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ADDRESS:

UST LAW REVIEW Office, Mezzanine Floor,
Faculty of Civil Law, Main Building, University
of Santo Tomas, España, Manila.

WEBSITE: http://lawreview.ust.edu.ph/
E-MAIL: ustlawreviewofficial@gmail.com
FACEBOOK: https://www.facebook.com/ustlawrev

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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.

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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.

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.

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 issue.

This second issue is a testament to the resilience of the UST LAW REVIEW and its commitment to igniting legal discourse.

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RECENT JURISPRUDENCE

DEBUNKING THE NON-EXISTENCE OF DOMESTIC VIOLENCE AGAINST MEN: A BASIS TO REVISIT REPUBLIC ACT 9262

Danielito Dimaano Jimenez[*]

INTRODUCTION

Intimate partner violence and gender-based violence

Intimate partner violence[1] (IPV) or domestic violence is concededly a human rights violation and a global public health issue.[2] The term domestic violence refers to abusive behavior in any personal relationship that allows one partner[3] to intimidate or gain power and control over the other. This is often thought of to occur between married spouses or in other intimate

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[*] Atty. Danielito Dimaano Jimenez or Atty. DJ is a true bloodied Thomasian who completed all his schooling at the University of Santo Tomas from elementary, high school, and college to his Master of Laws, where he obtained a general weighted average of 1.0568, ranking first for Batch December 2019. He is currently a candidate for a Doctor of Laws at the same UST Graduate School of Law. To date, Atty. DJ remains a well-respected and renowned law practitioner and is the managing partner of Jimenez Law Office. Atty. DJ has taught at the UST Faculty of Civil Law and is currently teaching at the UST Legal Management Department as one of its senior faculty members.

[1] "Intimate Partner Violence" (IPV) is often used synonymously with gender-based violence. Other terms have included wife beating, wife battering, man beating, husband battering, relationship violence, domestic abuse, spousal abuse, and family violence with some legal jurisdictions having specific definitions. (Jacquelyn C. Campbell, Health consequences of intimate partner violence. Lancet, 59, 1331-1336 (2002).

[2] (Jacquelyn C. Campbell, Health consequences of intimate partner violence. Lancet, 59, 1331-1336 (2002); Garcia-Moreno, Jansen, Ellsberg, Heise, & Watts, 2006; Patricia Tjaden & Nancy Thoennes, Prevalence and consequences of male-to-female and female-to-male intimate partner violence as measured by the National Violence Against Women Survey. Violence Against Women, 6(2), 142-161 (2000).

[3] "Partner" as defined by H.B. 4888 includes intimate relationships of heterosexual, lesbian, gay, bisexual, queer, intersex, cisgender, and transgender partners. (An Act Amending R.A. No. 9262 or "An Act Defining Violence Against Women and Their Children, Providing For Protective Measures for Victims, Prescribing Penalties Therefore, And for Other Purposes", Expanding Its Coverage and Covered Acts Prescribing Penalties Therefore, and For Other Purposes," House Bill No. 4888)

relationships, but it actually refers to any family relationships or persons living in the same home.[4]

The United Nations defines gender-based violence as an act of violence that results in physical, sexual, or psychological harm or suffering to women, girls, men, and boys, as well as threats of such acts, coercion, or arbitrary deprivation of liberty. Often, however, it is gender-based violence that is highlighted and protected through gender-based laws. This is equally acknowledged as a violation of fundamental human rights.

While women are often the victims of gender-based violence and that violence against men is seemingly non-existent, gender-based violence applies to men on a wide scale. Male abuse is part and parcel of IPV and is, in fact, a subject often disregarded for various reasons. Increasing research has highlighted the health burdens, intergenerational effects, and demographic consequences of such violence.[5]

To a wider extent, domestic abuse does not just cover the intentional infliction of physical injury. Oftentimes, especially towards men, domestic abuse covers psychological or mental injury resulting from undue pressure, intimate or sexual deprivation, and, to some extent, financial abuse or the exploitation of one's income or other financial resources. It also includes the withholding of necessary medical care to treat a partner's physical and mental health needs by one having the care and responsibility, although the last two may equally be applicable to all genders.

The Anti-Violence Against Women and their Children Law

In the Philippines, various gender-based laws have been legislated to address domestic violence. These include Republic Act No. 9262[6], otherwise known as the Anti-Violence Against Women and Their Children Act of 2004

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[4] Domestic Violence. Legal Dictionary. https://legaldictionary.net/domestic-violence/ (last accessed Nov. 5, 2019)

[5] United Nations 2006.

[6] "Republic Act 9262" or the "Anti-Violence Against Women and Their Children Act of 2004 refers to an act defining violence against women and their children, providing for protective measures for victims, prescribing penalties therefore, and for other purposes. (An Act Defining Violence Against Women and Their Children, Providing For Protective Measures For Victims, Prescribing Penalties Therefore, And For Other Purposes, Republic Act No. 9262 (2004))

(R.A. 9262). Under this Act, violence against women and children is classified not as a personal or a private offense but as a public crime, and all forms of abuse, be it psychological,[7] economic,[8] or physical,[9] are covered.

One of the essential protections under this law is that it allows women and their children to secure a Barangay Protection Order and/or Temporary or Permanent Protection Order from family courts. Over the past 15 years since the effectivity of R.A. 9262, the number of domestic violence, mainly against women and children, is still on an upward trend. In 2016, there were a total of 1,749 cases involving a variety of cases against women including, but not limited, to sexual abuse, physical abuse and maltreatment, sexual exploitation, and psychological and emotional abuse.

R.A. 9262 promotes safety and empowers and protects women and children victims from any form of violence. The constructs of such law only recognize women and children as victims of abuse. It is apparent that it does not acknowledge that men could also be possible victims. Instead, they are viewed as the perpetrators of abuse. Furthermore, there is an absence of actual statistical data and reports on male victims of domestic abuse.

In the landmark case of Garcia v. Drilon,[10] the Supreme Court (SC) upheld the constitutionality of R.A. 9262. The SC ruled that the law does not violate the guarantee of equal protection of laws because there are simply substantial distinctions between and among women, children, and men. In upholding R.A.

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[7] "Psychological Violence" under H.B. 4888 refers to acts or omissions causing or likely to cause mental or emotional suffering of the victim such as but not limited to intimidation, harassment, stalking, damage to property, public ridicule or humiliation, repeated verbal abuse and mental infidelity. It includes causing or allowing the victim to witness the physical, sexual or psychological abuse of a member of the family to which the victim belongs, or to witness pornography in any form or to witness abusive injury to pets or to unlawful or unwanted deprivation of the right to custody and/or visitation of common children. It shall also include electronic or Information Communication Technology (ICT)-related violence which is any act or omission involving the use or exploitation of data or any form of ICT which causes or is likely to cause mental, emotional, or psychological distress or suffering to the partners and their children. This includes any forms of harassment, intimidation, coercion, threat, or vilification of the partner and their children through any form, as well as any form of stalking including hacking of personal accounts on social media and the use of location data from electronic devices, fabrication of fake information or news through text messages or other cyber, electronic, or multimedia technology. (H. No. 4888, sec. 3)

[8] "Emotional Abuse" is a form of domestic abuse perceived as the most severe form of abuse, especially when conducted with an audience of children.

[9] "Physical Violence" or "Battery" under R.A. 9262 refers to an act of inflicting grave and repeated physical harm upon the individual resulting in the physical and psychological or emotional distress. (R.A. 9262, sec. 3 (a)(b))

[10] *Garcia v. Drilon*, G.R. No. 179267, June 25, 2013.

9262 and its provisions, the SC found, among others, that "women are the usual and most likely victims of violence."

The SC in Garcia[11] also acknowledged that the enactment of R.A. 9262 is aimed to address the discrimination brought about by the biases and prejudices against women and that women and children deserve special protection in order to succeed in their war against violence. As and by way of a factual basis to support this, the framers of R.A. 9262, as well as statistics from the Philippine National Police (PNP) recognized the seemingly unequal power between men and women.

The recognition of the inherent dignity of men and women alike, and the equal and inalienable rights of all members of the human family, male or female, is enshrined in the Universal Declaration of Human Rights (UDHR), which considers the recognition as the foundation of freedom, justice, and peace in the world.

The UDHR became the fundamental and universal standard of human rights that protects individuals in all nations. This declaration, in fact, recognizes that all human beings are born free and equal in dignity and rights[12] and that everyone has the right to recognition everywhere as a person before the law.[13] Further, all individuals are equal before the law and are entitled without any discrimination to equal protection of the law.[14]

A. Violence against women and men: statistics and the lack thereof

In the 2017 National Demographic and Health Survey15 released by the Philippine Statistics Authority, the key findings on violence against women included the following:

Experience of Violence: 5% of women aged 15 to 49 experienced physical violence, and 2% experienced sexual violence

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[11] Id.

[12] UDHR, art 1.

[13] UDHR, art 6.

[14] UDHR, art 7.

[15] Philippine Statistics Authority (PSA) and ICF, Philippines National Demographic and Health Survey 2017, 129 (2018).

Marital Control: 9% of ever-married women report that their husbands/partners have exhibited at least three specified types of controlling behaviors

Spousal Violence: 24% of ever-married women have experienced physical, sexual, or emotional abuse by their current or most recent husband/partner, and 15% experienced such violence in the 12 months preceding the survey

Injuries due to spousal violence: 40% of ever-married women who experienced spousal physical or sexual abuse in the 12 months preceding the survey sustained an injury

Help-seeking: Only 1% out of 3% of women who have ever experienced physical or sexual violence have sought help

Data confirm that women, in the overwhelming majority of cases, are the victims of violence from a partner. To date, there is hardly any statistical data recording men as victims of domestic violence in the Philippines. Only data on women and children victims of domestic violence are apparently available. While little has been recorded for men subjected to violence and abuse in heterosexual relationships, even less has been written in relation to abuse in same-sex relationships.

There is a need, therefore, to revisit the application and scope of R.A. 9262 and factors that show strong bases for the need to put in place the necessary mechanisms to legislate and expand or amend R.A. 9262, the issue being none of the current laws sufficiently protect all victims of domestic violence except women and children.

B. Societal perception against male domestic violence

Societal perceptions are likely to perpetuate the common assumption that women are the only victims and, implicitly, that men are the main perpetrators of such violence. This would arguably constrain the ability of the man to take up the position of the victim that would warrant the right to seek help with an expectation of recognition. Support resources and networks available for female victims of domestic violence are not available for male victims, given the fact that women and children are the victims of domestic violence most of the time and are usually publicized.

While the criticism is ongoing and yet unresolved, the issues of the debate have been confined largely to the very concerns that the discourse seeks to challenge: how male victims could benefit from the criminal justice system and the degree to which it ought to be the principal response to domestic violence with male victims.

"Domestic Violence Against Men" is not a myth.

The study shows that domestic violence or domestic abuse is not always or mainly gender-based. Since men are often perceived as perpetrators rather than victims and women often as victims rather than perpetrators, case laws here and abroad are often in favor of women.

Feminism groups were the ones who exposed the problem of wife beating, made an awareness campaign regarding the numerous women who were victims of domestic violence, and lobbied for laws punishing it. Through this movement, the American Justice System and its Legislature made assault and battery within the family a heinous crime. Laws were enacted to finally end the era of impunity being enjoyed by the abusers. International treaties as well as convention resolutions upholding the rights and dignity of women were agreed upon and greatly influenced the increasing number of women's movements globally. The decisions made in international conferences also form a considerable part in eliminating discrimination not only in a particular country but also globally.

The primary basis that ascertained the rights of men and women is found in the United Nations Charter and the Universal Declaration of Human Rights. It tackles the many rights and freedoms that are given to or recognized in every human being, which include, among others, upholding human dignity regardless of gender. Some examples are: Vienna Declaration and Program of Action, Program of Action of the International Conference on Population and Development, and the Platform for Action adopted at the Fourth World Conference on Women (FWCW).

Incidents and statistics

The Scottish Government, in its 2016-2017 report, shows that 19.3% of recorded victims of domestic abuse were male. Most prevalent in the 41-50

age group at 2,478 documented cases and the rate per 10,000 of the population is 38.[16]

In an article in the U.K. dated March 1, 2019 entitled "Male domestic abuse victims' suffering in silence,[17] Jenny Rees of BBC explained that the most recent Crime Survey for England and Wales estimated that 1.3 million women and 695,000 men experienced domestic abuse in the last year. Citing Dr. Sarah Wallace from USW, it has also been observed that male abuse has been perceived to be appearing unmanly. The article further explained as well that there were numerous reasons why domestic violence and abuse (DVA) was not reported by both men and women, including, among others, a fear of retaliation, or a lack of trust or confidence in the police, shame, embarrassment.

As shown, stereotyping seems to be one of the many reasons why male abuse is not as much reported. But then, would the same reasoning be sufficient not to provide adequate legislation to address male violence?

Awareness and Underreporting of Domestic Violence Against Men

It was in 1986 when two scholars[18] exposed the taboo of the existence of males as victims of domestic violence. In a longitudinal study[19] of 272 newlywed couples, 44% of the women claimed that they used physical aggression against their partner even before marriage and 2 years after marriage, whereas 32% of the wives admitted that they used aggression against their husbands. In the early 90s, crime statistics from the U.S. Department of Justice showed that 167,000 men were the victims of assault by an intimate partner.[20]

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[16] Scottish Government: Domestic abuse recorded by Police Scotland 2016-17

[17] Jenny Rees, BBC March 1, 2019

[18] Straus, M. A., & Gelles, R. J. (1986). Societal change and change in family violence from 1975 - 1985 as revealed by two national surveys. *Journal of Marriage and the Family,* 48, 465-479.

[19] O'leary, K. D., Barling, J., Arias, I., Rosenbaum, A., Malone, J., & Tyree, A. (1989). Prevalence and stability of physical aggression between spouses: a longitudinal analysis. *Journal of Consulting and Clinical Psychology,* 57, 263-268.

[20] Hines, D. A., & Malley-Morrison, K. (2001). Psychological effects of partner abuse against men: A neglected research area. *Psychology of Men & Masculinity,* 2(2), 75-85.

The results of the National Family Violence Surveys in 1975 and 1985 in the United States[21] showed that 11.6% of the husbands experienced some sort of violence from their wives.

Awareness and documentation of domestic violence differs from country to country. In the late 1990s, estimates are that only about a third of cases of domestic violence are reported in the United States and the United Kingdom.[22]

Lower number of reported cases may therefore be expected in less developed societies with less attention and support.

The under-reporting of domestic violence was opined to be almost universal and may be due to the sensitive nature of the subject.[23] Lemkey discussed several theories attempting to explain the causes of domestic violence.

> Culture of Violence Theory explains that the kind of environment influences domestic affairs. Thus, when the climate is violent, families are more prone to being violent.
>
> Evolutionary Theory discusses that as families evolve into tighter-knit ones, and obedience to authority is being enforced through corporal punishment.
>
> Feminist Theory stresses that women are considered to be inferior to men and are susceptible to abuse. It also considers violence as a normal part of an intimate relationship.
>
> Biopsychosocial Perspective is a combination of the biological, psychological, and social factors which may eventually result in violence.
>
> Exchange Theory reveals that inflicting violence leads to a certain level of gratification on the part of the abuser.
>
> Investment Theory describes that victims cannot get out of a violent relationship because of consideration for the amount of their "investment" (i.e., emotional, time, financial) in the relationship.

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[21] As cited by Straus, M. A., & Gelles, R. J. (1986). Societal change and change in family violence from 1975 - 1985 as revealed by two national surveys. *Journal of Marriage and the Family,* 48, 465-479.

[22] Tjaden, P., & Thoennes, N. (1998). Prevalence, incidence, and consequences of violence against women: Findings from the National Violence Against Women Survey (NCJ-172837). Washington, DC: Department of Justice.

[23] Watts, C., & Zimmerman, C. (2002). Violence against women: Global scope and magnitude. Lancet, 359, 1232-1237.

> Resource Theory illustrates that the family member who brings more resources in the family tends to exercise a higher level of power over the other family members.
>
> Social Learning Theory explains that certain situations cause a person to commit violence.
>
> Marital Power Theory says that within a marriage, there is a power struggle between parties. While ordinarily, the less powerful one is the one more prone to physical abuse, it does not necessarily cover women alone as men too at times are weaker in a relationship, whether it be marital or same sex.
>
> Traumatic Bonding Theory explains that the victim (men or women) of abuse tends to be dependent on the abuser, making it hard for the victim to run away from the relationship.
>
> Ecological Theory is the most crucial theory. It considers the environment, culture, social networks of the family, history of the family, and closer family setting influences why violence is being instigated. These are the external factors that trigger a family member in inflicting violence to another family member regardless of gender.

Greater responsibility was placed on the male victims who were also taken less seriously than female victims[24] while in hypothetical scenarios, female perpetrators were seen as less capable of inflicting harm than males and as reacting more strongly to a 'battering' incident than men.[25] Similarly, female violence directed against men was generally considered a taboo subject by society and the media.[26]

Importance of Gender Differences in the Perpetration of Domestic Violence and/or Intimate Partner Abuse (IPA)

While women are more likely to perpetrate more varied forms of violence, men are more likely to perpetrate more serious forms of violence.[27] Many

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[24] Harris, R.J., & Cook, C.A. (1994). Attributions about Spouse Abuse: It matters who the batterers and victims are. *Sex Roles, 30(7-8),* 553-565.

[25] Cormier, N. (2006). A Consideration of Gender in University Students' Perceptions of Intimate Partner Abuse. [Unpublished dissertation]. University of British Columbia, Okanagan, Canada.

[26] Sarantakos, S. (1999). Husband abuse: Fact or fiction? *Australian Journal of Social Issues, 34,* 231-252.

[27] Tjaden, P., & Thoennes, N. (2000). Prevalence and consequences of male-to-female and female-to-male intimate partner violence as measured by the National Violence Against Women Survey. Violence Against Women, 6(2), 142-161.

scholars and victim-advocates report that women have different motivations for using force against their current or former intimate partners.[28]

Anderson and Umberson's study[29] of male IPA offenders concluded that these men were effective in twisting their less serious (female) partners' behaviors into the major violence, while they excused their own abusive behaviors as rational, capable, and nonviolent.

While women are more likely than men to use force to resist violence initiated by their intimate partners, men are more likely than women to use force to control and exercise power over their partners.[30]

This important distinction between women's primary motivation as self-defense and men's primary motivation as control has major gender implications for practitioners responding to those charged with IPA—many charged women may be victims of IPA acting in self-defense, rather than the offenders.

This raises the issue in national surveys: who is reporting the abuse to the research investigator? Typically, the respondent to these national studies is whoever answers the phone first. If an intimate partner abuser is monitoring all incoming calls, it is likely that he will be the respondent. At the same time, it is not unusual for victims to minimize their time on phone calls when jealous and controlling batterers "check-up" on them by calling to make sure they are not talking to anyone on the phone.

A long survey would be something such a victim would want to avoid. Moreover, if a victim answers the survey phone call, but the batterer is home, it is likely that s/he would minimize the abuse or choose not to take part in the study. Das Dasgupta[31] has developed a very complete report on women's use of nonlethal violence in heterosexual relationships.

A significant amount of research reports that women suffer more negative consequences as a result of violence from a current or former male partner

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[28] Melton, H. C., & Belknap, J. (2003). He hits, she hits: Assessing gender differences and similarities in officially reported intimate partner violence. Criminal Justice and Behavior, 30(3), 328-348.

[29] Anderson, K. L. & Umberson, D. (2001). Gendering violence – Masculinity and power in men's accounts of domestic violence. Gender & Society, 15(3), 358- 380.

[30] Barnett et al., 1997; Hamberger et al., 1997; Hamberger & Guse, 2002; Hamberger & Potente, 1994

[31] Das Dasgupta, S. (2001). Towards an understanding of women's use of non-lethal violence in intimate heterosexual relationships.

than men do from a current or former female partner.[32] Women involved in IPA are more likely than their male counterparts to suffer from injuries, require medical treatment, lose time from work, and experience bedridden days than are men.[33] Clearly, there are significant gender differences regarding men and women's use of abuse and force against their current and former intimate partners. Men and boys are more likely (than women and girls) to be the perpetrators, and women and girls are more likely (than men and boys) to be the victims of IPA.

At the same time, it is important to recognize that there are some women and girls who are abusive and violent to their intimate male partners.[34] They are not what Johnson[35] would envision as "common couple" abusers, but rather, are the primary aggressors in their relationships.

One of the few studies that has focused on these women and girls, reports three components of a model attempting to explain female-perpetrated IPA, as follows: learning, opportunity, and choice.[36]

> 1. Learning is a means by which the girl or woman learns to be abusive through experiencing or witnessing IPA or other violence. Indeed, other research claims that women charged with domestic violence have disproportionately high experiences of childhood abuse.[37]
>
> 2. Opportunity, as described by Perilla and her colleagues, closely indicates retaliation opportunity, but could be seen as self-defense by some. Their example of an "opportunity" is where the power shifts for a period of time, for example, when the male abuser is passed out from alcohol, and the woman/victim chooses to use violence against him in this vulnerable state.

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[32] Brush, 1990; Cantos et al., 1994; Cascardi & Vivian, 1995; Cook & Harris, 1995; Dobash et al., 1992; Holtzworth-Munroe, Smutzler, & Bates, 1997; Milardo, 1998; O'Leary et al., 1989; Stets & Straus, 1990; Tjaden & Thoennes, 2000; Vivian & Langhinrichsen-Rohling, 1994.

[33] Archer, 2000; Berk et al., 1983; Brush, 1990; Cantos et al., 1994; Cascardi & Vivian, 1995; Cook & Harris, 1995; Dobash et al., 1992; Holtzworth-Monroe et al., 1997; Johnson & Bunge, 2001; Morse, 1995; O'Leary et al., 1989; Rand, 1997; Stets & Straus, 1990; Tjaden & Thoennes, 2000; Vivian & Langhinrichesen-Rohling, 1994

[34] Johnson, H., & Pottie Bunge, V. (2001). Prevalence and consequences of spousal assault in Canada. Canadian Journal of Criminology, 43(1), 27-45.

[35] Johnson, M. P. (1995). Patriarchal terrorism and common couple violence: Two forms of violence against women. Journal of Marriage and the Family, 57, 283-294.

[36] Perilla, J. L., Frndak, K., Lillard, D. & East, C. (2003) A working analysis of women's use of violence in the context of learning, opportunity, and choice. Violence Against Women, 9(1), 10-46.

[37] see Swan & Snow 2003

> Choice - Just as those in the domestic violence movement have the mantra "violence is a choice" when talking about male batterers, this approach must also be taken for women who are violent toward intimate partners. They report cases in which women chose violence in self-defense, but also in retaliation: a case in which a man quit abusing his wife after many years of marriage, but she used violence once he stopped, as a way to make up for the years of abuse she had experienced at his hands.[38]

The intervention programs are designed for male offenders. Can they be applied to female offenders? On the basis of existing research that approximately five percent of IPA cases are female-perpetrated, what then do we do with this information regarding women and girls who use abuse and violence against intimate partners? The study concluded that learning, opportunity, and choices are gendered themselves, necessitating gender-tailoring of intervention programs for female-batterers. It is likely they do not come to IPA behaviors through entitlement as much as their own victimizations, relative to male IPA perpetrators.[39]

Cases of Domestic Violence Against Men in the Philippines

In the Philippines, domestic abuse against men is generally unheard of and seems to be legally non-existent. No less than the legal and published definition of domestic abuse is limited to women. The Philippine Statistics Authority describes domestic abuse as physical, sexual, and psychological violence occurring in the family/household which may be classified as wife battering, wife assault, woman abuse, marital violence, wife cruelty, and family violence. There are reported cases and actual experiences of male abuse which may be considered as sufficient information or empirical data that will establish the existence of domestic abuse against men in the Philippines.

Manila Doctors Hospital's Rafael R. Castillo for the Philippine Daily Inquirer in September 2018 quoted anti-domestic abuse advocate Emiliano Manahan saying that the incidence of male abuse is on the rise, affecting 12 to 15 out of every 100 couples in the country. The problem, however, is that the

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[38] Perilla, J. L., Frndak, K., Lillard, D. & East, C. (2003) 10-46.

[39] Das Dasgupta, S. (2001). Towards an understanding of women's use of non-lethal violence in intimate heterosexual relationships. Retrieved from http://www.vawnet.org/ DomesticViolence/Research/VAWnetDocs/ AR_womviol.php

majority of Filipinos who are victims of domestic abuse do not even see themselves as victims. Worse, the problem of male domestic abuse—physical, emotional, sexual, and financial—has been trivialized and made the subject of jokes.[40] Nano further explained that the shame and guilt attached to male abuse are the reasons it is usually ignored. He explains that the search for genuine gender equality, which is at the center of human rights issues, should convince everyone to discuss and address the reality that "there are men in relationships who are also victims of domestic violence, thus, they equally need attention and help."[41]

A pioneer study[42] on the psychological effects of domestic violence against husbands with the use a phenomenological-clinical approach revealed and explored the experiences of abuse in intimate relationships of six Filipino husbands.

Although many wanted to believe that "only women are abused," this perception was debunked by the experiences of the participants of the study. The participants could hardly describe how the abuse acquired its form. From a typical fight to a violent exchange of words from a simple taunt to an outburst of sorts-from throwing of objects to physical attacks, and from a minor disagreement to a life-threatening encounter.[43]

Perception on Men and Women as Perpetrators and Victims, respectively

In a patriarchal and traditional society, the study shows that masculinity is usually associated with power, domination, and control over women and, as McHugh argues, "violence is one means by which men can perform masculinity."[44] This male trend tradition has been legitimized and seen as natural and a way of life. Children in fact are typically raised to identify colors with gender as well as role playing. Hence, this dominant model inevitably

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[40] HeadlinesHealth. (2018, September 18). More Filipino men battered by their wives. Retrieved from https://lifestyle.inquirer.net/306549/filipino-men-battered-wives/.

[41] Ibid

[42] Juriprudencia, J. (2007). Coming out of the Shadows: Husbands Speak About Their Experience of Abuse in Intimate Relationships. Philippine Journal of Psychology. Vol 40 No 2, pp. 34-57.

[43] Ibid.

[44] Anderson and Umberson, 2001. Cited in Understanding gender and Intimate Partner Abuse, McHugh, M. Sex Roles, vol. 52, n 11/12.

shapes the way children grow up and construct themselves.[45] The study shows that the violence often perpetrated by men against women is a condition of inequality between them, men and women.

Gender roles and expectations, male entitlement, sexual objectification, and discrepancies in power and status have legitimized, rendered invisible, sexualized, and helped to perpetuate violence against women". Major institutions also reinforce and perpetuate these entitlements and inequalities, which are at the roots of gender violence.

This violence, however, may take place in any sphere of life regardless of gender. In other words, while there is gender inequalities at home and outside—be it workplace or school— taking into account this gender role, wherein women are victims and men are perpetrators, reality is that gender discrimination is a very complex concept which can be difficult to define, particularly in the legal context.

Gender discrimination can be defined in a variety of ways, but is most commonly identified as making decisions based on aesthetic perceptions of one's gender, therefore, in a sense, laws focusing only on the protection of female victims of domestic violence is subtlety discriminatory.

Other Foundations of Gender Laws and Why Women Are Viewed as Victims and Men as Perpetrators

The study shows that feminist theories and the feminist movements have vehemently demonstrated that knowledge cannot be considered neutral or objective. As was found, traditionally, researchers have engendered knowledge on the basis of the dominant perspective and behavior in society, which was the male one (androcentrism). As a consequence, knowledge has been blind to the specific historical, political, social, and personal conditions on which it was reported, making invisible gender differences.[46]

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[45] Camarasa,, M. and Heim, D. (2007). Gender Violence effects and indicators: Theoretical and methodological framework. Associació de Dones per la Inserció Laboral.

[46] Camarasa,, M. and Heim, D. (2007). Gender Violence effects and indicators: Theoretical and methodological framework. *Associació de Dones per la Inserció Laboral.*

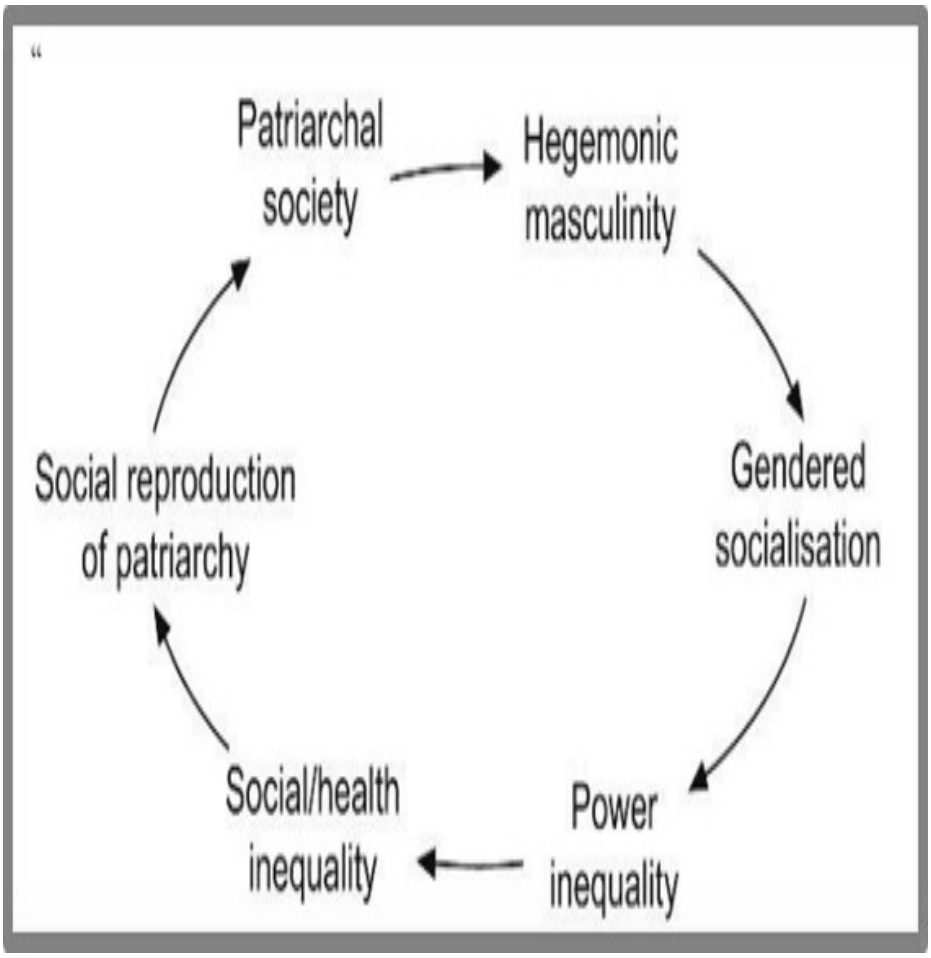

Figure 1. Sociological Dynamics of Gender Inequality

The roles that men and women play in society are not biologically determined, so much as they are socially determined. From the moment of birth, gender expectations influence how boys and girls are treated.

Hegemonic masculinity is defined "the form of masculinity which is culturally and politically dominant at a particular time and place."[47] It is a practice of legitimizing the unequal power of men compared to women by normalizing masculinity as the dominant position, and manufacturing consent among men and women that this is the way it should be.

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[47] Scot-Samuel, A. (2009). Patriarchy, masculinities and health inequalities. American Sociological Review, 77(4), 650-665.

The concept of hegemonic masculinity influences societal expectations of everyone inside and outside of home. The dominant position of masculine traits plays a role in defining its female counter position by setting standards of what is perceived as "feminine" in society.

The dominant role of masculinity pertains to the workforce as well as the family. This idea of hegemonic masculinity and the inequalities and society structuring it causes can be seen as a cyclical cycle, with a continuation and sustainability, resulting in a continuation of gender roles and inequality.[48]

Thus, as shown in this study, roles expected of men and women have led to cultural and stereotypical beliefs to associate these with men with the roles as the "aggressor" or "perpetrators" of domestic violence; in the same fashion that certain laws were crafted in order to protect women who are sociologically and culturally accepted as "potential victims."

These cultural stereotypes are communicated to men and women from early childhood and become embedded in their behaviors and contribute to the difficulty in addressing domestic violence in all fronts. This type of society is one that has been in place for centuries, in which men are the central authoritative figure, both at a micro and macro level. Literally, patriarchy means "rule of the father."[49] According to sociological theories, patriarchy is a result of social and cultural conditioning, passed on from generation to generation. Men continue to remain in power, resulting in a society aimed at please the male gender. This power spans from political, to occupational and personal aspects of society.[50]

There is an overwhelming perceived male domination of our society, however, it is the female portion of society that benefits from these laws. On the contrary, because of this hierarchical system, it can be overwhelmingly seen that men victims of domestic violence are not direct beneficiaries of our legal system. [51]

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[48] Burnette, J. (2009). H-Net Reviews. H-Net: Humanities and Social Sciences Online. Retrieved from http://www.hnet.org/reviews/showrev.php?id=23001

[49] Scot-Samuel, A. (2009). Patriarchy, masculinities and health inequalities. American Sociological Review, 77(4), 650-665;

[50] Op.cit. Hays and Morrows, 2013.

[51] Tickner, A. (2011). "Patriarchy". Routledge Encyclopedia of International Political Economy: Entries P-Z. Taylor & Francis. pp. 1197–1198.

Gender relations are the result of the way social processes act on a specific biological category and form social relations between them. From an egalitarian point of view, gender relations are fair if, within those relations, males and females have equal power and equal autonomy. This does not imply that all men and all women do exactly the same things, but it does mean that gender relations do not generate unequal opportunities and choices for men and women.

The sociological problem, then, is whether a society within which deeply egalitarian gender relations predominate is possible.

From an anthropological research, human history shows that there is enormous variation in the character of social relations between men and women. In certain societies at some points in history, women were virtually the slaves of men, completely disempowered and vulnerable.[52] In other times and places, women have had considerable autonomy and control over their bodies and activities.

For example, in every society, women have historically had primary responsibility for early infant care; in no society has it been the case that the prevalent social norms backed the principle that fathers should be as involved in the care of babies as mothers.[53] However, a generalization from this empirical observation that egalitarian norms about parenting of babies are not possible would be unjustified. Since this observed universal has occurred in a world characterized by certain specific economic, political and cultural properties, the empirical universality of this "fact" does not mean that this is simply a natural reflection of biological imperatives. Until the very recent past, for example, birth control was relatively ineffective then but now it is as much reliable as any other means.

