support thereof, these documents were not exempted from the Hearsay Rule. It opined that the vehicular incident was investigated by the Traffic Management and Security Department of the PNCC Skyway Corporation, which prepared a Traffic Accident Sketch. The incident was only endorsed to the PNP, which in turn prepared a Traffic Accident Report. Thus, the matters indicated in the Traffic Accident Report were not personally known to the investigating officer. Rather, it was the PNCC traffic enforcer, Tatlonghari, who had personal knowledge of the facts stated in the Traffic Accident Report. Yet, no affidavit of his testimony was submitted before the MeTC.

ISSUES

(1) Is the Traffic Accident Report admissible even if PO3Quila did not have personal knowledge of the contents thereof?

(2) Does the Traffic Accident Report have probative value?

RULING

(1) **YES.** While hearsay evidence is generally considered inadmissible in evidence, there are exceptions thereto. One of the exceptions is entries made in official records. Jurisprudence has laid down the requisites for this exception to apply as follows:

> (a) that the entry was made by a public officer, or by another person specially enjoined by law to do so;
> (b) that it was made by the public officer in the performance of his duties, or by such other person in the performance of a duty specially enjoined by law; and
> (c) that the public officer or other person had sufficient knowledge of the facts by him stated, which must have been acquired by him personally or through official information.

In the present case, the first and second requisites are undeniably present. The entries made in the Traffic Accident Report was made by a public officer, PO3 Quila, and done in the performance of his duties. The bone of contention, however, revolves around the presence of the third requisite.

UCPB's argument that it was actually PO3 Quila who investigated the accident and had personal knowledge of the contents he entered in the Traffic Accident Report is bereft of evidentiary support. As found by the CA, UCPB presented Christian S. Cruz, whose testimony merely proved the existence of the insurance policy on Lojo's vehicle, while Mary Jane Villamor merely showed the legal fees incurred by UCPB in connection with the case. Thus, none of the evidence presented by UCPB supports its argument.

Nevertheless, with respect to the absence of a timely objection on the issue of admissibility of the Traffic Accident Report, the same requires further examination. The SC took this occasion to harmonize its ruling in *Standard Insurance Co. Inc. vs. Cuaresma* as applied by the CA and the case of *Malayan Insurance Co., Inc. vs. Spouses Reyes* espoused by UCPB.

It is the absence of a timely objection that differentiates *Standard Insurance* on one hand and the case of *Malayan Insurance,* on the other hand. As the Court found in *Malayan Insurance*, the failure of the respondent therein to raise timely objection to the admissibility of the police report despite the absence of proof as to whether the police officer who prepared it had personal knowledge of the facts contained therein, resulted in the admissibility of the said report despite being hearsay evidence.

Timely objection made by a party against the evidence presented by the other party is significant since the Rules mandates that objections to evidence must be made as soon as the grounds therefore become reasonably apparent. In the case of testimonial evidence, the objection must be made when the objectionable question is asked or after the answer is given if the objectionable features become apparent only by reason of such answer, otherwise, the objection is waived and such evidence will form part of the records of the case as competent and complete evidence and all parties are thus amenable to any favorable or unfavorable effects resulting from the evidence.

In the case of documentary evidence, offer is made after all the witnesses of the party making the offer have testified, specifying the purpose for which the evidence is being offered. It is only at this time, and not at any other, that objection to the documentary evidence may be made. When a party failed to interpose a timely objection to evidence at the time they were offered in evidence, such objection shall be considered as waived. This is true even if by its nature the evidence is inadmissible and would have surely been rejected if it had been challenged at the proper time. Moreover, grounds for objection must be specified in any case. Grounds for objections not raised at the proper time shall be considered waived, even if the evidence was objected to on some other ground. Thus, even on appeal, the appellate court may not consider any other ground of objection, except those raised at the proper time.

Poring over the pleadings submitted in support of the arguments raised by the parties, the Court found that no timely objection was made by Pascual Liner on the admissibility of the Traffic Accident Report. An oversight committed by the CA in ruling the inadmissibility of the Traffic Accident Report lies in the characterization of the complaint filed by UCPB as one falling under the Rules on Summary Procedure. Had the claim of UCPB fallen within the coverage of the Rules on Summary Procedure at the time it was filed, it would only be on appeal when the issue of admissibility of evidence could be assailed by Pascual Liner. This is because the Rules on Summary Procedure does not provide rules on offer of evidence; rather, it requires the submission of position papers and affidavits of witnesses of the parties before a judgment is rendered. However, the amount sought to be recovered by UCPB was P350,000.00, which is above the threshold set by the prevailing Rules on Summary Procedure at the time of the filing of the complaint. The ordinary rules on offer and objection should, therefore, be applied,

and the issue of admissibility of the Traffic Accident Report as hearsay evidence should not have been entertained by the CA.

(2) **YES**. Hearsay evidence, whether objected to or not, cannot be given credence except in very unusual circumstances. One of the circumstances for which hearsay evidence must be given probative value is when it establishes proof that is independent of its character as hearsay. Under the superseded Rules, the standard for which hearsay evidence was appreciated is the opportunity to subject the person who has the actual personal knowledge of the facts being testified by a witness, to cross-examination. However, this no longer holds true when the evidence, despite its hearsay character, establishes a presumption or a fact which does not necessitate the conduct of cross-examination.

The doctrine of *res ipsa loquitor* is an exception to the rule that hearsay evidence is devoid of probative value. This is because the doctrine of *res ipsa loquitor* establishes a rule on negligence, whether the evidence is subjected to cross-examination or not. It is a rule that can stand on its own independently of the character of the evidence presented as hearsay. The doctrine was eloquently explained in the case of *Solidum vs. People*:

Res ipsa loquitur is literally translated as "the thing or the transaction speaks for itself." The doctrine *res ipsa loquitur* means that "where the thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from want of care." xxx

As such, the applicability of the doctrine of *res ipsa loquitor* establishes a presumption of negligence based on the occurrence of the incident in itself. In cases involving vehicular accidents, it is sufficient that the accident itself be established, and once established through the admission of evidence, whether hearsay or not, the rule on *res ipsa loquitor* already starts to apply.

In the case of hearsay evidence seeking to prove negligence, which is not objected to, as in the instant case, the same becomes admissible in evidence because of the waiver by the other party as to its admissibility. With respect to its probative value, unlike other hearsay evidence, where the truth could not still be determined by the court despite its admissibility because of the issue of reliability

of the source of the information and the absence of opportunity on the part of the court to examine the truth of such hearsay evidence, hearsay evidence that seek to prove negligence can stand on their own despite their character as hearsay. This is because the doctrine of *res ipsa loquitor* establishes a rule on negligence, which pinpoints the person guilty of negligence based on a given set of facts. It springs from common knowledge by which liability can already be determined from the occurrence of the mishap or accident. As such, it fills in the gap that usually accompanies the appreciation of the probative value of a hearsay evidence that is not objected to. Once negligence is established, there is no need for the court to make further examination simply because the presumption of negligence is already provided by the rule of *res ipsa loquitor,* as the event, which is a vehicular accident in this case, already speaks for itself. Thus, while as a general rule, hearsay evidence does not have probative value whether it be objected to or not, an exception to this is a hearsay evidence that seeks to prove negligence under the doctrine of *res ipsa loquitor,* which carries probative weight when not objected to.

The elements of *res ipsa loquitur* are: (1) the accident is of such character as to warrant an inference that it would not have happened except for the defendant's negligence; (2) the accident must have been caused by an agency or instrumentality within the exclusive management or control of the person charged with the negligence complained of; and (3) the accident must not have been due to any voluntary action or contribution on the part of the person injured.

In the instant case, the Traffic Accident Report of P03 Quila and the Traffic Accident Sketch showed that all three vehicles involved in the accident were traversing the same direction. Being at the rear end of the vehicles, Cadavido had a clear view of the traffic direction and the presence of the vehicles in front of him. He had the responsibility to observe the proper distance between vehicles and had the last opportunity to take the needed maneuvers to avoid a collision. As he failed to take the necessary precautions, it was Cadavido who set into motion the vehicles that caused the vehicular accident, hitting the insured vehicle in the rear and the latter vehicle in turn hitting the rear of the aluminum van that was in front. There was also no evidence adduced to show contributory negligence on the part of the insured vehicle.

Cadavido's signature on the said sketch served as an admission of the location of the damage caused by the collision to the vehicles involved. It was also

an affirmation that the Traffic Accident Sketch was able to accurately reflect the respective positions of the vehicles involved in the accident.

The rule is when an employee causes damage due to their own negligence while performing their own duties, there arises a presumption that their employer is negligent. This presumption can be rebutted only by proof of observance by the employer of the diligence of a good father of a family in the selection and supervision of its employees. In this case, Pascual Liner did not adduce proof to show that it observed the required diligence of a good father of a family. Thus, it is liable for the negligence committed by its employee.

VICENTE J. CAMPA, JR. AND PERFECTO M. PASCUA *v.* HON. EUGENE C. PARAS, PRESIDING JUDGE, RTC, BR. 58, MAKATI CITY AND PEOPLE OF THE PHILIPPINES

G.R. NO. 250504, 12 JULY 2021, *SECOND DIVISION* (LAZARO-JAVIER, *J.*)

DOCTRINE OF THE CASE

To aid the courts in determining whether there is inordinate delay our jurisdiction has adopted the Balancing Test as established in the case of Cagang v. Sandiganbayan which involves the assessment of four (4) criteria: first, the length of the delay; second, the reason for the delay; third, the defendant's assertion or non-assertion of his or her right; and fourth, the prejudice to the defendant because of the delay.

Applying the Balancing test, the Supreme Court found that there was inordinate delay. First, it is undisputed that the DOJ took about ten (10) years and five (5) months from filing of the complaint before it issued a Resolution dated 08 February 2019 finding probable cause to indict Campa, Jr. and Pascua. Second, the delay was purely imputable on the prosecution and Campa, Jr. and Pascua did not cause or contributed to the delay. Third, Campa, Jr. and Pascua had actually timely assailed the subject resolution through a Manifestation with Motion to Adopt and Entry of Appearance with Motion to Dismiss. Moreover, when the trial court denied their motions, Campa, Jr. and Pascua did not take much time on assailing the Orders of denial through the present Petition for Certiorari. Fourth, Campa, Jr. and Pascua were unduly prejudiced by the ten (10) – year delay because access to records and contact to witnesses could prove to be too difficult to effectively defend themselves in trial.

FACTS

On 12 September 2007, the Bangko Sentral ng Pilipinas (BSP) filed a complaint before the DOJ against the officers of Bank Wise, Inc. including Vicente Campa, Jr. (Campa, Jr.) and Perfecto Pascua (Pascua) and five others, for violation of Monetary Board Resolution No. 1460 in relation to Section 3, Republic Act No. 7653 (R.A. No. 7653). In the complaint, the BSP charged Campa, Jr., et al. with issuing unfunded manager's checks and failing to present documents to support the bank's disbursements in acquiring assets. After due proceedings, the case was deemed submitted for resolution on 29 August 2008.

More than ten (10) years thereafter, the Department of Justice (DOJ) found probable cause to hold Campa, Jr. and Pascua. for the offense charged as

indicated under Resolution dated 08 February 2019. The DOJ then filed before the Regional Trial Court (RTC) eleven (11) Informations against Campa, Jr. and five (5) against Pascua for violation of Monetary Board Resolution No. 1460 in relation to Section 3, R.A. No. 7653.

By filing Manifestation with Motion to Adopt and Entry of Appearance with Motion to Dismiss, Campa Jr. and Pascua sought the dismissal of the cases before the trial court on the ground of inordinate delay. According to them, the unreasonable length of the investigation before the DOJ violated their right to speedy disposition of their cases as enshrined under Section 16, Article III of the 1987 Constitution. The RTC ruled that the delay of ten (10) years and five (5) months was neither vexatious, capricious, nor oppressive and may be attributed to the complexity of the case, which involved voluminous documents. After their motion for reconsideration was denied, Campa, Jr. and Pascua filed the present petition for *certiorari* before the Supreme Court.

ISSUES

I. Did the delay in the preliminary investigation before the DOJ violate Campa, Jr. and Pascua's constitutional right to a speedy disposition of their cases?

II. Did the RTC act in grave abuse of discretion when it denied Campa, Jr. and Pascua's motion to dismiss and/or quash?

RULING

(1) **YES**. Campa, Jr. and Pascua's right to speedy disposition of case was violated. The right to speedy disposition of cases under Section 16, Art. III of the 1987 Constitution may be invoked against all judicial, quasi-judicial or administrative bodies, in civil, criminal, or administrative cases before them and inordinate delay in the resolution of cases warrant their dismissal. Delay is determined through the examination of the facts and circumstances surrounding each case, not through the mere mathematical reckoning. To aid the courts in determining whether there is inordinate delay our jurisdiction has adopted the Balancing Test as established in the case of *Cagang v. Sandiganbayan* which involves the assessment of four (4) criteria: first, the length of the delay; second, the reason for the delay; third, the defendant's assertion or non-assertion of his or her right; and fourth, the prejudice to the defendant because of the delay.

Applying the Balancing test, the Supreme Court found that there was inordinate delay. First, it is undisputed that the DOJ took about ten (10) years and five (5) months from filing of the complaint on 12 September 2007 before it issued a Resolution dated 08 February 2019 finding probable cause to indict Campa, Jr. and Pascua for violation of Monetary Board Resolution No. 1460 in relation to Section 3, R.A. No. 7653. Second, the delay was purely imputable on the prosecution and Campa, Jr. and Pascua did not cause or contributed to the delay. Third, Campa, Jr. and Pascua had actually timely assailed the subject resolution through a Manifestation with Motion to Adopt and Entry of Appearance with Motion to Dismiss. Moreover, when the trial court denied their motions, Campa, Jr. and Pascua did not take much time on assailing the Orders of denial through the present Petition for *Certiorari*. Fourth, Campa, Jr. and Pascua were unduly prejudiced by the ten (10) – year delay because access to records and contact to witnesses could prove to be too difficult to effectively defend themselves in trial.

(2) **YES.** Grave abuse of discretion is the capricious or whimsical exercise of judgment equivalent to lack or excess of jurisdiction and is required to be so patent and gross as to amount to an evasion of a positive duty or to a virtual refusal to perform a duty enjoined by law, as where the power is exercised in an arbitrary and despotic manner by reason of passion and hostility.

In this case, Campa, Jr. and Pascua sufficiently established that the trial court acted in grave abuse of discretion. Procedural rules are clear on the periods for resolving cases and jurisprudence provides analogous situations on which the trial court could have based its rulings. In spite of these, the trial court denied Campa, Jr. and Pascua's motions without properly determining the existence of inordinate delay by applying the balance test in accordance with *Cagang v. Sandiganbayan*. If the trial court otherwise applied the same, it would have discovered for itself that inordinate delay had indeed attended the DOJ investigation and that Campa, Jr. and Pascua's right to speedy disposition of their cases had been violated.

PEDRITO M. NEPOMUCENO *v.* PRESIDENT RODRIGO R. DUTERTE, ET AL.

UDK NO. 16838, 11 MAY 2021, *EN BANC* (LOPEZ, *J.*)

DOCTRINE OF THE CASE

Section 3, Rule 65 of the Revised Rules of Court is the governing provision that provides the requirements for a party to avail the relief of a writ of mandamus. It provides that a writ of mandamus may be issue in either situations: first, "when any tribunal, corporation, board, officer or person unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station"; second, "when any tribunal, corporation, board, officer or person . . . unlawfully excludes another from the use and enjoyment of a right or office to which such other is entitled."

The instant petition contemplates the first situation. Nepomuceno must raise the specific provision of law that enjoins Pres. Duterte et al. to perform a duty resulting from their office, but which they unlawfully neglected to perform. He must also show that the act sought to be compelled concerns the performance of a ministerial duty, not a discretionary one.

If the law imposes a duty upon a public officer and gives him the right to decide how or when the duty shall be performed, such duty is discretionary and not ministerial. The duty is ministerial only when the discharge of the same requires neither the exercise of official discretion [n]or judgment.

Nepomuceno failed to point out the existence of a ministerial duty, which the law compels the respondents to perform with regard to the conduct of trial and procurement of vaccines for COVID-19, as prayed for in the petition. During the time when the national government planned to procure and enter into contracts for the procurement of the Sinovac vaccine, there was no law in effect that required the mandatory conduct of clinical trial for the procurement of any COVID-19 vaccine, including that produced by Sinovac. Further, discretion was given to the government officials in addressing the spread of COVID-19, giving them enough leeway to decide the interventions they may see as proper.

FACTS

Pedrito Nepomuceno (Nepomuceno) filed a writ of mandamus petition against President Rodrigo Duterte, Health Secretary Francisco Duque, and Gen. Carlito Galvez, Jr. (Ret.) as Chief Implementer of the National Task Force against COVID-19 (Pres. Duterte *et al.),* seeking to compel Pres. Rodrigo *et al.* to follow

FDA rules on drug acquisition, procurement, and use, particularly on the issue of trials and procurement and use of COVID-19 vaccine (Sinovac Vaccine). Nepomuceno further requested the issuance of a Cease-and-Desist Order prohibiting the purchase and use of the Sinovac vaccine, as well as that it and any other COVID-19 vaccines undergo the necessary trials in the Philippines before being approved for emergency and/or routine use.

At the heart of the petition is the Nepomuceno's concern about the national government's proposal to buy Sinovac vaccinations for distribution and administration to the Filipino people in order to prevent the spread of infection caused by the COVID-19 virus, despite reports casting doubt on the Sinovac vaccine's efficiency and the lack of a comprehensive investigation on how it performs in combating COVID-19.

ISSUES

(1) Should Pres. Duterte, as the incumbent President of the Republic of the Philippines, be dropped as a respondent?

(2) Is there a ministerial duty on the part of the Pres. Duterte *et al.* that would warrant the issuance of a writ of mandamus?

(3) Is Nepomuceno's direct resort before the Supreme Court proper?

RULING

(1) **YES.** Pres. Duterte, as the incumbent President of the Republic of the Philippines, must be dropped as a respondent. Settled is the rule that the President of the Republic of the Philippines cannot be sued during his/her tenure. This immunity from suit applies to Pres. Duterte regardless of the nature of the suit filed against him for as long as he sits as the President of the Republic of the Philippines. Presidential immunity applies regardless of the nature of the suit brought against an incumbent President. As discussed in *Soliven v. Makasiar*, the rationale for the grant to the President of the privilege of immunity from suit is to assure the exercise of Presidential duties and functions free from any hindrance of distraction, considering that being the Chief Executive of the Government is a job that, aside from requiring all of the office-holder's time, also demands undivided attention.

In this case, the presidential immunity from suit shields President Duterte from facing any complaint or petition during his tenure. While he remains accountable to the people, the only proceeding for which he may be involved in litigation during his term of office is an impeachment proceeding, which is clearly not the present case. Hence, he is not a proper party to be sued in the instant petition.

(2) **NO.** Nepomuceno failed to point out any ministerial duty on the part of Pres Duterte *et al.* that would justify the issuance of a writ of mandamus.

Section 3, Rule 65 of the Revised Rules of Court is the governing provision that provides the requirements for a party to avail the relief of a writ of mandamus. It provides that a writ of mandamus may be issue in either situations: first, "when any tribunal, corporation, board, officer or person unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station"; second, "when any tribunal, corporation, board, officer or person . . . unlawfully excludes another from the use and enjoyment of a right or office to which such other is entitled." The instant petition contemplates the first situation. Nepomuceno must raise the specific provision of law that enjoins the respondents to perform a duty resulting from their office, but which they unlawfully neglected to perform. He must also show that the act sought to be compelled concerns the performance of a ministerial duty, not a discretionary one.

"Discretion," means a power or right conferred upon them by law or acting officially, under certain circumstances, uncontrolled by the judgment or conscience of others. A purely ministerial act or duty in contradiction to a discretionary act is one which an officer or tribunal performs in a given state of facts, in a prescribed manner, in obedience to the mandate of a legal authority, without regard to or the exercise of his own judgment upon the propriety or impropriety of the act done. If the law imposes a duty upon a public officer and gives him the right to decide how or when the duty shall be performed, such duty is discretionary and not ministerial. The duty is ministerial only when the discharge of the same requires neither the exercise of official discretion [n]or judgment.

Nepomuceno failed to point out the existence of a ministerial duty, which the law compels the Pres. Duterte *et al.* to perform with regard to the conduct of trial and procurement of vaccines for COVID-19, as prayed for in the petition.

During the time when the national government planned to procure and enter into contracts for the procurement of the Sinovac vaccine, there was no law in effect that required the mandatory conduct of clinical trial for the procurement of any COVID-19 vaccine, including that produced by Sinovac. Further, discretion was given to the government officials in addressing the spread of COVID-19, giving them enough leeway to decide the interventions they may see as proper.

The grant of discretion in favor of the President with respect to the manner of performing his duty to address the pandemic brought about by the spread of COVID-19 is fortified by the enactment of Republic Act No. 114949 (R.A. 11494). The law paved the way for President Duterte to exercise powers that are necessary and proper to undertake and implement COVID-19 response and recovery interventions. When R.A. 11494 granted the President the authority "to exercise powers that are necessary and proper xxx," Congress devolved its power in favor of the President to give him full authority in terms of the direction to be taken by the government in its response to the spread of COVID-19. He was even given the authority to procure vaccines that did not undergo Phase IV trials as required by the Universal Health Care Law. The only standard that has to be taken, into account is that these vaccines are recommended and approved by the WHO and/or other internationally recognized health agencies.

To grant Nepomuceno the relief he is seeking would further render nugatory Executive Order No. 121 (E.O. 121) which was issued consistent with the authority granted by Congress to the President under R.A. 11494 The issuance of an Emergency Usage Authorization (EUA) precludes the need for the completion of the conduct of clinical trials. As long as the conditions are met, any vaccine given an EUA may now be administered in the Philippines.

The absence of a ministerial duty to conduct clinical trials and to observe the general procurement requirement of public bidding as prayed for in the petition, is further strengthened by the enactment of Republic Act No. 11525 (R.A. 11525), or the "COVID-19 Vaccination Program Act of 2021." Signed into law on February 26, 2021, R.A. 11525 exempted the procurement of COVID-19 vaccines, including its ancillary supplies and services, from the general procurement requirement of public bidding, explicitly allowing its negotiated procurement under emergency cases. R.A. 11525 also provides that only COVID-19 vaccines that are registered with the FDA as evidenced by a Certificate of Product Registration or which possess an Emergency Use Authorization (EUA)

can be validly procured. As the FDA had already issued an EUA in favor of the Sinovac vaccine on February 22, 2021 pursuant to the authority granted to it under E.O. 121 and with the allowance of its procurement through negotiated procurement, no valid ground exists to require the conduct of further clinical trials and public bidding.

It bears stressing that ample authority has been granted by the legislative department in favor of Pres. Duterte to be able to speedily address the rising cases of COVID-19 in the Philippines. Extraordinary times that present an invisible threat to the health of individuals, unbeknown to humanity, require an immediate, exceptional response from the government. This exceptional response must of course be in line with the guidelines and actions undertaken by an international central authority which, in this case, is the WHO and trusted international agencies.

In all, Nepomuceno failed to point out any provision of law that imposes a ministerial duty on the part of the Pres. Duterte *et al.* to perform an act in compliance with a specific mandate for conduct of clinical trial and procurement of COVID-19 vaccines, specifically that produced by Sinovac. The contrary even appears, Pres. Duterte *et al.* are given sufficient leeway to be exempted from the usual procedures in the conduct of clinical trials and usual procurement processes.

(3) **NO.** The direct resort to the Supreme Court was improper. A challenge to the efficacy of the Sinovac vaccine is a question of fact that is beyond the scope of this Court's jurisdiction. To go into the details of a vaccine's efficacy would require the presentation of its clinical trial results and a comparative analysis of the various results of the other vaccines in order to determine the acceptable standard of what an effective COVID-19 vaccine should be. The Supreme Court is not a trier of facts. The doctrine of hierarchy of courts requires a party to file the appropriate petition in the proper court, especially when the petition calls for an examination of the factual issues raised in the petition. In the case of a petition for mandamus, Section 21 of Batas Pambansa Bilang (B.P.) 129 grants the regional trial court original jurisdiction in resolving a petition for the issuance of a writ of mandamus.

The doctrine of hierarchy of courts, thus, reverberates the authority given by law at every level of the Judiciary. The exceptions that will allow the direct resort to the Supreme Court was enumerated in *Gios-Samar* are as follows:

> "(1) when there are genuine issues of constitutionality that must be addressed at the most immediate time;
> (2) when the issues involved are of transcendental importance;
> (3) cases of first impression;
> (4) the constitutional issues raised are better decided by the Court;
> (5) exigency in certain situations;
> (6) the filed petition reviews the act of a constitutional organ;
> (7) when petitioners rightly claim that they had no other plain, speedy, and adequate remedy in the ordinary course of law that could free them from the injurious effects of respondents' acts in violation of their right to freedom of expression; [and]
> (8) the petition includes questions that are "dictated by public welfare and the advancement of public policy, or demanded by the broader interest of justice, or the orders complained of were found to be patent nullities, or the appeal was considered as clearly an inappropriate remedy."

Nepomuceno failed to point out any question of law worthy of consideration by the Supreme Court. He also failed to present any circumstance or nature of the question raised in the petition that would fall in any of the exceptions for which the legality of the actions taken by the respondents may be thoroughly examined. As discussed, the petition failed to comply with the requisites of a petition for mandamus, in addition to the infirmities that failed to take into account well-established principles in law and jurisprudence.

As the judicial branch of the government tasked to interpret laws, settle actual controversies, and keep every government office within the scope of their authority, it is not within the office of the Court to go beyond what the law requires, including those involving the procurement of COVID-19 vaccines. As the law has expressly excluded the conduct of clinical trials and exempted its procurement from the general rules of the bidding process, the Court cannot step in to add another layer of requirement before the procurement of COVID-19 vaccines, and their use, specifically those granted with EUA.

CYNTHIA A. VILLAR, FORMER MEMBER, HOUSE OF REPRESENTATIVES, LONE DISTRICT OF LAS PIÑAS CITY *V.* ALLTECH CONTRACTORS, INC., PHILIPPINE RECLAMATION AUTHORITY, DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, ENVIRONMENTAL MANAGEMENT BUREAU, AND CITIES OF LAS PINAS, PARANAQUE, AND BACOOR

G.R. NO. 208702, 11 MAY 2021, *EN BANC* (CARANDANG, *J.*)

DOCTRINE OF THE CASE

It must be clarified that in assailing the issuance of an ECC, the proper remedy is to file an appeal before the proper reviewing authority instead of a petition for writ of kalikasan.

In Paje v. Casino, the Court already recognized that the validity of an ECC may be challenged via a writ of kalikasan with qualification. It was explained that:

A party, therefore, who invokes the writ based on alleged defects or irregularities in the issuance of an ECC must not only allege and prove such defects or irregularities, but must also provide ***causal link or, at least, a reasonable connection*** *between the defects or irregularities in the issuance of an ECC and the actual or threatened violation of the constitutional right to a balanced and healthful ecology of the magnitude contemplated under the Rules.*

Unfortunately, while Villar raised alleged irregularities in the issuance of the ECC (i.e., the use of an improper form of assessment study, lack of public hearing and consultation, and absence of a project alternative), these are not material and necessary due to the nature of the proposed project. Therefore, no compelling reason was presented to warrant the intervention of the Court. In addition, it has been determined that there is no actual or imminent threat that can be attributed to the proposed project that would prejudice the life, health, or property of residents of the cities of Las Piñas and Parañaque. Hence, the issuance of a writ of kalikasan is not warranted.

FACTS

In 2009, Alltech Contractors, Inc. (Alltech) submitted a proposal to the cities of Las Piñas and Parañaque. Its purpose is to develop, finance, engineer,

design and reclaim hectares of lands from both cities. These cities eventually accepted Alltech's proposal and executed their respective Joint Venture Agreement (JVA).

Later on, the Las Piñas and Parañaque Coastal Bay Project (proposed project) was approved by the Philippine Reclamation Authority (PRA). Such approval was subject to full compliance with existing laws, rules, and regulations in relation to the environment.

In March 2010, the Environmental Management Bureau (EMB) directed Alltech to submit before the Department of Environment and Natural Resources an Environmental Performance Report Management Plan (EPRMP) for the proposed reclamation project. The submitted proposal was subsequently reviewed by the Environmental Impact Assessment Review Committee (EIARC).

In 2011, EIARC recommended the issuance of the Environmental Compliance Certificate for the proposed project after it had reviewed the biophysical, social, and economic impact it may cause.

Fearing that the proposed project will impede the flow of rivers that might raise the risk of flooding and danger to its residents, then-Representative Villar collected signatures to oppose the proposed project. Subsequently, she filed a petition for the issuance of a writ of *kalikasan*, invoking the right to a balanced and healthful ecology of her constituents.

In 2012, the Court issued the writ of *kalikasan* against Alltech. The case was then remanded to the Court of Appeals (CA) to accept the return of the writ, and to conduct the necessary hearing, reception of evidence and rendition of judgment.

The CA denied the petition for the issuance of the writ of *kalikasan*. Based on the totality of evidence, the proposed project underwent the required EIA review process in compliance with the law, and the submission of the EPRMP was proper and lawful. In addition, Tricore Solutions, Inc. (Tricore) and Center for Environmental Concerns-Philippines (CEC-P), the companies commissioned by Villar, did not conduct a comprehensive objective assessment and lacked expertise in the field in order to competently conclude that the proposed project will cause environmental damage. It also did not apply the precautionary principle

since there was numerous data that ruled out the uncertainty of the nature and scope of the anticipated threat. Motion for Reconsideration was also denied.

Villar contended the following: (1) that the issuance of an ECC for the proposed coastal bay project is illegal and unlawful because Alltech did not prepare the appropriate EIA study, and (2) that the proposed project impinges on the viability and sustainability of the Las Piñas-Parañaque Critical Habitat and Ecotourism Area (LPPCHEA).

Hence, this petition.

ISSUES

(1) Is a petition for writ of *kalikasan* proper in assailing the issuance of the ECC for Alltech's proposed project?

(2) Did Alltech use an improper form of assessment study which warrants the invalidity of the ECC?

(3) Was there an actual or imminent threat that can be attributed to the proposed project that would prejudice the life, health, or property of residents of the cities of Las Piñas and Parañaque?

(4) Is the precautionary principle applicable in this case?

(5) Will the proposed project impinge the viability and sustainability of the LPPCHEA?

RULING

(1) **NO.** Villar failed to establish the causal link between the alleged irregularities in the issuance of Alltech 's ECC to justify resorting to the extraordinary remedy of filing a petition for a writ of *kalikasan*.

To promote the government's environmental protection programs, P.D. No. 1586 was enacted declaring inter alia that:

No person, partnership or corporation shall undertake or operate any such declared environmentally critical project or area without first securing an

Environmental Compliance Certificate issued by the President or his duly authorized representative. xxx (Emphasis supplied)

In the current structure of the government, it is the DENR-EMB, under the authority of the DENR Secretary, that is authorized to issue ECCs.

A petition for writ of *kalikasan* is an extraordinary remedy classified as a special civil action under the Rules of Procedure for Environmental Cases (RPEC). Under Section 1, Rule 7 of the RPEC, the essential requisites for the issuance of a writ of *kalikasan* are: (I) there is an actual or threatened violation of the constitutional right to a balanced and healthful ecology; (2) the actual or threatened violation arises from an unlawful act or omission of a public official or employee, or private individual or entity; and (3) the actual or threatened violation involves or will lead to an environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities or provinces. As a rule, the party claiming the privilege bears the *onus* of proving the requisites listed above.

In filing a petition for writ of *kalikasan*, Villar argued at length the alleged irregularities in the issuance by the EMB of the ECC for the proposed project. However, it must be clarified that in assailing the issuance of an ECC, the proper remedy is to file an appeal before the proper reviewing authority instead of a petition for writ of *kalikasan.*

Nevertheless, in *Paje v. Casino*, the Court already recognized that the validity of an ECC may be challenged via a writ of kalikasan with qualification. It was explained that:

A party, therefore, who invokes the writ based on alleged defects or irregularities in the issuance of an ECC must not only allege and prove such defects or irregularities, but must also provide **causal link or, at least, a reasonable connection** between the defects or irregularities in the issuance of an ECC and the actual or threatened violation of the constitutional right to a balanced and healthful ecology of the magnitude contemplated under the Rules.

Unfortunately, while Villar raised alleged irregularities in the issuance of the ECC (i.e., the use of an improper form of assessment study, lack of public hearing and consultation, and absence of a project alternative), these are not

material and necessary due to the nature of the proposed project. Therefore, no compelling reason was presented to warrant the intervention of the Court.

(2) **NO.** Alltech submitted the proper form of study required for the proposed project.

In securing an ECC, the proponent is required to submit a form of study depending on the classification of the proposed project under the EIS System. These reports include: (1) EIS; (2) Programmatic EIS; (3) Initial Environmental Examination Report; (4) Initial Environmental Examination Checklist; (5) Project Description Report (PDR); (6) EPRMP; and (7) Programmatic EPRMP (PEPRMP).

In Alltech's application, the DENR-EMB required an EPRMP which refers to a "documentation of the actual cumulative environmental impacts and effectiveness of current measures for single projects that are already operating but without ECCs." On the other hand, EIS pertains to a "document, prepared and submitted by the project proponent and/or EIA Consultant that serves as an application for an ECC. It is a comprehensive study of the significant impacts of a project on the environment. It includes an Environmental Management Plan/Program that the Proponent will fund and implement to protect the environment." Based on this definition, an EIS is wider in scope than an EPRMP. However, it does not automatically mean that an EIS is the appropriate EIA report to be submitted in all projects.

In the present case, the EPRMP that Alltech submitted was the proper form of study. As pointed out by the DENR-EMB, the proposed project is premised on the existence of a reclamation project covered by an ECC previously issued to the PEA, now PRA, and Amari. Under the Revised Procedural Manual for DAO No. 2003-30, the type of EIA report for a project which had previously operated or existing with previous ECCs intended to be modified, expanded or restart operations is not an EIS but an EPRMP or PEPRMP. There was no grave abuse of discretion proven to be attributed to the DENR-EMB when it instructed the project proponent to file an EPRMP. Hence, it enjoys the presumption of regularity in the performance of its official duties. Based on its technical expertise, it found that the information provided in an EPRMP sufficiently addressed the environmental concerns of the government.

It is within the DENR-EMB's function and expertise to determine the category or classification of a proposed project as it is equipped with the knowledge and competence to resolve issues involving the highly technical field of EIS System. Alltech merely complied with the instruction of the DENR-EMB to submit an EPRMP. The project proponent should not be faulted for this as it is not in the position to substitute the assessment or technical opinion of the DENR-EMB with its own judgment. It is within the sphere of the technical knowledge and expertise of the DENR-EMB, and not the Court nor the project proponent, to determine the appropriate EIA report to submit for a particular project.

(3) **NO.** The CA determined that there is no actual or imminent threat that can be attributed to the proposed project that would prejudice the life, health, or property of residents of the cities of Las Piñas and Parañaque.

The companies commissioned by Villar, CEC-P and Tricore, failed to conduct a comprehensive and objective assessment of the proposed project and lacked the expertise necessary in the field of hydrology and hydraulics to competently conclude that the proposed project will cause environmental damage. They claimed that the proposed project will cause flooding in the cities of Las Piñas and Parañaque.

The study of CEC-P is inaccurate and unreliable as it depended on the EPRMP submitted in August 2010 and not the final EPRMP that the Alltech submitted in December 2010. Therefore, the study of CEC-P, that was based on wrong and inaccurate data, cannot be considered a reliable reference in concluding that the proposed project lacked clear scientific study on the flooding hazards of reclamation and the appropriate mitigation measures to be adopted by the project proponent.

On the other hand, the companies commission by Alltech to DHI presented a comprehensive analysis of the consequences of the implementation of the proposed project before the CA. Its finding was supported by the Flooding Impact Assessment and a Flushing Impact Assessment conducted that adds credibility and persuasive value to the proposed project. DCCD also presented its flood assessment survey determined that the current flooding problems in the Las Piñas and Parañaque areas were largely due to the fact that the existing drainage system cannot adequately drain the low-lying areas. With the implementation of

the proposed project, and adopting the mitigating measures included in the proposed project. The communities will actually benefit as engineering interventions will be introduced to address the flooding issues.