Furthermore, even if it was arguably natural for women to specialize in taking care of infants, this would not actually resolve the question of whether it was desirable for a cultural norm telling women that they should do most of the caregiving or whether egalitarian norms could never become dominant. Just because something is "natural" – in the sense of reflecting some underlying biological characteristics of people – does not mean it is desirable and unchangeable.

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[52] Gerson, K. (2013). The Unfinished Revolution: How a New Generation is Reshaping Family, Work, and Gender in America. Oxford University Press.

[53] Reskin, Barbara F., & Denise D. Bielby (2005) "A Sociological Perspective on Gender and Career Outcomes," 9 J. of Economic Perspectives 79–86.

A final issue in play in thinking about possible transformations of gender relations concerns variations among men and among women in underlying biologically-rooted dispositions.[54]

It may be that because of genes and hormones, men are, on average, more aggressive have stronger instinctual proclivities to dominate, and that woman are, on average, more nurturant and have stronger dispositions to engage in caregiving activities.

However, regardless of what are the "natural" dispositions of the average man and woman, it is also equally certain that there is a tremendous overlap in the distribution of these attributes among men and among women. There are many women more aggressive than the average male and many men more nurturant than the average female. It is also virtually certain that whatever are the behavioral differences between genders that are generated by genes and hormones, society and culture exaggerate these differences because of the impact of socialization and social norms on behavior.

These observations on gender, nature, and the possibilities of much more egalitarian relations than what currently exists constitute the theoretical foundations background for gendered laws. However, there are empirical changes in recent decades that explore the conditions which would make further changes toward gender equality possible in the future.[55]

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[54] McLaughlin, H., Uggen, C., and Blackstone, A. (2012). Sexual Harassment, Workplace Authority, and the Paradox of Power. American Sociological Review, 77(4), 625- 647. doi:10.1177/0003122412451728.

[55] McLaughlin, H., Uggen, C., and Blackstone, A. (2012). Sexual Harassment, Workplace Authority, and the Paradox of Power. American Sociological Review, 77(4), 625- 647. doi:10.1177/0003122412451728; Scot-Samuel, A. (2009). Patriarchy, masculinities and health inequalities. American Sociological Review, 77(4), 650-665.

Related Laws on Domestic Violence Outside the Philippines

Bangladesh

According to the Office of the Law Commission of Bangladesh, domestic violence may be defined as "violence perpetrated by a man upon a woman and vice versa in the course of leading a domestic life." However, Section 3 of the Domestic Violence (Prevention and Protection) Act of 2010 defines domestic violence but seemingly limits it to acts committed against women:

> "3. Domestic violence.- For the purpose of this Act, domestic violence means physical abuse, psychological abuse, sexual abuse or economic abuse against a woman or a child of a family by any other person of that family with whom victim is, or has been, in family relationship."

A reading of the entire text of the law shows that while domestic violence extends to cover other couples who are jointly living together, the same remains to be directed for the protection of women and children alone. It fails to provide protection to men.

The focus on women victims may be attributed to the fact that victims of domestic abuse in Bangladesh are mostly women reported to be physically tortured, sexually assaulted, psychologically injured, and mentally humiliated within their homes by their husbands or by other members of the family. Wife battering is a common affair in both upper and lower social classes in Bangladesh, especially among the disadvantaged classes.[56] These extreme cases nonetheless may not exactly be the same situation in the Philippines.

Hong Kong

The 1986 Domestic Violence Ordinance of Hong Kong penalizes domestic abusers regardless of gender, for violence mostly directed against a child in a legitimate relationship or those in the "matrimonial home," which includes a home in which the parties to a marriage ordinarily reside together whether or not it is occupied at the same time by other persons. Thus, a further

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[56] Sabrin, Meherba, et al. "Domestic Violence in Bangladesh - A Legal Study." BDLD - Bangladesh Law Digest, 5 Apr. 2018, http://bdlawdigest.org/domestic-violence-in-bangladesh.html

reading of the law shows that it covers not just men as domestic abusers, but even women. A reading of the law interchangeably uses child or applicant to a marriage who can be subject of violence. Implicitly, a man or a woman in such marriage may be covered.

Section 5 on the Arrest for breach of order even refers to an application by "a party to a marriage," without regard to gender, who may be found to restrain the other party from using violence against the applicant or a child living with the applicant

In other words, even women who are found to have abused a child or guilty of restraining through violence can be penalized.

Cambodia

In this jurisdiction, women are generally subservient to men. The traditional code of conduct known as *Chbab Srey* (Women's Law) taught women in Cambodia to be subservient to men. [57] Up until 2007 schools in Cambodia taught the *chibab* to the young students as regards what was expected from them as women.[58]

To date, "The Law on The Prevention of Domestic Violence and The Protection of Victims" was crafted to prevent domestic violence, protect the victims, and strengthen the culture of non-violence and the harmony within the households in society in the Kingdom of Cambodia.

For this purpose, Article 2 of the law expands domestic violence to the violence that happens and can happen towards husband or wife, dependent children, and persons living under the roof of the house and dependent on the households.

Article 3 of the same law intends to prevent such violence effectively and efficiently by taking the most appropriate measures in order to protect the victims or the persons who could be vulnerable. These acts of violence may be: (i) acts affecting life; (ii) acts affecting physical integrity; (iii) tortures or cruel acts; and (iv) sexual aggression.

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[57] Galabru, Kek. "Violence Against Women: How Cambodian Laws Discriminate Against Women" (PDF). Cambodian League for the Promotion and Defense of Human Rights. The Cambodian Committee of Women. Archived from the original on 3 July 2014. Retrieved 22 April 2015

[58] Mustakova-Possardt, Elena (2014). Toward a Socially Responsible Psychology. New York: Springer. pp. 207–229. ISBN 9781461473909

It is interesting to note that "tortures or cruel acts" include the following acts: harassment causing mental/psychological, emotional, and intellectual harms to physical persons within the households and mental/psychological and physical harms exceeding morality and the boundaries of the law.

Indonesia

Similar to other jurisdictions, Indonesia, the most populous Muslim-majority country in the world, has an anti-domestic violence law. The "Law Regarding the Elimination of Violence In House of 2004" recognizes the right of the citizens to get a sense of security and to be free from all forms of violence in accordance with the philosophy of the *Pancasila* (the five basic principles of the Republic of Indonesia) and the 1945 Constitution of the Republic of Indonesia.

Although the law acknowledges that the victims of violence in household are mostly women and must get protection from the state and/or the public so that they can be freed from violence or threat of violence, torture, or treatment degrading human dignity, no less than the same law applies to all genders and is all-inclusive.

Article 2 on the scope of household in this Law shall include the following:

> (a) husband, wife, and children;
>
> (b) people whose family relationship with the individual referred to under letter a is due to blood relationship, marriage, suckling at the same breast, care, and guardianship, who lives in the household; and/or
>
> (c) c. the individual working to assist the household and living in the household.
>
> The people working as referred to under letter c shall be considered as family member during the period while living in the household in question.

Chapter VI of the law provides a "protection order" that a victim of domestic abuse may avail of. Within a period of twenty-four hours from the time of knowing or receiving report on violence in household, the Indonesian police is obliged to immediately provide temporary protection to the victim effective for not longer than seven (7) days from the issuance of the order.

The law likewise provides for the coordination with a health worker, social worker, companion volunteer, and/or spiritual mentor to accompany the victim, as well as the advocate or lawyer. Clearly, the police as well as social

workers and courts play major and vital roles in the protection of victims of household violence.

Related Laws on Domestic Abuse Against Men in the Philippines and Related Jurisprudence on Domestic Abuse

There is hardly any law in the Philippines that addresses domestic violence against men. Male abuse pertaining to physical injuries is the only form of abuse that may be addressed in an all-inclusive provision under the Revised Penal Code of the Philippines. No local legislation addresses other forms of male abuse.

Any form of altercations and misunderstandings that will eventually result in inflicting only physical pain upon an individual may be brought to justice under the certain provisions and in a variety of degrees.

The Revised Penal Code of the Philippines[59] defines the elements and penalties for physical injuries under Articles 262 to 266 namely the crimes of: *Mutilation,*[60] *Serious Physical Injuries,*[61] *Administering Injurious Substances or*

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[59] Act No. 3815 (December 8, 1930) AN ACT REVISING THE PENAL CODE AND OTHER PENAL LAWS

[60] Art. 262. Mutilation. — The penalty of reclusion temporal to reclusion perpetua shall be imposed upon any person who shall intentionally mutilate another by depriving him, either totally or partially, or some essential organ of reproduction. Any other intentional mutilation shall be punished by prision mayor in its medium and maximum periods.

[61] Art. 263. Serious physical injuries. — Any person who shall wound, beat, or assault another, shall be guilty of the crime of serious physical injuries and shall suffer:

1. The penalty of prision mayor, if in consequence of the physical injuries inflicted, the injured person shall become insane, imbecile, impotent, or blind;
2. The penalty of prision correccional in its medium and maximum periods, if in consequence of the physical injuries inflicted, the person injured shall have lost the use of speech or the power to hear or to smell, or shall have lost an eye, a hand, a foot, an arm, or a leg or shall have lost the use of any such member, or shall have become incapacitated for the work in which he was therefore habitually engaged;
3. The penalty of prision correccional in its minimum and medium periods, if in consequence of the physical injuries inflicted, the person injured shall have become deformed, or shall have lost any other part of his body, or shall have lost the use thereof, or shall have been ill or incapacitated for the performance of the work in which he as habitually engaged for a period of more than ninety days;
4. The penalty of arresto mayor in its maximum period to prision correccional in its minimum period, if the physical injuries inflicted shall have caused the illness or incapacity for labor of the injured person for more than thirty days.

If the offense shall have been committed against any of the persons enumerated in Article 246, or with attendance of any of the circumstances mentioned in Article 248, the case covered by subdivision number 1 of this Article shall be punished by reclusion temporal in its medium and maximum periods;

Beverages,[62] *Less Serious Physical Injuries,*[63] and *Slight Physical Injuries and Maltreatment.*[64]

The Philippines, however, has laws protecting women and children against domestic violence. They are considered the more vulnerable members of the family. These laws do not cover domestic violence committed against man/male partner by an abusive party.

Under R.A. 9262 the concept of "violence" against women and children includes not only physical violence, but also sexual violence, psychological violence, and economic abuse, including threats of such acts, battery, assault, coercion, harassment, or arbitrary deprivation of liberty.

The law penalizes any act or a series of acts "committed by any person against a woman who is his wife, former wife, or against a woman with whom

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the case covered by subdivision number 2 by prision correccional in its maximum period to prision mayor in its minimum period; the case covered by subdivision number 3 by prision correccional in its medium and maximum periods; and the case covered by subdivision number 4 by prision correccional in its minimum and medium periods.

The provisions of the preceding paragraph shall not be applicable to a parent who shall inflict physical injuries upon his child by excessive chastisement.

[62] Art. 264. Administering injurious substances or beverages. The penalties established by the next preceding article shall be applicable in the respective case to any person who, without intent to kill, shall inflict upon another any serious, physical injury, by knowingly administering to him any injurious substance or beverages or by taking advantage of his weakness of mind or credulity.

[63] Art. 265. Less serious physical injuries. Any person who shall inflict upon another physical injuries not described in the preceding articles, but which shall incapacitate the offended party for labor for ten days or more, or shall require medical assistance for the same period, shall be guilty of less serious physical injuries and shall suffer the penalty of arresto mayor.

Whenever less serious physical injuries shall have been inflicted with the manifest intent to kill or offend the injured person, or under circumstances adding ignominy to the offense in addition to the penalty of arresto mayor, a fine not exceeding 500 pesos shall be imposed.

Any less serious physical injuries inflicted upon the offender's parents, ascendants, guardians, curators, teachers, or persons of rank, or persons in authority, shall be punished by prision correccional in its minimum and medium periods, provided that, in the case of persons in authority, the deed does not constitute the crime of assault upon such person.

[64] Art. 266. Slight physical injuries and maltreatment. The crime of slight physical injuries shall be punished:

1. By arresto menor when the offender has inflicted physical injuries which shall incapacitate the offended party for labor from one to nine days, or shall require medical attendance during the same period.
2. By arresto menor or a fine not exceeding 20 pesos and censure when the offender has caused physical injuries which do not prevent the offended party from engaging in his habitual work nor require medical assistance.
3. By arresto menor in its minimum period or a fine not exceeding 50 pesos when the offender shall ill-treat another by deed without causing any injury.

the person has or had a sexual or dating relationship, or with whom he has a common child, or against her child whether legitimate or illegitimate, within or without the family abode."

For the past fifteen years since the enactment of the VAWC, the Philippine Congress has sought to expand the law to include specific acts of violence that utilize electronic communications and social media platforms. House Bill No. 8655 seeks to enact the "Expanded" Anti-Violence Against Women and Their Children Act." This is considered a separate piece of legislation, notwithstanding the fact that Republic Act No. 10175, or the Cybercrime Prevention Act of 2012, already incorporates updated cyber-crimes or those criminal acts under the VAWC that are committed through the use of information and communications technologies.

It is also interesting to note that under R.A. 9262, women and children are likewise afforded the right to seek protection orders.

These protection orders are found under Section 8 of the law:

> Sec. 8. Protection Orders. A protection order is an order issued under this act for the purpose of preventing further acts of violence against a woman or her child specified in Section 5 of this Act and granting other necessary relief.

The reliefs granted under a protection order serve the purpose of safeguarding the victim from further harm, minimizing any disruption in the victim's daily life, and facilitating the opportunity and ability of the victim to independently regain control over her life. The provisions of the protection order shall be enforced by law enforcement agencies. The protection orders that may be issued under this Act are the barangay protection order (BPO), temporary protection order (TPO) and permanent protection order (PPO).

The protection orders that may be issued under this Act shall include any, some or all of the following reliefs:

> (a) Prohibition of the respondent from threatening to commit or committing, personally or through another, any of the acts mentioned in Section 5 of this Act;
>
> (b) Prohibition of the respondent from harassing, annoying, telephoning, contacting or otherwise communicating with the petitioner, directly or indirectly;

(c) Removal and exclusion of the respondent from the residence of the petitioner, regardless of ownership of the residence, either temporarily for the purpose of protecting the petitioner, or permanently where no property rights are violated, and if respondent must remove personal effects from the residence, the court shall direct a law enforcement agent to accompany the respondent to the residence, remain there until respondent has gathered his things and escort respondent from the residence;

(d) Directing the respondent to stay away from petitioner and designated family or household member at a distance specified by the court, and to stay away from the residence, school, place of employment, or any specified place frequented by the petitioner and any designated family or household member;

(e) Directing lawful possession and use by petitioner of an automobile and other essential personal effects, regardless of ownership, and directing the appropriate law enforcement officer to accompany the petitioner to the residence of the parties to ensure that the petitioner is safely restored to the possession of the automobile and other essential personal effects, or to supervise the petitioner's or respondent's removal of personal belongings;

(f) Granting a temporary or permanent custody of a child/children to the petitioner;

(g) Directing the respondent to provide support to the woman and/or her child if entitled to legal support. Notwithstanding other laws to the contrary, the court shall order an appropriate percentage of the income or salary of the respondent to be withheld regularly by the respondent's employer for the same to be automatically remitted directly to the woman. Failure to remit and/or withhold or any delay in the remittance of support to the woman and/or her child without justifiable cause shall render the respondent or his employer liable for indirect contempt of court;

(h) Prohibition of the respondent from any use or possession of any firearm or deadly weapon and order him to surrender the same to the court for appropriate disposition by the court, including revocation of license and disqualification to apply for any license to use or possess a firearm. If the offender is a law enforcement agent, the court shall order the offender to surrender his firearm and shall direct the appropriate authority to investigate on the offender and take appropriate action on matter;

(i) Restitution for actual damages caused by the violence inflicted, including, but not limited to, property damage, medical expenses, childcare expenses and loss of income; (j) Directing the DSWD or any appropriate agency to provide petitioner may need; and

(k) Provision of such other forms of relief as the court deems necessary to protect and provide for the safety of the petitioner and any designated family or household member, provided petitioner and any designated family or household member consents to such relief. Any of the reliefs provided under this section shall be granted even in the absence of a decree of legal separation or annulment or declaration of absolute nullity of marriage. The issuance of a BPO or the pendency of an application for BPO shall not

> preclude a petitioner from applying for, or the court from granting a TPO or PPO.

To show how strong and seemingly adequate RA 9262 is, the Supreme Court in the recent case of "*Villalon v. People*"[65] affirmed the eight-year jail time conviction of a husband who called her spouse "*tanga*" and "*mukhang pera,*" with such acts considered as psychological abuse and violative of Section 5(i) of RA 9262 as follows:

> (i) Causing mental or emotional anguish, public ridicule or humiliation to the woman or her child, including, but not limited to, repeated verbal and emotional abuse, and denial of financial support or custody of minor children of access to the woman's child/children.

Aside from the above, the jurisdiction of Philippine Courts towards these abuses against women and children transcends from one jurisdiction to another. In the case of "*AAA v. BBB*," [66] the Supreme Court considered psychological abuse as a transitory or continuing offense as follows:

> "Marital infidelity as cited in the law is only one of the various acts by which psychological violence may be committed. Moreover, depending on the circumstances of the spouses and for a myriad of reasons, the illicit relationship may or may not even be causing mental or emotional anguish on the wife. Thus, the mental or emotional suffering of the victim is an essential and distinct element in the commission of the offense. In criminal cases, the venue is jurisdictional…
>
> …In Section 7 of R.A. No. 9262, venue undoubtedly pertains to jurisdiction. As correctly pointed out by AAA, Section 7 provides that the case may be filed where the crime or any of its elements was committed at the option of the complainant. Which the psychological violence as the means employed by the perpetrator is certainly an indispensable element of the offense, equally essential also is the element of mental or emotional anguish which is personal to the complainant…
>
> …What may be gleaned from Section 7 of R.A. No. 9262 is that the law contemplates that acts of violence against women and their children may manifest as transitory or continuing crimes; meaning that some acts

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[65] G.R. No. 234520, February 28, 2018

[66] GR No. 212448, January 11, 2018

> material and essential thereto and requisite in their consummation occur in one municipality or territory, while some occur in another.
>
> In such cases, the court wherein any of the crime's essential and material acts have been committed maintains jurisdiction to try the case; it being understood that the first court taking cognizance of the same excludes the other. Thus, a person charged with a continuing or transitory crime may be validly tried in any municipality or territory where the offense was in part committed.
>
> What this case concerns itself is simply whether or not a complaint for psychological abuse under R.A. No. 9262 may even be filed within the Philippines if the illicit relationship is conducted abroad. We say that even if the alleged extra-marital affair causing the offended wife mental and emotional anguish is committed abroad, the same does not place a prosecution under R.A. No. 9262 absolutely beyond the reach of Philippine courts."

While it is also conceded that in the case of "*Garcia v. Drilon,*" [67] the Supreme Court unanimously confirmed the validity of R.A. 9262 and held that the same did not violate the guarantee of equal protection of laws because it rests on substantial distinctions, given the unequal power relationship between men and women, and that "women are the usual and most likely victims of violence", this study shows that the needed protection against domestic abuse must not only be intended for women and children but must be inclusive of all victims of domestic violence, such as but not limited to members of the LGBT Community and men who for equally suffer domestic violence.

In October 2019, Rizal 2nd District Representative, Fidel Nograles filed a bill that would protect spouses and partners in intimate relationships, regardless of gender against domestic violence.

This six (6)-page House Bill (HB) No. 4888 was filed by Rizal 2nd District Representative, Fidel Nograles which seeks to expand the coverage of Republic Act (RA) No. 9262 or the Anti-Violence Against Women and Their Children Act (VAWC) of 2004 to also cover abuse committed against same-sex partners and husbands in heterosexual relationships.

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[67] G.R. No. 179267, June 25, 2013

Under the bill, the term "partner" covers not only heterosexual relationships, but also lesbian, gay, bisexual, queer, intersex, cisgender, and transgender partners.

Women power advocates may argue that domestic violence against men are isolated cases, based on the lack of official reports, but just the same, it is well to note that based on this study, even if reports may be sparse, this does not necessarily mean that male abuse is a myth or is non-existent.

As shown, except for the law that governs physical injuries under the Revised Penal Code of the Philippines (RPC), there indeed is no other law, policy nor procedure which addresses domestic and sexual violence against men. There are in fact no specific provisions of law which specifically cater to male victims of sexual or domestic violence. Neither is there any registry nor office where sexual or domestic violence against men, such as sodomy, fraternization, adultery or underage sex may be reported to.

In the Philippines, the overall view of these individuals who were interviewed suggests that men remain to be relegated as perpetrators specially with the advent of RA 9262.

Instead of equally providing measures by which male abuse may be reported and addressed and where abusers may be prosecuted and penalized, protection for women and children remain the only forms of domestic abuse being addressed.

Neither is there any form of government service available to support the diverse needs of male domestic violence victims and their dependents. It is interesting to note that while some of the above countries do not specifically address male abuse solely, the laws implemented to address domestic abuse are simply inclusive.

Aside from the above findings, it also appears that unlike the Philippine government, private sector participation which equally addresses all forms of domestic violence seems to help in the promotion of protection of male and female victims. In the Philippines, there is hardly any education and training within security sector institutions as well as public awareness campaigns that address male domestic abuse. Instead, based on the opinions of the experts in the field, it is discrimination against women and children which remain the priority and focus both government and even the private sector.

Analysis And Discussion

Male victims of Domestic Violence exist despite barriers in making known their struggles.

Domestic violence appears to be present in all sectors of society, despite the victim's social identity or level of income. While men can experience domestic violence at any age, adult men in their mid-20s to late 40s most likely experience it.

Perpetrators of domestic violence primarily control, coerce and manipulate their victims at the psychological level, although physical harm may also be present.

In cases of situational couple violence, physical abuse is often used to draw attention by causing momentary pain and not as an instrument of physical domination. For these reasons, whether the victim appears physically stronger than the perpetrator is of little consequence.

Domestic violence against men is considered as a rare finding. This rarity has relegated it to a level of minimal importance. Notable scholars concluded that although male victims of domestic violence certainly exist, male victims of other forms of male violence are more prevalent.[68]

Taft, et al. suggested that focusing on gendered risk of violence in public health policy should target male-to-male public violence and male-to-female intimate partner abuse with no mention of female-to-male abuse. Their recommendation neglected male victims of domestic violence. The advocacy for men's rights shepherded by men's movements shows that the position of Taft, et al. is not generally acceptable.

Early research on violence as measured by acts shows that women are as violent as men, but when violence is measured by injuries, men are more violent.[69] Several authors have consistently reported higher prevalence figures of domestic violence against females as compared with males.[70] Most assaults

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[68] Taft, A., Hegarty, K., & Flood, M. (2001). Are men and women equally violent to intimate partners? Australian and New Zealand Journal of Public Health, 25, 498-500.

[69] Stets, J. E., & Straus, M. A. (1990). Gender differences in reporting marital violence and its medical and psychological consequences. In M. A. Straus & R. J. Gelles (Eds.), Physical violence in American families: Risk factors and adaptation to violence in 8,145 families (pp. 151-166). New Brunswick, NJ: Transaction.

[70] Coker, A. L., Davis, K. E., Arias, I., Desai, S., Sanderson, M., Brandt, H. M., et al. (2002) Physical and mental health effects of intimate partner violence for men and women. American Journal of Preventive Medicine, 23, 260-268. See also: Rennison, C. (2003). Intimate partner violence, 1993-2001 (Publication

are relatively minor and consist of pushing, grabbing, shoving, slapping, and hitting. The major assaults included rape[71] and homicide.[72] Women in their 20s were more likely to aggress than older women.

In the United States, women appeared to be aggressive because they did not believe that their male victims would be injured or would retaliate. They also wished to engage their victim's attention, particularly emotionally.[73]

In Nigeria, domestic violence against men is culturally regarded as a very serious offense. A male victim would abandon his female partner or refuse to eat the food she cooked. He may even deny having sex with her or withhold money and food from her. Divorce is also an option. Perpetrators are ordered to pay fines and issue a public apology, which is usually enforced by the victim's peers. When hospitalization is needed in severe cases, the male victims can obtain medical reports to present before the community chiefs' council or their customary or magistrate court, which ends with dissolution of the marriage in most cases.[74]

Current research provides little insight into the risks a man faces if he is assaulted by a woman in an intimate relationship. Family violence research has focused on the relative risks that men and women face and mask the high number of men at risk because of the larger number of female victims of domestic violence.

Several judicial systems in other countries follow the premise that guilt follows the offender, not the offended. The opposite is the case in domestic violence against men in which shame and guilt becomes the hallmark of the

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No. NCJ197838). Washington, DC: Bureau of Justice Statistics, Department of Justice; Tjaden, P., & Thoennes, N. (2000). Extent, nature, and consequences of intimate partner violence: Findings from the National Violence Against Women Survey (NCJ 181867). Washington, DC: Department of Justice.

[71] Ibid.

[72] Fox, J. A., & Zawitz, M. W. (2004). Homicide trends in the United States. Washington, DC: Department of Justice.

[73] Fiebert, M. S., & Gonzalez, D. M. (1997). Women who initiate assaults: The reasons offered for such behavior. Psychological Reports, 80, 583-590.

[74] Paul O. Dienye, P. and Gbeneol, P. BMedSc, MBBS, FWACP, FMCFM Domestic Violence Against Men in Primary Care in Nigeria American Journal of Men's Health 3(4) 333–339. DOI: 10.1177/1557988308325461.

victim with possible multiple psychological effects such as drug and alcohol abuse, mood disorders, and suicide.[75]

There is a substantial body of research analyzing violence and abuse simplistically along gender lines. Throughout history, women have been systemically stereotyped as more empathetic and nurturing and men as more competitive and assertive. These stereotypes have, in turn, been central to the social, political, and historical roles of men and women in their public and private lives. [76]

This framing led to the terminology of "victims" pertaining to women as "passive, weak, and powerless," as dominance feminists framed women as universally "potential or actual victims."[77]

The domestic violence movement is an iconic and central component of the larger feminist social movement.[78] However, acknowledging women's acts of violence toward men may be a necessary, albeit uncomfortable, step to end gendered violence.

Still, the gender binary prompted some backlash and policy battles regarding the frequency of female violence of intimate partners.

Over time, the movement has expanded to accept male victims within its infrastructure, but it has not soundly brought female perpetrators in its frame.[79] The domestic violence movement emerged in the 1960s and 1970s in the context of civil rights and antiwar movements.[80] The domestic violence movement's critical move was positioning abuse within a gendered context.[81]

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[75] Heise, L., Ellsberg, M., & Gottenmoeller, M. (1999). *Ending violence against women* (Population Reports, Series L, No.11). Baltimore: Population Information Program, Johns Hopkins University School of Public Health.

[76] White, J. and Kowalski, R. (1994). Deconstructing the Myth of the Nonaggressive Female: A Feminist Analysis, 18 PSYCHOL. WOMEN Q. 488, 504.

[77] Goodmark, L. (2015) *Hands Up at Home: Militarized Masculinity and Police Officers Who Commit Intimate Partner Abuse* 21. Univ. of Md., Legal Studies Research Paper No. 2015-4. Retrieved from http://papers.ssm.com/sol3/papers.cfn?abstract-id=2575677.

[78] Goodman, L. and Deborah Epstein, D. (2005). Refocusing on Women: A New Direction for Policy and Research on Intimate Partner Violence, 20 J. *Interpersonal Violence* 479, 480.

[79] Abrams, J. (2016). The Feminist Case for Acknowledging Women's Acts of Violence, 27 Yale J.L. & Feminism.

[80] Amy Lehmer, A. and Nicole E. Allen, N. (2009). Still a Movement After All These Years? Current Tensions in the Domestic Violence Movement, *Violence Against Women*. 656, 656.

[81] Schneider, E. (2008). Domestic Violence Reform in the Twenty-First Century: Looking Back and Looking Forward, 42 FAM. L.Q. 353, 359 .

The "cornerstone of scholarship and activism" as well as the "basis for law enforcement policies" was built upon a gender binary.[82]

It is important to understand domestic violence as a gendered issue is deeply connected to patriarchal systems of subordination by men and by the state. It is equally important to navigate men's rights backlashes and distortions carefully and vigilantly.[83]

Addressing women's acts of domestic violence would work to dismantle the masculinist frames that currently dominate our understandings of domestic violence offenders.[84] This masculinist frame has deep historic roots and an entrenched modern presence.

Historical responses to "wife beating" were more about policing masculinity norms than women's equality. This reinforced the tethering of masculinity to violence and femininity to vulnerability.[85]

Not acknowledging and understanding women's acts of domestic violence further perpetuates the myth that women are inherently and universally more peaceful than men. It perpetuates harmful views that all women who associate with violent behaviors are either not women or are not perpetrators, effectively masking victims of male violence and control.[86]

The narratives about women abusing men have been about the gender non-conformance of men who were abused. Katz observed that "men who beat their wives were unmanly cowards, while their wives embodied feminine weakness and dependence."[87]

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[82] Aviram, H. and Persinger, A. (2012). Perceiving and Reporting Domestic Violence Incidents in Unconventional Settings: A Vignette Survey Study, 23 HASTINGS WOMEN'S L.J. 159, 159 (2012).

[83] Notably, even this framing of domestic violence as a "women's issue," gives primary emphasis to women's victimization and secondary emphasis to male violence.

[84] Ramsey, C. (2016). The Stereotyped Offender: Domestic Violence and the Failure of Intervention, 120 PENN ST. L. REV.

[85] Abrams, J. (2010) The Collateral Consequences of Masculinizing Violence, 16 WM. & MARY J. WOMEN & L. 703.

[86] Abrams, J. (2016). The Feminist Case for Acknowledging Women's Acts of Violence, 27 Yale J.L. & Feminism.

[87] Katz, E. (2015). Judicial Patriarchy and Domestic Violence: A Challenge to the Conventional Family Privacy Narrative, 21 WM. & MARY J. WOMEN & L. 379, 412.

There is a notion that "men who 'allowed' their wives to beat them were so unmanly that they did not deserve society's care or protection."[88] Not adequately acknowledging the role of women as perpetrators perpetuates these historic myths of masculine strength, not power and control, as central to domestic violence.[89]

However, domestic violence, at its core, is about the exercise of power and control in an intimate partner setting.[90]

This focus on strength and physicality is problematic when "central to the feminist narrative is the idea that men who abuse are not generally angry or violent; rather, they only abuse their partners as a means of asserting power and control."[91]

Understanding women's acts of violence within feminism would also start to embrace the full diversity of women's experiences. It would move away from the long history of pathologizing and marginalizing women who use violence and aggression.[92]

A survey-based research found that the common perception is that the problem of partner abuse is located in the individual pathology or deviance of the individual, and/or that it is a result of 'dysfunctional' relationships underscored by individual mental illness, alcoholism, drugs, developmental difficulties or stress.[93] Research has also associated childhood abuse experiences and attachment difficulties with vulnerability to later 'psychopathologies,' such as personality disorder in both males and females and, confusingly, in both perpetrators and victims.[94] However, it has also been

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[88] Ibid. p. 415

[89] Ibid. p. 416

[90] Schneider, E. (2008). Domestic Violence Reform in the Twenty-First Century: Looking Back and Looking Forward, 42 FAM. L.Q., 356

[91] Goodmark, L. (2015). *Hands Up at Home: Militarized Masculinity and Police Officers Who Commit Intimate Partner Abuse* 21 (Univ. of Md., Legal Studies Research Paper No. 2015-4), Retrieved from http://papers.ssm.com/sol3/papers.cfn?abstract-id=2575677

[92] Abrams, J. (2016). The Feminist Case for Acknowledging Women's Acts of Violence, 27 Yale J.L. & Feminism.

[93] Hines, D.A., Brown, J., & Dunning, E. (2007). Characteristics of Callers to the Domestic Abuse Helpline for Men. Journal of Family Violence, 22, 63-72.

[94] Goldenson, J., Spidel, A., Greaves, C., & Dutton, D. (2009). Female Perpetrators of Intimate Partner Violence: Within-Group Heterogeneity, Related Psychopathology, and a Review of Current Treatment with Recommendations for the Future. *Journal of Aggression, Maltreatment & Trauma, 18,* 752–769.

argued that men are far less likely than women to carry the label of 'victim' into adulthood, even when childhood abuse experiences are acknowledged.[95]

Longitudinal research paradigms have highlighted that risk factors for later aggressive behavior are shared by girls and boys and predict both general and partner aggression.[96] In addition, personality-type risk factors (e.g. fearlessness, lack of empathy and impulsivity) and other risk factors, including low socio-economic status have been cited as highly predictive of later aggression.[97]

Furthermore, specific risk factors in terms of adolescent 'conduct disorder' were found to be predictive of both perpetration of later partner abuse and of pairing up with an 'abusive partner,' often leading to reciprocal abuse.[98]

In terms of female abusers, self-defense is often not the primary motivation for violence reported,[99] but rather efforts to exert dominance and control over their partner.[100]

According to an investigation on physical aggression, women were twice as likely as men to be the sole perpetrator of abuse.[101] Similarly, Swan and Snow noted that in 12% of their sample of couples, women were classed as dominant aggressors.[102] It has been suggested that power may therefore be exerted by women as well as men, at least within the specific context of an intimate relationship.[103]

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[95] Graham-Kevan, N. (2009). The Psychology of Women's Partner Violence: Characteristics and Cautions. *Journal of Aggression, Maltreatment & Trauma, 18,* 587- 603.

[96] Moffitt, T. E., Caspi, A., Rutter, M., & Silva, P. A. (2001). *Sex differences in antisocial behavior.* Cambridge, UK: Cambridge University Press.

[97] Graham-Kevan, N. (2009).

[98] Moffitt, Caspi, Rutter, & Silva, 2001

[99] Follingstad, D. R., Wright, S., Lloyd. S., & Sebastian, J. A. (1991). Sex differences in motivations and effects in dating violence. *Family Relations, 40,* 51-57.

[100] Rouse, L. P. (1990). The dominance motive in abusive partners: Identifying couples at risk. *Journal of College Student Development, 31,* 330-335.

[101] O'Leary, K.D., Barling, J., Arias, I, Rosenbaum, A., Used, T., Malone, J., & Tyree, A. (1989). Prevalence and stability of physical aggression between spouses: A longitudinal analysis. *Journal of Consulting and Child Psychology, 57(2),* 263-268.

[102] Swan, S.C., & Snow, D.L. (2002). A typology of women's use of violence in intimate relationships. *Violence Against Women, 8,* 286-319.

[103] Johnson, M.P. (2006). Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence. *Violence against women, 12,* 1003-1018.

By way of contrast, the Stitt and Macklin study asked twenty men whether 'they attributed their wife's behavior to an addiction or other issues.[104] In a nutshell, women may have the autonomy or agency to exert power and commit violence, other than to resist male oppression.

Domestic violence is indeed gendered and complex. It is both individualized and systemic. It has critical shared underpinnings, yet it is different in every manifestation.[105] It is time to consider whether it is too myopic to ignore female perpetrators. It is both "possible and politically necessary to acknowledge that some women use violence as a tactic in family conflict while also understanding that men tend to use violence more instrumentally to control women's lives."[106]

Characteristics of Male Victims of Domestic Violence

As shown in this study, definitions of domestic violence vary, and it may also be referred to as domestic abuse, intimate partner violence or family violence.

UN guidelines advocate definitions in national legislation that include physical, sexual, psychological and economic violence and apply to any individuals in an intimate relationship (including marital, non-marital, same sex and non-cohabiting) or in the same family or household.[107]

Michael Flood, a sociologist specializing in gender, sexuality and interpersonal violence, provides a more specific definition of domestic violence. According to him, domestic violence is "a systematic pattern of power and control exerted by one person against another, involving a variety of physical and non-physical tactics of abuse and coercion… in the context of a current or former intimate relationship."[108]

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[104] Stitt, S., & A. Macklin. (1995). *Battered men: the hidden victims of domestic violence.* [Research monograph]. Liverpool John Moores University, Liverpool, United Kingdom. p.49.

[105] Hunter, R. (2008). Domestic Violence Reform: Women's Experience in Court. p.5

[106] Kimmel, M. (2015). Gender Symmetry" in Domestic Violence. *Violence Against Women.* 1332, 1333, 1355

[107] United Nations, "Handbook for legislation on violence against women", UN Department of Economic and Social Affairs, Division for Advancement of Women, New York, 2010, pp. 24–25, www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20 on%20violence%20against%20women.pdf.

[108] Michael Flood, "He hits, she hits: Assessing debates regarding men's and women's experiences of domestic violence", Australian Domestic and Family Violence Clearinghouse seminar, Sydney, 6 December, 2012, p. 2.

The nature of domestic violence as a pattern makes it difficult to categorize in a legal sense. Hence, it is much easier to prosecute individual violent incidents if and when they occur than to penalize domestic violence as a behavioral pattern characterized by different kinds of abuse.

This can be problematic because many of the acts committed within the context of domestic violence leave no visible physical injuries, making it difficult to prove that they were even inflicted on the victim.

However, if security personnel have the requisite training as well as the foresight and resources necessary to document these seemingly minor disturbances and subsequently identify a pattern, it is possible to bring successful prosecutions. Domestic violence against men takes many forms, including:[109]

1) physical violence – pushing, biting, hitting, burning, strangling, using a weapon, committing homicide;
2) sexual violence – forcing sexual intercourse or non-consensual practices;
3) psychological violence – bullying, jealous behavior, humiliation, verbal abuse such as ridiculing and blaming;
4) isolation – forbidding social contact, confinement, undermining;
5) threats, intimidation and stalking – threatening with death or suicide, surveillance, controlling;
6) economic violence – withholding money, forbidding work or forcing the victim to work; and
7) legal and administrative abuse – use of institutions to inflict further abuse on a victim, for example taking out false restraining orders to deny the victim access to his children, pressuring through children, the abuse of pets or property damage.

It is important to highlight that some abuse which may ordinarily be considered too minor to warrant prosecution should be considered as an act of domestic violence when it occurs as part of a pattern of coercion and control. This means that the severity of an individual act should not be used as the only measure of the severity of the crime.

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[109] Gloor, D. and Hann Meier, H. (2012). "Assessing the severity of domestic violence", sociological background report for Swiss Federal Office for Gender Equality, Bern, June 2012, p. 10.

For example, a one-off incident where a heated argument between a couple results in a physical injury may be less serious than a case where one partner routinely reads the other's text messages in order to control his or her movements and social interactions.

In survey-based studies violent acts such as hitting and punching are regularly listed, but they are often reported as more frequent and having more severe consequences when perpetrated by a man against a woman.[110]

However, researchers have pointed out that women may 'even the score with physically stronger male partners' by using weapons or throwing things at them.[111]

Similarly, men are more likely to be victims of severe violence from women involving kicking or objects thrown[112] and that the number of attacks experienced is likely to be greater,[113] and that severe violence perpetrated by women often results in some type of injury.[114]

In interview-based studies, men described women's violence as frequently creative, common and including sexual violence (e.g. direct attacks on the man's genitals). The violence described might also include harm to children or be accompanied by random destruction of property.[115]

Men also regularly cite the experience of non-physical abuse, described sometimes as 'controlling behaviors,' emotional or psychological abuse.[116] It is important to understand these characteristics of domestic male abuse in terms of non-physical abuse as they equally have a life debilitating effect.

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[110] Scottish Executive Central Research Unit (2002). Domestic Abuse Against Men In Scotland. The Stationery Office Ltd: Gadd, D., Farrell, S., Dallimore, D., & Lombard, N. Retrieved from http://www.scotland.gov.uk/Resource/Doc/46737/0030602.pdf

[111] Hines, D. A., & Malley-Morrison, K. (2001). Psychological effects of partner abuse against men: A neglected research area. *Psychology of Men and Masculinity, 2*, 75–85.

[112] Strauss, M.A. (1980). Wife beating; how common and why? In M.A. Strauss & G.T. Hotaling (Eds.) *The social causes of husband-wife violence* (pp. 23-36). Minneapolis: University of Minneapolis Press.

[113] Archer, J. (2000). Sex Differences in Aggression between Heterosexual Partners: A Meta-Analytic Review. *Psychological Bulletin, 126,* 651-680.

[114] Morse, B.J. (1995). Beyond the conflict tactics scale: Assessing gender differences in partner violence. *Violence & Victims, 10(4),* 251-272.

[115] Northern Ireland Domestic Violence Forum (2005). *Abuse of Adult Males in Intimate Partner Relationships In Northern Ireland.* Authors: Brogden, M., & Nijhar, S.K. Retrieved from http://www.ofmdfmni.gov.uk/relationships.pdf

[116] Hines, D.A., Brown, J., & Dunning, E. (2007). Characteristics of Callers to the Domestic Abuse Helpline for Men. *Journal of Family Violence, 22,* 63-72.

Barriers in Reporting of Domestic Violence Against Men

As was shown in this study, there are indeed barriers in reporting "Domestic Violence Against Men." These are social, legal, and practical barriers. "Social Barriers" are founded on beliefs in society about how men ought to behave seem incompatible with them reporting domestic violence. For instance, police forces are sometimes perceived as "macho-type" organizations and men fear that officers will be unsympathetic and challenge their masculinity if they report. This may be coupled with social consequences. In Igbo-speaking parts of Nigeria, for example, many men attempt to settle injustices themselves because reporting to the police will be looked down upon by their parents and other senior members of the community. "Legal Barriers," on the other hand is the absence of laws for the protection of men. In a number of states, including the Philippines, there are hardly any laws that protect men. For instance, most laws do not recognize rape as a crime that can affect men. There are no clear reporting mechanisms that men can access. "Practical Barriers" prevent men from reporting domestic violence because either they physically cannot (e.g. cannot figure out how to), they have nothing to gain by reporting, or they risk making their situation worse.[117]

Notably, security sector institutions play a crucial role in removing many of these barriers. Small steps can dramatically improve the level of access to justice for male domestic violence victims. As a first step, security sector institutions need to gain a deeper understanding of the many different barriers to reporting that may exist in their context.

In a more extensive discussion of these barriers, which should justify institutionalizing mechanism to protect against domestic abuse against men, the following are considered essential factors:

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[117] Heather Huhtanen, "Sexual assault dynamics", in Attorney General's Sexual Assault Task Force, Advocacy Manual (Salem, OR: Oregon Department of Justice, 2007, p. 2); "Sexual offenders", in Attorney General's Sexual Assault Task Force, Advocacy Manual (Salem, OR: Oregon Department of Justice, 2007, p. 34), Peel, note 11 above, p. 64; Hickson et al., note 28 above, p. 283; R. Charli Carpenter, "Recognizing gender-based violence against civilian men and boys in conflict situations", Security Dialogue 37(1), 2006, p. 94; Noreen Abdullah-Khan, Male Rape: The Emergence of a Social and Legal Issue (Basingstoke: Palgrave Macmillan, 2008, pp. 71, 81, 85–86).

Social Barriers

The stigma associated with being a victim, especially for men, is one of the largest barriers to reporting. Men are taught from an early age that they are supposed to be strong and independent. They may not report domestic violence to avoid being labelled as victims or viewed as "soft and weak and incompetent."[118]

Others simply cannot or will not perceive themselves as victims. In extreme cases, men may even blame themselves for provoking their attackers, or isolate themselves due to the fear that they are at risk of becoming a perpetrator.

Often, men who do report having been victimized highlight having been drunk or high on drugs in order to "justify" their inability to defend themselves, which may make it less likely a conviction against their assailant would be achieved.[119]

When men are sexually assaulted by other men, they may fear a "double stigma" of being looked down upon as both a victim and a "homosexual", even if the latter is not the case. Religious men may feel they have sinned by engaging in forbidden sexual acts, even if the acts were not consensual. They may see the crime as a kind of divine punishment.

This explains why some male Muslim victims of sexual abuse by men refuse to report to Muslim security personnel. They worry that the security personnel will feel duty-bound to denounce this "homosexual activity" to the mosque regardless of how it came about. In addition to the social barriers affecting men because of their gender, there are also barriers that affect particular groups of men.

Certain men struggle to get security sector personnel to believe them when they report domestic violence because they are members of social groups that lack credibility due to social prejudice. These include those who are young adults, disabled, homeless, economically disadvantaged, substance dependent,

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[118] Fionnuala Ní Aoláin, "Masculinities and child soldiers in post-conflict societies", University of Minnesota Law School Legal Studies Research Paper Series No. 10-57, 2011; citation by Catharine A. MacKinnon, "Feminism, Marxism, method, and the state: An agenda for theory", Signs 7(3), Spring 1982, p. 530.

[119] Nicola Graham-Kevan, "The invisible domestic violence – Against men", The Guardian, 7 June 2011; Gary Foster, Cameron Boyd and Patrick O'Leary, "Improving policy and practice responses for men sexually abused in childhood", ACSSA Wrap No 12, 2012, www.aifs.gov.au/acssa/pubs/wrap/wrap12/index.html; Karen G. Weiss, "Male sexual victimization: Examining men's experiences of rape and sexual assault", Men and Masculinities 12(3), August 2008, pp. 289–293.

convicted criminals or have a history of abuse. Men who are incarcerated or institutionalized in psychiatric or other residential facilities also experience problems.[120]

Other groups have less of a problem convincing security sector personnel that domestic violence took place, but due to social stereotyping they struggle to demonstrate that it was non-consensual. This has been known to affect men who are homosexual, bisexual, transexuals, sex workers, partners of the perpetrator or victims of sexual violence committed by women. Social barriers also occur due to the relationship between the victim and the perpetrator. Reporting domestic violence may involve implicating a family member, colleague or other key person within their community.

Fear of exclusion, a desire not to destabilize the group and emotional or economic dependence on the perpetrator are common social barriers to reporting. It is for this reason that some boys who were sexually abused did not report the crime until over 20 years have passed. The security sector should be prepared to receive adults who were victims of violence in their childhood.

Legal Barriers

In many instances the law does not specifically criminalize domestic violence against men. While it might be possible to prosecute domestic violence under assault or battery laws, for example, the prospect of enduring a long, intrusive and complicated legal process that is of little perceived benefit to the victim means they may simply not report the crime. This has the knock-on effect of maintaining perceptions that domestic violence against men does not exist, meaning there is little impetus to change legislation.

In countries where sodomy, homosexuality or sexual relations outside marriage are criminalized, male victims of sexual violence may avoid reporting for fear of being prosecuted for violating these laws if their original case collapses.[121]

A further barrier to reporting that affects both men and women relates to the collection of evidence. Evidence of domestic violence can be difficult to

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[120] Jeffrey Gettleman, "Symbol of unhealed Congo: Male rape victims", New York Times, 5 August 2009.

[121] This was reported as problematic by people working with male victims in Uganda. Salome Atim, 'Sexual violence against men", paper presented at "Tough Choices – Ethical Challenges in Humanitarian Action", Humanitarian Congress, Berlin, 12–13 October 2012.

provide, and several reports of individual incidents to the police may be necessary to prosecute a perpetrator. Sexual violence often does not leave long-lasting physical marks on the body, and even when it does, it is hard to attribute them conclusively to the perpetrator.

Victims may be anxious about undergoing forensic medical examinations. In particular, if sexual violence has taken place against a man, an intimate examination of the penis, scrotum and rectum may be required, which can be humiliating. It can also be the case that men are not aware that what has happened to them is a crime.

In some cases, for example, they may see it as a cultural practice or a rite of passage. In others, such as those involving immigrant populations, it could be a consequence of not speaking the local language or being unfamiliar with the local justice system.

In the case of undocumented migrants or refugees, the problem is compounded by the fact that if they report domestic violence, they risk being charged for having entered the country illegally.[122]

Practical Barriers

Practical barriers are those that the security sector is best placed to help overcome. Victims often do not know how to report domestic violence. If they have to search through a maze-like building for the right place to report, they may well give up before finding it.

If the perpetrator is a member of the security sector, the victim may fear being discovered by them while attempting to report, or may believe that security sector personnel are immune from prosecution, either officially or unofficially.

Another common barrier occurs when reporting domestic violence will require the victim and his dependents (e.g. children, elderly or disabled relatives) to leave the home to avoid violent retribution.

Aside from having no alternative accommodation, some victims worry about losing custody of their children if they leave, are counter-accused, or are wrongly assumed to be the perpetrator and arrested. Safe houses that are open

[122] Dennis O'Brien, Understanding Male Sexual Abuse: Why Male Victims Remain Silent (Bloomington, IN: iUniverse, 2011, pp. 36–37).

to men remain few and far between and, as is the case with women's shelters, they tend to face chronic funding shortages.

Many victims only feel confident enough to report to the police after having received significant amounts of support from dedicated service providers. Services provided to female victims of domestic violence may be funded by ministries for women's affairs or other gender-specific sources, which may not have the mandate to provide services to men even if they wanted to.

In the UK, for example, the Home Office has not historically provided funding for male domestic violence victims and the Ministry of Justice Rape Support Fund only finances organizations that have a dedicated women's service, effectively excluding organizations specializing in support to male victims.[123]

Impacts/Consequences of Domestic Violence Against Men

Domestic violence impacts men in a multitude of ways. In addition to the impact on victims themselves, there is also a significant effect on others, such as children who unfortunately are witnesses to the violence and equally suffer secondary trauma as a result. Some of these children may later commit self-harm or domestic violence and other forms of abuse because they see it as "normal behavior."

As this cycle of violence is repeated, it also has a negative socio-economic impact on the community as a whole.

Domestic violence results in lost productivity at work and in household tasks, higher levels of absenteeism in the workplace, lost investments in human capital, higher insurance costs and significant expenditures on medical, legal and social services. These are often borne by the state and employers as well as the victims themselves.[124]

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[123] ManKind Initiative, "Public services challenge – Men's health", 2008, p. 4, www.mankind.org.uk/pdfs/menshealth.pdf; Martyn Sullivan, "An exploration of service delivery to male survivors of sexual abuse", report for Winston Churchill Travelling Fellowship, 2010–2011, p. 42, www.wcmt.org.uk/reports/840_1.pdf.

[124] Gary Barker and Marcos Nascimento (eds), Project H: Working with Young Men Series (Rio de Janeiro: Promundo, 2002, p. 147); Workplaces Respond to Domestic and Sexual Violence, "Impact of violence and the workplace", 28 September 2010, www.workplacesrespond.org/learn/the-facts/ impact-

Several studies have highlighted the self-reported shame and embarrassment of 'abused men.'

Men vary in their own alignment with and adherence to the ideals of a hegemonic masculinity.[125] They seek to accomplish multiple identity positions, and are not merely limited to those enabled through accounts of masculinity.

Furthermore, by rooting the debate on partner abuse only in totalizing notions of gender, rather than in the inherent attitudes and propensity of individuals to use violence and abuse as an inter-relational strategy, female victimization will continue, as will the unseen victimization of some men.[126]

There is a considerable body of evidence to suggest that the 'abused man' is constrained from seeking help. Male victims may not seek help because care agencies often deny the existence of violence against men where the female partner is the perpetrator.[127]

Men are not encouraged to report abuse.[128] They are conditioned not to ask for help and may feel disempowered by those in authority. Thus, they are less likely to report incidents of domestic violence.[129] In addition, a US community survey[130] of the help-seeking attitudes of abused men, cited: service perception of client group, shame and embarrassment, denial, stigmatization, and fear as constraints to seeking support from agencies. Du Plat-Jones[131] cited anecdotal concerns from UK men that their healthcare needs will not appropriately be met by healthcare professionals, a sentiment echoed by several men interviewed by Brogden and Nijhar.[132]

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of-workplace-violence; Hugh Waters, Adnan Hyder, Yogesh Rajkotia, Suprotik Basu, Julian Ann Rehwinkel and Alexander Butchart, "The economic dimensions of interpersonal violence", World Health Organization, Geneva, 2004, p. 6, http://whqlibdoc.who.int/ publications/2004/9241591609.pdf; Bronwyn Herbert, "Domestic violence costs $13bn a year", ABC News, 7 March 2011, www.abc.net.au/ news/2011-03-07/domestic-violence-costs-13bna-year/57284.

[125] Wetherell, M. and Edley, N. (1999). Negotiating Hegemonic Masculinity: Imaginary Positions and Psycho-Discursive Practices. *Feminism & Psychology 9(3),* 335-336.

[126] Stitt, S., & A. Macklin. (1995). *Battered men: the hidden victims of domestic violence.* [Research monograph]. Liverpool John Moores University, Liverpool, United Kingdom.

[127] Ibid.

[128] Barber, C.F. (2008). Domestic violence against men. *Nursing Standard, 22(51),* 35-39. Retrieved from http://www.scribd.com/doc/37691089/domesticviolence

[129] *Ibid.* p.37

[130] Tsui, V., Cheung, M. and Leung, P. (2010), Help-seeking among male victims of partner abuse: men's hard times. *Journal of Community Psychology, 38,* 769–780.

[131] Du Plat-Jones, J. (2006). Domestic violence: the role of health professionals. *Nursing Standard 21,* 14-16.

[132] As part of their study, Abuse of Adult Males in Intimate Partner Relationships in Northern Ireland.

In terms of reporting partner abuse as a crime, only around 7% of all incidents of domestic violence recorded by the police involved male victims attacked by female perpetrators.[133]

Abused men report that it is hard to accept their own situation and believe that the police blame men and are reluctant to produce crime reports on partner abuse against men. Therefore, given the higher level of partner abuse reported by men, it seems likely that men are constrained from reporting partner abuse as a crime.[134]

There is now a substantial body of research seeking to differentiate the experiences of male and female victims. A majority of this research can be criticized for focusing on a form of behavior (i.e. physical violence) perceived as 'male.' However, a few interview-based studies have drawn on wider definitions of abuse.[135]

Survey-based studies have tended to focus on 'internalizing' symptoms such as depression, which women experience at twice the rate of men. Many studies have failed to examine 'externalizing' symptoms such as alcoholism or PTSD which have been found to be significantly associated with the experience of partner abuse.[136] They have also often failed to assess suicidal, self-destructive, self-mutilating and assaultive behaviors.[137] Moreover, they fail to report that the male suicide rate is consistently higher than for women.[138]

Furthermore, while reporting immediate reactions such as anger, emotional distress and depression,[139] men also report other reactions such as wanting to seek revenge, feeling unsafe and feeling shame or fear.[140]

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[133] Scottish Executive Central Research Unit (2002). Domestic Abuse Against Men In Scotland. The Stationery Office Ltd: Gadd, D., Farrell, S., Dallimore, D., & Lombard, N. Retrieved from http://www.scotland.gov.uk/Resource/Doc/46737/0030602.pdf

[134] Lawrence, S. (2003) Domestic violence and men. *Nursing Standard, 17,* 41-43.

[135] For instance, in the study of Brogden & Nijhar (2005)

[136] Hines, D. A., & Malley-Morrison, K. (2001). Psychological effects of partner abuse against men: A neglected research area. *Psychology of Men and Masculinity, 2*, 75–85.

[137] Carmen, E. H., Rieker, P. P., & Mills, T. (1984). Victims of violence and psychiatric illness. *American Journal of Psychiatry, 141,* 378-383.

[138] Office for National Statistics, General Register Office for Scotland, Northern Ireland Statistics and Research Agency. (2011, May 7). General format. Retrieved from http://www.statistics.gov.uk/cci/nugget.asp?id=1092.

[139] Follingstad, D. R., Wright, S., Lloyd. S., & Sebastian, J. A. (1991). Sex differences in motivations and effects in dating violence. *Family Relations, 40,* 51-57.

[140] Morse, J.M. (1994). Designing funded qualitative research. In Norman K. Denzin & Yvonna S. Lincoln (Eds.), *Handbook of qualitative research* (2nd ed., pp.220-35). Thousand Oaks, CA: Sage.

In the UK qualitative literature, the most severe form of abuse cited by male respondents was emotional victimization, normally cumulative and involving long-term trauma, which at the extreme may lead to suicide attempts. Such victimization could affect their ability to work or result in a loss of home or livelihood.

Only a few of the interviewed men reported that in subsequent legal and matrimonial procedures were the courts receptive to the notion of the male as victim.

Men reported emotional trauma, not just because of the direct effects on themselves, but also because of their children witnessing such abuse and, in some cases, being forced to take sides.[141]

Such experiences in several cases affected the individual's ability to develop future relationships with members of the opposite sex, although others stated that future relationships could largely compensate for their experience of partner trauma.[142]

A minimal amount of research has garnered information about how men cope with the direct consequences of female-perpetrated abuse.[143]

The men interviewed in the Brogden and Nijhar study stated that to a varying extent they could 'manage' coercive abuse, but required coping strategies so to do.

There were concerns expressed that severe abuse would 'mentally destroy' them or that it undermined their image of masculinity in the outside world. To cope, most of the men attempted to conceal their abusive experiences from public view: variously out of embarrassment, by self-injury to conceal their bruises, or because they believed third parties would not take the abuse seriously.

Some respondents described coping through a process of passive acceptance as they became slowly immunized to the escalating abuse and

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[141] Josolyne, S. (2011). Men's experiences of violence and abuse from a female intimate partner: Power, masculinity and institutional systems. *Doctoral Dissertation for the Degree in Clinical Psychology.* University of East London, Stratford. Stratford, London: UK. Retrieved from http://www.mankind.org.uk/submisscampaigns.html.

[142] Scottish Executive Central Research Unit (2002). Domestic Abuse Against Men In Scotland. The Stationery Office Ltd: Gadd, D., Farrell, S., Dallimore, D., & Lombard, N. Retrieved from http://www.scotland.gov.uk/Resource/Doc/46737/0030602.pdf

[143] Hines, D.A., Brown, J., & Dunning, E. (2007). Characteristics of Callers to the Domestic Abuse Helpline for Men. *Journal of Family Violence, 22,* 63-72.

violence. Most found reasoning ineffectual and engaged in various strategies to avoid or temporarily escape from the problematic behavior.

Many felt trapped. By leaving, they risked disadvantage or unhelpful contacts with agencies while others attempted to normalize the abuse, believing that it would ease over time. Alcohol was a common resort with no positive effects, while some men attempted to use physical exercise to alleviate the domestic strife.

Work also provided a temporary but unsatisfactory distraction for some men. A majority of the men interviewed had terminated the relationship, either through choice by either party or through 'exhaustion'.

Again, a minimal amount of research has garnered information about the experiences of men who have sought support in response to abuse. Brogden and Nijhar reported that only a few men had sought external support, mostly from trusted friends.

The respondents mentioned having contacted male intimates, family members and professional agencies, but had received mixed responses, predominantly negative and unhelpful. Some support was experienced from 'breaking the silence' to a neutral party and in confiding subsequently to new intimate partners.

Stitt and Macklin reported that of 20 respondents, two said that they had gone to the police and three said that their partner had called the police.

The other 15 had stated that they did not want to involve the police, having little or no faith in the police being impartial and, in their ability, to acknowledge men as victims of partner abuse.

In terms of other services, some men had not contacted any agencies for support, expressing negative expectations of the response that they would receive. The services that the male victims had been involved with were unsympathetic (stigmatizing and minimizing) and/or unhelpful.

Counselling services and help-lines were viewed as offering no practical help and general physicians responded in practical ways by treating the physical injury or by prescribing psychiatric medication to men to help them cope with the stress, thus locating the problem in the man.[144]

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[144] Stitt, S., & A. Macklin. (1995). *Battered men: the hidden victims of domestic violence.* [Research monograph]. Liverpool John Moores University, Liverpool, United Kingdom.

As verified and shown by in previous studies, sex and gender or the physiological and biological differences between and among male, female, and transgender people are indeed factors in domestic abuse.

The study further confirmed that a vast majority of women here and abroad are often victims of domestic abuse mostly by their intimate partners.

However, equally, the study was able to establish that when it comes to intimate partner abuse or IPV, sex and gender are not always the only determining factors. It is not just about size or physical strength. Instead, control, power, and abuse are also factors that result in domestic abuse. Thus, "male abuse" exists.

Worse, the social stigma that men are perpetrators and that women are the victims, aside from the lack of appropriate measures here and abroad, are barriers that prevent providing protection to male victims. Also a barrier is the overflow of measures consisting of laws, covenants and treaties that solely protect women.

Men by nature are regarded as strong and independent and are therefore not expected to seek redress whenever they find themselves victims of domestic abuse. If they do so, such would be viewed weak and incompetent.

Despite this, the study was able to present the debilitating effect of domestic abuse not only against women, but also against men.

Unless mechanisms or processes are in place to address victims of domestic violence as a whole, which includes protection, prosecution, and coping mechanisms, the adverse effect of domestic violence transcends and are distractive not just to the victims, but sometimes, even with the other members of the family and the society as a whole.

Further study also showed that while there are best practices on the subject matter abroad, the measures in place within the Philippines is not sufficient to address all forms of domestic violence, including those against men.

In particular, even if the Revised Penal Code provides a provision that will prosecute offenders who commit physical violence against anyone including men, these measures may not at all be sufficient.

Unlike R.A. No. 9262 which significantly addresses domestic violence against women and children, and providing remedial measures not ordinarily found in the Revised Penal Code, such as securing protection orders either from the Barangay or from the courts in favor of women and children, the procedural and technical limitations of this law on domestic violence does not

at all address domestic male abuse. Thus, there is a need to revisit and even supplement R.A. No. 9262.

IV. CONCLUSION AND RECOMMENDATIONS

Conclusion

Domestic abuse against men or domestic male violence is real. There is an urgent necessity to provide justice for all victims of domestic abuse, including men, who are not immune from domestic abuse and its damaging effects.

Aside from the traditional gender role-playing, there are also factors that tend to undermine or even render the subject matter taboo in many jurisdictions, like in the Philippines. These factors include many forms of barriers against male abuse. These barriers notwithstanding, measures and coping mechanisms that are all-inclusive remain to be ideal. Ultimately, protecting victims of domestic abuse against men is not only for sake of the victims, but also for society as a whole.

Domestic abuse against men may not only lead to psychological and physical abuse but could also seriously endanger lives. The enormous effects of "Emotional Abuse," "Controlling Behavior," and "Psychological Abuse" cannot be undermined and need to be addressed in the Philippines.

While physical or sexual and psychological abuse against women is concededly widespread, this is not enough reason to downplay what other men equally suffer. Abuse, after all, is neither confined to the physical domain nor limited to a matter of strength. Control, power, influence, constant bullying, intimidation, and browbeating are also more common factors that result in domestic male abuse, which abuse similarly results in serious psychological damage.

Finally, from the legal perspective of all these abuses committed against men, it bears emphasis that the State is bound by the equal protection clause and is mandated to recognize the need to protect all family members and relationships, regardless of gender and sexuality, from violence and threats to their safety and security. Then, the State should exert efforts to address domestic violence committed against these individuals, whether it be the same-sex or heterosexual, married or not, and regardless of whether they are victims or not in keeping with the fundamental freedoms guaranteed under the 1987 Constitution, as well as provisions of the UDHR and other international human rights instruments of which the Philippines is a party. To this end, positive legislation and measures are a must.

While retaining R.A. No. 9262 is necessary as protection against domestic abuse for women and children, proposing a new measure or an additional measure that will equally consider protecting men against domestic violence is warranted.

Recommendations

On the part of the State, policy formation, as well as laws governing domestic abuse, must be all-inclusive. Barangays and other local officials who run the primary and smallest forms of local governance must have the necessary training that will reinforce their understanding that men can be victims and women (heterosexual and homosexual) can be perpetrators as well.

On a national level, there should also be an oversight, monitoring, and evaluation of domestic violence within security sector institutions to support policy formation against all forms of abuses, not just for women and children in the Philippines, but also for men. There should also be available statistics and reports to be made public. To this end, there should be sufficient mechanisms available for all victims of domestic violence to complain about and how their cases are to be handled by one or more security sector institutions, such as the local government and the prosecutorial service.

It is likewise recommended that the different women's and children's desks from the PNP and other law enforcement agencies such as the National Bureau of Investigation be expanded to a "Domestic Abuse Division" instead of limiting the same to women and children.

The current bill in Congress, H.B. 4888, seeks to expand the coverage of R.A. 9262 by including the term "partner" to cover not only heterosexual relationships but also "lesbian, gay, bisexual, queer, intersex, cisgender, and transgender partners." It is a useful start or reference which will also cover abuse committed against same-sex partners and husbands in heterosexual relationships. It is, however, recommended further to either improve H.B. 4888 and/or come up with additional mechanisms or another proposed measure that will adequately address domestic violence as they primarily contribute to the total effectiveness of any law against domestic violence. After all, there are some provisions of the current R.A. 9262 that may apply to women and children but may not be available to men.

While pushing for the passage of new measures that will address an all-inclusive anti-domestic violence or abuse law, it is recommended for Congress to consider a number of inclusions, to wit:

(a) to include, as a crime of violence against men, psychological, physical, sexual, and economic forms of violence, since these forms of abuses have been defined by R.A. 9262 and a similar but expanded definition may be adopted, save for instances that will solely apply to men or women;

(b) to include a provision designating "Psychological Violence against Male Partners" which would refer to acts or omissions causing or likely to cause mental or emotional suffering to be supported by a psychological assessment report; and

(c) to revisit the term "Physical Violence" which should refer to an act of inflicting grave and repeated physical harm and must not be isolated upon the individual resulting in the physical and psychological or emotional distress.

As to penalties, it is recommended that the penalty that must govern should also vary. Physical abuse constituting attempted, frustrated, or consummated parricide or murder or homicide shall be punished in accordance with the provisions of the Revised Penal Code.

Acts falling under Psychological and Sexual Abuse under Section 5 shall be punished by *prision correccional* or an imprisonment of six months one day to six years at the discretion of the Court and may be subject to probation if committed for the first time. Congress may also consider the imposition of a fine so that the perpetrator may be discouraged from committing the same offense. Likewise, mandatory psychological counseling or psychiatric treatment should also accompany the imposition of any similar penalty.

Aside from the above imposable penalties, it is also recommended to allow victims, including men, to similarly secure "Protection Orders" to prevent further acts of violence against such individuals specified in the proposed law. The relief granted under a protection order serves the purpose of safeguarding the victim from further harm, minimizing any disruption in the victim's daily life, and facilitating the opportunity and ability of the victim to regain control over his life independently.

In addition to protection orders, proper coordination with either a health worker, social worker, or psychologist to accompany the victim should also be mandated. A coordinated action not only by the barangay or the courts, but also by the health or social workers or psychologist, is warranted.

In providing health service to the victim, it is best that a health worker of any government hospital or social worker of the Department of Social Work and Development must:

1) examine the mental health of the victim in accordance with the professional standard; and

2) prepare written preliminary report on the result of examination on the victim to be reduced in a certificate.

As to the social worker, the latter is mandated to conduct counseling to strengthen and provide a sense of security to the victim; furnish information regarding the rights of the victim to obtain protection from the police and protection instruction ruling from a court; take the victim to a government alternative dwelling; and conduct integrated coordination in providing service to the victim with the police, social service, social institution needed by the victim.

In providing the service, the health or social worker should also:

(a) inform the victim of his/her right to be accompanied by the social or health worker;

(b) accompany the victim at the level of investigation, prosecution, or court examination by guiding the victim to objectively and completely describe the violence in household experienced by him/her;

(c) listen emphatically to all accounts of the victim so that the victim feels safe being accompanied by the companion; and

(d) provide actively psychological and psychic strengthening to the victim.

Aside from the above, any victim should also be entitled to legal representation by the Public Attorney.

Ideally, a court clinical psychologist may also be appointed to assist the social worker and to provide the necessary expert determination of especially in the matter of psychological abuse or violence.

Finally, it is recommended that the measure must provide the victims counseling, psycho-social services, and/or recovery, rehabilitation programs towards learning constructive ways of coping with anger and emotional outbursts and reforming their ways. When necessary, the offender may be similarly ordered by the Court to submit to psychiatric treatment or confinement.

In closing, it cannot be overemphasized that "justice for all" has long been envisioned in the "equal protection clause," which is one of the basic tenets and significant provisions in the 1987 Philippine Constitution. While it only admits an exception whenever substantial distinction is present, there clearly is no substantial distinction between men and women when it comes to domestic abuse.