Between the study conducted by CEC-P and those produced by DCCD, Surbana, and DHI, the Court is inclined to give more weight to the studies commissioned by Alltech which appear to be duly supported by scientific research. Unlike CEC-P, Surbana has amassed over 45 years of experience in planning and managing land reclamation and coastal development.

While Villar's intention in taking a proactive role in advancing her constituents' right to a balanced and healthful ecology is laudable, the Court cannot simply apply the extraordinary remedy of a Writ of Kalikasan to all environmental issues. As ruled in *Paje v. Casiño*, the Writ of Kalikasan is a highly prerogative writ that issues only when there is a showing of actual or imminent threat and when there is such inaction on the part of the relevant administrative bodies that will make an environmental catastrophe inevitable.

In this case, there is no actual or imminent threat that can be attributed to the proposed project that would prejudice the life, health, or property of residents of the cities of Las Piñas and Parañaque that warrants the issuance of a writ of *kalikasan*.

(4) **NO.** The precautionary principle is not applicable to the present case.

Section 1, Rule 20 of the RPEC states:
Section 1. Applicability. - When there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect, the court shall apply the precautionary principle in resolving the case before it. The constitutional right of the people to a balanced and healthful ecology shall be given the benefit of the doubt.

It is not meant to apply to all environmental cases. Essential to the application of the precautionary principle is the presence of scientific uncertainty.

In the present case, the threat was not established and the volumes of data generated by objective and expert analyses ruled out the scientific uncertainty of the nature and scope of the anticipated threat.

(5) **NO.** There is no sufficient basis to hold that the proposed project will impinge on the viability and sustainability of LPPCHEA.

Section 4 of R.A. No. 11038 establishes LPPCHEA as a "protected area" or a portion of land and/or water set aside by reason of its "unique physical and biological significance, manages to enhance biological diversity and protected against destructive human exploitation.

It must be clarified that the classification of LPPCHEA as a "protected area" under the ENIPAS does not automatically result to a prohibition of reclamation activities within the area, or alongside it. There is nothing in the NIPAS and ENIPAS expressly declaring that reclamation activities within or alongside a critical habitat is an incompatible activity that is not allowed.

Moreover, the metes and bounds of the LPPCHEA remain intact. No portion of the LPPCHEA will be utilized for the proposed project, as shown in the geographical illustrations submitted by Alltech and its consultants. Even the Tricore report Villar commissioned acknowledged that LPPCHEA was located adjacent to the project site. This recognition is critical in validating the assertion of Alltech that no portion of the proposed project will traverse the LPPCHEA.

LEGAL AND JUDICIAL ETHICS

SOLEDAD NUNEZ *v.* ATTY. ROMULO L. RICAFORT

A.C. NOS. 5054 & 6484, 02 MARCH 2021, *EN BANC* (PERLAS-BERNABE, *J.*)

DOCTRINE OF THE CASE

The new clemency guidelines for reinstatement to the Bar are as follows:

1. *A lawyer who has been disbarred cannot file a petition for judicial clemency within a period of* ***five (5) years*** *from the effective date of his or her disbarment, unless for the most compelling reasons based on extraordinary circumstances, a shorter period is warranted.*

For petitions already filed at the time of this Resolution, *the Court may dispense with the five (5)-year minimum requirement and instead, in the interest of fairness, proceed with a preliminary evaluation of the petition in order to determine its prima facie merit.*

2. *Upon the lapse of the said five (5)-year period, or earlier if so permitted by the Court, a disbarred lawyer becomes eligible to file a* ***verified petition*** *for judicial clemency. The petition, together with its supporting evidence appended thereto, must show on its face that the following criteria have been met:*

   (a) *The petitioner has fully complied with the terms and conditions of all prior disciplinary orders, including orders for restitution, as well as the five (5)-year period to file, unless he or she seeks an earlier filing for the most compelling reasons based on extraordinary circumstances;*

   (b) *The petitioner recognizes the wrongfulness and seriousness of · the misconduct for which he or she was disbarred. For petitions already filed at the time of this Resolution, it is required that the petitioner show that he or she genuinely attempted in good faith to reconcile with the wronged private offended party in the case for which he or she was disbarred (if any), or if such is not possible, the petitioner must explain with sufficient reasons as to why such attempt at reconciliation could not be made; and*

(c) Notwithstanding the conduct for which the disbarred lawyer was disciplined, the disbarred lawyer has the requisite integrity and competence to practice law.

3. *Upon the filing of the verified petition for clemency, together with its attachments, the Court shall first conduct a* ***preliminary evaluation and determine if the same has prima facie merit based on the criteria above-stated.***

4. *If the petition has prima facie merit based on the above criteria, the Court shall* ***refer*** *the petition to the OBC (or any other fact-finding body the Court so designates) in order to verify the details and the authenticity of the statements made and the evidence attached to the clemency petition. If the petition fails to show any prima facie merit, it should be denied.*

5. *After its investigation, the OBC (or such other fact-finding body designated by the Court) shall submit its fact-finding report to the Court, which shall ultimately resolve the clemency petition* ***based on the facts established in the said report.*** *The threshold of evidence to be applied is* ***clear and convincing evidence*** *since it is incumbent upon the petitioner to hurdle the seriousness of his or her established past administrative liability/ies, the gravity of which had warranted the supreme penalty of disbarment.*

6. *Unless otherwise resolved by the Court sitting En Banc, these guidelines and procedure shall apply to pending petitions for judicial clemency, as well as to those filed after the promulgation of this Resolution.*

The new clemency guidelines, as detailed herein, should not only apply to clemency petitions filed after the promulgation of this Resolution, but likewise, to pending petitions.

FACTS

There were three different administrative disciplinary complaints filed against Atty. Romulo Ricafort (Ricafort). All of which involved serious breaches of his fiduciary duties to his clients. The first administrative case against him happened in 1982, which was based on his failure to remit the proceeds of the lot sold despite numerous demands. The client won the civil case, however, Ricafort did various machinations just to avoid the remittance of the money. This resulted in his indefinite suspension.

In his 1992 case, it was alleged that Ricafort deposited in his own personal account the client's money instead of using it for the purpose as to why it was given to him. Despite demands made by the client, he failed to return the said money. The Court took into account his previous case in the penalty to be imposed. It decided to disbar Ricafort.

Later on, another complaint was filed against Ricafort for his failure to institute an action for a case of recovery of land. In addition, he did not return the money paid by his client. The Court considered the fact that Ricafort practiced law despite his indefinite suspension, it once again imposed a disbarment penalty.

In 2019, Ricafort filed before the Supreme Court a plea for clemency. This plea was made 17 years after his indefinite suspension from his first case, and when he was already 70 years old. He stated that he has atoned for his indiscretion.

ISSUE

Should judicial clemency be granted in favor of Nunez?

RULING

NO. The judicial clemency should not be granted. Judicial clemency hearkens back to the nature of membership in the Bar as a special privilege imbued with public interest. At its core, "[t]he basic inquiry in a petition for reinstatement to the practice of law is whether the lawyer has sufficiently rehabilitated himself or herself in conduct and character. The lawyer has to demonstrate and prove by **clear and convincing** evidence that he or she is again worthy of membership in the Bar."

Granting judicial clemency lies in the sound discretion of the Court pursuant to its constitutional mandate to regulate the legal profession in the exercise of such discretion, the Court is essentially called to perform an **act of mercy** by permitting the return of a repentant and reformed disbarred lawyer back to the ranks of the legal profession and thus, resume discharging the privileges and assuming the duties attendant thereto. However, the compassion of the Court in clemency cases must always be tempered by the greater interest of the legal profession and the society in general.

In fine, for the guidance of the Bench, the Bar, and the public, the new clemency guidelines for reinstatement to the Bar are as follows:

1. A lawyer who has been disbarred cannot file a petition for judicial clemency within a period of **five (5) years** from the effective date of his or her disbarment, *unless* for the most compelling reasons based on extraordinary circumstances, a shorter period is warranted.

    (a) **For petitions already filed at the time of this Resolution,** the Court may dispense with the five (5)-year minimum requirement and instead, in the interest of fairness, proceed with a preliminary evaluation of the petition in order to determine its *prima facie* merit.

2. Upon the lapse of the said five (5)-year period, or earlier if so permitted by the Court, a disbarred lawyer becomes eligible to file a **verified petition** for judicial clemency. The petition, together with its supporting evidence appended thereto, must show on its face that the following criteria have been met:

    (a) The petitioner has fully complied with the terms and conditions of all prior disciplinary orders, including orders for restitution, as well as the five (5)-year period to file, unless he or she seeks an earlier filing for the most compelling reasons based on extraordinary circumstances;

    (b) The petitioner recognizes the wrongfulness and seriousness of · the misconduct for which he or she was disbarred. For petitions already filed at the time of this Resolution, it is required that the petitioner show that he or she genuinely attempted in good faith to reconcile with the wronged private offended party in the case for which he or she was disbarred (if any), or if such is not possible, the petitioner must explain with sufficient reasons as to why such attempt at reconciliation could not be made; and

(c) Notwithstanding the conduct for which the disbarred lawyer was disciplined, the disbarred lawyer has the requisite integrity and competence to practice law.

3. Upon the filing of the verified petition for clemency, together with its attachments, the Court shall first conduct a **preliminary evaluation and determine if the same has *prima facie* merit based on the criteria above-stated.**

4. If the petition has *prima facie* merit based on the above criteria, the Court shall **refer** the petition to the OBC (or any other fact-finding body the Court so designates) in order to verify the details and the authenticity of the statements made and the evidence attached to the clemency petition. If the petition fails to show any *prima facie* merit, it should be denied.

5. After its investigation, the OBC (or such other fact-finding body designated by the Court) shall submit its fact-finding report to the Court, which shall ultimately resolve the clemency petition **based on the facts established in the said report.** The threshold of evidence to be applied is **clear and convincing evidence** since it is incumbent upon the petitioner to hurdle the seriousness of his or her established past administrative liability/ies, the gravity of which had warranted the supreme penalty of disbarment.

6. Unless otherwise resolved by the Court sitting *En Banc,* these guidelines and procedure shall apply to pending petitions for judicial clemency, as well as to those filed after the promulgation of this Resolution.

The new clemency guidelines, as detailed herein, should not only apply to clemency petitions filed after the promulgation of this Resolution, but likewise, to pending petitions.

In the instant case, it is observed that the testimonials/certifications attached to the subject petitions were all one-pagers that are similarly patterned and worded. The uncanny similarities between the testimonials/certifications

created an impression that they were not actual and personal accounts of the signatories, but rather - more likely than not - all pre-made, *pro-forma* documents conveniently made for their signing.

It is similarly worth noting that Ricafort committed multiple administrative infractions, all involving serious breaches of his fiduciary duties to his clients which demonstrates his propensity in this respect. In the same vein, he filed the subject petition only on March 25, 2019 - or just three (3) years, nine (9) months, and nine (9) days from the most recent Decision. In view of Ricafort's numerous infractions, the time that has lapsed from the imposition of the penalty is insufficient to ensure a period of reformation. In addition, after preliminary evaluation, the subject petitions failed to show any *prima facie* merit.

SUSAN R. ELGAR *v.* JUDGE SOLIMAN M. SANTOS, JR., MUNICIPAL CIRCUIT TRAIL COURT, NABUA-BATO CAMARIES SUR

A.M. NO. MTJ-16-1880 (FORMERLY OCA IPI NO. 13-2565-MJT), 27 APRIL 2021, *EN BANC RESOLUTION*, (INTING, *J.*)

DOCTRINE OF THE CASE

The purpose of A.M. No. 03-10-01-SC, also known as "Resolution Prescribing Measures to Protect Members of the Judiciary from Baseless and Unfounded Administrative Complaints" is to protect judges from baseless and unfounded suits. Such has no application in the case at bar because the complaint against Judge Santos is not baseless and is not unfounded.

FACTS

The complainant Susan Elgar (Elgar) filed a case against Judge Soliman Santos (Judge Santos) for gross negligence of the law and violations of the Code of Judicial Conduct and Canons of Judicial Ethics. On February 4, 2020, the Supreme Court *En Banc* found Judge Santos administratively liable for the following: a) failure to refer a case to the Philippine Mediation Center (PMC) as prescribed by law; b) pressing the parties to enter into an amicable settlement through means that exceeded the bounds of propriety; c) gross inefficiency through causing undue delay in the termination of the preliminary conference of the case; d) issuing an Extended Order after the withdrawal of the petition, wherein Elgar's counsel was unduly castigated, thereby exceeding the bounds of propriety; and e) giving the oppositor the option of submitting his pre-trial brief in contravention of its mandatory nature under the Rules of Court.

Accordingly, the Court imposed fines on Judge Santos and issued upon him a stern warning that a repetition of the same or similar acts would be dealt with more severely. The case at bar is now Judge Santos' Motion for Partial Reconsideration, claiming that the finding of his guilt and fines ordered for the first, fourth, and fifth offenses be reversed and set; the penalty for the fine in the second offense be reduced; A.M. No. 03-10-01-SC, also known as "Resolution Prescribing Measures to Protect Members of the Judiciary from Baseless and Unfounded Administrative Complaints" be operationalized against Elgar's counsel. He also prayed for the removal of the decision against him from the Supreme Court website until the final ruling of the case at bar.

ISSUE

Should the Court reconsider its previous Decision?

RULING

YES. The Court partly reconsidered its decision.

The Court found no compelling reason to reverse its finding that Judge Santos violated Supreme Court rules, directives, and circulars. Here, Judge Santos claimed that the charge against him of failure to refer the case to the PMC was not alleged in the Complaint-Affidavit and, thus, violates his right to be informed of the charges against him. To this, the Court ruled that such failure to refer was already evident in the narration of facts and no longer needed to be alleged specifically in the Complaint.

Furthermore, the Court also found no compelling reason to reverse its finding that Judge Santos exceeded the bounds of propriety when he issued the Extended Order and unduly castigated Elgar's counsel. According to the Court, Judge Santos should have been more prudent in his course of action and refrained from using his position to browbeat the counsel just because the latter did not agree with him. He further should have avoided the Extended Order since he had already granted the withdrawal of the petition.

However, the Court found that Judge Santos' act of giving the oppositor the option of submitting his pre-trial brief is not, as they have previously ruled, gross ignorance of the law, but is a mere violation of Supreme Court rules, directives, and circulars. While Judge Santos is not justified in making the oppositor's submission of the pre-trial brief optional, the Court took cognizance of Judge Santos' previous Orders directing the oppositor and his counsel to submit a pre-trial brief. Judge Santos even strongly reprimanded oppositor's counsel and ordered him to pay a fine of P1,000.00 for noncompliance with the Orders. Thus, the Court held that Judge Santos, although cognizant of the requirement of the pre-trial brief, decided to relax such requirement. While Judge Santos' action does not constitute gross ignorance of the law, he is still guilty of violation of Supreme Court rules, directives, and circulars.

The Court also found that the cited A.M. No. 03-10-01-SC, also known as "Resolution Prescribing Measures to Protect Members of the Judiciary from Baseless and Unfounded Administrative Complaints" had no application in the

case at bar. The purpose of such is to protect judges from baseless and unfounded suits. However, here, the complaint against Judge Santos is not baseless and not unfounded.

As for the prayer to remove the Court's decision from the Supreme Court website must fail. Here, the Court cites Sections 2, 3, and 4(b), Rule 14 of the Internal Rules of the Supreme Court which states that within 24 hours from the promulgation of the decision, the Chief Justice shall be formally informed of such and the latter shall direct the publication of such decision on the Supreme Court website.

Evidently, there is nothing in the Internal Rules of the Supreme Court to the effect that the decision of a motion for reconsideration must be waited upon before uploading the previous decision on the website.

Lastly, the Court mitigated Judge Santos' penalty as it found that the infractions were not attended by bad faith. Although this does not absolve him from administrative liability, the absence of malice is a mitigating circumstance.

RECENT LEGISLATION

REPUBLIC ACT NO. 11642

AN ACT STRENGTHENING ALTERNATIVE CHILD CARE BY PROVIDING FOR AN ADMINISTRATIVE PROCESS OF DOMESTIC ADOPTION, REORGANIZING FOR THE PURPOSE THE INTER-COUNTRY ADOPTION BOARD (ICAB) INTO THE NATIONAL AUTHORITY FOR CHILD CARE (NACC), AMENDING FOR THE PURPOSE REPUBLIC ACT NO. 8043, REPUBLIC ACT NO. 11222, AND REPUBLIC ACT NO. 10165, REPEALING REPUBLIC ACT NO. 8552, AND REPUBLIC ACT NO. 9523, AND APPROPRIATING FUNDS THEREFOR

ARTICLE I
GENERAL PROVISIONS

SECTION 1. *Short Title.* — This Act shall be known as the "Domestic Administrative Adoption and Alternative Child Care Act".

SECTION 2. *Declaration of Policy.* — It is hereby declared the policy of the State to ensure that every child remains under the care and custody of the parents and be provided with love, care, understanding, and security towards the full and harmonious development of the child' personality. Only when such efforts prove insufficient and no appropriate placement or adoption by an unrelated person be considered.

The best interest of the child shall be the paramount consideration in the enactment of alternative care, custody, and adoption policies. It shall be in accordance with the tenets set forth in all the rights of the child enumerated under Article 3 of Presidential Decree No. 603, otherwise known as the "Child and Youth Welfare Code"; the "United Nations Convention on the Rights of the Child (UNCRC)"; the "United Nations Guidelines on Alternative Care of Children"; the "United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children with Special Internationally'; and the "Hague Convention on the Protection of Children and Cooperation in Respect of Inter-Country Adoption".

Toward this end, the State shall:

(a) Ensure that a child without parental care, or at risk of losing it, is provided with alternative care options such as adoption and foster care;

(b) Establish alternative care standards to ensure that the quality of life and living conditions set are conducive to the child's development;

(c) Safeguard the biological parents from making hasty decisions to relinquish parental authority over the child;

(d) Prevent unnecessary separation of the child from the biological parents;

(e) Protect the adoptive parents from attempts to disturb their parental authority and custody over the adopted child;

(f) Conduct public information and educational campaign to promote a positive environment for adoption;

(g) Ensure that sufficient capacity exists within government and private sector agencies to handle adoption inquiries, process domestic adoption petitions, and offer adoption-related services, including pre-adoption and post-adoption services, for the biological parents, children, and adoptive parents;

(h) Encourage domestic adoption so as to preserve the child's identity and culture in the child's native land, and only when this is not feasible shall inter-country adoption be considered; and

(i) Establish a system of cooperation with the Inter-Agency Council Against Trafficking (IACAT), to prevent the sale, trafficking, and abduction of children and to protect Filipino children abandoned overseas who are made vulnerable by their irregular status.