Like women, men are never immune to suffering life-debilitating emotional injuries. Unless the State urgently recognizes the need to address the same on all fronts, domestic abuse against men will be treated as a myth. On the contrary, domestic abuse against men does happen, and its seeming non-existence was reasonably and rationally debunked as clear as noonday.

UNDERSTANDING TAXPAYER'S RIGHTS UNDER THE RUN AFTER TAX EVADERS (RATE) PROGRAM

*Ruby Rose Javier – Yusi**

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.

The Tax Code has several provisions that afford protection against the governmental power to tax. There is Section 228, which mandates that the taxpayer be informed in writing of the law and the facts on which the assessment against the taxpayer is made; otherwise, the assessment shall be void. There is also Section 246, which espouses the non-retroactivity of rules, regulations or rulings of the Bureau of Internal Revenue (BIR) if the implementation thereof will prejudice taxpayers, subject to a few exceptions. But perhaps the most important of the protections offered by the Tax Code are those relating to unreasonable examinations. The Tax Code assures a taxpayer "that he will no longer be subjected to further investigation for taxes after the expiration of a reasonable period of time."

[1] These safeguards are found in Sections 203 and 235 of the Tax Code.

Section 203 of the Tax Code provides that except for the following cases, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of a tax return and, no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period:[2]

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* Bachelor of Laws, *magna cum laude,* University of Santo Tomas Faculty of Civil Law (1990); Bachelor of Arts, Major in Political Science, University of Santo Tomas (1986); Senior Partner, Angara Abello Concepcion Regala and Cruz Law Offices (ACCRALAW).

[1] Commissioner of Internal Revenue v. BASF Coating + Inks Phils., Inc., G.R. No. 198677, 26 November 2014 citing Bank of the Philippine Islands v. Commissioner of Internal Revenue, G.R. No. 139736, 17 October 2005.

[2] In a case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. (Sec. 203)

(a) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return;[3] and

(b) If before the expiration of the three-year period, both the Commissioner and the taxpayer have agreed in writing to its extension.

On the other hand, Section 235 of the Tax Code mandates taxpayers to preserve their books of accounts and other accounting records only until the last day prescribed in Section 203 (three years) except in the following instances:

(a) In case of fraud, irregularity or mistakes, as determined by the BIR Commissioner;

(b) The taxpayer requests for a reinvestigation;

(c) To verify compliance with withholding tax laws and regulations;

(d) To verify capital gains tax liabilities; and

(e) As part of the exercise of the Commissioner's power to obtain information from other persons.

Outside of this three-year period, the taxpayer may dispose of these records as it pleases. The same Section 235 provides that, for income tax purposes, the BIR examination and inspection shall be made only once in a taxable year, subject to the same exceptions discussed above.

The RATE Program

In 2005, the Department of Finance and BIR launched the Run After Tax Evaders (RATE) Program. The objective of the program is to investigate criminal violations of the Tax Code and make tax evaders pay for the taxes due the government. Under this program, the BIR was able to file several criminal cases against media personalities and prominent businessmen. Some of these cases were dismissed by the courts due to the failure of the BIR to prove intent to evade, an important element in tax evasion cases.

[3] In such case, the period to assess is extended to ten (10) year from discovery of the fraud or failure to file the return.

Three years later, the BIR issued Revenue Memorandum Order (RMO) No. 24-2008, laying down the policies and guidelines for the RATE cases. Through RMO 24-2008, the BIR explained the rationale for the implementation of the RATE program. It said:

> "Before the inception of the RATE Program, the emphasis on the tax enforcement policy has always been on assessment and collection of taxes. The criminal aspect of any violation of internal revenue laws and regulations was not pursued as long as the taxpayers paid the taxes assessed against them. As such, upon payment and collection of the deficiency taxes, the cases against such erring taxpayers are usually withdrawn or dismissed.
>
> However, the Bureau had recently realized that maintaining public confidence in the fairness of the tax system is vital to effective tax administration. By **investigating potential violations of the Tax Code and prosecuting tax offenders**, the taxpaying public would recognize and be aware that the BIR is committed to ensure that everyone is paying their fair share of taxes. Consequently, this would lead to a change in the "risk equation" **since potential tax offenders would now think twice before committing any infraction of our tax laws**." (emphasis supplied)

In essence, RMO 24-2008 confirmed that the RATE program is an investigative proceeding aimed at prosecuting tax offenders, i.e., those who violate the provisions of the Tax Code, as amended, particularly Chapter II, Title X. The collection of taxes is just a collateral benefit.

RMO 24-2008 prescribed the guidelines for the implementation of the program. It stated:

> "2. Letters of Authority (L/A) for RATE cases to be investigated by the National Investigation Division (NID)/Policy Cases Division (PCD) shall be signed by the Deputy Commissioner for Legal & Inspection Group (DCIR-LIG), while L/As for RATE cases in the Regional Office/s (RO) shall be signed by the Regional Director.
>
> 3. Issuance of L/As shall **cover only the taxable years where prima facie evidence of fraud or violation of the provisions of the Tax Code (NIRC) has been established** unless the investigation of prior or subsequent years are necessary to determine or trace continuing transactions entered into in the covered year and concluding thereafter, or transactions concluding in the covered year which started in the prior years, or it could be established that the same scheme had also been utilized for the prior and/or subsequent years.
>
> 4. For RATE cases, the NID and PCD of the National Office and Special Investigation Division (SID) of the respective Regional Offices may conduct a second examination or inspection of the taxpayer's books of accounts and other accounting records even if the regular audit examination

> had been conducted thereon, **subject to the provisions of Section 235** of the Tax Code of 1997. However, any payment of deficiency tax or any amount assessed on the first investigation case shall be credited against the assessment in the second case if the findings/discrepancies in the second investigation include the same findings or issues identified during the regular audit covered by the first L/A." (emphasis supplied)

RMO 24-2008 also laid down the criteria for a case to fall under the RATE Program. Per this RMO, all of the following conditions must be present before an audit can fall under the RATE Program:

> "D. CRITERIA
>
> To qualify under the RATE Program, a case must conform to the following conditions:
>
> (a) Cases representing violations under any of Sections 254, 255, 257 & 258 of the NIRC of 1997, including One-Time Transactions, etc.;
>
> (b) High-profile Taxpayers or taxpayers well-known within the community, industry or sector to which the taxpayers belong; and
>
> (c) Estimated basic tax deficiency is at least One Million Pesos (P1,000,000.00) per year and tax type, but priority should be given to tax cases where the aggregate basic tax deficiencies for all types per year is Fifty Million Pesos (P50,000,000.00) or more."

Subsequently, the BIR issued RMO No. 27-2010 (March 2010) - Re-invigorating the Run After Tax Evaders (RATE) Program and Amending Certain Portions of RMO 24-2008. Re-invigoration is an apt term given that the BIR's RATE cases somehow waned after 2008 and was sought to be revived by then new BIR Commissioner Joel Tan-Torre. RMO 27-2010 stressed the need to: (1) conduct a preliminary investigation to establish the existence of *prima facie* evidence of fraud or tax evasion; and (2) adhere to established procedures.

RMO 27-2010 provides:

> "II. Policies and Procedures

The following policies and guidelines shall be observed in the development and investigation of RATE cases, in addition to those set forth in the relevant revenue issuances:

A. Development of RATE Cases

1) The development of RATE cases shall be the principal responsibility of the National Investigation Division (NID), and of the Special Investigation Divisions (SIDs). The Taxpayer Lifestyle Check System prescribed in Revenue Memorandum Order No. 19-2010, among others, shall be used in the development of RATE cases.

2) The BIR, through the NID/SIDs, shall coordinate with the concerned government agencies, such as, but not limited to the Department of Justice, the National Bureau of Investigation, the Criminal Investigation and Detection Group (CIDG), and other entities, in the development, investigation and prosecution of RATE cases, and in preventing the concealment/disposal/transfer of assets by taxpayer being investigated under the RATE Program. To this end, the BIR shall initiate the promulgation of appropriate Memoranda of Agreement (MOAs) with the concerned Government Agencies.

3) To expedite the development of RATE cases, the Revenue District Offices (RDOs), the Large Taxpayers Service (LTS) and its District Offices and Divisions, shall act immediately in all requests from the NID or the SIDs for information needed to validate or develop RATE cases. Failure of an RDO/LTS District Office or Division to provide the requested information within fifteen (15) working days from receipt of a request for information shall be considered as sufficient grounds for the imposition of administrative disciplinary action against the concerned office.

4) Upon the discovery of evidence of fraud in the course of a regular audit investigation, the RDO/LTS District Office or Division shall immediately transmit the records of the case to the NID or the SID concerned, for investigation under the RATE Program.

B. Issuance of Letters of Authority for RATE Cases

1) In all RATE cases, a preliminary investigation must first be conducted to establish prima facie evidence of fraud or tax evasion. Such investigation shall include the verification and

determination of the schemes employed and the extent of fraud perpetrated by the subject taxpayer.

2) In the event that, following the conduct of the required preliminary investigation, the NID/SIDs should determine that there is *prima facie* evidence of tax fraud, it shall submit the case, together with a memorandum justifying the issuance of a Letter of Authority (LA) to the Deputy Commissioner-Legal and Inspection Group (DCIR-LIG), through the Assistant Commissioner (Enforcement Service)/the concerned Regional Director, for evaluation.

   The DCIR-LIG shall then evaluate the request, and determine whether the same shall be recommended for approval by the Commissioner of Internal Revenue. If the DCIR-LIG finds a request meritorious, the docket of the case, together with the memorandum-request bearing the concurrence of the DCIR-LIG, shall be forwarded to the Commissioner, for final review and approval.

3) The DCIR-LIG shall likewise conduct the appropriate verification with the Letter of Authority Monitoring System (LAMS), to ascertain whether a LA for a taxpayer for a particular taxable year has already been issued to the concerned taxpayer.

   In the event that, following such verification, it is ascertained that no LA has been previously issued against the concerned taxpayer, a printout of the LAMS search results must be included in the docket of the case, to support the issuance of the requested LA.

4) If, however, it is disclosed that an LA was previously issued for the concerned taxpayer, and that the corresponding investigation has already been commenced or concluded, the DCIR-LIG shall include in the request for issuance of an LA a recommendation and justification for the re-assignment to, or re-opening of the investigation by, the NID/SID concerned. The Commissioner shall then decide whether the investigation shall be continued by the present investigating office, or if the investigation shall be re-assigned to/re-opened by the NID/SID concerned.

5) In the event that the Commissioner should rule in favor of the re-assignment to/re-opening of the tax investigation by the NID/SID, the DCIR-LIG shall inform the RDO/LT District Office or Division concerned, thru the Regional Director/Assistant Commissioner-LTS, of the decision of the Commissioner, and require the transmittal of the docket of the case to the NID/SID, as well as the cancellation of the existing LA.

6) Should the Commissioner approve a request for issuance of an LA, such approval will be communicated to the DCIR-LIG, for the preparation and issuance of the requested LA by the latter. *All LAs issued for RATE cases shall be signed by the DCIR-LIG.*

7) The issuance of LAs shall cover only the taxable year(s) for which prima facie evidence of tax fraud, or of violations of the Tax Code, was established through the appropriate preliminary investigation, unless the investigation of prior or subsequent years is necessary in order to:

- Determine or trace continuing transactions entered into in the covered year and concluded thereafter, or those transactions concluded in the covered year that were commenced in prior years; or
- Establish that the same scheme was utilized for prior or subsequent years.

C. Conduct of Investigation

1. The formal investigation of a RATE case, including the examination of the taxpayer's books of accounts, accounting records and third-party records through the issuance of LAs and/or access letters (if warranted), shall be commenced only after prima facie evidence of fraud or tax evasion has been established. In such investigations, the provisions of Section 235 (Preservation of Books of Accounts and Other Accounting Records) of the Tax Code shall be fully observed." (underscoring supplied)

Both RMOs 24-2008 and 27-2010 prescribe the rules to be observed in developing and conducting RATE cases, to wit:

1) The need for the BIR to separately establish a *prima facie* evidence of fraud or tax evasion before it issues the Letter of Authority (RATE-LA) to the subject taxpayer;

2) The year/s to be audited shall only be for the years where such evidence of fraud was initially established unless the audit of prior or subsequent years is necessary to trace continuing transactions entered into in the covered year and concluded thereafter, or those transactions concluded in the covered year that were commenced in prior years; and

> 3) During investigation, the three-year rule (with exceptions) for the preservation of books of account shall be fully observed.

Prima Facie Evidence of Fraud

As mentioned, a RATE audit is essentially an investigation of a possible criminal wrongdoing. Given that the proceeding can result in penal sanctions, a RATE audit should not be invoked by the BIR lightly, like a regular audit of taxpayers. Under the rules, the BIR must first establish a ground for such special audit or investigation. It is for this reason that both RMOs 24-2008 and 27-2010 mandate the conduct of a preliminary investigation to ascertain the existence of *prima facie* evidence of fraud or tax evasion before a RATE audit can be pursued.

Upon determination of the existence of fraud or tax evasion, RMO 27-2010 further requires the BIR to submit a report including: (1) the extent of the fraud possibly committed; and (2) a verification and determination of the schemes employed by the taxpayer. Only after this report has been submitted can the BIR-NID recommend the issuance of the RATE-LA to the Deputy Commissioner for Legal and Inspection Group (DCIR-LIG), through the Assistant Commissioner of the Enforcement Service, for large taxpayers, or through the Regional Director, for all other taxpayers.

RMO 27-2010 explains in detail the procedure to be undertaken before the RATE-LA can be issued, to wit:

> "B. Issuance of Letters of Authority for RATE Cases
>
> 1) In all RATE cases, a preliminary investigation must first be conducted to establish *prima facie* evidence of fraud or tax evasion. Such investigation shall include the verification and determination of the schemes employed and the extent of fraud perpetrated by the subject taxpayer.
>
> 2) In the event that, following the conduct of the required preliminary investigation, the NID/SIDs should determine that there is prima facie evidence of tax fraud, it shall submit the case, together with a memorandum justifying the issuance of the Letter of Authority (LA) to the Deputy Commissioner-Legal and Inspection Group (DCIR-LIG), through the Assistant Commissioner (Enforcement Service)/the concerned Regional Director, for evaluation.
>
> The DCIR-LIG shall then evaluate the request, and determine whether the same shall be recommended for approval by the

> Commissioner of Internal Revenue. If the DCIR-LIG finds the request meritorious, the docket of the case, together with the memorandum-request bearing the concurrence of the DCIR-LIG, shall be forwarded to the Commissioner, for final review and approval.
>
> 3) The DCIR-LIG shall likewise conduct the appropriate verification with the Letter of Authority Monitoring System (LAMS), to ascertain whether a LA for a taxpayer for a particular taxable year has already been issued to the concerned taxpayer.
>
> In the event that, following such verification, it is ascertained that no LA has been previously issued against the concerned taxpayer, a printout of the LAMS search results must be included in the docket of the case, to support the issuance of the requested LA.
>
> 4) If, however, it is disclosed that an LA was previously issued for the concerned taxpayer, and that the corresponding investigation has already been commenced or concluded, the DCIR-LIG shall include in the request for issuance of an LA a recommendation and justification for the re-assignment to, or re-opening of the investigation by, the NID/SID concerned. The Commissioner shall then decide whether the investigation shall be continued by the present investigating office, or if the investigation shall be re-assigned to/re-opened by the NID/SID concerned.
>
> 5) In the event that the Commissioner should rule in favor of the re-assignment to/re-opening of the tax investigation by the NID/SID, the DCIR-LIG shall inform the RDO/LT District Office or Division concerned, thru the Regional Director/Assistant Commissioner-LTS, of the decision of the Commissioner, and require the transmittal of the docket of the case to the NID/SID, as well as the cancellation of the existing LA.
>
> 6) Should the Commissioner approve a request for issuance of an LA, such approval will be communicated to the DCIR-LIG, for the preparation and issuance of the requested LA by the latter. All LAs issued for RATE cases shall be signed by the DCIR-LIG."

It is important, therefore, that the taxpayer, being subjected to a RATE investigation, confirms that the above process has indeed been followed by the BIR. If not, the taxpayer should question the legality of the issuance of the RATE-LA as it was not issued in accordance with the BIR's internal rules and violates the taxpayer's right to due process. In *Commissioner of Internal Revenue v. Avon Products Manufacturing, Inc.*,[4] the Supreme Court reminded the BIR that

[4] G.R. Nos. 201398-99 & 201418-19, 3 October 2018.

"while the government has an interest in the swift collection of taxes, the Bureau of Internal Revenue and its officers and agents cannot be overreaching in their efforts, but must perform their duties in accordance with law, with their own rules of procedure, and always with regard to the basic tenets of due process." In this case, the Supreme Court ruled that the BIR Commissioner's disregard of the standards and internal rules rendered the deficiency tax assessments null and void.

A taxpayer has the right to require the BIR to present the *prima evidence* of fraud or tax evasion before submitting itself to a RATE investigation. Time and again, our courts have ruled that fraud is a question of fact that should be alleged and proven.[5] Fraud cannot just be alleged in a RATE investigation, particularly when the RATE investigation attempts to disregard the prescriptive periods under Sections 203 and 235 of the Tax Code. As will be discussed, the existence of fraud or tax fraud is an essential element in all RATE investigations.

How is the Existence of Fraud Determined?

RATE investigations are often initiated by an informant alleging that a particular taxpayer has violated certain provisions of the Tax Code or by the discovery of a substantial discrepancy following a verified third-party information matching. In case the fraud is discovered through third-party information matching, which has been independently verified, the existence of *prima facie* evidence of fraud is confirmed, and the taxpayer now has the burden of disproving the information obtained by the BIR. It is essential that such third-party information is verified, i.e., the BIR made a separate inquiry into the discrepancy with the income payor, in case the discrepancy pertains to sales, or with the supplier, in case the discrepancy relates to purchases.

On the other hand, in case the RATE audit is instigated by an informant, the subject taxpayer has the right to demand the details of the alleged violations, short of identifying the informant's identity. This is part of the due process requirement under Section 228 of the Tax Code which mandates that the taxpayer be informed in writing of the facts on which the assessment against it is made. This will also allow the taxpayer to properly protest the BIR's findings, if any.

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[5] Commissioner of Internal Revenue v. Spouses Magaan, G.R. No. 232663, 3 May 2021.

In both instances, the taxpayer should insist that the investigation be restricted to the transaction/s in question or similar transactions where such scheme/s may have been applied. In other words, such a RATE investigation should not serve as a blanket authority for the BIR to audit, or re-audit, the entire business operations of the subject taxpayer. The RATE investigation must be focused on the alleged violations of the Tax Code as disclosed by the informant or as discovered through third-party matching and confirmed during a preliminary investigation. No more, no less.

Year/s Covered by the RATE-LA

RMO 27-2010 prescribes that the year to be audited or investigated shall only be for the year/s where such evidence of fraud was initially established. As an exception, the investigation could extend to prior or subsequent years to trace transactions concluded in the covered year that commenced in prior years or continuing transactions entered into in the covered year and concluded thereafter.

A RATE-LA may cover one or more "open" tax years, i.e., tax years within the three-year period discussed in Section 203 of the Tax Code, or multiple years within and/or outside of the open years. In the past, the BIR has limited its investigations to the open years, perhaps mindful of the burden of proof it would need to submit to justify the audit of already prescribed years.

Lately, however, the BIR has been issuing RATE-LAs for taxable years long outside the three-year period to assess. The BIR argues that in fraud cases, the right of the BIR to assess for deficiency taxes is extended to ten (10) years from discovery of the fraud. While it is correct that a RATE-LA can be issued beyond the 3-year period, it is still an exception. And as an exception, the BIR should, before issuing the "out of open period" RATE-LA, demonstrate that: (1) it has performed the procedures set in RMO 27-2010; (2) has confirmed the existence of fraud or tax evasion; and (3) has identified the covered year/s as the year/s when the existence of fraud was ascertained.

This second rule also prohibits what is called the shotgun audit approach. If the investigation will cover more than one year, it is critical that the BIR must have first identified the method adopted by the taxpayer and verified that this same method could have been applied by the taxpayer in prior or subsequent years. To illustrate, a taxpayer, not in the habitual sale of real property, sold a parcel of land and reported the sale at an undervalued price.

Later, the BIR was informed of the undervaluation and, after applying the procedures set in RMO 27-2010, issued the RATE-LA. The RATE-LA, in this case, should only cover the year of the sale. There is no need to extend the covered year to the year/s before or after the sale as the taxpayer is not habitually engaged in the sale of real properties.

And gone are the days when a RATE-LA, or any LA for that matter, authorizes an examination of a taxable year and "unverified prior years." In *Commissioner of Internal Revenue v. Gaw*, the Supreme Court ruled that such an LA contravenes Revenue Memorandum Order No. 43-1990[6] and, as such, is void to the extent that it covers unverified years. However, the LA is valid as to the declared taxable year.[7]

In June 2020, the Court of Tax Appeals (CTA) had the occasion to rule upon the validity of an electronic letter of authority (e-LA) issued by the BIR covering a period beyond the three - year prescriptive period to assess under Section 203 of the Tax Code. While *Hemisphere-Leo Burnett, Inc. v. Commissioner of Internal Revenue*[8] refers to an electronic letter of authority or e-LA and not a RATE-LA, the concept discussed therein is relevant as this could be invoked by the BIR when issuing RATE-LAs beyond the three-year period to assess.

In this case, the taxpayer (Hemisphere-Leo Burnett) received in November 2017 an e-LA from the BIR for the audit of its books of account for the year 2012. Hemisphere-Leo Burnett sought to prohibit the BIR from implementing the e-LA on the ground that the same was issued more than three years after the filing of the 2012 tax returns. It added that its case did not fall under any of the exceptions found in Section 222 of the Tax Code. The CTA ruled that the e-LA is valid since Sections 203 and 222 of the Tax Code do not prohibit the issuance of letters of authority beyond the three-year period.[9] The CTA distinguished an LA from an assessment, as follows:

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[6] RMO 43-1990 provides that a Letter of Authority (L/A) should "cover a taxable period not exceeding one taxable year. The practice of issuing L/As covering audit of "unverified prior years" is hereby prohibited. If the audit of a taxpayer shall include more than one taxable period, the other periods or years shall be specifically indicated in the L/A."

[7] G.R. No. 248070, dated 1 October 2019.

[8] CTA Case No. 9749, 3 June 2020.

[9] SEC. 222. Exceptions as to Period of Limitation of Assessment and Collection of Taxes.
(a) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a preceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission: Provided, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.

> "In stark contrast with a tax assessment, the LOA gives notice to the notice that it is under investigation for possible deficiency tax assessment; at the same time, it authorizes or empowers a designated revenue officer to examine, verify, and scrutinize a taxpayer's books and records, in relation to internal revenue tax liabilities for a particular period. The LOA commences the audit process and informs the taxpayer that it is under audit for possible deficiency tax assessment."
>
> In view of the foregoing distinction, a tax assessment is always preceded by an LOA, which entails the examination of a taxpayer's books of accounts and other accounting records; **and the issuance of an LOA does not necessarily mean the subsequent issuance of a tax assessment**. Parenthetically, the BIR is not mandated to make an assessment relative to every return filed with it." (emphasis supplied)

This pronouncement is alarming. It opens the door for BIR officials to go after taxpayers for taxable years that have long prescribed, even when the exceptions provided in Section 222 clearly do not apply. While it is true that the issuance of an LA does not equate to an assessment, such principle is only applicable in theory. For anyone who has been the subject of a tax audit would know that the purpose of a BIR audit is to assess and, ultimately, to collect. As they say, no taxpayer goes out of a tax audit unscathed.

However, a careful review of *Hemisphere* explains why the CTA ruled the way it did. The CTA was pressed to confirm the validity of the issued LA because Hemisphere-Leo Burnett was unable to present the tax returns that would be the reckoning point of the period to assess. The CTA noted:

> "Moreover, since, as already stated, an LOA commences the audit process and informs the taxpayer that it is under audit for a *possible* deficiency tax assessment, it seems rational that an LOA is no longer warranted when such tax assessment would already be issued beyond the prescriptive period.
>
> However, in this case, **We cannot blindly apply the three (3)-year period** under Section 203 of the NIRC of 1997 in relation to the issuance of the subject LOA. *Firstly*, there is no indication of the specific taxes that will be assessed brought about by the examination made under the subject LOA. Thus, and since internal revenue taxes has different last days prescribed by law for the filing of the corresponding tax return vis-à-vis the actual filing dates thereof, We cannot as yet determine the respective reckoning dates for the commencement of the said three(3)-year period.
>
> *Secondly*, no tax return was ever presented in evidence by petitioner. Relative thereto, it is incumbent upon a taxpayer, who wants to avail of the benefits of Section 203 of the NIRC of 1997 by setting up prescription as an affirmative defense, to **prove that he submitted a return**. If he fails to

> do so, the conclusion should be that no such return was filed, in which case the Government has ten (10) years within which to make the corresponding assessments. Thus, at this point, this Court cannot rule that petitioner is entitled to the benefits granted under Section 203 of the NIRC of 1997." (emphasis supplied)

Given that the taxpayer in *Hemisphere* was unable to present its tax returns upon which the CTA can conclude that prescription has set in, it can be said that *Hemisphere* did not create a precedent for the BIR. Therefore, a taxpayer may still question the validity of a RATE-LA (or a regular LA) if issued beyond the 3-year period unless the BIR is able to present *prima facie* evidence of fraud or tax evasion.

3-Year Rule on Preservation of Books

RMO 27-2010 recognizes that an audit under the RATE Program must still observe the 3-year rule for the preservation of books of accounts and accounts under Section 235 of the Tax Code. This rule, however, admits of the following exceptions:

> (a) Fraud, irregularity or mistakes, as determined by the Commissioner;
>
> (b) The taxpayer requests reinvestigation;
>
> (c) Verification of compliance with withholding tax laws and regulations;
>
> (d) Verification of capital gains tax liabilities; and
>
> (e) In the exercise of the Commissioner's power under Section 5(B) to obtain information from other persons in which case, another or separate examination and inspection may be made. Examination and inspection of books of accounts and other accounting records shall be done in the taxpayer's office or place of business or in the office of the Bureau of Internal Revenue. All corporations, partnerships or persons that retire from business shall, within ten (10) days from the date of retirement or within such period of time as may be allowed by the Commissioner in special cases, submit their books of accounts, including the subsidiary books and other accounting records to the Commissioner or any of his deputies for examination, after which they shall be returned. Corporations and partnerships contemplating dissolution must notify the Commissioner and shall not be dissolved until cleared of any tax liability.

A taxpayer required by the BIR, as part of a RATE investigation, to produce its books of accounts and other accounting records that are more than three years old may raise the argument that RMO 27-2010 recognizes and respects the provisions of Section 235 of the Tax Code.

While it can be said that RATE investigations, which are essentially tax fraud audits, fall within the exceptions provided in Section 235 of the Tax Code, it can effectively do so only after the BIR has established the existence of *prima facie* evidence of fraud or tax evasion. Again, mere allegation of the existence of fraud, without showing such evidence will not suffice to extend the period. It is for this reason that "industry-based" RATE investigations, i.e., investigations of certain industries perceived to be low in tax compliance, will fail this requirement since these audits are generally based on perception and not confirmed facts.

And this safeguard should be upheld even if the BIR issues a *Subpoena Duces Tecum* against the taxpayer. Section 266 of the Tax Code (Failure to Obey Summons) assumes that the order is lawful, i.e., not in violation of the Tax Code. It is submitted that an order to submit documents in violation of Section 235 of the Tax Code, i.e., where the BIR fails to present the *prima facie* evidence of fraud, is illegal and does not have any binding effect.

In conclusion, a taxpayer that receives a RATE-LA should not despair. There are enough safeguards afforded to it by the Tax Code and regulations before, during and even after the investigation. RMOs 24-2008 and 27-2010 ensure the taxpayer that no RATE-LA shall be whimsically issued by the BIR and that it may legally raise the defenses under Section 203 and 235 of the Tax Code, among others, if the procedures set out in these issuances are not faithfully observed. As the fraud investigation can cause irreparable damage to one's reputation and ultimately lead to criminal prosecution, the BIR must be reminded that the RATE program must be invoked judiciously. It should never be employed as a fishing expedition.

EVALUATING PROPOSALS TO CREATE STRONGER PRIVACY PROTECTIONS FOR VICTIM-SURVIVORS OF HUMAN TRAFFICKING AND MIGRANT SMUGGLING VIS-A-VIS THE CONSTITUTIONAL RIGHT TO FREEDOM OF SPEECH AND EXPRESSION

Lorenz Fernand D. Dantes[*]

Introduction

The Philippines has a very long experience when it comes to migration, dating back to its early history.[1] Over time however, due to economic problems and the weakness of the domestic labor market, it has become a necessity rather than a choice for many Filipino migrants. Currently, the Philippines ranks among the top countries of origin for labor migrants coming from Asia.[2] It currently has more than six million emigrants, making it the country with the highest number of emigrants from the Southeast Asian region, as well as the ninth highest in the whole world.[3] In 2021, it continued to rank as one of the world's largest recipients of remittances, ranking among the top five globally alongside India, China, Mexico and Egypt. These remittances amounted to $31.4 billion, representing a significant portion of the country's gross domestic product and an important source of income for recipient families.[4] It has become an important catalyst for the country's development, with one previous Philippine Development Plan even including among its goals the target of sending 1 million workers overseas every year.[5]

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[*] J.D., Ateneo De Manila University School of Law (2016); B.S. Legal Management, Minor in Economics, Ateneo De Manila University, (2012); Acting Director, Office of the Undersecretary for Migrant Workers' Affairs, Department of Foreign Affairs.

[1] Ana P. Santos, *Philippines: A History of Migration*, *available at* https://pulitzercenter.org/stories/philippines-history-migration (last accessed Jun. 2, 2022)

[2] Asian Development Bank, Labor Migration in Asia, 12 (2018) https://www.adb.org/sites/default/files/publication/410791/adbi-labor-migration-asia.pdf

[3] Migration Data Portal, *Migration data in South-eastern Asia*, *available at* https://www.migrationdataportal.org/regional-data-overview/south-eastern-asia (last accessed Jun. 2, 2022)

[4] Ben O. De Vera, *Cash remittances to PH hit new high of $31.4B in 2021 available at* https://business.inquirer.net/341015/cash-remittances-to-ph-hit-new-high-of-31-4b-in-2021 (last accessed Jun. 2, 2022)

[5] Maruja M.B. Asis, *The Philippines: Beyond Labor Migration, Toward Development and (Possibly) Return*, *available at* https://www.migrationpolicy.org/article/philippines-beyond-labor-migration-toward-development-and-possibly-return(last accessed Jun. 2, 2022)

Given the above, it comes as no surprise that a culture of migration remains deeply ingrained and firmly established in Philippine society. Migrant work is now one of the top employment options for both skilled and unskilled Filipino laborers, with the deployment of Overseas Filipino Workers even increasing by an annual average of 9.6 percent at one point in our recent history.[6] It is reported that from 2000 to 2020, the Filipino migrant population grew by considerable numbers, the fifth largest growth behind only India, Syria, Venezuela and China.[7] Unfortunately, with the rise of migration came an increase in incidents involving human trafficking and migrant smuggling. Victims are often subjected to various transgressions, involving not only contract violations regarding pay and working conditions but also fraud and deception about the nature of work in the destination country, forced labor, debt bondage, slavery prostitution, pornography, sexual assault and other forms manipulation, coercion and physical maltreatment.

In response, the Philippine government ramped up measures and programs to address the problem of human trafficking. Amongst its efforts inter alia, are the formation and strengthening of specialized inter-agency task forces tasked with investigation and prosecuting human traffickers and smugglers. It also established specialized shelters and one-stop service centers designed to assist victim-survivors of human trafficking.[8] For the period of 2020 to 2021 alone, these efforts resulted in the initiation of prosecution for almost four hundred (400) alleged human traffickers and the conviction of around eighty (80) more. Likewise, during this period, the Department of Foreign Affairs provided assistance to some 2,575 potential victims-survivors of human trafficking, which represents a welcome decrease in trafficking cases compared to previous numbers totaling 3,581 victim-survivors.[9]

The success of the Philippines in fighting human trafficking and migrant smuggling was recognized internationally, with the United States State Department granting the Philippines Tier 1 status in its Global Trafficking in Persons (TIP) back in 2016, a feat which it has subsequently maintained for

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[6] Senate of the Philippines, Overseas Filipino Workers at a Glance, 1 (2012) https://legacy.senate.gov.ph/publications/AG%202012-04%20-%20OFW.pdf

[7] United Nations Department of Economic and Social Affairs, Population Division, International Migration 2020 Highlights, 17 (2020) https://legacy.senate.gov.ph/publications/AG%202012-04%20-%20OFW.pdf
https://www.un.org/en/desa/international-migration-2020-highlights

[8] Joyce Ann Rocamora, *PH efforts vs. human trafficking rewarded in US report*, *available at* https://www.pna.gov.ph/articles/1145765 (last accessed Jun. 2, 2022)

[9] Department of Foreign Affairs, *Philippines Maintains Tier 1 In 2021 State Department Trafficking In Persons Report*, *available at* https://dfa.gov.ph/dfa-news/dfa-releasesupdate/29192-philippines-maintains-tier-1-in-2021-state-department-trafficking-in-persons-report (last accessed Jun. 2, 2022)

six years straight as of this writing.[10] On its way to achieving this feat, one of the key partnerships that the government secured was with the media.[11] In doing so the government recognized the important role the media practitioners and investigative journalists play in combating human trafficking. By reporting and covering trafficking cases and stories of the victim-survivors, the media can educate and raise the awareness of the general public on relevant human trafficking issues, such as the modus operandi of trafficking syndicates and pertinent programs that provide specialized care for trafficking victim-survivors.

In crafting its reports and providing media coverage on human trafficking cases however, media practitioners must observe pertinent laws designed to protect the right to privacy of the victim-survivors of human trafficking. This includes the confidentiality provision under Section 6 of Republic Act 9208.