No child shall be a subject of administrative adoption unless the status of the child has been declared legally available for adoption except in cases of relative or step-parent adoption where such declaration is not required. Independent placement cases, or the entrustment of a child by the birthparents to a relative or another person without seeking intervention from government, nongovernment, or any social worker, will be covered by the provisions of this Act if the child is already in the custody of their custodian before the effectivity of this Act.

It is hereby recognized that the administrative adoption processes for the cases of legally-available children, relative, stepchild, and adult adoptees are the most expeditious proceedings that will redound to their best interest.

SECTION 3. *Objectives*. – This Act shall provide for and allow simpler and inexpensive domestic administrative adoption proceedings and shall streamline services for alternative child care. Pursuant to this, it shall create the National Authority for Child Care (NACC), which shall exercise all powers and functions relating to alternative child care including, declaring a child legally available for both domestic, administrative adoption and inter-country adoption, foster care, kinship care, family-like care, or residential care.

SECTION 4. *Definition of Terms*. – As used in this Act:

(a) Abandoned child refers to a child who has no proper parental care or guardianship, a foundling, or on who has been deserted by one's parents for a period of at least three (3) continuous months, and has been declared as such by the NACC;

(b) Abandoned Filipino child in foreign country refers to an unregistered or undocumented child found outside the Philippine territory, with known or unknown facts of birth, separated from or deserted by the biological Filipino parent guardian, or custodian for a period of at least three (3) continuous months and committed to a foreign orphanage or charitable institution or in a temporary informal care, and has been declared as such by the NACC, upon recommendation of the Office of the Social Welfare Attaché (OSWA) of the Department of Social Welfare and Development (DSWD), or the Department of Foreign Affairs (DFA);

(c) Actual custodian refers to the guardian or spouses who raised a child or person and consistently treated the child as their own;

(d) Adoption refers to the socio-legal process of providing a permanent family to a child whose parents had voluntarily or involuntarily given up their parental rights, permanently transferring all rights and responsibilities, along with filiation, making the child a legitimate child of the adoptive parents: Provided, That adult adoption shall be covered by the benefits of this Act;

In the interest of clarity, adoption shall cease to be part of alternative child care and becomes parental care as soon as the process is completed.

(e) Adoption para-social worker refers to an unregistered and unlicensed social work practitioner who ideally has three (3) years of experience in handling alternative child care or adoption cases, or both;

(f) Adoption social worker refers to an individual who is registered and licensed by the Professional Regulation Commission (PRC), in accordance with Republic Act No. 9433, otherwise known as the "Magna Carta for Public Social Workers" and who ideally has three (3) years of experience in handling alternative child care or adoption cases, or both. For purposes of this Act, in the event that an adoption social worker is not available, adoption para-social worker shall be allowed to render the services required: Provided, That only duly registered and licensed social workers shall sign and submit the pertinent documents;

(g) Alternative child care refers to the provision of planned substitute parental care to a child who is orphaned, abandoned, neglected, or surrendered, by a child-caring or child-placing agency. This may include foster care, kinship care, family-like care, and residential care;

(h) Child refers to a person below eighteen (18) years of age or a person eighteen (18) years of age or over but who is unable to fully take care or protect himself or herself from abuse, neglect, cruelty, exploitation, or discrimination because of physical or psychosocial disability or condition: Provided, That for the purpose of this Act, where relevant, a child shall also refer to an adult son, daughter, or offspring;

(i) Child Legally Available for Adoption (CLAA) refers to a child in whose favor a certification was issued by the NACC that such child is legally available for adoption after the fact of abandonment or neglect has been proven through the submission of pertinent documents, or one who was voluntarily committed by the child's parents or legal guardians;

(j) Certificate Declaring a Child Legally Available for Adoption (CDCLAA) refers to the final written administrative order issued by the NACC declaring a child to be abandoned and neglected, and committing such child to the care of the NACC through a foster parent, guardian, or duly licensed child-caring or child-placing agency. The rights of the biological parents, guardian, or other custodian to exercise authority over the child shall cease upon issuance of the CDCLAA;

(k) Child-caring agency refers to a duly licensed and accredited agency by the DSWD that provides twenty-four (24)-hour residential care services for abandoned, orphaned, neglected, or voluntarily and involuntarily committed children;

(l) Child case study report refers to a written report prepared by an adoption social worker containing all the necessary information about a child, including the child's legal status, placement history, past and present biopsychosocial and spiritual aspects, case background, ethno-cultural background, and biological family background or history;

(m) Child-placing agency refers to a private nonprofit or charitable or government agency duly licensed and accredited agency by the DSWD to provide comprehensive child welfare services including receiving and processing of petitions, for adoption and foster care, evaluating the prospective adoptive parents (PAPs) or foster parents, preparing the child case study report and home study report;

(n) Child Placement Committee (CPC) refers to the committee under the supervision of the Deputy Director for Services composed of a child psychiatrist or psychologist, a medical doctor, a lawyer, an adoption social worker, a representative of nongovernmental organization (NGO) engaged in child welfare, and any other professional as may be needed, to provide the necessary assistance in reviewing petitions for adoption;

(o) Deed of Voluntary Commitment (DVC) refers to the notarized instrument relinquishing parental authority and committing the child to the care and custody of the NACC or child-placing or child-caring agency, executed by the child's biological parents or by the child's legal guardian in their absence, mental incapacity or death, to be signed in the presence of an authorized representative of the NACC, after counseling and other services have been made available to encourage the child's biological parents or legal guardian to keep the child;

(p) Domestic adoption refers to an administrative adoption proceeding where the Order of Adoption is issued within the Philippines and is undertaken between a Filipino child and eligible adoptive parents;

(q) Foreign national refers to any person who is not a Filipino citizen;

(r) Foster care refers to the provision of planned temporary substitute parental care to a child by a foster parent;

(s) Foster child refers to a child placed under foster care;

(t) Foster parent refers to a person, duly licensed by the NACC, to provide foster care;

(u) Foundling refers to a deserted or abandoned child of unknown parentage and whose date or circumstances of birth on Philippine territory are unknown and undocumented. This shall also include those with the above circumstance of birth during their infancy and/or childhood, and have reached the age of majority without benefiting from adoption procedures;

(v) Home study report refers to a written report prepared by an adoption social worker relative to the motivation and capacity of the prospective adoptive or foster parents to provide a home that meets the needs of a child;

(w) Inter-country adoption refers to the socio-legal process of adopting a child by a foreign national or a Filipino citizen habitually a resident outside Philippine territory which complies with the principles stated in the Hague Convention of 1993;

(x) Involuntarily committed child refers to one who has been permanently deprived of parental authority due to: abandonment; substantial, continuous, or

repeated neglect; abuse or incompetence to discharge parental responsibilities, of known or unknown parents;

(y) Local Social Welfare Development Officer (LSWDO) refers to a person who is a duly licensed social worker and appointed by the local chief executive to head the provincial, city, or municipal social welfare development office which serves as the frontline of the local government unit (LGU) in the delivery of social welfare and development programs and services;

(z) Matching refers to the judicious selection from the regional or interregional levels of a family for a child based on the child's needs and best interest as well as the capability and commitment of the adoptive parents to provide such needs and promote a mutually satisfying parent-child relationship;

(aa) Neglected child refers to a child whose physical and emotional needs have been deliberately unattended or inadequately attended within a period of three (3) continuous months. A child is unattended when left without the proper provisions or proper supervision;

(bb) Petition refers to the duly accomplished application from for the foster case or adoption, including the social case study report and its supporting documents from an authorized or accredited agency or central authority;

(cc) Placement refers to the physical entrustment of the child with the foster parent or to the adoptive parents;

(dd) Post-adoption services refer to psychosocial services and support services provided by adoption social workers after the issuance of the Order of Adoption by the NACC or Final Decree of Adoption or its equivalent;

(ee) Pre-Adoption Placement Authority (PAPA) refers to the matching committee organized by the NACC, through the RACCO, that is tasked to deliberate the regional and interregional matching of children legally available for adoption and approved prospective adoptive parents;

(hh) Relative refers to someone other than family members, within fourth (4th) degree of consanguinity or affinity;

(ii) Simulation of birth record refers to the tampering of the civil registry to make it appear in the record of birth that a child was born to a person who is not such child's biological mother, causing the loss of the true identity and status of such child;

(jj) Social case study report refers to the report prepared by the adoption social worker on the PAP's capacity to raise the child; the social agency efforts to locate the child's biological parents or relatives; interventions given to the child and the family; and the adoption social worker's assessment of the case. It shall include both the child case study report and the home study report;

(kk) Social worker refers to a licensed practitioner by the PRC who, by academic training and social work professional experience, possesses the skill to achieve the objectives as defined and set by the social work profession, through the use of the basic methods and technique of social work (case work, group work, and community organization) which are designed to enable individuals, groups and communities to meet their needs and to solve the problems of adjustment to a hanging pattern of society and, through coordination with an organized social work agency which is supported partially or wholly from government or community solicited funds;

(ll) Step-parent refers to a parent who is married to the mother or father of a child, but who is not that child's biological mother or father;

(mm) Supervised trial custody (STC) refers to the period of time after the placement of a child in an adoptive home whereby an adoption social worker helps the adoptive family and the child in the adjustment process to facilitate the legal union through adoption;

(nn) Support refers to everything indispensable for the full and harmonious development of the child, including sustenance, dwelling, clothing, medical attention, and education, in keeping with the financial capacity of the family; and

(oo) Voluntarily committed child refers to the one whose parent or legal guardian knowingly and willingly relinquished parental authority to the NACC, the DSWD, or any duly accredited child-placing or child-caring agency or institution.

ARTICLE II
NATIONAL AUTHORITY FOR CHILD CARE

SECTION 5. *National Authority for Child Care (NACC).* – The Inter-Country Adoption Board (ICAB) is hereby reorganized to a one-step quasi-judicial agency on alternative child care, known as the National Authority for Child Care (NACC), attached to the DSWD.

All duties, functions, and responsibilities of the ICAB, the DSWD, and those of other government agencies relating to alternative child care and adoption are hereby transferred to the NACC.

The Department of Budget and Management (DBM), in coordination with the ICAB and the DSWD, shall formulate a cohesive organizational structure with corresponding plantilla positions responsive to fulfill the functions and divisions of the NACC as stipulated under this Act.

SECTION 6. *Jurisdiction of the NACC.* – The NACC shall have the original and exclusive jurisdiction over all matters pertaining to alternative child care, including declaring a child legally available for adoption; domestic administrative adoption; adult adoption; foster care under Republic Act No. 10165, otherwise known as the "Foster Care Act of 2012"; adoptions under Republic Act No. 11222, otherwise known as the "Simulated Birth Rectification Act"; and inter-country adoption under Republic Act No. 8043, otherwise known as the "Inter-Country Adoption Act of 1995". The NACC shall also have the authority to impose penalties in case of any violation of this Act.

SECTION 7. *Composition of the NACC.* – The NACC shall be composed of a Council and a Secretariat.

The Council shall be composed of the Secretary of the DSWD as ex officio chairperson and six (6) other members, who are to be appointed by the President for a nonrenewable term of six (6) years: Provided, That there shall be appointed one (1) psychiatrist or psychologist, two (2) lawyers who shall have at least the qualifications of a Regional Trial Court (RTC) judge, one (1) registered social worker, and two (2) representatives from NGOs engaged in child-caring and child-placing activities.

The members of the Council shall receive a reasonable per diem allowance for each meeting attended.

The Council shall act as the policy-making body for purposes of carrying out the provisions of this Act and shall formulate child welfare policies which shall constantly adjust to ongoing studies on alternative child care. En banc, it shall serve as Appeals Committee for contested denials of petitions issued by the Executive Director or the Deputy Director for Services.

The Secretariat shall implement and execute policies on alternative child care pursuant to the provisions of this Act. It shall be headed by an Executive Director, with the rank of an Undersecretary who shall be assisted by two (2) deputy directors, one (1) for services and another one (1) for administration and finance with the rank of Assistant Secretary.

The Deputy Director for Services shall, pursuant to the provisions of this Act, assist the Executive Director in the supervision and monitoring of the overall process for alternative child care, including declaring a child legally available for adoption, domestic, and inter-country adoption, foster care, residential care, family-like care, and kinship care, as well as the provision of child and family welfare services.

The NACC may hire professionals and various experts, who shall form part of the CPC to be composed of a child psychiatrist or psychologist, a medical doctor, a lawyer, an adoption social worker, a representative of an NGO engaged in child welfare, and any other professionals, as may be needed, to provide the necessary assistance to the Deputy Director for Services and Executive Director in reviewing petitions for adoption.

The Deputy Director for Administration and Finance shall be in charge of human resource development and management, property and logistics management, assets and financial management, and other administrative support services.

SECTION 8. *Functions of the NACC.* – The NACC shall ensure that the petitions, and all other matters involving alternative child care, including the issuance of CDCLAA, and the process of domestic and inter-country adoption, foster care, kinship care, family-like care, or residential care are simple, expeditious, and inexpensive, and will redound to the best interest of the child involved.

Towards this end, the NACC Council shall act as the policy-making body and when convened as such, as an en banc appeals committee for contested denials of petitions issued by the Executive Director or the Deputy Director for Services, while the NACC Secretariat shall be responsible for the following key functions:

(a) Act and resolve petitions for the issuance of CDCLAA as provided under this Act;

(b) Facilitate, act, and resolve all matters relating domestic administrative adoption as provided in this Act;

(c) Facilitate, act, and resolve all matter relating to inter-country adoption, pursuant to Republic Act No. 8043;

(d) Facilitate, act, and resolve all matters relating to foster care pursuant to Republic Act No. 10165;

(e) Facilitate, act and resolve all matters relating to the rectification of simulated birth pursuant to Republic Act No. 11222;

(f) Supervise and control the following acts to be performed by the RACCO under the provisions of this Act;

(g) Determine action on petitions for adoption, foster care, and other forms of alternative child care that been filed through and processed by the RACCOs;

(h) Set standards and guidelines on adoption including pre- and post-legal adoption services;

(i) Convene an Independent Appeals Committee whenever necessary to be composed of professionals and experts from its CPC, to resolve appeals filed by interested parties involving denials of petitions at the RACCO level;

(j) Act as the central authority in matter relating to inter-country adoption and shall act as the policy-making body for purposed of carrying out the provisions of this Act, including Republic Act No. 8043, in consultation and coordination with the DSWD-OSWA, DFA, the different child care and placement agencies, adoptive agencies, as well as NGOs engaged in child care and placement activities, specifically the functions under SECTION 4 of the aforementioned law;

(k) Determine, in coordination with the DFA or the OSWA, procedures for suitable alternative care of Filipino children stranded abroad, including countries not party to the Hague Convention or have no diplomatic relations with the Philippines;

(l) Ensure that inter-country adoption will not be pursued until all possible domestic placement of the child has been exhausted;

(m) Conduct national information dissemination and advocacy campaign on alternative child care;

(n) Establish clear programs to keep children with their biological families wherever possible;

(o) Assess the progress and identify gaps in the implementation of this Act and come up with policy recommendations;

(p) Keep records of all adoption, foster care, and other alternative child care cases, and provide periodic information and reports on the performance of the agency;

(q) Conduct research on adoption, foster care, and other alternative child care policies or in related fields to further improve and strengthen the office programs and services and for policy formulation and development;

(r) Provide technical assistance and conduct capability-building activities to all concerned agencies and stakeholders;

(s) Determine and impose administrative fees;

(t) In partnership with the Department of the Interior and Local Government (DILG), provide the necessary support and technical assistance to LGUs, especially the Local Council for Protection of Children (LCPC), who are among the first responders to cases of child abandonment and voluntary commitment, on matters related to alternative child care processes and engage them during the pre-adoption process;

(u) Build linkages and partnerships with independent and private entities such as licensed and accredited child-caring institutions, foundations, and social worker groups to ease the burden on the government to monitor all petitions;

(v) Impose fines or penalties for any noncompliance with or breach of this Act, its implementing rules and regulations (IRR), and the rules and regulations which it promulgates or administers;

(w) Formulate and develop policies for programs and services relating to the process of adoption, foster care, kinship care, family-like care, or residential care; and

(x) Enforce this Act and its IRR, as well as perform all other functions necessary to carry out the objectives of this Act and other related laws, such as Republic Act No. 8043 and Republic Act No. 10165 toward the simple, expeditious, and inexpensive process relating to foster care, issuance of CDCLAA, domestic administrative adoption, and inter-country adoption, and all other forms of alternative care, that would redound to the best interest of the child.

SECTION 9. *Regional Alternative Child Care Office (RACCO).* – There shall also be a Regional Alternative Child Care Office (RACCO) created for each region of the country, which shall be headed by a Regional Alternative Child Care (RACC) officer.

The RACCO is tasked to ensure a well-functioning system of receipt of local petitions for CDCLAA and adoption, and other requests regarding alternative placement and well-being of children.

The RACCO shall have dedicated personnel who shall exclusively handle each of the following:

(a) Issuance of the CDCLAA;

(b) Domestic administrative adoption;

(c) Inter-country adoption;

(d) Foster care;

(e) All other forms of alternative care including family-like care, kinship care, and residential care; and

(f) Rectification of simulated birth pursuant to Republic Act No. 11222.

There shall be an RCPC installed in each RACCO which shall be supervised by the RACC officer. It shall be composed of a multidisciplinary group including a child psychiatrist or psychologist, a medical doctor, a member of the Philippine Bard, an adoption social worker and a representative of an NGO involved in child welfare: Provided, That no member of the group shall have relations with the child or PAP being matched.

SECTION 10. *Appointments and Staffing Patterns.* – The DBM, in coordination with the ICAB and DSWD, shall create the organizational structure and staffing patterns necessary for the performance of functions of the NACC: Provided, That officers and employees holding permanent appointments shall be given preference for appointment to the new positions in the approved staffing pattern comparable to their former positions.