In its earliest iteration, Section 6 prohibited "any editor, publisher, and reporter or columnist in case of printed materials, announcer or producer in case of television and radio, producer and director of a film in case of the movie industry, or any person utilizing tri-media facilities or information technology to cause publicity of any case of trafficking in persons."[12] However, this prohibition will only apply if the prosecution or trial is conducted behind closed-doors, thereby rendering a big gap in the privacy protections of the trafficking victim-survivors and plenty of leeway for media reporting.[13]

Recognizing this legal loophole, the legislature sought to strengthen the confidentiality provision when it passed Republic Act 10364. As presently worded, the provision now removed the requirement that the prosecution or trial be conducted behind closed-doors, to wit:

> SEC. 7. *Confidentiality.* – At any stage of the investigation, rescue, prosecution and trial of an offense under this Act, law enforcement officers, prosecutors, judges, court personnel, social workers and medical practitioners, as well as parties to the case, shall protect the right to privacy of the trafficked person. Towards this end, law enforcement officers,

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[10] Pilar Manuel, *PH keeps top classification in US anti-human trafficking report*, *available at* https://www.cnnphilippines.com/news/2021/7/2/PH-Tier-1-2021-Trafficking-in-Persons-Report-US-State-Department.html (last accessed Jun. 2, 2022)

[11] Butch M. Quejada, *IACAT, KBP magkasangga kontra human trafficking*, *available at* https://www.philstar.com/bansa/2012/04/25/800068/iacat-kbp-magkasangga-kontra-human-trafficking (last accessed Jun. 2, 2022)

[12] An Act To Institute Policies To Eliminate Trafficking In Persons Especially Women And Children, Establishing The Necessary Institutional Mechanisms For The Protection And Support Of Trafficked Persons, Providing Penalties For Its Violations, And For Other Purposes [Anti-Trafficking in Persons Act of 2003], Republic Act No. 9208 § 6 (2003).

[13] Id.

> prosecutors and judges to whom the complaint has been referred may, whenever necessary to ensure a fair and impartial proceeding, and after considering all circumstances for the best interest of the parties, order a closed-door investigation, prosecution or trial. The name and personal circumstances of the trafficked person or any other information tending to establish the identity of the trafficked person and his or her family shall not be disclosed to the public.
>
> It shall be unlawful for any editor, publisher, and reporter or columnist in case of printed materials, announcer or producer in case of television and radio, producer and director of a film in case of the movie industry, or any person utilizing tri-media facilities or electronic information technology to cause publicity of the name, personal circumstances, or any information tending to establish the identity of the trafficked person except when the trafficked person in a written statement duly notarized knowingly, voluntarily and willingly waives said confidentiality.
>
> Law enforcement officers, prosecutors, judges, court personnel, social workers and medical practitioners shall be trained on the importance of maintaining confidentiality as a means to protect the right to privacy of victims and to encourage victims to file complaints.[14] (Emphasis Supplied)

Although broader in its scope, the amendments introduced by Republic Act 10364 still suffer from a significant limitation. It specifies that the media is only prohibited from causing publicity to the name, personal circumstances, or any information tending to establish the identity of the trafficked person. This limitation attempts to balance the freedom of expression of the media practitioners and the right to privacy of the trafficking victim-survivors. Nonetheless, throughout the world, it has been recognized that merely hiding the name and the identity of the trafficking victim-survivors is usually not enough to safeguard the privacy of the victim-survivors. Sensationalism in the media, including those involving investigative journalism and public affairs programs and commentaries discussing human trafficking, can further traumatize victim-survivors of human trafficking and migrant smuggling.[15]

In other words, mere anonymity of the name and identity of the victim-survivors is not enough to protect them from privacy intrusions that can cause further emotional distress. For instance, the manner in which the story of the

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[14] An Act Expanding Republic Act No. 9208, Entitled "An Act To Institute Policies To Eliminate Trafficking In Persons Especially Women And Children, Establishing The Necessary Institutional Mechanisms For The Protection And Support Of Trafficked Persons, Providing Penalties For Its Violations And For Other Purposes [Expanded Anti-Trafficking in Persons Act of 2012], Republic Act No. 10364 § 10 (2012).

[15] Sophie Whisnant, *How the media perpetuates harmful misconceptions about human trafficking survivors, available at* http://mediahub.unc.edu/how-the-media-perpetuates-harmful-misconceptions-about-human-trafficking-survivors/ (last accessed Jun. 2, 2022)

victim-survivors is portrayed in the news report or a documentary can cause further suffering and distress to the victim-survivors, especially if it involves publicly showing video footage or photographs which are sensitive to the victim-survivors. This holds true even if the identity of the victim-survivor remains anonymous. In addition, confidentiality of the trafficking victim's name, personal circumstances and identity will not protect them from other forms of media coverage that can still affect their privacy and cause them further suffering, such as unauthorized disclosure of other facts not covered by the confidentiality protections, inaccurate reporting on their trafficking case, employing insensitive interview questions, use of sensationalist language in reporting, employing victim-blaming narrative, and repeatedly attempting to contact the victim-survivors in order to secure their consent for an interview. In fact, intrusion into the privacy of the trafficking victim-survivor can still happen even if they knowingly, voluntarily and willingly waive the confidentiality of their name and identity such as when the media practitioner uses deceptive journalistic methods in the conduct of the interview like using ambush questions and hidden cameras/recorders, or when the media practitioner misrepresents or misquotes what the interviewee said. Moreover, investigative documentaries can feature scenes where the anonymous trafficking victim is accompanied by the journalist to the place where the trafficking occurred in order to acquire more in-depth information, thereby causing the anonymous victim to relieve their undesirable experiences.[16]

Although media practitioners such as the *Kapisanan ng mga Brodkaster ng Pilipinas* (KBP) employ self-regulation through their own code of conduct, the age of social media has now made it possible for just about anyone to become a journalist. Social media has given anyone, even those who do not have any academic or professional background in ethical journalistic practices, the tools to broadcast news or report information to the public.

Perhaps recognizing this matter as well, the Senate passed Senate Bill 2449 on its third and final reading last February 2022. The Senate bill seeks to amend Republic Act 9208 as already amended previously by Republic Act 10364. In its proposed amendments to the confidentiality provision, it provides that:

> It shall be unlawful for any editor, publisher, reporter or columnist in case of printed materials, announcer or producer in case of television and radio broadcasting and digital media, and producer and director of the film in case of the movie industry, to cause any publicity that may result in the further suffering of the victim. Any person or agency involved in the reporting, investigation or trial of cases of gender-based violence shall

[16] Mary Kareen Gancio, Human Trafficking Sa Kwaderno Ng Taga-Ulat: The Reporter's Notebook Episode, " Pinays for Export" and the TIP Guidelines for Media Professionals (2011) (Research Paper, University of the Philippines)

> refrain from any act or statement that may be construed as blaming the victim or placing responsibility on the victim for the offense committed against them.17 (Emphasis Supplied)

Curiously, its counterpart in the House of the Representatives, House Bill 10658, does not contain such provision. Nonetheless, the enrolled copy of the consolidated version of Senate Bill 2449 and House Bill 10658, was sent to the Office of the President on May 24, 2022 for the signature of the President.

As seen above, the proposed amendment now employs a more general phrasing, unhindered by narrow limitations and loopholes as can be seen in the language of the law under Republic Act 9208 and Republic Act 10364. The only qualification now is if it will result in further suffering of the trafficking victim. If eventually signed into a law, a question then arises if this push for greater privacy protection to victims of human trafficking and migrant smuggling constitutes as an unconstitutional infringement on the freedom of expression of reporters and media practitioners. In other words, will the prohibition on causing any publicity that may result in the further suffering to the trafficking victim operate as an unconstitutional prior restraint on free speech? The author submits that in this case, the need for stronger privacy protections to the victims takes precedence over concerns relating to freedom of expression.

Overview of the Right to Privacy

It is said that every man possesses the right to privacy as a natural right.[18] It is so intimately connected with our personhood that without privacy, we lose our integrity as persons.[19] The need for privacy is something that human beings seek innately and instinctively. This is because there is a natural desire

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[17] An Act Strengthening Protections Against Trafficking In Persons, Amending For This Purpose Republic Act No. 9208, As Amended By Republic Act No. 10364, Entitled 'an Act To Institute Policies To Eliminate Trafficking In Persons Especially Women And/Or Children, Establishing The Necessary Institutional Mechanisms For The Protection And Support Of Trafficked Persons', And Other Special Laws, Providing Penalties For Its Violations And For Other Purposes, S.B. 2449, 18th Cong., 3rd Regular Session, (2021)

[18] James Whitman, The Two Western Cultures of Right to Privacy: Dignity versus Liberty, 113 YALE LAW JOURNAL 1151, 1153 (2004)

[19] Id.

among human beings to keep certain things secret and hidden from others.[20] This holds true, perhaps even more, if they are victims of a crime.

Being an essential human need, the right to privacy is considered as one of the most fundamental rights available to man. Justice Brendais said it best in his dissent in *Olmstead v U.S*, when he describes the right to privacy as "the most comprehensive of rights and the right most valued by civilized men."[21]

It is this comprehensive nature that makes the right to privacy so powerful. The right to privacy covers a broad range of horizons and can be invoked in different contexts. It is present in different aspects of life and affords individuals various forms of protection in diverse types of situations.[22]

However, the flexibility of this right comes with a price. Its expansiveness makes it abstract and difficult to define.[23] Even if it is often defined in legal circles as the "right to be left alone"[24], the expansive scope of the right to privacy is still very hard to grasp. It is difficult to determine with particularity when an individual should be left alone or when something must be hidden from the prying eyes of others. Indeed, from the high brass of the military establishment down to private individuals and trafficking victims, the concept of privacy differs within a single society.[25]

This should not come as a surprise, as the right to privacy essentially flows from an individual.[26] As every individual is unique and different, their concept of privacy also differs.[27] However, while the right to privacy varies from society to society, it is also universally recognized.[28] This seeming contradiction stems from the fact that within the right to privacy, there are still 4 values which are treasured by every individual, yet the appreciation of each value differs among them. These four values are Autonomy, Identity, Reputation, Seclusion.[29]

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[20] Alexandra Rengel, Privacy as an International Human Right and The Right to Obscurity in Cyberspace , 2 GRONINGEN JOURNAL OF INTERNATIONAL LAW 33, 34 (2014)

[21] Olmstead v. United States 277 U.S. 438 (1928)

[22] Whitman, *supra* note 19 at 1154.

[23] Whitman, *supra* note 19 at 1153

[24] *Olmstead,* 277 U.S. at 478 (J.Brendais, Dissenting Opinion)

[25] Whitman, *supra* note 19 at 1153

[26] Oscar Tan, Articulating the Complete Philippine Right to Privacy in Constitutional and Civil Law: A Tribute to Chief Justice Fernando and Justice Carpio, 82 PHIL. LAW JOURNAL 78, 153 (2008)

[27] Whitman, *supra* note 19 at 1153

[28] Id.

[29] Tan, *supra* note 26 at 87

Autonomy upholds an individual's right to due process.[30] He has a right not to be intruded upon in different aspects of his life, particularly his actions and decisions.[31] This value was summed up by the case of *Morfe v. Mutuc*:

> Protection of this private sector — protection, in other words, of the dignity and integrity of the individual — has become increasingly important as modern society has developed. All the forces of a technological age — industrialization, urbanization, and organization — operate to narrow the area of privacy and facilitate intrusion into it. In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society[32] (Emphasis Supplied)

The second value is identity.[33] This refers to an individual's right against unauthorized appropriation of his name and likeness.[34] It can also refer to a right against publicity.[35] This often gives rise to appropriation torts as well as damages for infliction of distress. In American cases, the most common cause is when an unauthorized person uses the name or picture of another person for reporting, advertisements, and commercial endeavors.[36]

The third value is reputation.[37] This value refers to the right of an individual against disclosure of matters concerning his private life and against placing him in false light in the public eye.[38] The value of reputation serves as the rationale for false light torts, the prohibition against wiretapping and the right against self-incrimination.[39] However, it must be remembered that there can be no privacy claims for matters which are already publicly known, no matter how personal they may be.[40]

The fourth and most-well known value is that of seclusion.[41] This is the value most important to the victims of human trafficking and migrant smuggling. In fact, it is from the value of seclusion that the right to privacy

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[30] *Id.* at 153

[31] Id.

[32] Morfe v. Mutuc 22 SCRA 424, 445 (1968)

[33] Tan, *supra* note 26 at 154

[34] Antonio T. Carpio, *Intentional Torts in Philippine Law,* 47 PHIL. LAW JOURNAL 649, 687 (1972)

[35] Id.

[36] Id.

[37] Tan, *supra* note 26 at 154

[38] Carpio, *supra* note 36 at 686

[39] Tan, supra note 26 at 155

[40] Carpio, supra note 36 at 687

[41] Tan, *supra* note 26 at 153

gets its other famous name, "the right to be left alone."[42] It refers to an individual's right to physical and mental solitude, or to his "peace of mind."[43] All the other values, such as reputation, identity and autonomy, is just a manifestation of an individual's desire for seclusion or to be "left alone."[44] This value is the rationale for the rights against search and seizure, privacy of correspondence, intrusion torts, and all the other laws relating to privacy.[45] In other words, seclusion is the very essence of privacy. Justice Romero's separate opinion in the case of *Ople v. Torres* explains this value very well:

> What marks offs man from a beast? Aside from the distinguishing physical characteristics, man is a rational being, one who is endowed with intellect which allows him to apply reasoned judgment to problems at hand; he has the innate spiritual faculty which can tell, not only what is right but, as well, what is moral and ethical. Because of his sensibilities, emotions and feelings, he likewise possesses a sense of shame. In varying degrees as dictated by diverse cultures, he erects a wall between himself and the outside world wherein he can retreat in solitude, protecting himself from prying eyes and ears and their extensions, whether from individuals, or much later, from authoritarian intrusions.[46]

These four values are what provide flexibility to the right to privacy. The four values allow it to evolve and be adopted across different legal systems. This is very evident in how the Philippines incorporated the right to privacy from foreign jurisprudence, especially from that of the United States.

Philippine jurisprudence on the right to privacy has been very much influenced by that of the United States.[47] Over the course of its history, the United States Supreme Court came out with numerous landmark decisions explaining the constitutional basis of the right to privacy. While most of these cases revolve around the concern of sexuality, it must be understood that the constitutional guarantee of right to privacy is not only limited to the concern of sexuality. In *Griswold v. Connecticut*, a case which involves a statute prohibiting the distribution of condoms, the Court explained that although there was no constitutional provision on the right to privacy, the Constitution still protects it by creating a penumbra of guarantees that join together to create such a

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[42] Tan, *supra* note 26 at 153

[43] Carpio, *supra* note 36 at 686

[44] Tan, *supra* note 26 at 153

[45] *Id.* at 155

[46] Ople v. Torres 293 SCRA 141, 171 (1998) (J.Romero, Separate Opinion).

[47] Carpio, *supra* note 120 at 686

right.[48] In a paragraph likewise invoked in Philippine court decisions concerning the right to privacy, the United States Supreme Court said:

> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.' The Fourth and Fifth Amendments were described in Boyd v. United States, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life'. We recently referred in to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully and particularly reserved to the people'. These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.[49]

After providing for the constitutional basis of the right to privacy in *Griswold*, the court will go on to explain the qualification for invoking the right in the case of *Katz v. United States*. The court explained here the doctrine which became known as reasonable expectation of privacy. In this case, government agents electronically recorded a private conversation in an enclosed telephone booth and used it as evidence in a criminal case.[50] The United States Supreme Court sided with the accused in saying that by shutting the door in the telephone booth to place the call, the accused had a *reasonable expectation* that his words will not be broadcasted to the world.[51] However, it was the concurring opinion of Justice Harlan who made his own explanation of the doctrine, which caught the eye of many legal scholars and will often be quoted in future Supreme Court decisions, both in the U.S. and in the Philippines. In his concurring opinion, Justice Harlan explained that there are two requisites to properly invoke the right to privacy, "first, that a person have exhibited an

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[48] Griswold v. Conneticut 381 U.S. 479, 484 (1965)

[49] Id.

[50] Katz v. United States 389 U.S. 347, 348 (1967)

[51] *Id.* at 352

actual (subjective) expectation of privacy"[52] and second, that "the expectation be one that society is prepared to recognize as reasonable."[53] By establishing these two, a person can establish a reasonable expectation of privacy and properly invoke his constitution right in proper courts of law.

However, the *Katz* standard of reasonable expectation is not the sole determinant in determining the violation of the right to privacy. In the more recent case of *United States v. Jones*[54], which involves a GPS Tracker that was installed without permission on the vehicle of the accused, the prosecution sought to belittle the accused's claim to privacy by arguing that he has no reasonable expectations on the public roads.[55] The United States Supreme Court disagreed by saying that privacy rights of the accused do not rise and fall with the Katz formulation[56] In this case, the court clarified that what really determines the violation of the right is whether there has been a trespass on one's person, property, houses, papers and effects. It does not matter whether this trespass was a physical intrusion or merely a technical one, stating that "the *Katz* reasonable-expectation-of-privacy test has been added to, but not substituted for, the common-law trespassory test.[57]

Also noteworthy in our study of the right to privacy is the ruling in the case of *Cox Broadcasting v. Cohn*, wherein the United States Supreme Court was confronted with the question involving freedom of the press and the right to privacy of rape victims. In this case, the press insisted on its right to publish the names of victims in a rape case.[58] The U.S. Supreme Court ruled by stating that trials are public proceedings and, as such, the press can report anything that happens there, including the names of the parties[59] It explained that "the interests of privacy fade when the information involved already appears on public record."[60] In understanding this ruling however, it must be recognized that the United States Supreme Court ruling is confined only to one specific form of intrusion, the public disclosure of a specific fact relating to the victim (i.e., name of the victim) which is already in the public record. Be that as it

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[52] *Id.* at 361 (J. Harlan, Concurring Opinion)

[53] Id.

[54] United States v. Jones, 565 U.S. 400 (2012)

[55] *Id.* at 409

[56] *Id.* at 406

[57] *Id.* at 409

[58] Cox Broadcasting v. Cohn, 420 U.S. 469, 472 (1975)

[59] *Id.* at 494,

[60] *Id.* at 495

may, the ruling did not state that other forms of intrusion into the privacy of the victim would be just as permissible.

In the Philippines, one of the most significant analyses of the right to privacy was a speech made by Justice Reynato Puno. In his speech, "The Common Right to Privacy," which would have big influence on our jurisprudence, Justice Puno provided for three main categories of the right to privacy:

Decisional Privacy	Right of individuals to make certain kinds of fundamental choices with respect to their personal autonomy
Situational Privacy	Right of individuals to feel privacy in a physical space, undisturbed by any form of trespass
Informational Privacy	Right of individuals to control information about themselves

In the 1987 Constitution, Article III, Section 2 is a good example of locational privacy, while Section 3 and Section 17 of Article III demonstrate informational privacy. Meanwhile, Sections 6, 8, 12, and 18(1) of Article III are good examples of decisional privacy.

In Philippine jurisprudence, *Morfe v. Mutuc* is the first definite and unequivocal ruling of the Philippine Supreme Court with regard to the right to privacy. In this case, the constitutionality of the provision of the anti-graft law, which requires public officers to periodically submit their statement of assets and liabilities (SALN) was assailed as a violation of the right to privacy.[61] The Philippine Supreme Court, while disagreeing that such an obligation constitutes an invasion of privacy, declared that in the Philippine jurisdiction, there is a constitutional right to privacy.[62] In doing so, it echoed the ruling of the U.S. Supreme Court in the case of *Griswold v. Conneticut*.

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[61] *Morfe,* 22 SCRA at 428

[62] Id. at 444

However, the Philippine Supreme Court was also quick to clarify that constitutional right to privacy is more than just a penumbra or amalgamation of several constitutional guarantees. Rather, it is a separate and distinct right in and of itself. In the words of the court: "'The constitutional right to privacy has come into its own. The right to privacy as such is accorded recognition independently of its identification with liberty. In itself, it is fully deserving of constitutional protection.'"[63] In resolving the issue, the Supreme Court used the "rational relationship test" to assess whether an intrusion into an individual's privacy is valid.[64] According to this test, as long as the intrusion is reasonably related to a valid and legitimate purpose, then the Court will uphold the intrusion.[65] In this case, it was adequately shown that public interest in accountability and transparency serves as a valid purpose in requiring submission of the SALN.

The Court followed up this pronouncement in *Ople v. Torres*. This case involves the constitutionality of an administrative order creating a national computerized identification system.[66] The court struck down the order saying that it violates the right to privacy. The Court stated that the right to privacy "was not engraved in our Constitution for flattery"[67] and that it is "one of the most threatened rights of man living in a mass society."[68] The threats emanate from various sources — governments, journalists, employers, social scientists, etc." In this case, the Philippine Supreme Court also identified more precisely, the penumbra from which the right of privacy is sourced. It listed the Constitution, the Revised Penal Code, the Anti-Wiretapping Act, the Bank Secrecy Act, the Intellectual Property Code, the Rules of Court, and the Civil Code, among others, as laws which protect an individual's zone of privacy.[69] Just like any other fundamental right, the government is therefore burdened with proving that there exists a compelling state interest when it infringes upon the right to privacy and that it is not overbroad and vague.[70]

In addition to the laws mentioned in the *Ople v. Torres* ruling, other special laws that emphasize the penumbra of the right to privacy in our legal jurisdiction, include inter alia, the Kasambahay Law, which states that house helpers shall be guaranteed privacy at all times and prohibits them from

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[63] *Id.* at 444

[64] *Id.* at 445

[65] Id.

[66] *Ople,* 293 SCRA at 144

[67] *Id.* at 170

[68] Id.

[69] *Id.* at 157

[70] *Id.* at 158

publicly disclosing any communication or information pertaining to the members of the household.[71] The Philippine HIV and AIDS Policy Act, which provides for the confidentiality and privacy of any individual who has been tested for HIV, has been exposed to HIV, has HIV infection or HIV- and AIDS-related illnesses, or was treated for HIV-related illnesses.[72] The National Internal Revenue Code, which makes it unlawful to divulge any information regarding the income, inheritance and business of any taxpayer.[73] The Safe Spaces Act, which penalizes acts constituting gender-based online sexual harassment such as invasion of victim's privacy through cyberstalking and incessant messaging.[74] The Labor Code, which provides that any specific information disclosed by labor organizations in confidence shall not be revealed.[75] The Alternative Dispute Resolution Act, which declares as confidential all those information obtained in mediation proceedings.[76] The Data Privacy Act, which protects all personal information obtained through communication systems while providing for the creation of the National Privacy Commission as well as the procedure for collecting private information and the rights of individuals whose personal information was collected.[77] The Adoption law, which provides the confidentiality of all information obtained in adoption hearings.[78] Likewise, procedural laws provides for the privacy of privileged communications,[79] the privacy of an accused in criminal

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[71] An Act Instituting Policies for the Protection and Welfare of Domestic Workers [The Kasambahay Law], Republic Act No. 10361 §§7, 10 (2012).

[72] An Act Strengthening the Philippine Comprehensive Policy on Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) Prevention, Treatment, Care, and Support, and, Reconstituting the Philippine National Aids Council (PNAC), Repealing for the Purpose Republic Act No. 8504, Otherwise Known as The "Philippine Aids Prevention and Control Act of 1998", and Appropriating Funds Therefor [Philippine HIV and AIDS Policy Act], Republic Act No. 11166 §44 (2018).

[73] An Act Amending the National Internal Revenue Code and For Other Purposes [NATIONAL INTERNAL REVENUE CODE], Republic Act No. 8424 §278 (1997).

[74] An Act Defining Gender-Based Sexual Harassment in Streets, Public Spaces, Online, Workplaces, and Educational or Training Institutions, Providing Protective Measures and Prescribing Penalties Therefor [Safe Spaces Act], Republic Act No. 11313 §12 (2018).

[75] A Decree Instituting a Labor Code [LABOR CODE], Presidential Decree No. 442, art. 231 (1974).

[76] An Act to Institutionalize the Use of Alternative Dispute Resolution System in the Philippines [Alternative Dispute Resolution Act], Republic Act No. 9285 §278 (2004).

[77] An Act Protecting Individual Personal Information in Information and Communications System in the Government and Private Sector [Data Privacy Act], Republic Act No. 10173 §§7, 11 (2012).

[78] An Act Establishing the Rules and Policies on Domestic Adoption of Filipino Children [Domestic Adoption Act], Republic Act No. 8552 §15 (1998).

[79] RULES OF EVIDENCE, rule 130, §§ 24,25

proceedings,[80] the privacy of physical and mental examination in discovery proceedings,[81] and for the remedy of the Writ of Habeas Data.[82]

As for international commitments and obligations, the Philippines is a party to the ASEAN Declaration on Human Rights which state that:

> Every person has the right to be free from arbitrary interference with his or her privacy, family, home or correspondence including personal data, or to attacks upon that person's honour and reputation. Every person has the right to the protection of the law against such interference or attacks.[83]

In the International Covenant on Civil and Political Rights, the Philippines committed to a similar guarantee that states:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.[84]

Both are identical to the earlier commitment made by the Philippines under the United Nations Declaration on Human Rights, which states:

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.[85]

More specifically to victims of human trafficking and migrant smuggling, the Philippines is likewise a party to the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, which states that:

> In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of

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[80] 2000 Rules of Criminal Procedure, rule 115

[81] 1997 Rules of civil procedure, rule 28, §3

[82] THE RULE ON WRIT ON WRIT OF HABEAS DATA, A.M. No. 08-1-16-SC, January 22,2008, §1

[83] ASEAN Human Rights Declaration, Article 21, *adopted* November 18, 2012. 21st ASEAN Summit;

[84] International Covenant on Civil and Political Rights, Article 17, *adopted* March 23, 1976, 999 U.N.T.S. 171

[85] G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Supp. No. 13, U.N. Doc. A/810 (December 10, 1948).

> trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.[86]

Meanwhile, it is also important to note that the Philippine Supreme Court subsequently supplemented the rational relationship test in *Morfe v. Mutuc*, by adopting the reasonable expectation test, from Justice Harlan's concurring opinion in the aforementioned *Katz* ruling.[87] In this case, the Supreme Court declared that the administrative order failed to pass both tests. In doing so, the Court explained the nature of the right to privacy by stating that:

> In no uncertain terms, we also underscore that the right to privacy does not bar all incursions into individual privacy. The right is not intended to stifle scientific and technological advancements that enhance public service and the common good. It merely requires that the law be narrowly focused and a compelling interest justify such intrusions. Intrusions into the right must be accompanied by proper safeguards and well-defined standards to prevent unconstitutional invasions. We reiterate that any law or order that invades individual privacy will be subjected by this Court to strict scrutiny.[88]

This pronouncement also echoes the earlier ruling of the Philippine Supreme Court in the case of *People v. CFI of Rizal*,[89] where the court aptly described the right to privacy as an:

> Essential condition to the dignity and happiness and to the peace and security of every individual, whether it be of home or of persons and correspondence. Nothing is more closer to a man's soul than the serenity of his privacy and the assurance of his personal security. Any interference allowable can only be for the best of causes and reasons. [90]

In *Hing v. Choachuy*,[91] a case which involves the installation of CCTV cameras and taking of unauthorized pictures of complainant's place of

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[86] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Article 6, adopted May 28, 2002 , 2237 U.N.T.S. 319

[87] *Id.* at 163,164

[88] *Ople,* 293 SCRA at 169

[89] People v CFI of Rizal 101 SCRA 86 (1980)

[90] *Id.* at 101

[91] Hing v Choachuy, 699 SCRA 667 (2013)

business, the Philippine Supreme Court once again emphasized the reasonable expectation test and said that the nature of the right to privacy is:

> The right to be free from unwarranted exploitation of one's person or from intrusion into one's private activities in such a way as to cause humiliation to a person's ordinary sensibilities. It is the right of an individual "to be free from unwarranted publicity, or to live without unwarranted interference by the public in matters in which the public is not necessarily concerned. Simply put, the right to privacy is "the right to be let alone.
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> x x x x
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> In ascertaining whether there is a violation of the right to privacy, courts use the "reasonable expectation of privacy" test. This test determines whether a person has a reasonable expectation of privacy and whether the expectation has been violated.51 In Ople v. Torres, we enunciated that "the reasonableness of a person's expectation of privacy depends on a two-part test: (1) whether, by his conduct, the individual has exhibited an expectation of privacy; and (2) this expectation is one that society recognizes as reasonable." Customs, community norms, and practices may, therefore, limit or extend an individual's "reasonable expectation of privacy." Hence, the reasonableness of a person's expectation of privacy must be determined on a case-to-case basis since it depends on the factual circumstances surrounding the case.[92] (Emphasis Supplied)

Limitations on Freedom of Speech, Expression and of the Press

The freedom of speech, of expression, and of the press is one of the most sacred rights guaranteed under the 1987 Constitution. Freedom of speech extends to every form of expression, whether oral, written or recorded. It also includes campaign speech, symbolic speech, commercial speech and peaceful picketing. It is reinforced by our international treaty obligations, such as International Covenant on Civil and Political Rights, which states that:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[93]

The constitutional prohibition against limitation of speech, expression and of the press rests primarily on two things: Prior Restraint and Subsequent

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[92] *Hing,* 699 SCRA at 676, 677

[93] International Covenant on Civil and Political Rights, Article 19, adopted March 23, 1976, 999 U.N.T.S. 171

Punishment. Prior restraint occurs when there is an attempt by the government to prevent the exercise of the right, such movie and press censorship. Freedom from prior restraint is largely freedom from government censorship of publications, whatever the form of censorship and regardless of whether it is wielded by the executive, legislative or judicial branch of the government.[94] Subsequent punishment, on the other hand, occurs when punishment is imposed by the government after the right has been exercised, such as penalizing a journalist for making a specific kind of report. It must be remembered however, that the distinction is really hypothetical as the threat of a subsequent punishment could very well operate as a prior restraint.[95]

Over time, jurisprudence in the United States and the Philippines has identified certain types of speeches which are not protected by the Constitution. This includes those which are dangerous to national security, [96] those which incite sedition,[97] those which are libelous[98] and those which exhibit obscenity.[99]

For those which are protected however, jurisprudence has developed three types of tests before a limitation can be imposed on freedom of expression. These three tests were best explained by the Court in *Chavez v. Gonzales*, where it states that:

> "(a) the dangerous tendency doctrine which permits limitations on speech once a rational connection has been established between the speech restrained and the danger contemplated; (b) the balancing of interests tests, used as a standard when courts need to balance conflicting social values and individual interests, and requires a conscious and detailed consideration of the interplay of interests observable in a given situation of type of situation; and (c) the clear and present danger rule which rests on the premise that speech may be restrained because there is substantial danger that the speech will likely lead to an evil the government has a right to prevent. This rule requires that the evil consequences sought to be prevented must be substantive, "extremely serious and the degree of imminence extremely high."[100]

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[94] 1-United Transport Koalisyon (1-UTAK) vs. Commission on Elections, 755 SCRA 441, 454 (2015)

[95] BERNAS , S.J., *supra* note 18 at 248-249.

[96] BERNAS , S.J., *supra* note 18 at 253.

[97] Id.

[98] *Id.* at 283

[99] Chavez v. Gonzales 545 SCRA 441,449 (2008)

[100] *Id.* at 487, 488

Related thereto, the Philippine Supreme Court has also recognized that the exercise of freedom of expression and of the press is subject to reasonable limitations of time, place and manner. This type of regulation is known as a content-neutral regulation.[101] In case law, it is often compared to a content-based regulation.[102] Content-neutral regulations are merely concerned with the time, place and manner of the exercise of the right, while content-based regulations are based on the subject matter.[103] Content-neutral regulation does not, in any manner, affect or target the actual content of the message. It is not concerned with the words used, the perspective expressed, the message relayed, or the speaker's views.[104] If the regulation is content neutral, only substantial government interest is required for its validity.[105] If the regulation is content-based, then it will be subjected to the strictest scrutiny of the clear and present danger test.[106]

The lesser form of scrutiny applied by the Court in content-neutral regulations is called the "intermediate approach."[107] The main requirement imposed by Philippine jurisprudence for the intermediate approach is that the restriction be "narrowly-tailored to promote an important or significant governmental interest that is unrelated to the suppression of expression."[108] In the combined jurisprudence of the United States and the Philippines, case rulings have identified residential privacy,[109] judicial independence,[110]public order,[111]cleanliness of parks,[112] religious freedom,[113] and even the decongestion of traffic in public streets,[114] as significant government interest justifying content-neutral regulation. One difference between U.S. and Philippine jurisprudence however, is that the United States Supreme Court ruling often

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[101] *Chavez,* 545 SCRA at 493

[102] Id.

[103] Id.

[104] Loida Nicolas-Lewis vs Commission on Elections 913 SCRA 515, 554 (2019)

[105] Id.

[106] Id.

[107] Id.

[108] *Chavez,* 545 SCRA at 493

[109] Frisby v. Shultz 484 U.S. 474, 482 (1988)

[110] In Re: Petition to Annul En Banc Resolution A.M. 98-7-02 296 SCRA xi, xv (1998)

[111] Reyes v Bagatsing 125 SCRA 553, 563 (1983)

[112] Clark v. CCNV 468 U.S. 288, 296 (1984)

[113] Ignacio v. Ela 99 Phil. 347,351 (1956)

[114] Schneider v. State 308 U.S. 147, 160 (1939)

emphasizes the requirement that alternative forms of communications must be left open.[115]

In order to determine whether a regulation is content-neutral or content-based, the United States Supreme Court has used the intent test, most significantly in the case of *Ward v. Rock against Racism*, to wit:

> The principal inquiry in determining content-neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages, but not others. Government regulation of expressive activity is content-neutral so long as it is *justified* without reference to the content of the regulated speech.[116] (Emphasis Supplied)

This ruling foreshadowed the ruling of the Philippine Supreme Court in the case *Nicolas-Lewis v. COMELEC,* wherein a similar test was enunciated:

> The particular law or regulation must be judiciously examined on what it actually intends to regulate to properly determine whether it amounts to a content-neutral or content-based regulation as contemplated under our jurisprudential laws. To rule otherwise would result to the absurd interpretation that every law or regulation relating to a particular speech is a content-based regulation. Such perspective would then unjustifiably disregard the well-established jurisprudential distinction between content-neutral and content-based regulations.[117] (Emphasis Supplied)

Concurring with the abovementioned distinction between content-neutral and content-based regulation is the elucidation which was pronounced by the United States Supreme Court in the case of Hill vs Colorado. In this case, it was ruled that:

> First, it is not a "regulation of speech." Rather, it is a regulation of the places where some speech may occur. Second, it was not adopted "because of disagreement with the message it conveys." This conclusion is supported not just by the Colorado courts' interpretation of legislative history, but more importantly by the State Supreme Court's unequivocal holding that the statute's "restrictions apply equally to all demonstrators, regardless of

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[115] *Frisby,* 487 U.S. at 481

[116] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)

[117] Nicolas-Lewis, 913 SCRA at 555

> viewpoint, and the statutory language makes no reference to the content of the speech."[118] (Emphasis Supplied)

Proceeding from the above, one can deduce that in ascertaining if a regulation is content- neutral, one should look at key markers, such as whether the restrictions apply equally to all regardless of viewpoint, whether the statutory language makes no reference to the content of the speech and if the restriction was adopted because of disagreement with the message it conveys.