Provided, further, That existing plantilla items in the ICAB and DSWD which are dedicated to alternative child care and adoption shall be transferred to the NACC.

Provided, finally, That no new employees shall be hired until all permanent officers and employees have been appointed, including temporary and casual employees who possess the necessary qualification requirements, among which is the appropriate civil service eligibility, for permanent appointment to positions in the approved staffing pattern, in case there are still positions to be filled, unless such positions are policy-determining, primarily confidential or highly technical in nature.

Qualifications of all appointees shall be in accordance with civil service rules and regulations. The existing Adoption Resource and Referral Unit (ARRU) of the DSWD shall now function as the RACCOs for each region of the country under the NACC.

ARTICLE III
DECLARATION OF A CHILD LEGALLY AVAILABLE FOR ADOPTION

SECTION 11. *Declaration of Availability for Adoption of Involuntarily Committed Child and Voluntarily Committed Child.* – The CDCLAA in case of an involuntarily committed child under Article 141, paragraph 4(a) and Article 142 of Presidential Decree No. 603 shall be issued by the NACC within three (3) months following such involuntary commitment.

In case of voluntary commitment as contemplated in Article 154 of Presidential Decree No. 603, the CDCLAA shall be issued by the Executive Director within three (3) months following the filing of the DVC, as signed by the parents with the NACC.

Upon petition filed with the NACC, the parents or legal guardian who voluntarily committed a child may recover legal custody and parental authority from the agency or institution to which such child was voluntarily committed when it shown to the satisfaction of the NACC that the parents or legal guardian is in a position to adequately provide for the needs of the child: Provided, That the petition for restoration is filed within three (3) months after the signing of the DVC.

In the case of foundlings, the CDCLAA shall be issued by the Executive Director within three (3) months following the issuance of the child's foundling certificate or birth certificate

SECTION 12. *Who May File a Petition for CDCLAA.* – The Head or Executive Director of a licensed or accredited child-caring or child-placing agency or institution managed by the government, PGU, NGO, or provincial, city, or municipal social welfare development officer (SWDO) who has actual custody of the minor may file a petition before the NACC, through the RACCO, for the issuance of a CDCLAA. If the child is under the custody of any other individual, the child-caring or child-placing agency or institution shall do so with the consent of the child's custodian.

SECTION 13. *Petition for CDCLAA.* – The petition shall be in the form of an affidavit, subscribed and sworn to before any person authorized by law to administer oaths.

It shall contain facts necessary to establish the merits of the petition and shall state the circumstances surrounding the abandonment, neglect, voluntary commitment of the child, or discovery of the foundling.

The petition shall be supported by the following documents:

(a) Social case study report made by the RACCO, LGU, licensed or accredited child-caring or child-placing agency or institution charged with the custody of the child;

(b) Proof that efforts were made to locate the parents or any known relatives of the child. The following shall be considered sufficient;

(1) Written certification from a local or national radio or television station that the case was aired on three (3) different occasions;

(2) Publication in one (1) newspaper of general circulation to be shouldered by the petitioner: Provided, That publication can be dispensed with in the case of step-parent and relative adoption;

(3) Police report or barangay certification from the locality where the child was found, or a certified copy of tracing report issued by the Philippine Red Cross national headquarters (NHQ) or social service division, which states that despite due diligence, the child's parents could not be found;

(4) Returned registered mail to the last known address of the parents or known relatives, if any; or in the case of a voluntarily committed child, the DVC signed by the biological parent;

(5) Birth certificate, if available; and

(6) Recent photograph of the child and photograph of the child upon abandonment or admission to the agency or institution.

SECTION 14. *Procedure for the Filing of the Petition for CDCLAA*. – The petition shall be filed in the RACCO where the child was found, abandoned, voluntarily committed, or discovered.

The RACCO shall immediately examine the petition and its supporting documents, if sufficient in form and substance, and shall authorize the posting of the notice of the petition in a conspicuous place for five (5) consecutive days in the locality where the child was found, abandoned, voluntarily committed, or discovered, and in social media platforms or other online platforms of the NACC and the concerned LGU.

If the RACCO finds that the petition is insufficient, the case shall be put on hold and the petition shall be returned to the petitioner for compliance with the additional information or documents requested by the RACCO.

Within fifteen (15) working days after the completion of its posting, the RACCO shall render a recommendation and transmit a copy of such recommendation, together with the records, to the Executive Director.

SECTION 15. *Declaration of Availability for Adoption.* – Upon finding merit in the petition, the Executive Director shall issue a CDCLAA within seven (7) working days from receipt of the recommendation, unless further investigation or additional information or documents are needed to determine the merits of the petition. A copy of the CDCLAA shall be transmitted to the petitioner and all interested parties known to the Executive Director.

SECTION 16. *Opposition to the Petition for CDCLAA*. – In cases of abandoned, neglected children, and foundlings, if the biological parents, relatives or legal guardian of the child appear and oppose the issuance of the CDCLAA, prior to its issuance, the case shall be put on hold and the RACCO, Deputy Director for Services, or Executive Director, depending on where the case is pending for review at the time the petition is opposed, shall direct the handling adoption social worker to immediately investigate and request for a Parenting Capability Assessment Report (PCAR) from the LGU where the biological parents, relatives, or legal guardian reside.

Within fifteen (15) working days after the issuance of the PCAR, the handling adoption social worker shall render a recommendation on whether to grant or deny the opposition of the biological parents, relatives, or legal guardian of the child.

Within fifteen (15) working days after the receipt of the handling adoption social worker's recommendation, the RACCO, Deputy Director for Services, or Executive Director shall decide on the merits of the petition.

SECTION 17. *Appeal.* – The decision of the NACC shall be appealable to the Court of Appeals within ten (10) days from receipt of the Order by the interested party, otherwise the same shall be final and executory.

SECTION 18. *Certification.* – The CDCLAA issued by the NACC Executive Director shall be, for all intents and purposes, the best evidence that the child is legally available in a domestic adoption proceeding: and in an inter-country adoption proceeding, as provided in Republic Act No. 8043.

SECTION 19. *Counseling Services.* – It shall be the duty of the NACC, through the RACCO, child-caring or child-placing agencies, as well as the city, municipal, or barangay social workers, when appropriate, to provide necessary and appropriate counseling services by adoption social workers to the following:

(a) Biological Parents – Counseling shall be provided to the biological parents before and after the birth of the child. No binding commitment to an adoption plan shall be permitted before the birth of the child.

In all proceedings for adoption, the NACC shall require proof that the biological parents have been properly counseled to prevent them from making hurried decisions caused by strain or anxiety to give up the child, and to sustain that all measures to strengthen the family have been exhausted and that any prolonged stay of the child in own how will be inimical to child welfare and interest.

A period of three (3) months shall be allowed for the biological parents to reconsider any decision to relinquish a child for adoption before the decision becomes irrevocable.

Counseling and other appropriate social service interventions and services shall also be offered to the biological parents after the child has been relinquished for adoption.

Steps shall be taken by the NACC to ensure that no hurried decisions are made and all alternatives for the child's future and the implications of each alternative have been provided.

(b) Prospective Adoptive Parents (PAPs) – Counseling sessions, forums, and seminars on adoption, among others, shall be provided to resolve possible adoption issues and to prepare them for effective parenting.

Adoption telling shall be one of the central themes of the sessions, forums, or seminars to equip the PAPs with the ability to divulge the adoption to the adoptee in a manner that will strengthen the parent-child relationship.

As a proven helpful practice, adoption shall be disclosed to the child as early as possible by the adoptive parents: Provided, That disclosure of adoption shall be mandatory before the adoptee reaches the age of thirteen (13) years old. An adoption social worker must conduct adoption-themed activities to such children, which will inculcate the positive aspects of adoption in their young minds.

SECTION 20. *Biological Parent Search.* – It shall be the duty of the NACC, LGU, or the child-placing or the child-caring agency, which has custody of a child to exert all efforts using tri-media and any other possible means to locate the biological parents of the child and seek their consent. If such effort fail, the child shall, if applicable, be registered as a foundling and subsequently be the subject of administrative proceedings where said child shall be declared abandoned: Provided, That if the adoptee is an adult, the biological parent search is at the discretion of the adoptee.

SECTION 21. *Who May Adopt.* – The following may adopt:

(a) Any Filipino citizen at least twenty-five (25) years of age, who is in possession of full civil capacity and legal rights; has not been convicted of any crime involving moral turpitude; is of good moral character and can model the same; is emotionally and psychologically capable of caring for children; at least sixteen (16) years older than the adoptee; and who is in a position to support and care for adopted children in keeping with the means of the family: Provided, That the requirement of sixteen (16)-years difference between the age of the adopter and the adoptee may be waived when the adopter is the biological parent of the adoptee, or is the spouse of the adoptee's parent;

(b) The legal guardian with respect to the ward after the termination of the guardianship and clearance of financial accountabilities;

(c) The legal guardians with respect to the foster child;

(d) Philippine government officials and employees deployed or stationed abroad: Provided, That they are able to bring the child with them; and

(e) Foreign nationals who are permanent or habitual residents of the Philippines for at least five (5) years possessing the same qualifications as above stated for Filipino nationals prior to filing of the petition: Provided, That they come from a country with diplomatic relations with the Republic of the Philippines and that the laws of the adopter's country will acknowledge the Certificate of Adoption as valid, acknowledge the child as a legal child of the adopters, and allow entry of the child into such country as an adoptee: Provided, further, That requirements of residency may be waived for the following:

(1) A former Filipino citizen, habitually residing in the Philippines, who seeks to adopt a relative within fourth (4th) civil degree of consanguinity or affinity; or

(2) One who seeks to adopt the legitimate child of the Filipino spouse; or

(3) One who is married to a Filipino citizen and seeks to adopt jointly with the spouse a relative within the fourth (4th) degree of consanguinity or affinity of the Filipino spouse.

Spouses shall jointly adopt, except in the following cases:

(a) If one spouse seeks to adopt the legitimate child of the other; or

(b) If one spouse seeks to adopt own illegitimate child: Provided, That the other spouse has signified consent thereto; or

(c) If the spouses are legally separated from each other.

SECTION 22. *Who May Be Adopted.* – The following may be adopted:

(a) Any child who has been issued a CDCLAA;

(b) The legitimate child of one spouse by the other spouse;

(c) An illegitimate child by a qualified adopter to improve status of legitimacy;

(d) A Filipino of legal age if, prior to the adoption, said person has been consistently considered and treated by the adopters as their own child for a period of at least three (3) years;

(e) A foster child;

(f) A child whose adoption has been previously rescinded;

(g) A child whose biological or adoptive parents have died: Provided, That no proceedings shall be initiated within six (6) months from the time of death of said parents; or

(h) A relative of the adopter.

SECTION 23. *Whose Consent is Necessary to the Adoption.* – After being properly counseled and informed of the right to give or withhold approval of the adoption, the written consent of the following to the adoption are hereby required:

(a) The adoptee, if ten (10) years of age or over;

(b) The biological parents of the child, if known, or the legal guardian, or the proper government instrumentality which has legal custody of the child, except in the case of a Filipino of legal age if, prior to the adoption, said person has been consistently considered and treated as their own child by the adopters for at least three (3) years;

(c) The legitimate and adopted children, ten (10) years of age or over, of the adopters, if any;

(d) The illegitimate children, ten (10) years of age or over, of the adopter if living with said adopter or over whom the adopter exercises parental authority and the latter's spouse, if any; and

(e) The spouse, if any, of the person adopting or to be adopted.

Provided, That children under ten (10) years of age shall be counseled and consulted, but shall not be required to execute within consent.

SECTION 24. *Documentary Requirements*. – The PAPs shall attach the following to the Petition for Adoption and shall submit the same to the RACCO:

(a) Home study report and child case study report duly prepared pursuant to the provisions of this Act, which requires a uniform and standardized format of the report;

(b) Authenticated or security paper copies of birth record of the PAPs and the child;

(c) Authenticated or security paper copies of Marriage Certificate, if the PAPs are married; or Court Decision or Certificate of Finality, if annulled, divorced or legally separated;

(d) National Bureau of Investigation (NBI) or Police Clearance; If foreign national, clearance from police authorities where he or she lived for more than twelve (12) months any time in the past fifteen (15) years;

(e) Written consent to the adoption by the biological parent(s) or the person(s) exercising substitute parental authority over the child and the written consent of the child if at least ten (10) years old, signed in the presence of an adoption social worker of the NACC or child-caring agency, or of the child-placing agency for cases where the child is from a foster home, after proper counseling as prescribed in this Act;

(f) Authenticated or security paper copies of the Death Certificate of biological parents, as applicable;

(g) Original copy of CDCLAA, as applicable;

(h) Result of the recent medical evaluation of the child and the PAPs;

(i) Mandatory result of the psychological evaluation of the PAPs;

(j) Mandatory result of the psychological evaluation of the child, for children five (5) years old and above;

(k) Child care plan with a list of at least three (3) temporary custodian of the child in order of preference in case of death, absence or incapacity of the PAPs;

(l) Letter attesting to the character and general reputation of the PAPs from at least three (3) non-related character references, of whom one must preferably come from an employer or supervisor or with who the PAPs have business dealings. The contact details of the person attesting must be so indicated in the letter;

(m) Recent close-up and whole-body pictures of the child and the PAPs taken within the last six (6) months; and

(n) Documents showing the financial capacity of the PAPs.

The NACC shall formulate and produce official, uniform, and standard forms of the foregoing documentary requirements that will be easily used and submitted by the PAPs for their Petition for Domestic Adoption.

The documentary requirements previously submitted to the NACC for other child care services may be considered and admitted for domestic administrative adoption, if applicable: Provided, That the adoption social worker of the NACC, LGU, and child-caring or child-placing agencies are nor precluded from asking for additional documents as may be necessary as proof of the facts alleged in the petition or to establish a factual claim.

ARTICLE IV
PROCEDURE

SECTION 25. *Case Study*. – No Petition for Adoption shall be processed by the NACC or its RACCs unless an adoption social worker of the NACC, the social service office of the LGU, or any child-placing or child-caring agency, has made a case study of the adoptee, the biological parents as well as the adopters, and has submitted the report and recommendations on the matter to the respective RACCO as among the supporting documents of the petition, and the NACC for the issuance of the Certificate of Adoption.

At the time of preparation of the prospective adoptive child's case study, the concerned adoption social worker shall confirm with the Philippine Statistics Authority (PSA) the real identity and registered name of the prospective adoptee. If the birth of a prospective adoptee was not registered with the PSA, it shall be the responsibility of the said social worker to ensure that said prospective adoptee is registered.

The case study on the prospective adoptive child shall establish that said child is legally available for adoption and that the documents to support this fact are valid and authentic.

Further, the case study of the prospective adopters shall ascertain their genuine intentions and that the adoption is in the best interest of the child. If the adoption social worker determines that the adoption shall redound to the best interests of the child, a recommendation shall be made to the RACCO or the NACC for the petition to be granted; otherwise, a denial thereof shall be recommended. Upon discovery of new information that would warrant denial of the petition to protect the best interest of the child, the said social worker is duty bound to report the same to the RACCO or the NACC.

The case studies and other relevant documents and records pertaining to the adoptee and the adoption shall be preserved with confidentiality by the NACC.

SECTION 26. *Matching Process*. – There shall be a matching process for case of legally available children thirty (30) calendar days after the issuance of the CDCLAA or the next matching conference, whichever is applicable. The matching of the child to approved PAPs shall be carried out during the regular matching conference by the Matching Committee in the regional level, the RCPC under the RACCOs: Provided, That interregional matching, which shall be monitored and supervised by the Deputy Director for Services, may be conducted upon recommendation of the Executive Director, at any time, depending on the number of children declared legally available for adoption and the number of approved PAPs. Subject to the approval of the NACC, the RCPC shall fix its own internal rules and procedures. However, the records of the children and the approved PAPs not matched after two (2) presentations in the regional level shall be forwarded to the NACC for inclusion in the interregional matching presentation: Provided, That children with special needs shall be immediately forwarded if not matched in the first meeting, except under special circumstance. The matching proposal made by the RCPC shall be approved by the NACC, through the Executive Director.

Cases of step-parent adoption, relative adoption, and adult adoption, shall not undergo the matching process: Provided, That the child and the PAPs have been living in one household for not less than two (2) years.

SECTION 27. *Personal Appearance of Prospective Adoptive Parents*. – To further ascertain fitness, qualifications, good intentions, and sincerity of PAPs, the handling RACCO shall require PAPs to personally appear before it at least twice during the application period and on specific dates to be determined by the same.

SECTION 28. *Issuance of Pre-Adoption Placement Authority (PAPA)*. – Once a child is matched to an approved PAPs and was subsequently accepted, the NACC through the RACCO shall authorize the pre-adoption placement of the child to the PAPs if recommended by the appropriate social worker that there is a need for supervised trial custody prior to the filing of Petition for Adoption, and in cases when there is no decision on the Petition for Adoption within sixty (6)) calendar days from the receipt of the Deputy Director for Services of the positive recommendation of the RACCO on the petition, through no fault or negligence on the part of the PAPs.

In cases of adult or relative adoption, the PAPs shall automatically be issued a PAPA without undergoing the matching process.

SECTION 29. *Supervised Trial Custody (STC)*. – Upon the recommendation of the adoption social worker of the need for STC, and after the matching process and

issuance of the PAPA, the NACC through the RACCO shall give the adopters an STC over the adoptee for a period of not more than six (6) months within which the parties are expected to adjust psychologically and emotionally to each other and establish a bonding relationship. The STC shall be supervised and monitored monthly by the adoption social worker who prepared the child case study and home study report, and who shall submit a report regarding the placement.

The PAPs shall assume all the responsibilities, rights, and duties to which the biological parents are entitled from the date the adoptee is placed with the prospective adopters.

The STC may be waived in all cases of stepchild, relative, infant, or adult adoptions, as assessed and recommended by the adoption social worker.

Further, for regular cases, the STC may be reduced or waived depending on the assessment and recommendation of the adoption social worker, and the express consent of the PAPs.

For independently placed cases, the adoption social worker shall prepare one post-placement report recommending the qualified adoptive parents to continue their parental obligations towards the child or adoptee.

SECTION 30. *Petition for Administrative Adoption.* – The thriving parent-child relationship during the said STC, if recommended, as substantiated by the monthly monitoring report of the adoption social worker, shall give rise to the filling of a Petition for Adoption.