Analysis

Having discussed the laws and jurisprudential doctrines on the right to privacy and freedom of expression, it is now imperative to determine whether the enhanced privacy restrictions for victims of human trafficking, as proposed by Senate Bill 2449, constitute an unconstitutional prior restraint.

We answer this in the negative. We can conclude in this case that the restriction proposed is a content-neutral regulation. Following the guidelines set forth in cases such as Ward v. Rock against Racism, Nicolas-Lewis v. COMELEC, and Hill v. Colorado, it is clear that the proposed regulation under Senate Bill 2449 is unrelated to the content of the expression. Senate Bill 2449 does not make any reference to the content of the regulated speech, nor is it concerned with the words used, the perspective expressed, the message relayed, or the speaker's views, but merely on its damage to the privacy rights of the trafficking victim. What is regulated is not the message it conveys but the manner of the speech, i.e., causing publicity that may result in further suffering to the victim. Furthermore, it applies equally to all media practitioners regardless of viewpoint.

The mere fact that the restrictions apply specifically to speech and expression relating to the case of the trafficking victims does not make it a content-based regulation. As stated in the case of *Nicolas-Lewis v. COMELEC*:

> The fact that the questioned regulation applies only to political speech or election-related speech does not, by itself, make it a content-based regulation. It is too obvious to state that every law or regulation would apply to a particular type of speech such as commercial speech or political speech. It does not follow, however, that these regulations affect or target the

[118] Hill v. Colorado 530 U.S. 703, 719 (2000)

> content of the speech or expression to easily and sweepingly identify it as a content-based regulation.[119] (Emphasis Supplied)

This ruling is in concurrence with the opinion of the U.S. Supreme Court in the case of *McCullen v. Coakley*, where it was stated that "a facially neutral law does not become content-based simply because it may disproportionately affect speech on certain topics."[120] Moreover, in the aforementioned case of *Hill v. Colorado,* it was emphasized that the mere fact that the statements must sometimes be examined to determine whether it is covered by the restriction is not determinant of the restriction becoming content-based, stating that :

> It is common in the law to examine the content of a communication to determine the speaker's purpose. Whether a particular statement constitutes a threat, blackmail, an agreement to fix prices, a copyright violation, a public offering of securities, or an offer to sell goods often depends on the precise content of the statement. We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct.[121]

Even though the United States Supreme Court stated in the case of *McCullen v. Coakley* that a statute would not be content-neutral if it were concerned with "undesirable effects that arise from the direct impact of speech on its audience or listener's reactions to speech,"[122] it still recognized therein that the restriction under its consideration is a content-neutral regulation because the problems identified to justify the restrictions will still "arise irrespective of any listener's reactions."[123] In this case, the same holds true as the damage to the privacy of the trafficking victims will still arise irrespective of any listener's reaction.

McCullen v. Coakley also adds that a statute would be content-based if it required "enforcement authorities" to "examine the content of the message that is conveyed to determine whether a violation has occurred."[124] However, it would be content-neutral if the Act would be violated not on what it said but simply on the place where it said. Following this logic, it is clear that a violation of the confidentiality provisions under Senate Bill 2449 would not

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[119] Nicolas-Lewis, 913 SCRA at 555

[120] McCullen v. Coakley 573 U.S 464, 480 (2014)

[121] *Hill,* 530 U.S. at 721

[122] *McCullen,* 573 U.S. at 481

[123] *McCullen,* 573 U.S. at 481

[124] *McCullen,* 573 U.S. at 479

require enforcement authorities to examine the content of the news report about the trafficking case, but merely whether it caused damage to the privacy rights of the trafficking victim. In other words, it is not concerned with what was said in the report, but with the invasion of privacy of the victim.

Corollary thereto, while it is true that Senate Bill 2449 can have the "inevitable effect" of restricting speech related to the trafficking cases more than speech on other subjects, *McCullen v. Coakley* guide us that the restriction should still be deemed content-neutral:

> It is true, of course, that by limiting the buffer zones to abortion clinics, the Act has the "inevitable effect" of restricting abortion-related speech more than speech on other subjects. But a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics. On the contrary, a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.[125] (Emphasis Supplied)

Having determined that the proposed regulation of speech and expression under Senate Bill 2449 is a content-neutral regulation, we can now examine if it satisfied jurisprudential requirements of validity.

According to the United States Supreme Court in the case of *United States v. O'Brien*, the four essential requisites for the validity of a content-neutral regulation are:

> We think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[126]

This was later on adopted by the Philippine Supreme Court in its rulings, such as in the case of *1-Utak v. COMELEC*, where it stated that:

A content-neutral regulation, *i.e.*, which is merely concerned with the incidents of the speech, or one that merely controls the time, place or manner, and under well-defined standards, is constitutionally permissible, even if it restricts the right to free speech, provided that the following requisites concur: *first,* the government regulation is within the constitutional power of the

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[125] *McCullen,* 573 U.S. at 480

[126] United States v. O'Brien, 391 U.S. 367, 377 (1968)

Government; *second,* it furthers an important or substantial governmental interest; *third,* the governmental interest is unrelated to the suppression of free expression; and *fourth*, the incidental restriction on freedom of expression is no greater than is essential to the furtherance of that interest.[127] (Emphasis Supplied)

In Senate Bill 2449, it is easy to see that the first, second and third requisites are easily complied with. It goes without saying that Senate Bill 2449 is within the power of the government to enact. Furthermore, the privacy of human trafficking victims is an important or substantial governmental interest unrelated to the suppression of free expression. Having said that, our point of inquiry should focus on the fourth criterion in the said test, i.e., that the regulation should be no greater than what is essential to the furtherance of the governmental interest.

In evaluating the fourth criterion, the United States Supreme Court has consistently looked at the presence of ample alternative channels for speech and expression.[128] Philippine jurisprudence has adopted similar standards, as exemplified in the previously mentioned case of *Nicolas-Lewis v. COMELEC,* wherein the Philippine Supreme Court made the following disquisition:

> The failure to meet the fourth criterion is fatal to the regulation's validity as even if it is within the Constitutional power of the government agency or instrumentality concerned and it furthers an important or substantial governmental interest which is unrelated to the suppression of speech, the regulation shall still be invalidated if the restriction on freedom of expression is greater than what is necessary to achieve the invoked governmental purpose.
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> In the judicial review of laws or statutes, especially those that impose a restriction on the exercise of protected expression, it is important that we look not only at the legislative intent or motive in imposing the restriction, but more so at the effects of such restriction when implemented. The restriction must not be broad and should only be narrowly-tailored to achieve the purpose. It must be demonstrable. It must allow alternative avenues for the actor to make speech.[129]

In making our analysis, it is important likewise to remember the pronouncement of the U.S. Supreme Court in the case of *Ward v. Rock against Racism* that a narrowly tailored regulation need not be the least restrictive or

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[127] 1-United Transport Koalisyon (1-UTAK), 755 SCRA at 457

[128] *Hill,* 530 U.S. at 726

[129] Nicolas-Lewis, 913 SCRA at 557

least intrusive means of serving the government's content-neutral interests.[130] The ruling explains this further by stating that:

> So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.[131]

It is clear in this case that Senate Bill 2449 leaves open ample alternative channels for speech and expression. As stated in the American case of *Iskcon of Potomac v. Kennedy,* the restriction leaves open ample alternative communication channels if resorting to the alternative would not infringe on the autonomy of the speaker, if it would not make it less likely that they would reach their intended audience, or if it would not prevent them from revealing their identity or advocating their cause.[132] In this case, the autonomy of the media practitioners is not infringed as they are still free to report on trafficking cases. Neither will the enhanced confidentiality clause under Senate Bill 2449 prevent media practitioners from reaching their audience or to advocate their message.

In making our conclusion, we must also take into consideration the ruling of the Philippine Supreme Court in the case *Ayer Productions v. Capulong*, where it was confronted with the question of whether the claim to privacy can stifle freedom of expression.[133] Although the ruling did not answer the question directly, instead choosing to sidestep by stating that the subject matter of the case is not concerned with the privacy of former senator Juan Ponce Enrile as it is already a historical fact, the Philippine Supreme Court still recognized that "the limits of freedom of expression are reached when expression touches upon matters of essentially private concern."[134]

Conclusion

Freedom of speech, expression and of the press is a fundamental right. It is one of the essential foundations of a democratic society. However, just like

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[130] Ward, 491 U.S. at 798

[131] Ward, 491 U.S. at 800

[132] Iskcon of Potomac v. Kennedy 61 F.3d 949, 958 (D.C. Cir. 1995)

[133] Ayer v. Capulong, 160 SCRA 861, 870 (1988)

[134] *Id.* at 872 (citing Lagunzad v. Vda De Gonzales 92 SCRA 488,489)

any right, it must be balanced with other societal interests such as the right to privacy. In balancing these two rights, it must be recognized that victim-survivors of human trafficking and migrant smuggling experience severe physical, mental and emotional suffering as a result of their ordeal, and must be given utmost assistance towards healing their physical and emotional wounds. Hence, even slight intrusions into their privacy would not only set them back on their road to recovery and recoupment, but it would give them new sources of emotional distress and traumatization. As such, the enhanced confidentiality provisions under Senate Bill 2449, once signed into law, would bring a welcome development that will help protect the privacy of trafficking victim-survivors, thereby aiding their recovery, rehabilitation and reintegration into society.

PHILIPPINE JURISPRUDENCE ON THE LACK OF DUE PROCESS ISSUE ARISING FROM THE APPLICATION OF THE DOCTRINE OF PIERCING THE VEIL OF CORPORATE FICTION: AN ANALYSIS

Prof. Amado E. Tayag[*]

INTRODUCTION

A. Doctrine of Corporate Entity

Under the general doctrine of separate juridical personality, a corporation has a legal personality separate and distinct from that of the people comprising it.[1] By virtue of this doctrine, stockholders of a corporation enjoy the principle of limited liability: the corporate debt is not the debt of the stockholder.[2] Thus, being an officer or a stockholder of a corporation does not make one's property the property also of the corporation.[3]

Doctrinally, a corporation is a legal or juridical person with a personality separate and apart from its individual stockholders or members and from any other legal entity to which it may be connected or related. It is not, in fact and in reality, a person but the law treats it as though it were a person by process of fiction thus facilitating the conduct of corporate business. The stockholders

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[*] Prof. Tayag obtained his *Juris Doctor* degree, M*agna Cum Laude,* from the University of Santo Tomas Faculty of Civil Law in 1990 where he graduated "Class Valedictorian". He is a recipient of the university's Rector's Award for Academic Excellence in the field of law. He earned his Bachelor of Arts degree major in Philosophy at the UST Faculty of Arts and Letters, and his Master of Laws degree, *Magna Cum Laude,* at the UST Graduate School of Law. He has been a Faculty Member and a Bar Reviewer in Mercantile Law at the UST Faculty of Civil Law since 2001. Per the invitation of the UP Law Center where he also gives Pre-Bar Review lectures, he participated as a member of the "Expert Committee" which finalized the suggested answers to the 2019 and to the 2020-2021 Bar Examination questions in Commercial Law.

[1] Heirs of Tan Uy v. International Exchange Bank, G.R. No. 166282, June 16, 2019

[2] Philippine National Bank vs. Hydro Resources Contractors Corporation, G.R. No. 167530, Mar. 13, 2013

See Cesar L. Villanueva and Teresa S. Villanueva-Tiansay, *Philippine Corporate Law* (2013) 880. "x x x the corporate defenses of limited liability should still be available to stockholders of such close corporations."

[3] Traders Royal Bank v. Court of Appeals, G.R. No. 78412, Sep. 26, 1989

or members who, as natural persons, are merged in the corporate body, compose the corporation but they are not the corporation.[4]

The doctrine of corporate entity fills a useful purpose in business life and whether the purpose is to gain an advantage under the law of the state of incorporation or to avoid, or to comply with the demands of creditors or to serve the creator's personal or undisclosed convenience, so long as that purpose is the equivalent of business activity or is followed by the carrying on of business of the corporation, the corporation remains a separate entity. But the doctrine is one of substance and validity and courts will, in proper cases, disregarding forms and looking to substance, ignore the legal fiction of corporate entity.[5]

B. Doctrine of Piercing the Veil: Common Law Origin

Under the doctrine of piercing the veil of corporate fiction, the court looks at the corporation as a mere collection of individuals or an aggregation of persons undertaking business as a group, disregarding the separate juridical personality of the corporation unifying the group. Another formulation of this doctrine is that when two business enterprises are owned, conducted and controlled by the same parties, both law and equity will, when necessary to protect the rights of third parties, disregard the legal fiction that two corporations are distinct entities and treat them as identical or as one and the same.[6]

The said doctrine has its roots in common law countries[7] which, as a general rule in corporation law, uphold the principle of separate personhood but, in exceptional situations, may pierce the corporate veil.[8]

In the United States, corporate veil piercing is the most litigated issue in corporate law.[9] Although courts are reluctant to hold an active shareholder

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[4] See De Leon, Hector: The Corporation Code of the Philippines, Annotated; Eleventh Edition 2013, page 15

[5] Ibid.

[6] Pantranco Employees Association,, Inc. et. al. vs. NLRC, et. al., G.R. NO. 170689, March 17, 2009

[7] Like Germany, the United Kingdom and the United States

[8] Larson, Aaron (12 July 2016): "*Piercing the Corporate Veil*". *ExpertLaw*

[9] Thompson, Robert B. (1991), "Piercing the Corporate Veil: An Empirical Study", Cornell Law Review, 76: 1036–1074

liable for actions that are legally the responsibility of the corporation, even if the corporation has a single shareholder, they will often do so if the corporation was markedly noncompliant with corporate formalities, to prevent fraud, or to achieve equity in certain cases of undercapitalization.[10]

In most jurisdictions, no bright-line rule exists and the ruling is based on common law precedents. In the United States, different theories, most important "alter ego" or "instrumentality rule", attempted to create a piercing standard. Mostly, they rest upon three basic prongs—namely:[11]

(a) "unity of interest and ownership": the separate personalities of the shareholder and corporation cease to exist;

(b) "wrongful conduct": wrongful action taken by the corporation; and

(c) "proximate cause": as a reasonably foreseeable result of the wrongful action, harm was caused to the party that is seeking to pierce the corporate veil.

Thus, the factors that a court may consider when determining whether or not to pierce the corporate veil can be said to include the following:[12]

(a) Absence or inaccuracy of corporate records;

(b) Concealment or misrepresentation of members;

(c) Failure to maintain arm's length relationships with related entities;

(d) Failure to observe corporate formalities in terms of behavior and documentation;

(e) Intermingling of assets of the corporation and of the shareholder;

(f) Manipulation of assets or liabilities to concentrate the assets or liabilities;

(g) Non-functioning corporate officers and/or directors;

(h) Significant undercapitalization of the business entity (capitalization requirements vary based on industry, location, and specific company circumstances);

(i) Siphoning of corporate funds by the dominant shareholder(s);

(j) Treatment by an individual of the assets of corporation as his/her own;

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[10] Gelb, Harvey (December 1982). "Piercing the Corporate Veil - The Undercapitalization Factor". Chicago Kent Law Review 59 (1)
See also: Macey, Jonathan; Mitts, Joshua (2014). "Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil". Cornell Law Review 100

[11] *Rands, William J. (1998). "Domination of a Subsidiary by a Parent" (PDF). Indiana Law Review. 32: 421*

[12] *Barber, David H.* "Piercing the Corporate Veil". *Williamette Law Review*. 17: 371

(k) Corporation being used as a "façade" for dominant shareholder(s) personal dealings

C. The Doctrine as Applied in Philippine Jurisprudence

1. Three Basic Areas

Not to be outdone, Philippine jurisprudence is likewise replete with cases wherein our Supreme Court had repeatedly, whenever apropos, applied this doctrine. Thus, in a long line of cases, including *Martinez vs. Court of Appeals,13 GCC vs. Alson Development and Investment Corporation,14 Pantranco Employees Association, Inc., et al., vs. NLRC, e. al.15* and *Rivera vs. United Laboratories16,* the fundamental rule states that this doctrine applies only in three (3) basic areas, namely:

1) When the corporate vehicle is used to defeat public convenience as when the corporate fiction is used as a vehicle for the evasion of an existing obligation;

2) In fraud cases or when the corporate entity is used to justify a wrong, protect fraud, or defend a crime; or

3) In *alter ego* cases, where a corporation is merely a farce since it is a mere alter ego or business conduit of a person, or where the corporation is so organized and controlled and its affairs are so conducted as to make it merely an instrumentality, agency, conduit or adjunct of another corporation.

Parenthetically, the High Court is consistent in enunciating the basic rule, which states that in the absence of malice, bad faith, or a specific provision of law making a corporate officer liable, such corporate officer cannot be made personally liable for corporate liabilities.[17]

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[13] G.R. No. 131673, 10 September 2004

[14] G.R. No. 154975, January 29, 2007

[15] G.R. No. 170689, March 17, 2009

[16] G.R. No. 155639, April 22, 2009

[17] Subject to the exception which was applied by the Court in *Naguiat*, infra., wherein the High Tribunal said:

2. Alter ego rule

As regards the third basic area mentioned above -- the so-called *alter ego* rule, equally well-settled is the principle that the corporate mask may be removed or the corporate veil pierced when the corporation is just an *alter ego* of a person or of another corporation. For reasons of public policy and in the interest of justice, the corporate veil will justifiably be impaled only when it becomes a shield for fraud, illegality or inequity committed against third persons.

In this connection, case law[18] lays down a three-pronged test to determine the application of the *alter ego* theory, which is also known as the instrumentality theory, namely: (1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetuate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal right; and (3) The aforesaid control and breach of duty must have proximately caused the injury or unjust loss complained of.[19]

The first prong is the "instrumentality" or "control" test. This test requires that the subsidiary be completely under the control and domination of the parent.[20] It examines the parent corporation's relationship with the subsidiary.[21] It inquires whether a subsidiary corporation is so organized and controlled and

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"The Court here finds no application to the rule that a corporate officer cannot be held solidarily liable with a corporation in the absence of evidence that he had acted in bad faith or with malice. In the present case, Sergio Naguiat is held solidarily liable for corporate tort because he had actively engaged in the management and operation of CFTI, a close corporation."

[18] Philippine National Bank vs. Hydro Resources Contractors Corporation (consolidated with Asset Privatization Trust vs. Hydro Resources Contractors Corporation and Development Bank of the Philippines vs. Hydro Resources Contractors Corporation), G.R. Nos. 167530, 167561 and 167603, March 13, 2013

[19] Concept Builders, Inc. v. National Labor Relations Commission, G.R. No. 108734 May 29, 1996

[20] Reed, Bradley: Clearing Away the Mist: Suggestions for Developing a Principled Veil Piercing Doctrine in China, Vanderbilt Journal of International Law 39: 1643, citing Stephen Presser, PIERCING THE CORPORATE VEIL, § 1:6, West (2004)

[21] Ibid., citing *White v. Jorgenson*, 322 N.W.2d 607, 608 (Minn. 1982) and *Multimedia Publishing of South Carolina, Inc. v. Mullins*, 431 S.E.2d 569, 571 (S.C. 1993)

its affairs are so conducted as to make it a mere instrumentality or agent of the parent corporation such that its separate existence as a distinct corporate entity will be ignored.[22] It seeks to establish whether the subsidiary corporation has no autonomy and the parent corporation, though acting through the subsidiary in form and appearance, "is operating the business directly for itself."[23]

The second prong is the "fraud" test. This test requires that the parent corporation's conduct in using the subsidiary corporation be unjust, fraudulent or wrongful.[24] It examines the relationship of the plaintiff to the corporation.[25] It recognizes that piercing is appropriate only if the parent corporation uses the subsidiary in a way that harms the plaintiff creditor.[26] As such, it requires a showing of "an element of injustice or fundamental unfairness."[27]

The third prong is the "harm" test. This test requires the plaintiff to show that the defendant's control, exerted in a fraudulent, illegal or otherwise unfair manner toward it, caused the harm suffered.[28] A causal connection between the fraudulent conduct committed through the instrumentality of the subsidiary and the injury suffered or the damage incurred by the plaintiff should be established. The plaintiff must prove that, unless the corporate veil is pierced, it will have been treated unjustly by the defendant's exercise of control and improper use of the corporate form and, thereby, suffer damages.[29]

The main issue which this Paper seeks to address and analyze is with regard to the lack of due process which may arise from the application of the said doctrine.

Indeed, there are a plethora of cases wherein our Supreme Court has to decide, among other issues, on the following:

> *Whether or not a third party, either natural or juridical, who was not impleaded nor was made a party to a case, can be adjudged to be solidarily liable with a party-litigant to a case as a consequence of the application of such doctrine.*

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[22] Ibid. citing Maurice Wormser: DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATE PROBLEMS (1929)

[23] Ibid.

[24] Ibid.

[25] White v. Jorgenson, supra. footnote 18

[26] Reed, Bradley, supra. footnote 17

[27] White v. Jorgenson, supra. footnote 18, citing *Victoria Elevator Co. v. Meriden Grain Co*., 283 N.W.2d 509, 512 (Minn. 1979)

[28] Olthoff, Mark, Beyond the Form: Should the Corporate Veil Be Pierced?, 64 UMKC L. Rev. 311, 318 (1995)

[29] Ibid.

II. DISCUSSION AND ANALYSIS

A. Relevant Jurisprudence

A.C. Ransom **case**[30]

In *A.C. Ransom*, the main issue is:

> "Is the judgment against a corporation to reinstate its dismissed employees with backwages, enforceable against its officers and agents, in their individual, private and personal capacities, who were not parties in the case where the judgment was rendered?"

The facts of the case, as culled from the decision, are as follows:

> "A.C. Ransom Corporation was a family corporation, the stockholders of which were members of the Hernandez family. In 1973, it filed an application for clearance to close or cease operations, which was duly granted by the Ministry of Labor and Employment, without prejudice to the right of employees to seek redress of grievance, if any. Backwages of 22 employees, who engaged in a strike prior to the closure, were subsequently computed at P164,984.00. Up to September 1976, the union filed about ten (10) motions for execution against the corporation, but none could be implemented, presumably for failure to find leviable assets of said corporation. In its last motion for execution, the union asked that officers and agents of the company be held personally liable for payment of the backwages. This was granted by the labor arbiter. In the corporation's appeal to the NLRC, one of the issues raised was: "Is the judgment against a corporation to reinstate its dismissed employees with backwages, enforceable against its officer and agents, in their individual, private and personal capacities, who were not parties in the case where the judgment was rendered?" The NLRC answered in the negative, on the ground that officers of a corporation are not liable personally for official acts unless they exceeded the scope of their authority.
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> On *certiorari*, this Court reversed the NLRC and upheld the labor arbiter. In imposing joint and several liability upon the company president, the Court

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[30]"A.C. Ransom Labor Union-CCLU, *Petitioner*, v. National Labor Relations Commission (First Division), A.C. Ransom (Phils.) Corporation, Ruben Hernandez, Maximo C. Hernandez, Jr., Porfirio R. Valencia, Laura H. Cornejo, Francisco Hernandez, Celestino C. Hernandez & Ma. Rosario Hernandez, *Respondents*" (First Division, *J. Melencio-Herrera*), G.R. No. L-69494. June 10, 1986

In reversing the NLRC and upholding the decision of the Labor Arbiter, the Court, in determining who can be held liable for violating the pertinent provisions of the Labor Code when the employer is a corporation, applied the definition of employer under the Labor Code which was culled from R.A. No. 602 or the Minimum Wage Law, that is, "any person acting in the interest of an employer, directly or indirectly."[31]

Thus, in *A.C. Ransom*, the one held responsible and thus adjudged solidarily liable to pay the dismissed employees is its President. Thus, said the Court:

> "The record does not clearly identify "the officer or officers" of RANSOM directly responsible for failure to pay the back wages of the 22 strikers. In the absence of definite proof in that regard, we believe it should be presumed that the responsible officer is the President of the corporation who can be deemed the chief operation officer thereof. Thus, in RA 602, criminal responsibility is with the "Manager or in his default, the person acting as such." In RANSOM, the President appears to be the Manager.
>
> Considering that non-payment of the back wages of the 22 strikers has been a **continuing situation,** it is our opinion that the personal liability of the RANSOM President, at the time the back wages were ordered to be paid should also be a continuing joint and several personal liabilities of all who may have thereafter succeeded to the office of president; otherwise, the 22 strikers may be deprived of their rights by the election of a president without leviable assets."[32]

Naguiat case[33]

In *Naguiat*, the facts of the case are hereby summarized as follows:

> Respondent Clark Field Taxi Corporation or CFTI held a concessionaire contract to operate taxi services within Clark Air Base. Due to the phase out of the US military bases including Clark, the services of the individual respondents as taxicab drivers were terminated in Nov. 1991.
>
> Based on the agreement had during the negotiations between the drivers' union and CFTI, the drivers will be given P500. for every year of service as severance pay. Several drivers accepted the amount except the individual respondents who joined another organization (respondent National Organization of Workingmen) and later filed a complaint before the NLRC, for payment of separation pay. The Labor Arbiter rendered

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[31] Art. 212 (c), Labor Code

[32] Supra. footnote 28

[33] **"**Sergio F. Naguiat, doing business under the name and style Sergio F. Naguiat Enterprises, Inc., & Clark Field Taxi, Inc., ***Petitioners***, v. National Labor Relations Commission (Third Division), National Organization of Workingmen and its members, Leonardo T. Galang, et al., ***Respondents"*** (Third Division, *J. Panganiban*), G.R. No. 116123. March 13, 1997

> judgment ordering CFTI to pay P1,200 (instead of the originally agreed P500.) for every year of service, not as separation pay (since the closure was due to force majeure) but for "humanitarian considerations.
>
> On appeal, the NLRC modified the decision by ordering petitioners to pay separation pay of ½ month pay (i.e., $120.) for every year of service. The NLRC adjudged as solidarily liable Sergio and Antolin Naguiat, the father/President and son/Vice-President & General Manager, respectively.

One of the principal arguments adduced by petitioners is that they were denied due process in that even though they were not impleaded as parties in the proceedings before the labor arbiter, they were declared solidarily liable with the corporation.

In ruling against petitioners, the Supreme Court applied *A.C. Ransom*[34] and came up with the following ratiocinations:

> "We advert to the case of A.C. Ransom once more. The officers of the corporation were not parties to the case when the judgment in favor of the employees was rendered. The corporate officers raised this issue when the labor arbiter granted the motion of the employees to enforce the judgment against them. In spite of this, the Court held the corporation president solidarily liable with the corporation.
>
> Sergio F. Naguiat, admittedly, was the president of CFTI who actively managed the business. Thus, applying the ruling in A. C. Ransom, he falls within the meaning of an "employer" as contemplated by the Labor Code, who may be held jointly and severally liable for the obligations of the corporation to its dismissed employees.
>
> Moreover, petitioners also conceded that both CFTI and Naguiat Enterprises were "close family corporations" 34 owned by the Naguiat family. Section 100, paragraph 5, (under Title XII on Close Corporations) of the Corporation Code, states:
>
> "(5) To the extent that the stockholders are actively engaged in the management or operation of the business and affairs of a close corporation, the stockholders shall be held to strict fiduciary duties to each other and among themselves. Said stockholders shall be personally liable for corporate torts unless the corporation has obtained reasonably adequate liability insurance."
>
> It is thus clear the said provision of the Corporation Code specifically imposes personal liability upon the stockholder actively managing or operating the business and affairs of the close corporation.

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[34] Supra., footnote 29

Nothing in the records show whether CFTI obtained "reasonably adequate liability insurance;" thus, what remains is to determine whether there was corporate tort.

Our jurisprudence is wanting as to the definite scope of "corporate tort." Essentially, "tort" consists in the violation of a right given or the omission of a duty imposed by law. Simply stated, tort is a breach of a legal duty Article 283 of the Labor Code mandates the employer to grant separation pay to employees in case of closure or cessation of operations of establishment or undertaking not due to serious business losses or financial reverses, which is the condition obtaining at bar. CFTI failed to comply with this law-imposed duty or obligation. Consequently, its stockholder who was actively engaged in the management or operation of the business should be held personally liable.

Furthermore, in MAM Realty Development v. NLRC, the Court recognized that a director or officer may still be held solidarily liable with a corporation by specific provision of law. Thus:

". . . A corporation, being a juridical entity, may act only through its directors, officers and employees. Obligations incurred by them, acting as such corporate agents, are not theirs but the direct accountabilities of the corporation they represent. True, solidary liabilities may at times be incurred but only when exceptional circumstances warrant such as, generally, in the following cases:

xxx

4. When a director, trustee or officer is made. by specific provision of law, personally liable for his corporate action." (footnotes omitted)

Furthermore, Sergio and Antolin Naguiat **voluntarily submitted themselves to the jurisdiction of the labor arbiter when they, in their individual capacities, filed a position paper** together with CFTI, before the arbiter. They cannot now claim to have been denied due process since they availed of the opportunity to present their positions.

In fact, in posting the **surety bond** required by this Court for the issuance of a temporary restraining order enjoining the execution of the assailed NLRC Resolutions, only **Sergio F. Naguiat, in his individual and personal capacity, principally bound himself to comply with the obligation** thereunder, i.e., "to guarantee the payment to private respondents of any damages which they may incur by reason of the issuance of a temporary restraining order sought, if it should be finally adjudged that said principals were not entitled thereto."

Kukan Int'l Corp. case[35]

The facts of the case can be summarized as follows:

> Private respondent Morales was awarded a contract for the supply and installation of signages in a building located in Makati. Despite having complied with his obligations under the contract, Morales was not fully paid of his fees. Thus, he filed a case against Kukan for collection of sum of money.
>
> After trial, the lower court rendered judgment ordering Kukan to pay Morales principal sum plus interest, moral damages and attorney's fees.
>
> After the sheriff had levied personal properties located inside the offices of Kukan, Kukan International Corp, filed an Affidavit Third Party Claim. The trial court dismissed the third party claim and adjudged Kukan and Kukan International as solidarily liable for the monetary portion of the judgment for being one and the same. On appeal, the Court of appeals affirmed the trial court.

The main issue is whether or not the trial court and the appellate courts erred in applying the doctrine of piercing the veil and even assuming it is applicable, whether or not Kukan International Corp. ("KIC") is denied of due process.

First, the Supreme Court ruled that the trial court did not properly acquire jurisdiction over KIC. Citing *La Naval Drug Corporation v. Court of Appeals*,[36] the High Court said:

> In *La Naval Drug Corporation v. Court of Appeals*, the Court essentially ruled and elucidated on the current view in our jurisdiction, to wit: "[A] special appearance before the court—challenging its jurisdiction over the person through a motion to dismiss even if the movant invokes other grounds—is not tantamount to estoppel or a waiver by the movant of his objection to jurisdiction over his person; and such is not constitutive of a voluntary submission to the jurisdiction of the court."[37]
>
> In the instant case, KIC was not made a party-defendant in Civil Case No. 99-93173. Even if it is conceded that it raised affirmative defenses through its aforementioned pleadings, KIC never abandoned its challenge,

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[35] "Kukan International Corporation**, Petitioner**, vs. Hon. Amor Reyes, in her capacity as Presiding Judge of the Regional Trial Court of Manila, Branch 21, and Romeo M. Morales, doing business under the name and style "RM Morales Trophies and Plaques, **Respondents"** (First Division, *J. Velasco, Jr.*), G.R. No. 182729, September 29, 2010

[36] G.R. No. 103200, August 31, 1994

[37] *Garcia v. Sandiganbayan*, G.R. Nos. 170122 & 171381, October 12, 2009

> however implicit, to the RTC's jurisdiction over its person. The challenge was subsumed in KIC's primary assertion that it was not the same entity as Kukan, Inc. Pertinently, in its Comment and Opposition to Plaintiff's Omnibus Motion dated May 20, 2003, KIC entered its **"special but not voluntary appearance"** alleging therein that it was a different entity and has a separate legal personality from Kukan, Inc. And KIC would consistently reiterate this assertion in all its pleadings, thus effectively resisting all along the RTC's jurisdiction of its person. It cannot be overemphasized that KIC could not file before the RTC a motion to dismiss and its attachments in Civil Case No. 99-93173, precisely because KIC was neither impleaded nor served with summons. Consequently, KIC could only assert and claim through its affidavits, comments, and motions filed by special appearance before the RTC that it is separate and distinct from Kukan, Inc. (Emphasis supplied)

Pacific Rehouse **case**[38]

In *Pacific Rehouse*, the Regional Trial Court (RTC) ratiocinated that being one and the same entity in the eyes of the law, the service of summons upon EIB Securities, Inc. (E-Securities) has bestowed jurisdiction over both the parent and wholly-owned subsidiary. The RTC cited the cases of *Sps. Violago v. BA Finance Corp. et al.*[39] and *Arcilla v. Court of Appeals*[40] where the doctrine of piercing the veil of corporate fiction was applied notwithstanding that the affected corporation was not brought to the court as a party.

Citing *Kukan*[41], the Supreme Court said:

> The Court already ruled in *Kukan International Corporation v. Reyes* that compliance with the recognized modes of acquisition of jurisdiction cannot be dispensed with even in piercing the veil of corporate fiction, to wit:
>
> The principle of piercing the veil of corporate fiction, and the resulting treatment of two related corporations as one and the same juridical person with respect to a given transaction, is basically applied only to determine established liability; it is not available to confer on the court a jurisdiction it has not acquired, in the first place, over a party not impleaded in a case.

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[38] "Pacific Rehouse Corporation, **Petitioners**, vs. Court of Appeals and Export and Industry Bank, Inc., **Respondents"**, G.R. No. 199687, March 24, 2014 (consolidated with "Pacific Rehouse Corporation, Pacific Concorde Corporation, Mizpah Holdings, Inc., Forum Holdings Corporation and East Asia Oil Company, Inc., **Petitioners**, vs. Export and Industry Bank, Inc., **Respondent"**), First Division, *J. Reyes*, G.R. No. 201537, March 24, 2014

[39] 581 Phil. 62 (2008)

[40] G.R. No. 89804, October 23, 1992

[41] Supra. footnote 34

> Elsewise put**, a corporation not impleaded in a suit cannot be subject to the court's process of piercing the veil of its corporate fiction**. In that situation, the court has not acquired jurisdiction over the corporation and, hence, any proceedings taken against that corporation and its property would infringe on its right to due process. (Emphasis supplied)
>
> xxx
>
> As Export Bank was neither served with summons, nor has it voluntarily appeared before the court, the judgment sought to be enforced against E-Securities cannot be made against its parent company, Export Bank. Export Bank has consistently disputed the RTC jurisdiction, commencing from its filing of an Omnibus Motion by way of special appearance during the execution stage until the filing of its Comment before the Court wherein it was pleaded that "RTC [of] Makati[, Branch] 66 never acquired jurisdiction over Export [B]ank. Export [B]ank was not pleaded as a party in this case. It was never served with summons by nor did it voluntarily appear before RTC [of] Makati[, Branch] 66 so as to be subjected to the latter's jurisdiction."

As for the two (2) cases cited by the trial court in support of its decision, the High Tribunal, in *Violago,* said that although the corporation VMSC was not made a third party defendant, the person who was found liable in Avelino, was properly made a third party defendant in the first instance. On the other hand, in *Arcilla*, the Supreme Court enunciated that although the corporation CMRI was not a party to the suit, it was Arcilla, the defendant himself who was found ultimately liable for the judgment award. CMRI and its properties were left untouched from the main case, not only because of the application of the *alter ego* doctrine, but also because it was never made a party to that case. In other words, it is the officer Arcilla himself who was made a party to the case and not the corporation.

B. Analysis

1. **This doctrine is basically applied only to determine established liability; it is not available to confer on the court a jurisdiction it has not acquired, in the first place, over a party not impleaded in a case. Elsewise put, a corporation not impleaded in a suit cannot be subject to the court's process of piercing the veil of its corporate fiction.**

Based on the foregoing relevant cases, it would seem, albeit *prima facie*, that our Supreme Court has been either strict or has been lenient in dealing with the issue on the denial of due process that may ensue from the application of the doctrine of piercing the veil.

However, a more thorough review of these and other relevant cases would reveal that such is not necessarily the matter at hand. For the avoidance of doubt, as regards the issue on whether or not the application of the doctrine would allow the consequent denial of due process, the basic rule, as enunciated in *Kukan*[42] and reiterated in *Pacific Rehouse,*[43] is quite clear. Thus ---

> The principle of piercing the veil of corporate fiction, and the resulting treatment of two related corporations as one and the same juridical person with respect to a given transaction, is basically applied only to determine established liability; it is not available to confer on the court a jurisdiction it has not acquired, in the first place, over a party not impleaded in a case. Elsewise put**, a corporation not impleaded in a suit cannot be subject to the court's process of piercing the veil of its corporate fiction**. In that situation, the court has not acquired jurisdiction over the corporation and, hence, any proceedings taken against that corporation and its property would infringe on its right to due process. (Emphasis supplied)

It is thus beyond any doubt that whenever any one or more of the three basic areas[44] that would justify the application of the doctrine of piercing the veil would be present, our courts should make sure that its application would not result in a denial of due process on the part of any party who would be made liable pursuant to such doctrine. Simply put, it is imperative that the court should have first acquired jurisdiction over any party who would eventually be held liable pursuant to the application of such doctrine.

2. In A.C. Ransom, even though the court technically did not acquire jurisdiction over the persons of the then current and future presidents of the corporation, there are enough legal bases for their being held liable for the obligations of the corporation.

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[42] Supra. footnote 35

[43] Supra. footnote 38

[44] Supra., see footnotes 13 to 16

In *A. C. Ransom,*[45] as heretofore stated, one of the two main issues which is apropos to the matter at hand is whether or not the judgment against the corporation is enforceable against its officers and agents in their personal capacities even though they were not parties in the case where the judgment was rendered.

In ruling the said issue in the affirmative, it would seem at the onset that the High Court had deprived the officers concerned of their constitutional right to due process when they were found to be solidarily and personally liable with the corporation for the back wages of the 22 strikers even though these officers were not parties to the case where the final judgment originated from.

However, consistent with the totality rule, a reading of the whole parts of the decision would indubitably show that such an observation is more apparent than real. Verily, there are several significant bases and justifications for declaring the officers concerned to be personally liable, i.e., Ruben Hernandez, who was President of RANSOM in 1974, together with other Presidents of the same corporation who had been elected as such after 1972 or up to the time the corporate life was terminated.

Such bases or justifications can be summarized in the following manner:

First, under Art. 265 of the Labor Code, a dismissed employee due to an unlawful lockout shall be entitled to full back wages;

Consequently, under Art. 273, any person violating the aforesaid provisions shall be penalized with a fine and/or imprisonment;

The next question then that the Court, speaking through Justice Melencio-Herrera, had posed for its consideration is how can those provisions be implemented when the employer is a corporation? The answer is found in Art. 212 (c) which was culled from Section 2 of R.A. 602 or the Minimum Wage Law, i.e., an employer includes any person acting in the interest of the employer, directly or indirectly;

Under Section 15 (b) of the Minimum Wage Law, when any violation of the said law is committed by a corporation, the manager or the person acting as such when the violation took place shall be held responsible. In the same vein, under P.D. 525, where a corporation fails to pay the emergency allowance therein provided, the penalty as be imposed upon the guilty officer/s;

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[45] Supra., footnote 29

And since the record does not clearly identify "the officer or officers" of RANSOM directly responsible for failure to pay the back wages of the 22 strikers, the High Court presumed that the responsible officer is the president of the corporation who can be deemed the chief operation officer thereof;

And, finally, considering that non-payment of the back wages of the 22 strikers has been a continuing situation, the Court ruled that the personal liability of the RANSOM President, at the time the back wages were ordered to be paid should also be a continuing joint and several personal liabilities of all who may have thereafter succeeded to the office of president; otherwise, the 22 strikers may be deprived of their rights by the election of a president without leviable assets.

A careful consideration of the foregoing circumstances obtaining in the case would reveal that even though the court technically did not acquire jurisdiction over the persons of the then current and future presidents of the corporation, there are enough legal bases for their being held personally liable for the obligations of the corporation without necessarily violating their constitutional right to due process.

3. In Naguiat, even though the labor arbiter did not acquire jurisdiction over the person of the president of the respondent corporation, there are likewise several legal and factual bases that would support the legality of the finding of personal liability on the part of the president.

In *Naguiat*, even though the labor arbiter did not acquire jurisdiction over the person of the president of the respondent Clark Field Taxi Corporation ("CFTI"), there are likewise several legal and factual bases that have been considered and affirmed by the High Court if only to obliviate any doubt as to the legality of the finding of personal liability on the part of the president.

These bases, as culled from the *ponencia* of the case, may be summarized as follows:

Sergio F. Naguiat, admittedly, was the president of the CFTI who actively managed the business. Applying the ruling in *A. C. Ransom*[46], he falls within the meaning of an "employer" as contemplated by the Labor Code, who may be

[46] Supra.

held jointly and severally liable for the obligations of the corporation to its dismissed employees;

Moreover, petitioners also conceded that both CFTI and the other family corporation, Naguiat Enterprises were "close family corporations" owned by the Naguiat family. Section 100[47], paragraph 5, (under Title XII on Close Corporations) of the Corporation Code, states:

> "(5) To the extent that the stockholders are actively engaged in the management or operation of the business and affairs of a close corporation, the stockholders shall be held to strict fiduciary duties to each other and among themselves. Said stockholders shall be personally liable for corporate torts unless the corporation has obtained reasonably adequate liability insurance."

Art. 283 of the Labor Code mandates the employer to grant separation pay to employees in case of closure or cessation of operations of establishment or undertaking not due to serious business losses or financial reverses. CFTI, which failed to comply with this law-imposed duty or obligation, is deemed to have committed tort. Consequently, its stockholder who was actively engaged in the management or operation of the business should be held personally liable.

Furthermore, the High Court applied the ruling in *MAM Realty Development v. NLRC*[48] where the Court recognized that a director or officer may still be held solidarily liable with a corporation by specific provision of law. Thus:

> "4. When a director, trustee or officer is made. by specific provision of law, personally liable for his corporate action."
>
> 5. Sergio and Antolin Naguiat were also deemed to have voluntarily submitted themselves to the jurisdiction of the labor arbiter when they, in their individual capacities, filed a position paper together with CFTI, before the arbiter. The Court said they cannot now claim to have been denied due process since they availed of the opportunity to present their positions;
>
> 6. And, finally, in posting the surety bond required for the issuance of a temporary restraining order enjoining the execution of the assailed NLRC Resolutions, the president Sergio F. Naguiat, in his individual and personal capacity, principally bound himself to comply with the obligation thereunder, i.e., "to guarantee the payment to private respondents of any damages which they may incur by reason of the issuance of a temporary

[47] Now Sec. 99 of R.A. No. 11232 otherwise known as the Revised Corporation Code of the Philippines, signed into law by President Duterte on Feb. 20, 2019 and took effect on Feb. 23, 2019

[48] G.R. No. 114787 June 2, 1995

> restraining order sought, if it should be finally adjudged that said principals were not entitled thereto."

III. CONCLUSION AND RECOMMENDATION

For good measure, we reiterate the following rule as amply enunciated by the Supreme Court as regards when the doctrine of piercing the veil may properly be applied. Thus, it is not sufficient that there is the presence of one or more of the three (3) basic areas[49] that would justify its application. The courts must likewise materially consider and comply with the following jurisprudential precedents:

The doctrine is applied only to determine established liability; it is not available to confer on the court a jurisdiction it has not acquired, in the first place, over a party not impleaded in a case. Thus, a corporation not impleaded in a suit cannot be subject to the court's process of piercing the veil of its corporate fiction. If the court has not acquired jurisdiction over the corporation or the officer/director concerned, any proceedings taken against that corporation and its property would infringe on its right to due process;[50]

The wrongdoing must be clearly and convincingly established[51];

The application of the doctrine is frowned upon and should be done with caution. The wrongdoing cannot be presumed, otherwise an injustice that was never intended may result from an erroneous application[52];

The corporate veil will justifiably be impaled only when it becomes a shield for fraud, illegality or inequity committed against third persons[53];

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[49] Supra notes 13 to 16.

[50] *Kukan Int'l Corp.*and *Pacific Rehouse* cases; Supra notes 35 and 38.

[51] See Matuguina Integrated Wood Products, Ins. vs. Court of Appeals, G.R. No. 98310, Oct. 24, 1996; Complex Electronics Employees Association vs. NLRC, G.R. Nos. 121315 and 122136, July 19, 1999; Solidbank Corporation vs. Mindanao Ferroalloy Corporation, G.R. No. 153535, July 28, 2005; China Banking Corporation vs. Dyne-Sem Electronics Corporation, G. R. 149237, June 11, 2006

[52] See Heirs of Fe Tan Uy vs. International Exchange Bank, G.R. No. 166282, June 16, 2019

[53] See Philippine National Bank vs. Hydro Resources Contractors Corporation, G.R. No. 167530, Mar. 13, 2013;
In the case of *Umali vs. Court of Appeals*, G.R. No. 89561, Sep. 13, 1990, it was ruled that even if fraud is established, this fact alone is not sufficient to justify the piercing of the corporate fiction where it is not sought to hold the officers and stockholders personally liable for corporate debt. Thus, where the petitioners are merely seeking the declaration of the nullity of a foreclosure sale, piercing the corporate veil is not the proper remedy, for such relief may be obtained having to disregard the legal corporate entity, and this is true even if grounds exist to prove it.

The presumption is that the stockholders, directors and officers are separate and distinct from the corporation itself and that the burden of proving otherwise lies upon the party seeking to have the court pierce the veil.[54]

Personal liability of a corporate director, trustee or officer along (although not necessarily) with the corporation may so validly attach, as a rule, only when

1) He assents (a) to a patently unlawful act of the corporation, or (b) for bad faith, or gross negligence in directing its affairs, or (c) for conflict of interest, resulting in damages to the corporation, its stockholders or other persons;

2) He consents to the issuance of watered stocks or who, having knowledge thereof, does not forthwith file with the corporate secretary his written objection thereto;

3) He agrees to hold himself personally and solidarily liable with the corporation; or

4) He is made, by a specific provision of law, to personally answer for his corporate action.[55]

Thus, in those cases wherein the trial court in applying the doctrine had denied due process on the part of the party declared to be liable or wherein the lower court had contravened any one or more of the foregoing rules, our Supreme Court has been consistent in reversing and setting aside the application of the doctrine made by the court *a quo*.[56]

Under the premises, it would therefore be highly advisable for the High Court to further solidify and strengthen the continuous training and education of judges stationed in trial courts all over the country which are especially designated as commercial courts. Specifically, these judges must be reminded time and again about the foregoing rules enunciated by our Supreme Court that would ensure that its primordial objective of averting inequity and injustice is ultimately and completely attained not only on the part of the parties to a case but equally important, on the part of those who were not made parties to a case or those over whom the courts did not acquire jurisdiction.

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[54] See Ramoso vs. Court of Appeals, G.R. No. 117416, Dec. 8, 2000; also Land Bank of the Philippines vs. Court of Appeals, G.R. No. 127181, Sep. 4, 2001 (citing Complex Electronics Employees Association vs. NLRC, supra.)

55 Tramat Mercantile, Inc. and David Ong vs. Court of Appeals, et. al., G.R. No. 111008, Nov. 7, 1994; see also Abbott Lab., Phils. et. al. vs. Pearle Alcaraz, G.R. No. 192571, Apr. 22, 2014

[56] See footnotes 51 to 55; see also *MAM Realty Dev. Corp. and Manuel Centeno vs. NLRC, et. al.,* G. R. No. 114787, June 2, 1995

Finally, it would do well to end this Paper by quoting the pertinent portions of the decision of our Supreme Court in the case of *Land Bank of the Philippines vs. the Court of Appeals, Eco Management Corporation and Emmanuel C. Oate*[57] penned by then Justice Leonardo Quisumbing of the Court's Second Division. These quoted portions very well constitute a summary of the nature, rationale, bases and limitations of this equitable doctrine of piercing the veil of corporate fiction, thus:

> "A corporation, upon coming into existence, is invested by law with a personality separate and distinct from those persons composing it as well as from any other legal entity to which it may be related.58 By this attribute, a stockholder may not, generally, be made to answer for acts or liabilities of the said corporation, and vice versa.59 This separate and distinct personality is, however, merely a fiction created by law for convenience and to promote the ends of justice.60 For this reason, it may not be used or invoked for ends subversive to the policy and purpose behind its creation61 or which could not have been intended by law to which it owes its being.62 This is particularly true when the fiction is used to defeat public convenience, justify wrong, protect fraud, defend crime, confuse legitimate legal or judicial issues,63 perpetrate deception or otherwise circumvent the law.64 This is likewise true where the corporate entity is being used as an alter ego, adjunct, or business conduit for the sole benefit of the stockholders or of another corporate entity.65 In all these cases, the notion of corporate entity will be pierced or disregarded with reference to the particular transaction involved.66
>
> The burden is on petitioner to prove that the corporation and its stockholders are, in fact, using the personality of the corporation as a means to perpetrate fraud and/or escape a liability and responsibility demanded by law. In order to disregard the separate juridical personality of a corporation, the wrongdoing must be clearly and convincingly established.67 In the absence of any malice or bad faith, a stockholder or

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[57] Supra note 54.

[58] Citing Yutivo Sons Hardware Company vs. Court of Tax Appeals, 1 SCRA 160, 165 (1961); Francisco Motors Corporation vs. CA, 309 SCRA 72, 82 (1999)

[59] Citing NAMARCO vs. Associated Finance Company, 19 SCRA 962, 965 (1967)

[60] Citing Azcor Manufacturing, Inc. vs. NLRC, 303 SCRA 26, 35 (1999)

[61] Citing *Emilio Cano Enterprises Inc., vs. CIR*, 121 Phil. 276, 278-279 (1965)

[62] Citing *McConnel vs. Court of Appeals*, 1 SCRA 722, 725 (1961)

[63] Citing *R.F. Sugay & Co. vs. Reyes*, 120 Phil. 1497, 1502 (1964)

[64] Citing Gregorio Araneta, Inc. vs. Paz Tuason de Paterno, 49 O.G. 45, 56 (1953)

[65] Citing Comm. Internal Revenue vs. Norton Harrison Corp., 120 Phil. 684, 690-691 (1964)

[66] Citing *Koppel, Inc. vs. Yatco*, 77 Phil. 496, 505 (1946)

[67] Citing Complex Electronics Employees Association vs. National Labor Relations Commission, 310 SCRA 403, 418 (1999), see supra.

an officer of a corporation cannot be made personally liable for corporate liabilities

THE PATENT PANDEMIC: AN EMPIRICAL CRITICAL AND COMPARATIVE ANALYSIS OF THE PHILIPPINES' EMERGENCY PATENT LAWS

Raul Gabriel M. Manalo[*]

INTRODUCTION

MEDICAL ISSUES IN RELATION TO PATENTS

A continuous global issue nowadays is in the field of medicine. From emerging new diseases to complex access to healthcare, the field remains a big problem for individuals and governments. Technology aids in this problem as it serves as inventions that propel humanity in progressing to create medicine either to alleviate symptoms of illnesses or cure them altogether. Patents protect these inventions by giving inventors exclusive rights to their intellectual inventions for a limited period of time unless they are compensated for the use of such inventions. The pharmaceutical industry relies heavily on patents as its activities not only involve producing and selling drugs but also researching and creating them as well.

[1] These invented drugs are usually expensive at first but later on will be turned into generic and cheaper yet effective drugs to provide better and wider access to medicine for the public. Problems arise, however, when large pharmaceutical companies either refuse to give licenses of their medical patents or charge expensively for such licenses. Thus, when disasters such as pandemics strike, the masses are left to deal with expensive drugs or inappropriate medication.[2] Such events call for government action, particularly in the medical field, as the government has to protect the health and wellbeing of its people.

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[*] Staff, UST Law Review - Vol. 66 (2022); J.D. Candidate, University of Santo Tomas Faculty of Civil Law (2024); A.B. European Studies, International Business & Economics Track, Minor in Chinese Studies, Ateneo de Manila University (2019); Executive Assistant to the Chairman, Starforce Security Services, Inc.

[1] Ronil Remoquillo, Implications of the Patentability Requirements and Other Policy Considerations to the Pharmaceutical Industry - The Japanese and Philippine Experience, WIPO/JPO Long-Term Research Fellowship, 1-2, Sept. 30. 2009.

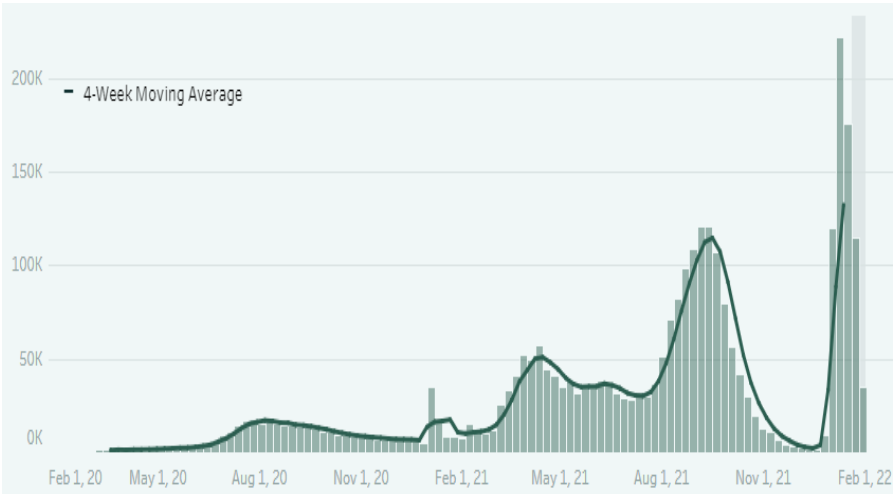
[2] Remonquillo, supra note 1, at 2.

COVID-19 PANDEMIC

The year 2020 began with the Coronavirus, commonly known as COVID, creeping into every nation around the world. By the second quarter of the year, it brought governments to their knees as it affected the global economies and the world was sent into a pandemic situation. Countries scrambled to adjust their policies in containing the spread of the disease through actions such as quarantines, work-from-home setups, and state-financial aid.

Globally, there are more than 370 million confirmed cases of COVID as January 2022 ends. As shown in the chart below taken from the World Health Organization (WHO), it shows the upward curve of global COVID cases, revealing the continuously significant increase in cases. The continuous increase is due to multiple variants appearing and spreading as the disease mutates. Examples of variants include the Delta variant and the recent Omicron variant. Both variants are extremely pervasive, hence the numerous surge of cases during the points of their emergence.

In the Philippines, numerous spikes have occurred throughout the pandemic, as shown in the chart below. These include the summer of 2021, 3rd quarter of 2021 and early 2022, when the Omicron variant emerged. In an effort to mitigate the damage of the disease, the Philippine government enacted Republic Act (RA) 11494, also known as the Bayanihan Act, during the height of the early lockdown. This paved the way for numerous policy changes by government agencies to combat COVID. These policies include financial aid to those employees who lost their jobs due to the pandemic, benefits for frontline workers (e.g., death benefit), and quarantine passes to control movement in high-density areas.



Source: Department of Health (DOH) COVID19 Tracker (https://doh.gov.ph/covid19tracker)

The pandemic prompted pharmaceutical companies as well as other industries to find remedies to counteract COVID. As of late 2020, vaccines are now being introduced into society to provide protection against the disease's effects. Before and after the release of the vaccines, however, industries have already invented their own products and methods to either increase their protection from COVID or mitigate the effects of the disease on those afflicted with it. Thus, there is increasing debate on the exception or circumvention of invention rights or intellectual property rights on these inventions as there is a greater need to prevent the loss of human life due to COVID.[3]

This paper will discuss the Philippines' Patent law, particularly on its emergency patents provision (sec. 74 and 93), as well as its implications on the country from socio-political, economic and legal perspectives. The scope of this paper includes Patent law in the pharmaceutical industry coupled with the application of certain legal concepts onto the said law. This study will be done using comparative research through jurisprudence and extrapolation of studies and reviews conducted in other countries (e.g., United States of America, Nigeria, South Africa).

[3] World Health Organization (WHO), Intellectual Property Protection: Impact on Public Health**,** WHO Drug Information Vol. 19 (3), 236-238, 2005.

PATENT LAW IN THE PHILIPPINES

INTELLECTUAL PROPERTY CODE

The Intellectual Property Code of the Philippines[4] (IPC, RA 8293) is the governing law for matters involving Intellectual Property. Prior to the current law, there were three laws for the protection of intellectual property which were Presidential Decree (PD) 49 (Decree on the Protection of Intellectual Property), RA 165 (Old Patent Law), and RA 166 (Trademark Law).

The creation of RA 8293 is provided under sec. 2 of the law; summarily to provide protection and security for intellectual property rights holders as well as promote technological transfers, encourage innovation, and ensure market access for new inventions.

The law has various provisions on the kinds of intellectual property, particularly on Patents, Trademarks, and Copyright. This paper, however, will focus on Patent law, specifically on its rights, limitations, compulsory licensing, and government use of Patents.

Suppletorily, for this paper, the Universal Access to Cheaper Drugs law or RA 9502[5] shall be mentioned and applied as it is the law providing for easier access to cheaper and quality medicine. Its application is mainly to show the legislature's actions in developing a stronger foundation for accessible medicine by amending certain provisions in the IPC. Specifically, excluding certain medical inventions from patent protection, creating limitations on Patent rights pertaining to medicine, and expanding the provisions on compulsory licensing, especially in accordance with the Agreement on Trade-Related Aspects on Intellectual Property Rights (TRIPS Agreement)[6]. Said agreement shall be further discussed in the latter parts of the paper.

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[4] An act prescribing the Intellectual Property Code and establishing the Intellectual Property Office, Providing for its powers and functions, and for other purposes, RA 8293.

[5] An act providing for cheaper and quality medicines, amending for the purpose RA 8293, RA 6675, and RA 5921, and for other purposes, RA 9502.

[6] The TRIPS Agreement provides for the minimum standards for enforcing intellectual property law across signatories for all types of intellectual property. According to the WTO's Fact Sheet (2003), the TRIPS agreement attempts to universalize or standardize a level of protection to states through obligations and modes of dispute settlement to protect IPR holders.

PATENT LAW, RIGHTS, AND LIMITATIONS OF A PATENT HOLDER

A patent holder has certain rights as provided for under Sec. 72 of the IPC they may exercise with respect to their patented property:

> If the patent pertains to a product, the patent holder may prohibit and prevent any unauthorized person from making, using, offering for sale, selling, or importing the patented product;
>
> If the patent pertains to a process, the patent holder may restrain, prevent, or prohibit any unauthorized person from using the process. This means using the said process for manufacturing, dealing, selling, or importing any product derived from the patented process;
>
> Patent owners may also assign or transfer the patent and create licensing contracts to other entities who may wish to use the patent.

In summary, a patent gives protection to patent holders to prevent any abuse of one's inventions. This form of protection will last for a total of 20 years from the time of filing of the application.[7] As stated in *Pearl and Dean vs. Shoemart, Inc.*: "... The goal of a patent system is to bring new designs and technologies into the public domain… On one side of the coin is the public which will benefit from new ideas; on the other are the inventors who must be protected."[8] The said case also referred to the case of *Bauer & Cie vs. O'Donnell,* which briefly emphasized that the patent system allows for the promotion of new and useful inventions to remain in public for the people's use. Furthermore, the protection of the invention for a number of years while gaining the privilege of reaping the fruits from their invention.

Despite the promotion of intellectual property rights, however, such rights are not absolute. Sec. 72 of the IPC provides for the exceptions to which a Patent holder may not prevent a user from utilizing his invention/process:

> Using a patented product which is put on the market in the Philippines by the owner of the patented product (or with his express consent to put such product into the market);
>
> With regards to drugs: the limitations on patent rights apply after the drug has been introduced in the Philippines or anywhere else in the world by the patent owner or their authorized representative.

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[7] RA 8293, sec. 54.

[8] *Pearl and Dean vs. Shoemart, Inc.,* G.R. No. 148222, August 15. 2003.

> Provided further by the provision, the right to import the drug must be available to any government agency or private third party
>
> When the product/process is done privately or not on a commercial scale;
>
> Provided that the use does not significantly prejudice the economic interests of the Patent owner.
>
> When the product/process is exclusively used for experimental use of the invention or for scientific or educational purposes;
>
> For drugs/medicine, if the act is for the purpose of development and submission of information for issuance and approval of government regulatory agencies required by law;
>
> When the act is for preparation for cases (medical/pharmaceutical) of medicine in accordance with a medical prescription;
>
> When the invention is used in any ship, vessel, aircraft, or land vehicle entering the territory of the Philippines temporarily or accidentally
>
> Provided such invention is for the needs of such vehicles and not to be used for manufacturing anything to be sold in the Philippines.

EMERGENCY PATENTS

Emergency Patents are not formally defined by any academic journal nor legal source but for the purposes of this paper and for brevity, this paper defines and coins the term "Emergency patents" as "those patents exploited or used without the consent of the patent owner for the purpose of dealing with national emergencies and preservation of public interest." However, this definition shall be limited to the scope of public health and medicine. The reason for this is the limited literature on patent use outside of the field of medicine and public policy.

The critical idea of emergency patents is that these patents are to be exploited by an entity without the permission of the patent holder to mainly and urgently preserve said public health. The research theorizes that there are two kinds of "emergency patents": (1) Government Use and (2) Compulsory Licensing. They are considered emergency patents as they can be an urgent mechanism (particularly during national emergencies) for the use of patented inventions without the consent of the Patent owner.

GOVERNMENT USE

Under Sec. 74 of the IPC, the Philippine Government or its authorized entity may exploit a patented invention without any agreement or consent of the patent holder during certain circumstances as follows:

> When public interest (particularly: national security, health, development) so requires;
>
> A judicial or administrative body deems that the manner of exploitation by the patent owner or his licensee is anti-competitive;
>
> For drugs/medicine, there is a national emergency or other circumstances of extreme urgency that would require the use of the patented invention;
>
> For drugs/medicine, there is public non-commercial use of the patent without satisfactory reason;
>
> For drugs/medicine, the demand for the patented invention is not being met to an adequate extent and on reasonable terms.

Under sec. 74.2, the execution of sec. 74 provides for the requirements on the usage of emergency patents. This paper will focus mainly on national emergencies thus, only sec. 74.2 (a), (d), (e), (f), and (g) shall apply which are briefly and summarily stated below:

> Subsection a provides for the notice to the patent holder should the emergency patent be used for national emergencies.
>
> Subsection d states that the emergency patent shall only be used for the purpose it is authorized with;
>
> Subsection e states the non-exclusivity of the emergency patent;
>
> Subsection f creates the right of the patent holder to be adequately remunerated for the use of their emergency patent (basing the value on the economic value of the authorization); and
>
> Subsection g provides for the requirement of the existence of a national emergency or circumstances of extreme urgency. Such is only determined by the President of the Philippines.

COMPULSORY LICENSING

Compulsory licensing under sec. 93 of the IPC is the granting by the government of a license to an individual who has the ability to exploit a patented invention without an agreement with the patent holder. This compulsory license may be granted under the following circumstances:

> National emergencies or other circumstances of extreme urgency;

> If public interest requires such license (for national security, nutrition, health, economic development);
>
> When a judicial or administrative body has determined that the manner of exploitation by the owner of the patent or its licensee is anti-competitive;
>
> In cases of public non-commercial use of the invention by the patent holder without satisfactory reason;
>
> Without satisfactory reason, the patented invention is not being worked in the Philippines on a commercial scale despite being capable of being worked upon,
>
> Provided the importation of the patented invention will constitute to be working or using of the patent;
>
> When the demand for the patented drug is not being met as determined by the Dept. of Health (DOH).

Under RA 9502, it inserted a new section under sec. 93,[9] which provides for the issuance of a Special Compulsory license under the TRIPS agreement to which the Philippines is a party. Following the TRIPS agreement, sec. 93-A gives the Director General of the Intellectual Property Office (IPO) the power to grant a special compulsory license for importation of patented drugs and medicine of those who did not opt out of Art. 31bis of the TRIPS agreement. Art. 31bis shall be discussed in the latter parts of this paper but regarding RA 9502, these special compulsory licenses are for ensuring access to quality, affordable medicine in the local market. The special license also grants the right of adequate remuneration to the patent holder and such license must provide measures in order to protect the patent holder from any possible abuses to his patent rights.

Furthermore, sec. 93-A is available for the manufacturing and exportation of drugs and medicines to countries having insufficient manufacturing capacity in their pharmaceutical sector to address public health matters. The importing country, however, must also grant the compulsory license on their end in order for the importation of the drug from the Philippines in compliance with the TRIPS agreement.

The purpose of compulsory licenses is mentioned in the case of *Smith Kline & French Labs. vs. Court of Appeals:* "... the legislative intent in the grant of a compulsory license was not only to afford others an opportunity to provide

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[9] RA 8293, sec. 93-A.

the public with the quantity of the patented product but also to prevent the growth of monopolies."[10]

COMPULSORY LICENSING VS. GOVERNMENT USE

In differentiating compulsory licensing from government use, the former is a grant given by the Director-General of the IPO to a private individual whom the government sees as one who has the ability to exploit the patented invention under the circumstances provided. Government use, on the other hand, is when a government agency or a government-authorized entity exploits a patented invention even without an agreement with the Patent holder.

As provided under sec. 93 and 94, one of the main differences is that a compulsory license is mainly petitioned or initiated by a private entity who believes that they are capable of utilizing a patented invention using the grounds of sec. 93 as basis for their license application. Plain-text reading shows that only private persons are involved in the grant of a compulsory license, whereas for emergency patents, it allows for the use of the patented invention by government agencies in addition to private entities. The exception is the special compulsory license under the TRIPS agreement initiated by the DOH as they are the ones who recommend to the Director-General the need for such license for importation of a certain patented drug.

This leads to another difference which is the importation and exportation of the patented product. Compulsory licenses allow an individual to exploit a patented invention without the patent owner's consent. As provided by sec. 93-A, the provision talks of not only importation of a foreign patented product but also exportation of a locally patented medicine (provided that the importing foreign country granted the same compulsory license in their jurisdiction). Meanwhile, sec. 74 is silent as to the use of the patented invention for importation and exportation. Overall, this would perhaps mean that the scope of sec. 74 remains on a national level while compulsory licenses are able to transcend said scope to have an international reach on other nations' patents.

Another difference in the essential components to the execution of emergency patents are the grounds. Government use of the patents are determined by the President as stated in sec. 74.2 (g).[11] For compulsory

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[10] Smith Kline & French Labs vs. Court of Appeals, G.R. No. 121867, July 24. 1997.

[11] The President of the Philippines determines the national emergency and the urgency of the need to exploit the patented invention.

licensing, the provisions in the chapter for said subject are silent on who determines a "national emergency". Additionally, one detail different from the government use is the taking into account "vital sectors of the national economy" when it comes to concerns of public interest. The significance of this is that it would also deal not only with actual emergencies declared by the government but also with unfamiliar emergencies.[12] The petition for compulsory licenses may present arguments that could possibly highlight the need to exploit a certain patented invention in order to address matters such as inaccessibility of medicine for certain diseases.

Lastly, there is a difference when it comes to the limitations of patent use (importation, exportation). For government use, the provisions are silent on the "use" including importation or exportation of patented products. Therefore, it is plausible that government use strictly focuses on Patents in the Philippines only, whereas compulsory licensing allows for the use of Patents abroad as it involves the importation and even exportation of said patented products.