In all cases, the Petition for Adoption shall be prepared and signed by the petitioner or PAPs. The said petition shall state the facts necessary to establish the merits of the petition. The petitioners must specifically allege that they are at least twenty-five (25) years of age, in possession of full civil capacity and legal rights; of good moral character; have not been convicted of any crime involving moral turpitude; are emotionally and psychologically capable of caring for children; are at least sixteen (16) years older than the adoptee, unless the adopter is the biological parent of the adoptee or is the spouse of the adoptee's parent; and are in a position to support and care for their children in keeping with the means of the family and have undergone pre-adoption services. The petition should also indicate the new name the petitioner wishes the child to have, if any.

The petition shall be in the form of an affidavit and shall be subscribed and sworn to by the petitioners before any person authorized by law to administer affirmation and oaths.

No subsequent petition involving the same PAPs shall be entertained unless the prior petition has attained finality.

SECTION 31. *Where to File the Petition.* – The petition together with complete and original supporting documents shall be filed by the petitioners with the RACCO of the city or municipality where the PAPs reside.

Upon receipt by the RACCO of the petition and its supporting documents, a copy of the petition shall be punished once a week for three (3) successive weeks in a newspaper of general circulation.

SECTION 32. *Administrative Adoption Process.* – In all proceedings for adoption, the NACC shall decide on the basis of all the documents presented to it, as well as

the evidence gathered during the personal interviews conducted by the RACCO with the handling adoption social worker, PAPs, and the adoptee. There shall be no adversarial proceedings and all domestic adoption cases shall be decided within sixty (60) calendar days from the receipt of the Deputy Director for Services of the recommendation of the RACCO on the petition.

The NACC, in the exercise of its quasi-judicial powers, shall observe and comply with the following administrative domestic adoption process:

(a) Within fifteen (15) working days from the filing of the Petition for Adoption by the PAPs, the RACCO shall determine whether the PAPs have complied with the substantive and procedural requirements for domestic adoption by extensively reviewing and examining the petition and its supporting documents, as well as conducting personal interviews with the handling adoption social worker, the PAPs, and the adoptee: Provided, That should the ROCCO require the PAPs to submit additional information or documents, the said fifteen (15)-day period shall be suspended;

(b) Should the RACCO find that the PAPs sufficiently complied with the requirements under this Act, it shall issue a certification attesting to the same, render a recommendation on whether to grant or deny the Petition for Adoption, and forward the same to the Deputy Director for Services within the said fifteen (15)-day period, excluding the periods of suspension;

(c) The Deputy Director for Services, who may consult the CPC consultants, as may be necessary, shall review the recommendation of the RACCO within fifteen (15) working days from receipt thereof and either;

(1) return it to the ROCCO for further examination with a written explanation of its insufficiency, or

(2) forward the Petition for Adoption to the Executive Director for final approval;

(d) In case the petition is returned by the Deputy Director for Services to the RACCO, the latter shall address the concerns raised by the Deputy Director for Services within fifteen (15) working days from receipt thereof;

(e) When the petition is forwarded by the Deputy Director for Services to the Executive Director, the latter shall act and decide on the recommendation within fifteen (15) working days from receipt thereof. However, if within the fifteen (15)-day period, the Executive Director finds that there is a need to return the petition to the RACCO for submission of additional information and documents or conduct of further investigation, as may be necessary, the action of the RACCO on the returned petition and finally deciding on whether to grant or deny the petition by the Executive Director should be settled within fifteen (15) workings days from the day the Executive Director returns the same to the RACCO, except when the information and documents needed are of such nature that cannot be easily obtained by the PAPs.

(f) In cases when there is no decision on the petition within sixty (60) calendar days from the receipt of the Deputy Director for Services of the recommendation of the RACCO on the petition, through no fault or negligence on the part of the PAPs, the latter may apply for PAPA, if none has been issued yet, with the Executive Director, through the RACCO, for the temporary placement of the child;

(g) If the Executive Director returns the petition or documents for further investigation to the RACCO, during the period that the child is under the custody of the PAPs, the child will remain the PAPs, taking into consideration the child's best interests: Provided, That if the Executive Director issues a denial on the petition, the child will be immediately removed by the RACCO from its temporary placement with the PAPs.

SECTION 33. *Objection to the Petition*. – Any person who has personal knowledge of any information, which by ordinary diligence could not be discovered, and which when introduced and admitted, would result in the denial of the petition and protect the child from possible harm or abuse may, at any time during the STC or before the issuance of the Order of Adoption, interpose an objection to the petition and file a complaint supported by evidence to that effect, with the NACC, through the RACCO where the petition was filed. The complaint will be subjected to verification and further investigation.

SECTION 34. *Order of Adoption*. – If the STC, as may be applicable, is satisfactory to the parties and the NACC is convinced that, from the trial custody report, the petition and its supporting documents including the STC report if applicable, that the adoption shall redound to the best interest of the child or prospective adoptee, the NACC through the Executive Director, shall issue an Order of Adoption which is a registrable civil registry document stating the name by which the child shall be known and shall likewise direct the following to perform the actions as stated:

(a) The adopter to submit a certified true copy of the Order of Adoption to the Civil Registrar where the child was originally registered within thirty (30) calendar days from receipt of the Order of Adoption; and

(b) The Civil Registrar of the place where the adoptee was registered;

(1) To seal the original birth record in the civil registry records which can be opened only upon order of the NACC; and

(2) To submit to the NACC proof of compliance with all the foregoing within thirty (30) calendar days from receipt of the Order of Adoption.

An Order of Adoption obtained under this Act shall have the same effect as a Decree of Adoption issued pursuant to the Domestic Adoption Act of 1998. A motion for reconsideration may be filed before the NACC, through the Executive Director, within fifteen (15) calendar days from an Order denying the adoption.

SECTION 35. *Judicial Recourse*. – Orders of Adoption may be appealed before the Court of Appeals within ten (10) days from receipt of the Order by the interested party, or from the denial of the motion for reconsideration; otherwise, the same shall be final and executory. Rule 43 of the 1997 Rules of Civil Procedure, as amended, shall have suppletory application.

SECTION 36. *Benefits of Adoptive Parents*. – The adoptive parents shall enjoy all the benefits entitled to biological parents, including benefits that can be availed through the Social Security System (SSS), Government Service Insurance System (GSIS), Department of Labor and Employment (DOLE), Bureau of Internal Revenue (BIR), Philippine Health Insurance Corporation (PhilHealth), Health Maintenance Organization (HMO) providers, among others, or through other existing laws from the date of the Order of Adoption was issued to the adoptive parent. Adoptive parents

may avail of paid maternity and paternity leaves as provided under existing laws for biological parents: Provided, That the leave benefits in this paragraph shall only be availed if by the adoptive parents within one (1) year from the issuance of the Order of Adoption: Provided, further, That the leave benefits in this paragraph shall not apply in cases of adult adoptions, and in all cases where the adoptive child has been in the care and custody of the adoptive parent for at least three (3) years before the issuance of the Order of Adoption by the NACC.

SECTION 37. *Civil Registry Record.* – An amended certificate of birth shall be issued by the civil registry, pursuant to the Order of Adoption, attesting to the fact that the adoptee ss the child of the adopter by being registered with the adopter's surname. The original birth record shall be stamped "cancelled" with the annotation of the issuance of an amended birth certificate in its place and shall be sealed in the civil registry records. The new birth certificate to be issued to the adoptee shall not bear any notation that it is an amended issue.

SECTION 38. *Database.* – The NACC shall keep a database showing the date of issuance of the Order in each case, compliance by the Local Civil Registrar with the preceding SECTION and all incidents arising after the issuance of the Order of Adoption. This database shall be governed by the provision on the succeeding SECTION, as well as the provisions of Republic Act No. 10173, otherwise known as the "Data Privacy Act of 2012".

SECTION 39. *Confidentiality.* – All petitions, documents, records, and papers relating to administrative adoption proceedings in the files of the city or municipal SWDOs, the RACCOs, the NACC, the DSWD, or any other agency or institution participating in such proceedings shall be kept strictly confidential. If the disclosure of certain information to a third person is necessary for security reasons or for purposes connected with or arising out of the administrative adoption and will be for the best interest of the adoptee, the Executive Director of the NACC may, upon appropriate request, order the necessary information released, restricting the purposes for which it may be used and in accordance with the existing laws on data privacy.

In any event, the disclosure of any information shall only be allowed upon the order of the Executive Director, based on the written request of the adoptee or in the case of a minor adoptee, his or her legal guardian or the adoptive parent or upon order of any lawful authority.

Any violation of the confidential nature of the records abovementioned shall be punishable pursuant to the penal provisions of this Act, Republic Act No. 10173 or other relevant laws.

No copy thereof as well as any information relating hereto shall be released without written authority from the NACC or the written request of any of the following:

(a) The adopted child, with appropriate guidance and counseling, or a duly authorized representative, spouse, parent, direct descendant, guardian or legal institution legally in charge of the adopted person, if minor;

(b) The court or proper public official whenever necessary in an administrative, judicial, or other official proceeding to determine the identity of the parent or parents or of the circumstances surrounding the birth of the adopted child;

(c) The nearest kin, in case of death of the adopted child.

The NACC shall ensure that information held by them concerning the origin of the adopted child, in particular the identity of the biological parents, is preserved.

SECTION 40. *Assistance to Indigent PAPs.* – Socialized fees may be charged to those who avail of the administrative adoption proceedings under this Act.

The Public Attorney's Office (PAO) shall provide free legal assistance including notarization of documents related thereto whenever warranted for qualified PAPs.

ARTICLE V
EFFECTS OF ADOPTION

SECTION 41. *Legitimacy.* – the adoptee shall be considered the legitimate child of the adopter for all intents and purposes and as such in entitled to all the rights and obligations provided by law to legitimate children born to them without discrimination of any kind. To this end, the adoptee is entitled to love, guidance, and support in keeping with the means of the family. The legitimate filiation that is created between the adopter and adoptee shall be extended to the adopter's parents, adopter's legitimate siblings, and legitimate descendants.

The adopter is also given the right to choose the name by which the child is to be known, consistent with the best interest of the child.

SECTION 42. *Parental Authority.* – Upon issuances of the Order of Adoption, adoption shall cease as alternative care and becomes parental care. Adoptive parents shall now have full parental authority over the child. Except in cases where the biological parent is the spouse of the adopter, all legal ties between the biological parents and the adoptee shall be severed and the same shall then be vested on the adopters.

In case spouses jointly adopt or one spouse adopts the legitimate child of the other, joint parental authority shall be exercised by the spouses.

SECTION 43. *Succession.* – In testate and intestate succession, the adopters and the adoptee shall have reciprocal rights of succession without distinction from legitimate filiations. However, if the adoptees and their biological parents have left a will, the law on testamentary succession shall govern.

ARTICLE VI
POST ADOPTION SERVICES

SECTION 44. *Preliminaries to Adoption Telling.* – The adoption social worker handling the adopted child's case shall assist the adoptive parents in disclosing to the child the story about the adoption at an age deemed proper by psychosocial standards: Provided, That the actual disclosure regarding the adoption shall be the duty of the adoptive parents.

SECTION 45. *Search or Tracing of Biological Family.* – Upon reaching the age of majority, the assistance of the NACC, LGU, or the concerned child-caring or child-placing agency may be sought to trace the adoptee's biological family and eventually have a face-to-face meet-up. The right of the adoptee to identity shall take precedence

over any other considerations: Provided, That the adoptee, adoptive parents, and biological parents received adequate preparation from an adoption social worker regarding the said meet up.

SECTION 46. *After-care Monitoring and Submission of Report.* – Upon finalization of the adoption and the receipt of the amended birth certificate of the child, the NACC shall monitor the parent-child relationship to ensure that the adoption has redounded to the best interest of the child. A Closing Summary Report shall be prepared by the handling adoption social worker and submitted to the NACC after completing the after-care monitoring to the adopters and adoptees after one (1)-year period. Depending on the age and circumstances of the child, the NACC may require additional visits or reporting after the one (1)-year period.

SECTION 47. *Grounds for Rescission of Administrative Adoption.* – The adoption may be rescinded only upon the petition of the adoptee with the NACC, or with the assistance of the SWDO if the adoptee is a minor, or if the adoptee is eighteen (18) years of age or over but who is incapacitated or by his or her guardian on any of the following grounds committed by the adopter(s):

(a) Repeated physical or verbal maltreatment by the adopter despite having undergone counseling;

(b) Attempt on the life of the adoptee;

(c) Abandonment and failure to comply with parental obligations.

Adoption, being in the best interest of the child, shall bot be subject to rescission by the adopter. However, the adopter may disinherit the adoptee for causes provided in Article 919 of the Civil Code of the Philippines.

SECTION 48. *Venue.* – The petition shall be filed with the RACCO where the adoptee resides.

SECTION 49. *Time Within Which to File Petition for Rescission.* – Upon existence of any ground or grounds mentioned in SECTION 47 of this Act, the adoptee or the adoption social worker must file the petition for rescission of adoption before the NACC.

SECTION 50. *Order to Answer.* – The NACC shall issue an order requiring the adverse party to answer the petition for rescission within fifteen (15) days from receipt of a copy thereof. The order and copy of the petition shall be served on the adverse party in such manner as the NACC may direct.

SECTION 51. *Decision.* – If the NACC finds that the allegations of the petition for rescission are true, it shall render a decision ordering the rescission of administrative adoption, with or without costs, as justice requires. The NACC shall:

(a) Order that the parental authority of the biological parent of the adoptee be restored, upon petition of the biological parents and if in the best interest of the child, if the adoptee is still a minor or incapacitated, and declare that the reciprocal rights and obligations of the adopter and the adoptee to each other shall be extinguished. If the biological parent of the adoptee has not filed a petition for restoration of parental authority, or is not known, or if restoring the parental authority over the adoptee is not the latter's best interest, the NACC shall take legal custody over the adoptee if still a child;

(b) Declare that successional rights shall revert to its status prior to adoption, as of the date of decision. Vested rights acquired prior to administrative rescission shall be respected;

(c) Order the adoptee to use the name stated in the original birth or foundling certificate; and

(d) Order the Civil Registrar where the adoption order was registered to cancel the new birth certificate of the adoptee and reinstate the original birth or foundling certificate.

SECTION 52. *Service of Decision.* – A certified true copy of the decision shall be served by the petitioner upon the Civil Registrar concerned within thirty (30) days. The Civil Registrar shall forthwith enter the rescission order in the register and submit proof of compliance to the NACC within thirty (30) days from the receipt of the order.

All the foregoing effects of rescission of adoption shall be without prejudice to the penalties imposable under the Revised Penal Code and special laws if the criminal acts are properly proven.

SECTION 53. *Effects of Rescission.* – If the petition for rescission of adoption is granted, the legal custody of the NACC shall be restored if the adoptee is still a child. The reciprocal right and obligations of the adopters and the adoptee to each other shall be extinguished.

In cases when the petition for rescission of adoption is granted and the biological parents can prove that they are in a position to support and care for the child and it is in the child's best interest, the biological parents may petition the NACC for the restoration of their parental authority over the child.

The NACC shall order the Civil Registrar General to cancel the amended birth certificate and restore the original birth certificate of the adoptee.

Succession rights shall revert to its status prior to adoption, but only as of the date of the approval of the petition for rescission of adoption. Vested rights acquired prior to rescission shall be respected.

All the foregoing effects of rescissions of adoption shall be without prejudice to the penalties imposed under the Revised Penal Code if the criminal acts are properly proven.

ARTICLE VII
VIOLATIONS AND PENALTIES

SECTION 54. *Violations and Penalties.* –

(a) The penalty of imprisonment ranging from six (6) years and one (1) day to twelve (12) years or a fine of not less than Fifty thousand pesos (P50,000.00), but not more than Two hundred thousand pesos (P200,000.00), or both, at the discretion of the court shall be imposed on any person who shall commit any of the following acts:

(1) Obtaining consent for an adoption through coercion, undue influence, fraud, improper material inducement, or other similar acts;

(2) Noncompliance with the procedures and safeguards provided by the law for adoption; or

(3) Subjecting or exposing the child to be adopted to danger, abuse, or exploitation.

(b) Any person who shall cause the fictitious registration of the birth of a child under the name of a person who is not the child's biological parent shall be guilty of simulation of birth, and shall be imposed the penalty of imprisonment from eight (8) years and one (1) day to ten (10) years and a fine not exceeding Fifty thousand pesos (P50,000.00).

(c) Any physician, midwife, nurse, or hospital personnel who, in violation of their oath of profession, shall cooperate in the execution of the abovementioned crime shall suffer the penalties herein prescribed as well as the penalty of permanent disqualification from the practice of profession following relevant prescription of the law and governing authorities.

(d) Any person who shall violate regulations relating to the confidentiality and integrity of records, documents, and communication of adoption petitions, cases, and processes shall suffer the penalty of imprisonment ranging from one (1) year to one (1) day to two (2) years, or a fine of not less than Five thousand pesos (P5,000.00) but not more than Ten thousand pesos (P10,000.00) or both, at the discretion of the court.

A penalty lower by two (2) degrees than the prescribed for consummated offenses under this Article shall be imposed upon the principals of the attempt to commit any of the acts herein enumerated. Acts punishable under this Article, when committed by a syndicate and where it involves a child shall be considered as an offense constituting child trafficking and shall merit the penalty of imprisonment from twenty (20) years and one (1) day to forty (40) years.

Act punishable under this Article are deemed committed by a syndicate if carried out by a group of three (3) or more persons conspiring or confederating with one another in carrying out any of the unlawful acts defined under this Article.

An offender who is a foreign national shall be deported immediately after service of sentence and perpetually denied entry to the country.

Any government official, employee, or functionary who shall be found guilty of violating any of the provisions of this Act, or who shall conspire with private individuals shall, in addition to the above-prescribed penalties, be penalized in accordance with existing civil service laws, rules and regulations: Provided, That upon the filing of a case, either administrative or criminal, said government official, employee, or functionary concerned shall automatically be suspended until the resolution of the case.

Under this Act, adoption discrimination acts, including labelling, shaming, bullying, negative stigma, among others, are prohibited. Any person who shall commit said adoption discrimination acts shall be penalized with a fine of not less than Ten thousand pesos (P10,000.00) but not more than Twenty thousand pesos (P20,000.00), at the discretion of the court.

ARTICLE VIII
FINAL PROVISIONS

SECTION 55. *Information Dissemination.* – The NACC, in coordination with the DILG, Department of Education (DepEd), Department of Justice (DOJ), Department of Health (DOH), Council for the Welfare of Children (CWC), Philippine Information Agency (PIA), Civil Service Commission (CSC), GSIS, Association of Child Caring Agencies of the Philippines (ACCAP), Leagues of Cities and Municipalities of the Philippines, NGOs focused on child care, and the media, shall disseminate to the public information regarding this Act and its implementation and ensure that adoption and alternative child care are portrayed on mass media truthfully and free from stigma and discrimination.

The PIA shall strive to rectify mass media portrayals that adopted children are inferior to other children, and shall enjoin the Kapisanan ng mga Brodkaster ng Pilipinas, all print, media, and various social media platforms to disseminate positive information on adoption.

The DOH shall ensure that hospital workers are knowledgeable on adoption processes and the criminal liability attached to the act of simulating birth records.

SECTION 56. *Transitory Clause*. – All judicial petitions for domestic adoption pending in court upon the effectivity Transitory Clause. of this Act may be immediately withdrawn, and parties of the same shall be given the option to avail of the benefits of this Act. Upon effectivity of this Act and during the pendency of the establishment of the NACC, the functions relating to foster care, issuance of CDCLAA, and adoption under Republic Act No. 11222 shall remain with the DSWD, specifically, its Program Management Bureau (PMB).

In relation to domestic administrative adoption and inter-country adoption process, a transition team composed of the DWSD and the ICAB shall act as the NACC. The ICAB Executive Director shall sit as Chairperson of the transitory team, assisted by the DSWD-PMB Director as the Vice-Chairperson. Personnel of the DWSD involved in adoption services may be seconded to the transition team during the three (3)-year period. During this period, social workers already working with adoption cases may continue to perform all duties assigned to adoption social workers in accordance with the provisions of this Act.

The functions of the RACCO shall, during the three (3) year period, be performed by the DWSD field offices (FOs), specifically the Adoption Resource and Referral Units (ARRU) therein. The transition team shall provide technical assistance and policy guidance to personnel of the FOs in handling cases. A transitory team shall be created from the DSWD and the ICAB to ensure non-disruption of performance of functions and continued smooth delivery of services during the migration of all alternative child care functions and services to the NACC.

During the transition period, all Orders of Adoption issued and signed by the ICAB Executive Director as chairperson of the transition team, upon the recommendation of its members, shall be approved by the Secretary of the DSWD, or his representative in the ICAB Board, within a period of then (10) days from the issuance of said order: Provided, That if no action was taken by either the Secretary or his representative in the ICAB Board during the prescribed period, the Order of Adoption shall be deemed approved.

Upon the establishment of the NACC not later than three (3) years from the effectivity of this Act, all applications, submissions, and petitions involving child care, including the pre-adoption and post-adoption services, pending before the PMB and the ICAB shall be immediately forwarded to the NACC, which shall perform its functions and powers under this Act. Thereafter, the appropriate personnel of the ICAB and the DSWD involved in alternative child care services shall be permanently transferred to the NACC. This relevant offices in the regional offices of the DSWD involved in alternative child care shall, hereafter, be converted into RACCOs.

Upon effectivity of this Act and before the establishment of the NACC, administrative adoption may be immediately availed of and the necessary guidelines to make the benefits of this Act immediately operative shall be included in the IRR.

SECTION 57. *Designation of the Second Week of June as Adoption and Alternative Child Care Week*. – The second week of June of every year shall be designated as Adoption and Alternative Child Care Week.

SECTION 58. *Appropriations*. – The amount necessary for the implementation of the provisions of this Act shall be included in the General Appropriations Act of the year following its enactment into law and thereafter.

SECTION 59. *Implementing Rules and Regulations (IRR)*. – The Secretary of the DSWD and the Executive Director of the ICAB, after due consultation with the PSA, DOJ, DILG, DepEd, DOH, DOLE, NBI, Philippine Association of Civil Registrars, Juvenile Justice and Welfare Council (JJWC), National Council on Disability Affairs (NCDA), DFA, PhilHealth, SSS, GSIS, CWC and the Office of the Solicitor General, and two (2) private individuals representing child-placing and child-caring agencies shall, within six (6) months from the effectivity of this Act, formulate the necessary guidelines to make the provisions of this Act operative: Provided, That guidelines to operationalize SECTION 56 of this Act shall be enacted within three (3) months from the effectivity of this Act.

SECTION 60. *Saving Clause*. – Nothing in this Act shall affect any right of an adoptee acquired by judicial proceeding or otherwise before the commencement of this Act.

SECTION 61. *Separability Clause*. - If any provision or part of this Act is declared unconstitutional or invalid, the remaining parts or provisions not affected shall remain in full force and effect.

SECTION 62. *Repealing Clause*. – Republic Act No. 8552 ND Republic Act No. 9523 are hereby repealed, and Republic Act No. 8043, Republic Act No. 11222, and Republic Act No. 10165 are amended accordingly. All laws, decrees, letters of instruction, executive issuances, resolutions, orders or parts thereof which are inconsistent with the provisions of this Act are hereby repealed, modified, or amended accordingly.

SECTION 63. *Effectivity*. – This Act shall take effect fifteen (15) days after its publication in the Official Gazette or in a newspaper of general circulation.

Approved: January 6, 2021.

REPUBLIC ACT NO. 11596

AN ACT PROHIBITING THE PRACTICE OF CHILD MARRIAGE AND IMPOSING PENALTIES FOR VIOLATION THEREOF

SECTION 1. *Declaration of Policy.* — Consistent with Section 13, Article II of the Philippine Constitution, the State recognize the vital role of the youth in nation-building and promotes and protects their physical, moral, spiritual, intellectual, and social well-being. In the pursuit of this policy, the State shall abolish all traditional and cultural practices and structures that perpetuate discrimination, abuse and exploitation of children such as the practice of child marriage.

Further, the State recognizes the role of women in nation-building and shall therefore protect and promote their empowerment. This entails the abolition of the unequal structures and practices the perpetuate discrimination and inequality.

The State affirms the human rights of children consistent with its obligations under (1) international conventions to which the Philippines is a State Party, including the (a) Universal Declaration of Human Rights; (b) Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages; (c) UN Convention on the Rights of the Child; (d) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); (e) Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography; and (f) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; and (2) domestic laws like Republic Act No. 7610, otherwise known as the "Special Protection of Children Against Child Abuse, Exploitation and Discrimination Act."

The State affirms that marriage shall be entered into only with the free and full consent of capacitated parties, and child betrothal and marriage shall have no legal effect.

Pursuant to these policies, the State thus views child marriage as a practice constituting child abuse because it debases, degrades, and demeans the intrinsic worth and dignity of children.

SECTION 2. *Interpretation of this Act.* — In the interpretation of this Act, the best interests of the child shall be the primary consideration.

SECTION 3. *Definition of Terms.* — As used in this Act:

(a) Child refers to any human being under eighteen (18) years of age, or any person eighteen (18) years of age or over but who is unable to fully take care and protect oneself from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition;

(b) Child marriage refers to any marriage entered into where one or both parties are children as defined in the paragraph above, and solemnized in civil or church proceedings, or in any recognized traditional, cultural or customary manner. It shall

include an informal union or cohabitation outside of wedlock between an adult and a child, or between children;

(c) Guardians refer to relatives or individuals taking custody of a child in the absence of the parents, or anyone to whom a child is given or left for care or custody, whether permanent or temporary; or persons judicially appointed by a competent court as guardians;

(d) Parents refer to biological parents or adoptive parents; and

(e) Solemnizing officers refers to any person authorized to officiate a marriage under Executive Order No. 209, otherwise known as "The Family Code of the Philippines," or recognized to celebrate marriages by reason of religion, tradition, or customs.

SECTION 4. *Unlawful Acts.* — The following are declared unlawful and prohibited acts:

(a) Facilitation of Child Marriage. – Any person who causes, fixes, facilitates, or arranges a child marriage shall suffer the penalty of *prision mayor* in its medium period and a fine of not less than Forty thousand pesos (P40,000.00): *Provided, however*, That should the perpetrator be an ascendant, parent, adoptive parent, step parent, or guardian of the child, the penalty shall be *prision mayor* in its maximum period, or fine of not less than Fifty thousand pesos (P50,000.00), and perpetual loss of parental authority: *Provided, further*, That any person who produces, prints, issues and/or distributes fraudulent or tampered documents such as birth certificates, affidavits of delayed registration of birth and/or foundling certificates for the purpose of misrepresenting the age of a child to facilitate child marriage or evade liability under this Act shall be liable under this section, without prejudice to liability under other laws: *Provided, finally*, That if the perpetrator is a public officer, he or she shall be dismissed from the service and may be perpetually disqualified from holding office, at the discretion of the courts;

(b) Solemnization of Child Marriage. – Any person who performs or officiates a child marriage shall suffer the penalty of *prision mayor* in its maximum period and a fine of not less than fifty thousand pesos (P50,000.00): *Provided, however,* that if the perpetrator is a public officer, he or she shall be dismissed from the service and may be perpetually disqualified from holding office, at the discretion of the courts; and

(c) Cohabitation of an Adult with a Child Outside Wedlock. – An adult partner who cohabits with a child outside wedlock shall suffer the penalty of *prision mayor* in its maximum period and a fine of not less than Fifty thousand pesos (P50,000.00): *Provided, however,* That if the perpetrator is a public officer, he or she shall likewise be dismissed from the service and may be perpetually disqualified from holding office, at the discretion of the courts: *Provided, finally,* That this shall be without prejudice to higher penalties that may be imposed in the Revised Penal Code and other special laws.

SECTION 5. *Public Crimes.* — The foregoing unlawful and prohibited acts are deemed public crimes and be initiated by any concerned individual.

SECTION 6. *Legal Effect of a Child Marriage.* — Child marriage is void *ab initio*, and the action or defense for the declaration of absolute nullity of a child marriage shall not prescribe in accordance with Articles 35 and 39 of the Family Code of the Philippines. Articles 50 to 54 of the Family Code of the Philippines shall govern on matters of support, property relations, and custody of children after the termination of the child marriage.

SECTION 7. *Enabling Social Environment.* — To reinforce the prohibition and criminalization of child marriage, the government shall create an enabling social environment where the practice of child marriage shall not thrive, and for such purpose, the following policies shall be implemented, particularly for girls: (a) empowerment of children through the provision of information, skills and support networks; (b) enhancement of children's access to and completion of quality education; (c) provision of economic support and incentives to children and their families; and (d) application of strategic interventions to influence and empower parents and community leaders to discourage and eradicate the practice of child marriage.

Culturally-appropriate and comprehensive programs and services shall be formulated by the Department of Social Welfare and Development (DSWD) in coordination with the government agencies identified in Section 8 of this Act as duty bearers and with concerned civil society organizations (CSOs) and nongovernment organizations (NGOs). This shall be made and initiated by the DSWD within six (6) months from the effectivity of this Act.

SECTION 8. *Implementing Government Agencies as Duty Bearers.* — The provisions of this Act shall be fully and promptly implemented by the following government departments and agencies within their respective jurisdictions:

(a) DSWD – shall take the lead in the implementation of this Act and create programs that will address the prevalence of child marriage and provide appropriate services, including but not limited to legal services, health services, psychosocial services, counseling, educational, livelihood and skills development, temporary shelter and all other assistance necessary to protect victims of child marriage and their offspring. It shall include awareness campaigns on the negative effects of child marriage;

(b) Council for the Welfare of Children (CWC) – shall work closely with the DSWD in strengthening policies and creating programs to prohibit and end child marriage. It shall include the advocacy to prevent child marriage in the Philippine Plan of Action to End Violence Against Children (PPAEVAC);

(c) Department of Justice (DOJ) – shall ensure that the penal provisions of this Act are carried out and provide access to justice and legal services to victims through the Public Attorney's Office (PAO);

(d) Department of the Interior and Local Government (DILG) – shall institute a systematic information and prevention campaign against child marriage through barangay-level education programs and initiatives that are culturally-sensitive and child-centered. The DILG shall also mandate local government units (LGUs) to provide basic intervention for the rescue, recovery, rehabilitation and support of

victim of child marriages and their offspring; and establish a system of reporting cases of child marriage;

(e) Department of Education (DepEd) – shall include culturally-sensitive and age-appropriate modules and discussions on the impacts and effects of the child marriage in its comprehensive sexuality education curriculum;

(f) Department of Health (DOH) – shall ensure access to health services for the prevention of child marriage by providing sexual and reproductive health services and mental health services for children in child marriages, and appropriate health services for their offspring;

(g) Supreme Court of the Philippines – shall organize training programs for all relevant courts on the prevention of child marriage and other provisions of this Act and shall ensure strict application of the law and its interpretation in the best interests of the child;

(h) Philippine Commission on Women (PCW) – shall integrate dissemination of the provisions of this Act in programs on public awareness and behavior-change communications;

(i) Commission on Human Rights (CHR) – shall monitor the implementation of this Act as Gender Ombud and through its Child Rights Center/Desk;

(j) National Commission on Muslim Filipinos (NCMF) – shall include in its program of action awareness-raising campaigns within Muslim communities on the impacts and effects of child marriage in the overall health and development of children, monitor and report cases of child marriages in communities under its jurisdiction, ensure the faithful implementation of this Act and its interpretation in the best interests of the child; and

(k) National Commission for Indigenous Peoples (NCIP) – shall include in its program of action awareness-raising campaigns within indigenous cultural communities/indigenous peoples on the impacts and effects of child marriage in the overall health and development of children, monitor and report cases of child marriages in communities under its jurisdiction, ensure the faithful implementation of this Act and its interpretation in the interests of the child.

SECTION 9. *Participation of Women, Girls, Youth Organizations, and Civil Society Organizations.* — Implementing government agencies shall ensure continuing consultations with women, girls, and youth organizations as well as CSOs, whose full and active participation shall be guaranteed in every step and stage of decision-making processes.

SECTION 10. *Implementing Rules and Regulations.* — Within sixty (60) days from the effectivity of this Act, the DSWD as lead agency shall, in coordination with the DOH, the DepEd, the CWC, the NCMF, the NCIP, and one (1) representative each from CSOs representing women, children, Muslim Filipinos, and indigenous cultural communities/indigenous peoples, and in consultation with other concerned government agencies and stakeholders, promulgate rules and regulations to implement this Act.

SECTION 11. *Transitory Provision.* — Within one (1) year from the effectivity of this Act, the NCMF and NCIP shall extensively undertake measures and programs in their respective jurisdictions to assure full compliance with this Act. During the transition period of one (1) year, the applications of Section 4(a) and (b), and Section 5 of this Act to Muslim Filipinos and indigenous cultural communities/indigenous peoples shall be suspended.

SECTION 12. *Separability Clause.* — If any provision or part of this Act is declared invalid or unconstitutional, the remaining parts or provisions not affected thereby shall remain in full force and effect.

SECTION 13. *Repealing Clause.* — All laws, decrees, executive orders, and issuances, rules and regulations, or parts thereof which are inconsistent with the provisions of this Act are hereby repealed or modified accordingly.

SECTION 14**.** *Effectivity.* — This Act shall take effect immediately after fifteen (15) days after its publication in the Official Gazette or in one (1) newspaper of general circulation.

Approved: December 10, 2021.
Not yet published in any newspaper.

REPUBLIC ACT NO. 11576

AN ACT FURTHER EXPANDING THE JURISDICTION OF THE METROPOLITAN TRIAL COURTS, MUNICIPAL TRIAL COURTS IN CITIES, MUNICIPAL TRIAL COURTS, AND MUNICIPAL CIRCUIT TRIAL COURTS, AMENDING FOR THE PURPOSE BATAS PAMBANSA BLG. 129, OTHERWISE KNOWN AS THE "JUDICIARY REORGANIZATION ACT OF 1980," AS AMENDED

SECTION 1. — Section 19 of Bataas Pambansa Blg. 129, otherwise known as the "The Judiciary Reorganization Act of 1980" as amended, is hereby amended as follows:

"Section 19. *Jurisdiction of the Regional Trial Courts in Civil Cases* — Regional Trial Courts shall exercise exclusive original jurisdiction:

"xxx xxx xxx

"(2) In all civil actions which involve the title to, or possession of, real property, or any interest therein, where the assessed value exceeds Four hundred thousand pesos (P400,000.00), except for forcible entry into and unlawful detainer of lands or buildings, original jurisdiction over which is conferred upon the Metropolitan Trial Courts, and Municipal Trial Courts in Cities, Municipal Trial Courts, and Municipal Circuit Trial Courts;

"(3) In all actions in admiralty and maritime jurisdiction where the demand or claims exceeds Two million pesos (P2,000,000.00);

"(4) In all matters of probate, both testate and intestate, where the gross value of the estate exceeds Two million pesos (P2,000,000.00);

"xxx xxx xxx

"(8) In all other cases in which the demand, exclusive of interest, damages of whatever kind, attorney's fees, litigation expenses and costs or the value of the property in controversy exceeds Two million pesos (P2,000,000.00)."

SECTION 2. — Section 33 of the same law is hereby amended to read as follows:

"Section 33. *Jurisdiction of Metropolitan Trial Courts, Municipal Trial Courts in Cities, Municipal Trial Courts, and Municipal Circuit Trial Courts in Civil Cases.* — Metropolitan Trial Courts, Municipal Trial Courts in Cities, Municipal Trial Courts, and Municipal Circuit Trial Courts shall exercise:

"(1) Exclusive original jurisdiction over civil actions and probate proceedings, testate and intestate, including the grant of provisional remedies in proper cases, where the value of the personal property, estate, or amount of the demand does not exceed Two million pesos (P2,000,000.00), exclusive of interest, damages of whatever kind, attorney's fees, litigation expenses, and costs, the amount of which must be specifically alleged: Provided, That interest, damages of whatever kind, attorney's fees, litigation expenses, and costs shall be included in the determination of the filing fees: Provided, further, That where there are several claims or causes of actions between the same or different parties, embodied in the same complaint, the amount of the demand shall be the totality of the claims in all the causes of action, irrespective of whether the causes of action arose out of the same or different transactions;

"xxx xxx xxx

"(3) Exclusive original jurisdiction in all civil actions which involve title to, or possession of, real property, or any interest therein where the assessed value of the property or any interest therein does not exceed Four hundred thousand pesos (P400,000.00) exclusive on interest, damages of whatever kind, attorney's fees, litigation expenses and costs: Provided, That in cases of land not declared for taxation purposes, the value of such property shall be determined by the assessed value of the adjacent lots.

"(4) Exclusive original jurisdiction in admiralty and maritime actions where the demand or claim does not exceed Two million pesos (P2,000,000.00)."

SECTION 3. *Delegated Authority of the Supreme Court to Adjust the Jurisdictional Amounts for First and Second Level Courts.* — The Supreme Court, unless otherwise provided by law, without prejudice, however, on the part of the Congress to adjust the amounts when the circumstances so warrant, may adjust the jurisdictional amount for first and second level courts to: (1) reflect the extraordinary supervening inflation or deflation of currency; (2) reflect change in the land valuation; or (3) maintain the proportion of caseload between first and second level courts.

SECTION 4. — The provisions of this Act shall apply prospectively to all civil cases filed in the second level courts and first level courts from the date of its effectivity thereof.

SECTION 5. *Separability Clause.* — If any provision of this Act is declared unconstitutional, the same shall not affect the validity and effectivity of the other provisions thereof.

SECTION 6. *Repealing Clause.* — All laws, decrees, and orders inconsistent with the provisions of this Act shall be considered amended or modified accordingly.

SECTION 7. *Effectivity*. — This Act shall take effect fifteen (15) days following its publication in the Official Gazette or in two (2) national newspapers of general circulation.

Approved: July 30, 2021
Published in the Manila Bulletin on August 6, 2021

REPUBLIC ACT NO. 11647

AN ACT PROMOTING FOREIGN INVESTMENTS, AMENDING THEREBY REPUBLIC ACT NO. 7042, OTHERWISE KNOWN AS THE "FOREIGN INVESTMENTS ACT OF 1991," AS AMENDED, AND FOR OTHER PURPOSES

SECTION 1. Section 2 of Republic Act No. 7042 (RA No. 7042), as amended by Republic Act No. 8179, otherwise known as the "Foreign Investments Act of 1991," is hereby amended to read as follows:

"SECTION 2. *Declaration of Policy.* — Recognizing that increased capital and technology benefits the Philippines and that global and regional economies affect the Philippine economy, it is the policy of the State to attract, promote and welcome productive investments from foreign individuals, partnerships, corporations, and governments, including their political subdivisions, in activities which significantly contribute to sustainable, inclusive, resilient, and innovative economic growth, productivity, global competitiveness, employment creation, technological advancement, and countrywide development to the extent that foreign investment is allowed in such activity by the Constitution and relevant laws, and consistent with the protection of national security. Foreign investments shall be encouraged in enterprises that significantly expand livelihood and employment opportunities for Filipinos; enhance economic value of agricultural products; promote the welfare of Filipino consumers; expand the scope, quality and volume of exports and their access to foreign markets; and/or transfer relevant technologies in agriculture, industry and support services. Foreign investments shall be welcome as a supplement to Filipino capital and technology in those enterprises serving mainly the domestic market.

"The State shall promote accountability and integrity in public office, as well as the promotion and administration of efficient public service to entice foreign investments.

"Foreign investments shall be conducted based on the principles of transparency, reciprocity, equity, and economic cooperation.

"x x x."

SECTION 2. Section 3 of RA No. 7042 is hereby further amended to read as follows:

"SECTION 3. *Definitions.* — As used in this Act:

"(b) The term "investment" shall mean equity participation in any enterprise organized or existing under the laws of the Philippines and duly recorded in the enterprise's stock and transfer book, or any equivalent registry of ownership;

"(c) The term "foreign investment" shall mean an equity investment made by a non-Philippine national in the form of foreign exchange and/or other assets actually transferred to the Philippines and duly registered with the Bangko Sentral ng Pilipinas;

"(d) x x x;

"(e) x x x;

"(f) x x x;

"(g) x x x;

"(h) The term "practice of profession" shall mean an activity or undertaking rendered and performed by a registered and duly licensed professional or holder of a special temporary permit as defined in the scope of practice of a professional regulatory law; and

"(i) The term "pipeline transportation" shall mean the sector which includes transport of goods or materials through a pipeline such as crude, refined petroleum, natural gas, biofuels, and other chemically stable substance."

SECTION 3. Section 4 of RA No. 7042 is hereby amended to read as follows:

"SECTION 4. *Inter-Agency Investment Promotion Coordination Committee.* — There is hereby created the "Inter-Agency Investment Promotion Coordination Committee", hereinafter referred to as the "IIPCC", which shall be the body that will integrate all promotion and facilitation efforts to encourage foreign investments in the country. The Department of Trade and Industry (DTI) shall act as the IIPCC's lead agency. The IIPC shall be composed of the:

"(a) Secretary of the DTI, to preside as Chairperson;

"(b) Secretary/Undersecretary of the Department of Finance (DOF) as Vice-Chairperson;

"(c) One (1) representative from the DTI-Board of Investments (BOI);

"(d) One (1) representative from the DTI-Philippine Economic Zone Authority (PEZA);

"(e) One (1) representative from the Department of Foreign Affairs (DFA), Office of the Undersecretary for Multilateral Affairs and International Economic Relation (OUMAIER);

"(f) One (1) representative from the National Economic and Development Authority (NEDA);

"(g) One (1) representative from the Department of Information and Communications Technology (DICT);

"(h) One (1) representative from the Technical Education and Skills Development Authority (TESDA); and

"(i) Four (4) representatives composed of one (1) representative each from the National Capital Region, Luzon, Visayas and Mindanao, to be chosen from a list of nominees prepared and submitted by nationally recognized leading industry or business chambers, who shall be of known competence, probity, integrity and expertise in any of the fields of investment, advertising, banking, finance management and law, with at least ten (10) years of outstanding management or leadership experience.

"The Chairperson may from time to time, as a particular foreign investment may require, request the participation of other government departments and agencies or

instrumentalities, local government units (LGUs), nongovernmental organizations (NGOs) and local business chambers and enterprises.

"The IIPCC shall coordinate and, when necessary, partner with and assist the Bases Conversion and Development Authority (BCDA), Authority of the Freeport Area of Bataan (AFAB), Clark Development Corporation (CDC), Subic Bay Metropolitan Authority (SBMA), Cagayan Economic Zone Authority (CEZA), John Hay Management Corporation (JHMC), Poro Point Management Corporation (PPMC), Zamboanga City Special Economic Zone Authority (ZCSEZA), PHIVIDEC Industrial Authority (PIA), Aurora Pacific Economic Zone and Freeport Authority (APECO), Tourism Infrastructure and Enterprise Zone Authority (TIEZA) and all other similar existing authorities or that may be created by law, in promoting foreign investments to the country: *Provided,* That this shall not include the administration, design, and grant of fiscal incentives.

"The BOI is designated as the secretariat of the IIPC, implementing its policies and resolutions."

SECTION 4. A new section of RA No. 7042, as amended, is inserted as Section 4-A to read as follows:

"SECTION 4-A. *Powers and Functions of the IIPC.* —

"(a) To establish both a medium-and-long-term Foreign Investment Promotion and Marketing Plan (FIPMP), coordinating all existing investment development plans and programs under the BOI, PEZA, and various investment promotion agencies (IPAs), LGUs, and other agencies, as delineated in Section 4-B of this Act;

"(b) To design a comprehensive marketing strategy and campaign, promoting the country as a desirable investment area;

"(c) To support inbound and outbound foreign direct and trade missions for new international markets to explore the country as a possible location to do business;

"(d) To encourage and support research and development in priority areas indicated by the FIPMP;

"(e) To monitor actual performance against measurable and timebound targets in the FIPMP, to include job generation;

"(f) To submit annual evaluation and reports to the President of the Philippines and the Congress regarding the activities of the IIPCC;

"(g) To establish and regularly update an online database including a directory of ready local partners from priority sectors under the FIPMP, as a tool for promoting investments and business matching in local supply chains; and

"(h) To support local government efforts to promote foreign direct investments, expedite compliance with national requirements and address other safeguards and services requested by foreign investors in their different localities involved with said foreign investments."

SECTION 5. A new section of RA No. 7042, as amended, is inserted as Section 4-B to read as follows:

"SECTION 4-B. *Development of the Foreign Investment Promotion and Marketing Plan (FIPMP).* — A comprehensive and strategic Foreign Investment and Marketing Plan (FIPMP) shall be developed by the IIPC for the medium five-year and the long-term ten-year plan: *Provided*, That it is based on competitive advantages, natural resources, skill and educational development, traditional linkages, and international market potential, and it is fully consistent with the strategic investment priorities plan under Title XIII of the National Internal Revenue Code, as amended: *Provided, further,* That an online portal containing the FIPMP shall thereafter be uploaded, containing further details such as the IIPCC's procedure, contacts, schedules, among others.

"Said databases should also include a directory of local enterprises capable and willing to partner with potential foreign investors. The IIPC shall consult local chambers of commerce, sectoral, business groups, and other individual partners whenever foreign applicants seek partners, subcontractors, suppliers, and other local business counterparts.

"Similarly, Department of Education (DepEd), CHED, TESDA, Department of Labor and Employment (DOLE), the Professional Regulation Commission (PRC), and other training agencies involved in education and skills development shall likewise direct curriculum and training efforts toward manpower requirements of the FIPMP.

"The IIPCC shall coordinate with the concerned government agencies to ensure their alignment with the FIPMP.

"DTI shall promulgate such rules and regulations necessary to implement this provision."

SECTION 6. Section 5 of RA No. 7042, as amended is hereby amended to read as follows:

"SECTION 5. *Registration of Investments of Non-Philippine Nationals.* — Without need of prior approval, a non-Philippine national, as that term is defined in Section 3(a), and not otherwise disqualified by law, may upon registration with the Securities and Exchange Commission (SEC), or the DTI in the case of single proprietorships, do business as defined in Section 3(d) of this Act or invest in a domestic enterprise up to one hundred (100%) of its capital, unless participation of non-Philippine nationals in the enterprise is prohibited or limited to a smaller percentage by existing law and/or under the provisions of this Act. The SEC or the DTI, as the case may be, shall not impose any limitations on the extent of foreign ownership in an enterprise additional to those provided in this Act: *Provided, however,* That any enterprise seeking to avail of incentives under the Omnibus Investment Code of 1987 must apply for registration with the BOI, which shall process such application for registration in accordance with the criteria for evaluation prescribed in said Code: *Provided, finally,* That a non-Philippine national intending to engage in the same line of business as an existing joint venture, in which he or his majority shareholder is a substantial partner, must disclose the fact and the names and addresses of the partners in the existing joint venture in his application for registration with the SEC. During the transitory period as provided in Section 15 hereof, SEC shall disallow registration of the applying non-Philippine national if the existing joint venture enterprise, particularly the Filipino partners therein, can reasonable prove they are capable to make the investment needed for the

domestic market activities to be undertaken by the competing applicant. Upon effectivity of this Act, SEC shall effect registration of any enterprise applying under this Act within fifteen (15) days upon submission of completed requirements."

SECTION 7. Section 6 of RA No. 7042, as amended, is hereby amended to read as follows:

"SECTION 6. *Foreign Investments in Export Enterprises.* — Foreign Investment in export enterprises whose products and services do not fall within Lists A and B of the Foreign Investment Negative List provided under Section 8 hereof is allowed up to one hundred percent (100%) ownership.

"Export enterprises which are non-Philippine nationals shall register with BOI and submit the reports that may be required to ensure continuing compliance of the export enterprise with its export requirement. BOI shall advise SEC or DTI, as the case may be, of any export enterprise that fails to meet the export ratio requirement. The SEC or DTI shall thereupon order the non-complying export enterprise to reduce its sales to the domestic market to not more than forty percent (40%) of its total production; failure to comply with such SEC or DTI order, without justifiable reason, shall subject the enterprise to cancellation of SEC or DTI registration, and/or the penalties provided in Section 14 hereof.

"Export enterprises shall register and comply with the export requirements in accordance with Title XIII of the National Internal Revenue Code (NIRC), as amended, for purposes of availing any tax incentive or benefit."

Section 8 of RA No. 7042, as amended is hereby further amended to read as follows:

"SECTION 8. *List of Investment Areas Reserved to Philippine Nationals (Foreign Investment Negative List).* — x x x

"(a) x x x

"(b) x x x

"(1) which are defense-related activities, requiring prior clearance and authorization from Department of National Defense (DND) to engage in such activity, such as the manufacture, repair, storage and/or distribution of firearms, ammunition, lethal weapons, military ordinance, explosives, pyrotechnics and similar material, unless such manufacturing or repair activity is specifically authorized by the Secretary of National Defense; or

"(2) x x x

"Except as otherwise provided under Republic Act No. 8762, otherwise known as the Retail Trade Liberalization Act of 2000 and other relevant laws, micro and small domestic market enterprises with paid-in equity capital less than the equivalent of Two hundred thousand US dollars (US$200,000.00), are reserved to Philippine nationals: *Provided*, That if: (1) they involve advanced technology as determined by the "Department of Science and Technology, or (2) they are endorsed as startup or startup enablers by the lead host agencies pursuant to Republic Act No. 11337, otherwise known as the Innovative Startup Act; or (3) a majority of their direct employees are Filipinos, but in no case shall the number of Filipino employees be less

than fifteen (15), then a minimum paid-in capital of One hundred thousand US dollars (US$100,000.00) shall be allowed to non-Philippine nationals: *Provided, further,* That registered foreign enterprises employing foreign nationals and enjoying fiscal incentives shall implement an understudy or skills development program to ensure the transfer of technology or skills to Filipinos. Compliance with this requirement shall be regularly monitored by the DOLE.

"Nothing in this Act shall operate as a cause for termination of employees hired prior to the effectivity of this Act. In all cases, the provisions of Presidential Decree No. 442, otherwise known as the "Labor Code of the Philippines' and other applicable laws, rules and regulations issued by DOLE shall prevail.

"Amendments to List B may be made upon recommendation of the Secretary of National Defense, or the Secretary of Health, endorsed by the NEDA, or upon recommendation *motu proprio*, of NEDA, approved by the President, and promulgated through the issuance of the Foreign Investment Negative List by Executive Order.

"x x x

"Amendments to the Foreign Investment Negative List shall not be made more often than once every two (2) years: *Provided*, That the NEDA, in consultation and cooperation with the BOI, DTI, SEC, DIT, IPAs and other pertinent government agencies, shall, every two (2) years, (i) review the Foreign Investment Negative List, and (ii) submit to Congress an analysis of foreign investment performance economic activities of the industries under the Foreign Investment Negative List and the reasons for the recommended amendments, if any: *Provided, further,* That NEDA shall recommend to Congress investment-related matters requiring necessary legislation."

SECTION 9. A new section of RA No. 7042, as amended, is inserted as Section 16 to read as follows:

"SECTION 16. *Review of Strategic Industries.* – Upon the order of the President, the IIPCC, in coordination with the National Security Council (NSC), and the NEDA, shall review foreign investments involving military-related industries, cyber infrastructure, pipeline transportation, or such other activities which may threaten territorial integrity and the safety, security and well-being of Filipino citizens, when:

"(a) Made by a foreign government-controlled entity or state-owned enterprises except independent pension funds, sovereign wealth funds and multi-national banks; or

"(b) Located in geographical areas critical to national security.

"Any recommendation to suspend, prohibit, or otherwise limit a reviewed foreign investment under this section shall be transmitted to the Office of the President for appropriate action."

SECTION 10. A new section of RA No. 7042, as amended, is inserted as Section 17 to read as follows:

"SECTION 17. *Anti-Graft Practices in Foreign Investment Promotions.* – Public officials and employees involved in foreign investment promotions shall uphold the highest standards of public service, accountability, and integrity. Accordingly, any public official or employee involved in foreign investment promotions who shall commit

any of the acts under Section 3 of Republic Act No. 3019, as amended, otherwise known as the Anti-Graft and Corrupt Practices Act, shall, in addition to the penalties provided under Section 9(a) of the said Act, be punished by a fine of not less than Two million pesos (P2,000,000.00) but not more than Five million pesos (P5,000,000.00)."

SECTION 11. A new section of RA No. 7042, as amended, is inserted as Section 18 to read as follows:

"SECTION 18. *Non-Applicability.* – This Act shall not apply to banking and other financial institutions which are governed and regulated by Republic Act No. 8791, otherwise known as the "General Banking Law of 2000" and other laws under the supervision of the Bangko Sentral ng Pilipinas. Moreover, this Act shall not apply to the practice of professions that are covered by specific laws and fall under the jurisdiction of various Professional Regulatory Boards (PRBs) or any other equivalent regulating body, or those subject to reciprocity agreements with other countries.

"To the extent applicable, and provided that the necessary licenses, work permits and visas are property secured from the relevant government agencies, any occupation, employment or practice of profession not covered by any special law or reciprocity agreement as provided in the previous paragraph shall be subject to the provisions of this Act."

SECTION 12. The remaining sections in RA No. 7042, as amended, are hereby renumbered accordingly.

SECTION 13. *Appropriations.* – For purposes of implementing this Act, the amount of Fifty million pesos (P50,000,000.00) from the Contingent Fund of the General Appropriations Act for the current fiscal year is hereby appropriated and shall be released to the IIPCC. Thereafter, the amounts necessary to carry out this Act shall be included in the General Appropriation Act (GAA).

SECTION 14. *Implementing Rules and Regulations.* – The NEDA, in consultation with the DTI and the DOF, is hereby directed to amend the existing rules and regulations necessary for the efficient implementation of this Act.

SECTION 15. *Repealing Clause* – Republic Act No. 7042, as amended, is hereby amended. All laws, decrees, orders, rules and regulations or other issuances or parts thereof inconsistent with the provisions of this Act are hereby repealed or modified accordingly.

SECTION 16. *Separability Clause* – If any portion or provision of this Act is declared unconstitutional, the remainder of this Act or any provision not affected shall remain in force and effect.

SECTION 17. *Effectivity.* – This Act shall take effect after fifteen (15) days following its publication in the *Official Gazette* or in a newspaper of general circulation in the Philippines.

Approved: March 02, 2022.

Not yet published in any newspaper.