To briefly show the subtle difference between the two, a table is provided below:

EMERGENCY PATENTS		
	GOVERNMENT USE	**COMPULSORY LICENSING**
SCOPE & LIMITATIONS	-Local Level; -Only local patents can be exploited; -Does not involve importation and exportation.	-International level; -Patents abroad can be imported -If Patents abroad are to be exploited, foreign country must have the

[12] Unfamiliar meaning these are emergencies that while not as mainstream or commonly broadcasted as certain events, can still be said to become detrimental to national health as it involves some sort of danger if left untreated (e.g. prevalence of known diseases such as Hypertension or HIV/AIDS and incoming unknown diseases into the country).

		compulsory license for that product as well; -May involve importation and exportation
INITIATOR	-Government agency or authorized entity; -IPOPHL provides for the implementing rules & regulations for the use of the patent.	-Private entity; -Granted by the Director-General of the IPO; -Sec. of DOH may file a petition for a special compulsory license.
GROUNDS	-National emergencies as determined by the President	-Silent on who determines national emergencies; -Includes vital sectors of the national economy in consideration.

The importance of differentiating the two emergency patents is mainly to determine who would be initiating the "exploitation" of the patented product and the scope & limitations of the patents to be used for the pandemic/national emergency.

While one can argue that one is deprived of property because of the taking of one's patented invention without some sort of agreement, remuneration is still provided in accordance with the value of the patent authorization as provided. Furthermore, the idea of the government "taking" patented inventions is substantiated through jurisprudence, especially for matters involving public need. In obtaining an invention, the Philippine government can execute its power of eminent domain over the private property of a patent owner. Applied in this paper, it is the taking of a patented medical invention for public purposes and with just compensation. Eminent domain is defined

as "... entering upon private property for more than a momentary period, and, under the warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof".[13] The case of *Vda de Castellvi* stated circumstances for valid eminent domain which are: (1) the entrance and occupation of the private property, (2) such entrance must be more than a momentary period, (3) entry is under the warrant or color of authorities, (4) the entry must be for public purpose, and (5) the utilization results in the deprivation of the owner in enjoying their property. This criterion may not strictly and directly apply to cases of emergency patents and their taking of patented inventions. Thus, a more in-depth discussion shall be provided later in the implications as local and foreign jurisprudence and laws shall be analyzed.

INTERNATIONAL LAW ON PATENTS

The Philippines currently accedes to or is a member of numerous international obligations pertaining to Intellectual Property, particularly on patents. On the subject of emergency patents, the Philippines is a member of the World Trade Organization (WTO) and therefore is obliged to follow the provisions set by the Agreement on Trade Related Aspects of Intellectual Rights (TRIPS Agreement). In the next following sections, the research provides a brief background on the international obligations being observed by the Philippines in connection with emergency patents.

TRIPS AGREEMENT

The TRIPS agreement provides for a system of standardization on intellectual property protection, in this case, patents. Because the Philippines is a member of the United Nations (UN), the former complies with international laws and agreements of such international organizations. When the TRIPS was enacted, the Philippines conformed to such agreement through amendments to its own patent system.[14] One of the amendments made in

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[13] *Republic vs. Vda de Castellvi*, G.R. No. L-20620, August 15. 1974.

[14] Remoquillo, supra note 1, at 18.

conformity with the TRIPS agreement is the mentioned RA 9502, adding essential provisions that would relate to emergency patents and medicine.

Amidst the COVID pandemic, the Philippines, through its Senate Committee on Foreign Relations, released P.S. Res. No. 560.[15] This document is a resolution urging the Executive Department, particularly the Department of Foreign Affairs, to support India and South Africa's proposal to the WTO to suspend certain provisions of the TRIPS agreement that would pertain to the prevention, containment, and treatment of COVID-19. The resolution was made to address the monopoly of certain vaccine-technologies and other inventions that may facilitate the sharing and expedite production by local pharmaceuticals of medicine that may address the effects of the Coronavirus.

In relation to emergency patents, news reports during the peak of the pandemic show the concern of international organizations as well on the TRIPS waiver. In 2021, a representative of Citizens Urgent Response to End COVID-19 (CURE Covid) stated that the TRIPS waiver is necessary to increase the supply of vaccines and other medical supplies and technology.[16]

DOHA DECLARATION

The Doha Declaration is a reaffirmation of the TRIPS agreement wherein members acknowledge the right of States to grant compulsory licenses and to determine the grounds to grant such licenses. Furthermore, the declaration also recognizes the challenges of certain states and their pharmaceutical industries on compulsory licensing issues as based on art. 31(f) of the TRIPS agreement.[17] The key content of the Doha Declaration in relation to emergency patents is that the interpretation of the agreement should be seen to support the right to protect public health and provide flexibility in providing such protection.[18] The agreement recognizes the rights of member states to determine what would constitute national emergencies or circumstances of extreme urgency.[19]

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[15] S 274, 18th Congress, 2d Session (July 6. 2021).

[16] TRIPS waiver in light of the COVID-19 pandemic in the Philippines, Mirandah, 26 October 2021, https://www.mirandah.com/pressroom/item/trips-waiver-in-light-of-the-covid-19-pandemic-in-philippines/.

[17] Jamie Feldman, Compulsory Licenses: The Dangers Behind the Current Practice, Journal of Int.l Business and Law: Vol. 8:1, Art. 9, 2009, 147.

[18] Feldman, supra note 17, at 148.

[19] Feldman, supra note 17, at 149.

APPLICATION OF EMERGENCY PATENTS CONCEPT LOCAL JURISPRUDENCE

In the Philippines, there are only a number of cases reaching the Supreme Court involving compulsory licenses, and none which involve government use or the triggering of sec. 74. The jurisprudence mentioned in this research is to create a relationship between the principles being used for emergency patents and national emergencies, i.e., pandemics such as the COVID-19 pandemic. Such principles may then be extrapolated as a substantiation to socio-political, economic and legal current events involving the said pandemic and future national emergencies.

The case of *Dupont vs. Francisco* is significant because it emphasized the judiciary's power in protecting the public interest in national health, particularly on the Losartan product of the petitioner (Dupont). The patented product deals with hypertension and the Court in this case denied the petition as they deem that public interest is prejudiced if Dupont's patent revival is granted. This is because respondent (Therapharma, Inc.) and a number of other pharmaceutical companies also produce Losartan products that compete with the retail price and effectiveness of petitioner's. The Court ensured the economic competition and accessibility of Losartan products to those afflicted with Hypertension as the case showed facts on how the said disease is very prevalent and deadly in the Philippines. The doctrine of the aforementioned, which is to be applied in the contemporary period, is that it is the Court's duty to protect the accessibility of medical products, especially during national emergencies. The Supreme Court, in this case, utilized the fact that Hypertension is a pervasive disease and medicine against it is becoming economically problematic to lower-earning households. Today, the idea can be applied to rule for compulsory licenses or be a basis for administrative or judicial bodies to use certain patents to combat COVID.

A significant case relating to compulsory licenses is the case of *Smith Kline & French Laboratories, LTD. vs. Court of Appeals, et. al.*[20] In this case, the product being filed for a compulsory license by the private respondent (*Doctors Pharmaceuticals*) is the drug, Cimetidine, which is a vital medicine for heartburns and ulcers. The Court of Appeals decided for the private respondent as it found that the Director of Patents correctly granted the license. The Director determined that the product is considered useful as it is necessary for the

[20] *Smith Kline,* G.R. No. 121867.

promotion of public health thus, the grant was a valid exercise of police power. The petitioners (*Smith Kline)* elevated the case to the Supreme Court as they argued that the compulsory license grant is invalid as the grant was a wrongful exercise of police power and that there was an unjust taking of the intellectual property without just compensation; an invalid exercise of eminent domain. The Court answered that the license grant is a valid exercise as the legislative intent of compulsory licenses is to provide others the opportunity to supply the public with a quantity of the patented product as well as prevent the growth and possible abuses of companies who have a monopoly on certain products, especially on medical products. Furthermore, compulsory licensing of medical products is not a deprivation of property as it provides the patent owner a monopoly over the product for two (2) years and afterwards, a form of agreement can be made between the compulsory license petitioner and patent holder for a reasonable royalty.

Lastly, the case of *Barry John Price, et. al. vs. United Laboratories (UNILAB)*[21] focuses on the factual findings on the grants for compulsory licenses and the subject of just compensation in the "taking" of the patented product. The respondent in this case was granted a compulsory license for a pharmaceutical compound used for making anti-ulcer medicine, which the petitioner opposed. The case was elevated up to the Supreme Court where the essence of the decision focused on the capabilities of the private respondent being a qualified entity to be granted the compulsory license. This is because the respondent has the necessary equipment, technological expertise, and standards to ensure the quality of products that will be crucial to producing medicine for the public health. On the matter of compensation, the Court answered petitioner's arguments through sec. 36 of RA 165, which states that should there be no agreement on the terms of the license, the Director of Patents can set such terms which he did in this case as the petitioner is provided a reasonable royalty for the Patent use.

The cases of *Price* and *Smith Klein* focus on compulsory licensing, specifically on the issue of capability, public health, and property rights (pertaining to eminent domain and police power). The relevance of the two cases in application to the COVID-19 pandemic is that they can be used as precedence for future cases that involve the exploitation of patents without the agreement of the Patent holder. Should some patented medicine be urgently needed to address a pervasive emergency, the arguments of police power and protection of public health can be used. Additionally, any entity able to show their prowess and means to tinker and utilize medical products

[21] Barry John Price, et. al. vs. United Laboratories, G.R. No. 82542, September 29. 1988.

may also be granted compulsory licenses that can perhaps aid communities in accessing and obtaining cheaper alternative medicaments. Given that the country is facing another wave of spiking cases[22] with the emergence of the Omicron variant, perhaps the use of emergency patents could swiftly address the matter at a different pace. Other nations have applied similar principles to their own situations during the current pandemic and past crises as well.

FOREIGN CASES

Applying the similar principle of governments taking patents without an agreement for national emergencies, some of the significant examples include: the United Kingdom's (UK) *IPCom GMBH & Co. vs. Vodafone Grp., PLC.,*[23] Australia's *Stack vs. Brisbane City Council*[24]*,* and United States' Abbot and Merck against the failure of Thailand to enforce intellectual property rights after the latter applied for a compulsory license. Additionally, many countries have aligned their Intellectual Property laws and policies to Art. 31bis of the TRIPS agreement particularly on emergency patents (i.e., Compulsory licenses and State-use of Patents). Briefly, Art. 31bis of the TRIPS agreement provides for the global minimum standards for the protection and enforcement of intellectual property rights.[25] The agreement also provided for the use of compulsory licenses which, as mentioned earlier, allows for a government to license the use of a patented invention to an entity without the consent of the Patent holder; such licenses are also granted especially in times of urgency and national emergency.[26] The aforementioned foreign examples use the principle stated under Art. 31bis in order to either grant a compulsory license or for the state to utilize a patented invention without the patent owner's consent.

In the case of *IPCOM, GMBH.,* while not a case involving pharmaceutical inventions, it utilizes the Crown use (state-use) of infrastructure technology. The principle of the case shows the government use of such technology to give access for emergency responders and that the provisions of the UK's Patents Act[27] provide for the kinds of services that are included for state-use. For the

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[22] Calonzo, Andreo, Philippine Posts Highest Covid Positivity Rate as Cases Spike, Bloomberg Politics, 5 January 2022, https://www.bloomberg.com/news/articles/2022-01-05/philippines-posts-highest-covid-positivity-rate-as-cases-spike.

[23] IPCOM GMBH & Co. KG vs. Vodafone Group, PLC, EWHC 132 (Pat) paras [184]-[213].

[24] Stack vs. Brisbane City Council, FCA 570 [1995].

[25] WHO, supra note 3 at 238.

[26] WHO, supra note 3, at 239.

[27] Subsections 56 (2) and 59.

case of *Stack,* it is similar to *IPCOM*'s, wherein the Federal Court of Australia used Crown use over a patent on water meters to levy charges on users based on their water consumption for state purposes. Lastly, the case of Abbot and Merck involves Thailand's use of compulsory licenses for drugs treating chronic illnesses (e.g., Malaria, Ebola) and the United States placing the former on its IP watch list due to the former's failure in enforcing IP rights. This event's relevance is shown by the "strong arming" of a country to a patent holder as the latter has little recourse against the arguments of governments on "national emergencies".[28] Merck, the Patent holder in this case, was forced to argue under Thai law on the case given to them and this resulted in a negative international perception towards the company.[29] The protest from the company is due to the vague wordings of the Art. 31bis particularly on the duration of the use of the patented product together with the definition of a "national emergency".

The aforementioned foreign cases mainly discuss the extensive reach of the TRIPS agreement pertaining to the provisions of emergency patents. The scope of public health and national emergency is vast to the point that there are various studies arguing against art. 31bis as it contains deficiencies that may prove problematic to patent owners. This will be discussed in the latter parts of the paper but to briefly state, some of them include matters on broad terminologies on the agreement and matters on compensation. In spite of the issues, many countries have continued to adopt their IP laws in accordance with the TRIPS agreement, providing provisions for the notice, agreement, and compensation for the use of patented medicine.

EMERGENCY PATENTS LAW COMPARATIVE ANALYSIS

This portion of the paper provides an overview of some countries' legislative action and their emergency patent response to the COVID-19 pandemic. The inclusion of the provisions and literature could provide a supplement for lawyers, judiciaries, and scholars on creating arguments and decisions pertaining to emergency patents and its use in national emergencies. Such supplements can also be used for substantiation for further IP-policy

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[28] Alexandra Farquhar, Redefining the TRIPS Agreement to Accommodate en masse compulsory licensing of vaccines & other pharmaceuticals for the treatment of COVID-19**,** North Carolina Journal of Law & Technology vol. 22 (2), 271-272, December 2020.

[29] Darren Schuettler, Angered U.S. firm excludes Thailand from new drugs, Reuters, 14 March 2007, https://www.reuters.com /article/ us-thailand-drugs-abbott-idUSBKK27714620070314.

making and future emergency patent use for nations heavily affected by COVID-19.

South Africa has its South African Patents Act, which provides for patent rights and emergency patent use. Similar to the Philippines', the South African Patents Act also contains the two variations of the emergency patents[30] (i.e. government use and compulsory licensing).[31] Its Constitution however, explicitly shows the conditions to determine the just compensation of the "taking" of the intellectual property.[32] It being:

> (1) current use of the property;
>
> (2) history of the acquisition and use of the property;
>
> (3) its market value;
>
> (4) extent of direct state investment, beneficial capital investment, and subsidy in the acquisition of the property, and
>
> (5) purpose of the expropriation of said property.

In comparison with the Philippines' emergency patents provision, such criteria on remuneration for the taking of patented inventions is slightly different. The difference lies on the 4th criterion which is a factor not explicitly taken into account for cases of eminent domain nor the IP code's emergency patents. In the IP Code, it only takes into account the economic value of the authorization/grant for government use or compulsory licenses.[33] This could possibly result in inaccurate valuing of the patented invention if state subsidies and investments onto the invention are not factored in. On a different perspective, the "economic value of the authorization" can be seen as broad and without much detail as to how the valuation is calculated. This could leave patent owners without proper just compensation and due process for the taking of their property.

For the United Kingdom and Australia, they have the 1977 Patents Act (United Kingdom; Sec. 56-59 for emergency patents) and the 1990 Patents Act (Australia; Sec. 163), respectively. In UK's emergency patent law, anyone authorized in writing to act on the Crown's behalf may act on matters involving emergency patents. Such acts include making, using, and importing a patented medicine but not selling and offering for sale. The provisions for the UK's

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[30] South African Patents Act 57 of 1978, sec.s 4, 78-80.

[31] Mikhalien du Bois, State Use Provisions for Patent Law, and Expropriations: Some Comparative law Guidelines for South Africa during the Covid-19 Crisis and Beyond**,** PER/PELJ 2020, 3, 2020.

[32] South African Constitution, Sec. 25 (2) and (3).

[33] RA 8293, sec. 74.2 (f) and 100.6.

Patent Act do not require the state to negotiate with the Patent owner and an entity may obtain the authorization to infringe the patent even after the act has been done (Crown defense will be applied; immunity from infringement). An interesting provision is Sec. 57A of the UK's Patents Act allows for the determination of the compensation to the patent owner after the commencement of Crown use and courts can even award compensation for lost contracts and reasonable manufacturing profits.[34] Comparing UK law with the Philippines', the latter does not provide for compensation on lost contracts and manufacturing profits. Sec. 57A of the UK's Patent Act provides for a detailed procedure on the compensation for the loss of profits on the part of the patent owner. Such detail is somewhat lacking in the IP Code of the Philippines to the extent that the IP code does not specify who shall be remunerating the inventor. Furthermore, the code does not state the consideration of loss of profit from failure to secure contracts or from manufacturing costs.

Australia's crown use, on the other hand, provides for the assurance of immediate access to inventions for the benefit of the services of the respective governments and that infringement only takes place when there is a non-compliance with the terms agreed on in sec. 163 (2) of their Patents act. In 2020, amendments were made requiring prior negotiations with the Patent owner before any use of the invention with the exception of emergency instances. The amendments now explicitly require authorities to have tried for a reasonable period to achieve an agreement with the patent owner before the exploitation of the invention. These amendments are absent to the Philippines' as there is no provision which requires government authorities to obtain an agreement with the owner. The invocation of government use of patents does not explicitly provide the requirement for the state to attempt to negotiate with the patent owner for a certain period of time. For compulsory licenses, it at least requires the petitioner's efforts in obtaining authorization from the patent owner[35] before they may obtain a license without the latter's permission. Exceptions to this are national emergencies or when the demand for patented drugs is not being met.[36]

For Canada's Patent Act of 1985, it is similar to Australia's Patent act wherein the Canadian government has to negotiate with patent holders before the Patent's usage. Only when there is a failure can the government apply for the use of the patent without the Patent owner's consent. Again, the exception is a national emergency. In mid-March 2020, Canada legislated the COVID-19

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[34] Cornish, et. al., Intellectual Property, Sweet & Maxwell (6th Ed.), 324-325, 1 Jan 2007.

[35] RA 8293, sec. 95.

[36] RA 8293, sec. 95.2 (c) and (d).

Emergency Response Act making changes to current legislation to respond to the COVID-19 pandemic. The amendment clarified the government use of patents during public health emergencies; it provided limits to the period of the patent use to 30 September 2020[37]. Additionally, the amendment mandates that any application for the use of the Patents must mention the specific patent to be used as well as the person/entity authorized to exploit such invention.[38] Lastly, subsection 19.4 (5) clarified the remuneration for the government use of the patented invention by taking into account the economic value of the authorization and the extent to make, construct, use, and sell the patented invention. Comparatively, the significant difference between Canada and the Philippines is the legislation, which the former issued to adapt against the pandemic and its specificity on matters such as period of use and remuneration. The Philippines has not adopted any sort of legislation relating to emergency patents and the COVID-19 pandemic, which Canada has for its COVID-19 response act. Moreover, the emergency patent provisions of the Philippines do not take into account the extent to produce and sell the patented invention. Concurringly, Canada and the Philippines do have the same provisions on the limitations of the scope and duration.[39] Only in their COVID response act did Canada provide a more specific limitation on the duration, particularly in addressing the COVID-19 pandemic.

The aforementioned Patent laws of the various countries all show a form of protection and urgency to national emergencies, particularly on the subject of public health and negotiation & remuneration to the Patent owner. In comparing other countries' emergency patents provision against the Philippines', the differences mainly lie on the specificity especially on the matter of remuneration. Nations such as South Africa and Canada protect inventors by laying down in detail the basis of their remuneration. This is to ensure that inventors get compensated properly for their works especially since in the field of medicine, such products are mass produced and distributed to countries that differ in economics.

Summarily, the scope of the mentioned laws, cases, and their principles may be applicable to the Philippines. This is because the country experiences national emergencies similar to other countries' that could call for the use of emergency patents. An augmentation in the supply of booster shots (and vaccines) and other medicaments through emergency patents may help in the recovery of the Philippines in the socio-political and economic aspects. Furthermore, the idea of the government "taking" patented inventions is

[37] COVID-19 Emergency Responses Act, sec. 19.4 (9), 2020.

[38] Supra note at 19, sec. 19.4 (2)(d), 2020.

[39] Patent Act (R.S.C., 1985, c. P-4), sec. 19 (2)(a).

substantiated through jurisprudence, especially for matters involving public need.

LEGAL DISCUSSION

In analyzing the use of emergency patents, numerous implications on various legal concepts arise. These would include the right to due process, eminent domain, and antitrust. A discussion on these legal concepts is relevant to the paper as it allows readers to see and appreciate the complexities of emergency patents in the Philippines. Furthermore, it also presents to readers the harmonization of other countries' use of the concept of emergency patents in connection with the legal concepts as well.

DUE PROCESS

In the case of *Ang Tibay vs. National Labor Union, Inc.,*[40] it emphasized the right to due process and that while non-judicial courts are more liberal when it comes to formal rules of procedure, the quasi-judicial body, in this case, may not dispense an individual's due process right. The court must decide based on justice, equity, and the substantial merits of the case brought upon them. This would mean that there has to be a proper basis for decisions of courts which would also be equitable and in conformity with the circumstances surrounding the case at hand. *Ang Tibay* summarized the cardinal rights in due process or the "elements" of dissecting due process to determine if one has been afforded it. Such cardinal rights are:

> Right to a hearing which includes the right of the affected party to present his own case and submit his own evidence to support his claims;
>
> The judicial entity must consider the evidence that the affected party has presented;
>
> The judicial entity must have something supporting its decision otherwise, such decision would be null
>
> The evidence for the conclusion must be substantial. Substantial means that the evidence is something that a reasonable mind would accept as an adequate support to buttress one's conclusion;

[40] Ang Tibay vs. Court of Industrial Relations and National Labor Union, Inc., G.R. No. L-46496, February 27. 1940.

> The decision must be rendered based on the evidence presented or on the records. The decision must be disclosed to the parties afterward;
>
> The deciding body must act independently and in consideration of the law and the facts of the controversy.
>
> Lastly, the deciding body must render a decision wherein the parties to the case are aware of the issues involved and the reason for the former's decision.

The right to due process is essential for emergency patents as it is the precursor to the just compensation of a patent owner for the taking and use of their invention without consent. The principle here is that there must be a fair and standard procedure on safeguarding the property rights of a patent owner before they are deprived of their own property.

The jurisprudence research done in this study yielded Philippine cases that do not show the method or valuation of the patents nor the patent license on occasions of government use. For compulsory license, on the other hand, cases such as *Price vs. Unilab* showed the method of valuation done by the Philippine Patent Office. In the said case, the Office granted the compulsory license to UNILAB and the latter should pay Price, et al. a royalty of 2.5% percent of the net sales. These net sales would exclude transportation charges, discounts, credits or allowances, and other taxes included in the production, sale and transportation of the product. The subject of valuation will be further discussed in the next section. For this section, it will focus more on the principle of procedure in emergency patent cases and the need to follow the cardinal rights mentioned.

While procedures and jurisprudence are present for cases on compulsory licenses, such is the contrary when it comes to government use. An analysis of other nations' statutes also shows an absence of guidelines or procedures on how to quantify the value of patents for the purpose of compulsory licensing. A study conducted on compulsory licenses in Kenya[41] highlights the explicit guidelines on just compensation for land expropriation such as urgency to the acquisition, damage sustained by the owner, and increase on the value of the subject land. The Kenyan Constitution and statutes were also referenced in relation to their intellectual property laws wherein Kenyans must be provided due process for emergency patent use; when one is deprived of their private

[41] Kiremu Wanja, Property Rights vs. Public Right: A study on the relationship between compulsory licensing of patents and the eminent domaine doctrine in Kenya, Strathmore University Law School, February 2018.

property for public use. The guidelines, however, did not provide for the actual method of quantifying intellectual property specifically.

In analyzing the studies of intellectual property academics, there is a need for further clarification and/or improvement on the compulsory licenses and government use provisions especially for the Intellectual Property law of the Philippines. For procedures, there are established methods provided by institutions such as the World Health Organization (WHO) and other IP law academics who have set more flexible and competitive ways of compensating patent owners for the use of their inventions. In the mentioned study on Kenyan Law, it made a comparative analysis on the patent laws of the United States as the country has established a transparent method of determining the appropriate value of patents and its licenses.[42] The US Court of Federal Claims (USCFC) has established their own method in determining just compensation via two components to consider:

> (1) the determination of the value of the license at the time it was taken and
>
> (2) the government's delay in paying for the license.

In calculating the damage, the case of *Decca Ltd. vs. United States*[43] provided three methods of valuating the license value:

> (1) determination of reasonable royalty for the license;
>
> (2) awarding a percentage of government cost savings from governmental use of the patented invention; and
>
> (3) awarding of lost profits.

For the executive branch, some guideline or procedure should also be set by relevant administrative bodies to properly ascertain the correct value of compensation to be given. Providing the guidelines allow a more transparent and smoother evaluation of the values given by Courts when deciding on the just compensation of the patented inventions. It builds assurance for both the State and inventors that the invention is justly and adequately compensated; no inadequacies nor over compensation.

Comparatively, the presence of a provision on the requirement for negotiations is also in Philippine law whereas states such as Australia and Canada explicitly place negotiations as a requirement for the use of emergency

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[42] Wanja, supra note 41, at 32-34.

[43] Decca Ltd. vs. United States, [Ct Cl 1980] 640 F.2d 1156, 1167.

patents.[44] Whether government use or compulsory licenses, applications of emergency patents should have an obligation explicitly stated in the law to negotiate with the inventor to support the necessity of due process and provide protection to the patent owner. It would be best to require a level of effort from the applicant (i.e. number of attempts to communicate and negotiate) as to provide the protection of due process to the inventors.

EMINENT DOMAIN, PROPERTY RIGHTS, AND JUST COMPENSATION

On the subject of property, legal concepts such as eminent domain, just compensation, and health rights are rife with legal issues especially when it comes to the use of emergency patents. . The discussion of their legal implications is important to ensure that one knows the extent to which one can argue for emergency patents as well as recognize the limitations and areas of improvement on the laws relating to the subject.

For Property vs. Health rights, with the Philippines signing RA 9502, such law bolsters the already heavy emphasis on public health and affordability of medicine. Foundationally, the mentioned law finds its essence under the provisions of the 1987 Constitution of the Philippines, which highlights the protection of life[45] and health of the people.[46] The right to life trumps the right to property especially during circumstances of urgent national emergency and this would mean access to medicine. Such a right is justifiable as it would be for the interest of the public, public order, and public safety.[47] It would only be proper to justify the use of utilizing emergency patents given that cases are spiking once more this early 2022. To prevent further social and economic damage, the emergency patents provisions may be triggered by the appropriate entities (i.e., DOH, IPO).

On the matter of monopolies, eminent domain and police power, the cases of *Price, Smith Kline,* and *Du pont* establish the local jurisprudence on emergency patents (more emphasized on compulsory licensing than state-use). For future cases involving such Patents, the Philippine government may use the

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[44] Intellectual Property Laws Amendment (Productivity Commission Response Part 2 and Other Measures Act 2020, No. 9 2020, Sec. 163, subsection 3 and Sec. 133, Subsection 3 (c).

[45] CONST, art. II, sec. 5.

[46] CONST, art. II, sec. 15.

[47] Adebambo Adewopo, Access to Pharmaceutical Patents in the COVID-19 Emergency: A case for government use in Nigeria**,** Journal of African Law Vol. 65 (2), 275-276, 2021.

aforementioned cases as a basis for a court or administrative body's decision. To supplement their decisions, the mentioned bodies may also use foreign jurisprudence such as but not limited to the cases mentioned earlier. The application of the cases and its principles could provide the Philippine government with a justification to utilize emergency patents to procure a better supply of medicine and technology to alleviate the impact of the Omicron variant.

Despite the presence of jurisprudence, both local and international, the research would academically suggest that the taking done through emergency patents should be nuanced and uniquely separated from the normal eminent domain. Some of the elements of a valid taking mentioned earlier from the case of *Vda de Castellvi* include: that there is an entrance and occupation of the private property, such entrance is more than a momentary period, and that the utilization results in the deprivation of the owner in the enjoyment of their property. These elements cannot concur properly with the "taking" of patented inventions through compulsory licensing or government use because (1) there is no "entrance/occupation" of the private property; (2) in arguendo that one can argue that there is an "entrance", such entrance is only for a momentary period; and (3) the utilization of the property does not result in the total deprivation of the owner in enjoying the property. The subject property in this study is not some real property that can be "entered" unless one's definition of "enter" is through entering a contract or agreement regarding the patented invention. If that would be the case, the momentary period being discussed in the mentioned jurisprudence discusses periods that normally should not be temporary. For emergency patents, its usage only goes insofar as the duration of the national emergency requiring the use of the patented invention. Moreover, the use of the invention by the government or another capable entity does not totally deprive the owner of the enjoyment of his property. A patented medicine, while taken and produced by someone else, does not necessarily mean the patent owner is deprived or prevented from the use of their invented medicine.

In this section, one of its main focuses is on the issues of compensation and vague definitions[48] for those issues apply to the jurisprudence available and to Patent laws of the Philippines. Many studies have been done analyzing the TRIPS agreement, particularly on its art. 31bis as issues are mainly on its vague definitions, abusive use of emergency patents, and ineffective procedures under the said article.[49] For vague definitions, the first two words can

[48] Vague definitions: centers on definition issues particularly on "urgency", "national emergency", and "reasonable compensation"

[49] Farquhar, supra note 28, at 268.

somewhat be vague due to the broad dictionary definition, but in countering such argument, perhaps the intent of art. 31 of TRIPS is not to actually define such words or give grounds but to provide leeway or flexibility as mentioned earlier.[50] This is so that nations can tailor their laws, in this case IP laws, to whatever national issue they are uniquely experiencing.

On the issue of compensation, this topic was discussed in the jurisprudence of *Price* and *Smith Kline* wherein compensation is already considered just when a royalty agreement is agreed upon after the 2-year monopoly of the patent or when the Director of Patents provided an agreement. But, as mentioned earlier, the level of compensation, especially for heavily used medicine, may not be up to global standards. Thus, the WHO and United Nations Development Program (UNDP) created a guideline for establishing a royalty system through different approaches.[51] The first system states a 4% base royalty rate which is flexible up to 2% depending on certain factors. Another system would be the Canadian's royalty system wherein a royalty rate is set from 0.02% to 4% of the price of the generics made from the patented invention while considering the country's rank in the UNDP Human Development Index. A royalty system is also an option wherein it is based on the patented invention's product price but adjusted to the level of income of the country. Such modifications in the emergency patents provision, particularly for just compensation, are necessary to satisfactorily protect IP rights of patent holders.

Other countries also have their own means and methods of compensating patent owners for the use of emergency patents (particularly on compulsory licenses). In India, sec. 90 of the Indian Patent act provides for the valuation of a patent namely:

> (1) the nature of the invention;
>
> (2) the expenditure by the inventor on making the invention; and
>
> (3) the costs incurred in obtaining a patent and enforcing its protection.
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> Indian jurisprudence also provides that in the case of Natco Pharma, an Indian pharmaceutical, the Indian Patent Office decided that the remuneration should be based on a royalty-based method with the guidelines set by the UNDP.

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[50] Adewopo, supra note 47, at 281.

[51] Daniel Hofileña, Reinforcing the role of Intellectual Property in the Battle against the Pandemic: The Vowel Framework, DLSU Business & Economics Review 30(1) 2020, p.94, 2021.

A study provided by the Texas Intellectual Property Law Journal listed numerous methods of valuating patent licenses.[52] Some of the commonly mentioned methods are the Industry Standard Method and the 25 percent rule. For the industry standard method, the valuation is obtained by referencing royalty rates of past licensing transactions within the industry. While it is a good guide, it also has limitations as there are an innumerable number of unique factors per invention that affects the price of the invention. For the 25 percent rule, it is a widely used valuation method wherein. The licensee should pay a royalty equivalent to 25% of the expected profit from the invention being exploited. While simple and popular however, its use is mainly more as a guide and not the sole basis of valuation because the calculation does not take into account factors such as increasing production costs, operating expenses, etc., which would likely affect the hypothesized profit. While briefly stated, the aforementioned simply shows that there are commonly accepted ways of valuating patents and licenses in an attempt to create organized and standardized methods for both private and public intellectual property practitioners to follow.

The matter of valuation is a relevant and essential consideration to be accounted for when granting compulsory licenses as it is a critical procedural requirement in protecting an inventor's due process rights. A transparent and clear layout of what variables should be considered helps inventors and government bodies in correctly valuating the just compensation needed for the exploitation of the invention. This would certainly help ease the flow of the negotiation process when it comes to the procedural aspect of emergency patents. Sticking to certain globally acceptable valuation methods would possibly make procedural matters easier to follow for inventors and licensees, both local and international.

On the topic of compensation with eminent domain proceedings, this research points out the broad provisions of the IP code in providing compensation for exploiting a patent owner's invention. The provisions on the IP code state that compensation will be valued according to the economic value of the authorization/grant but do not state how the economic value will be measured. If one were to argue that the taking is something within the nature of "eminent domain," there should be guidelines in assessing the value of a property. Guidelines on valuing private property for government taking were provided in the *Vda de Castellvi* case wherein factors such as location and land condition were considered.[53] Thus, in instances where emergency patents

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[52] Ted Hagelin, Valuation of Patent Licenses, 12 Tex. Intell. Prop. L.J. 423, 2004.

[53] "We cannot disregard the observations of the commissioners regarding the circumstances that make the lands in question suited for residential purposes — their location near the Basa Air Base, just like the

are needed, there should be guidelines or a transparent calculation on how administrative or judicial bodies would value the property. This is to ensure the due process and just compensation that patent owners are duly entitled to.

Gathering the analysis on the issues of eminent domain, compensation, and due process forms a new issue for emergency patents, specifically on the subject of procedure. The nature of invoking emergency patents means that there is a great probability of the government or its authorized entity to utilize the invention before just compensation proceedings ensue. Procedurally, this would mean that inverse expropriation will be committed. The effect would then be that patent owners have to file for an ordinary civil action to obtain just compensation.[54] Legal practitioners, would have to observe the procedures under ordinary civil action and avoid raising rule 67 as it would not be applicable as provided in the jurisprudence of *National Power Corp. (NPC) vs. CA*.[55] The issue here is the probability that the matter of just compensation for the patent owner will be left solely to the judiciary instead of obtaining assistance from executive agencies (Intellectual Property Office).

The case would prove to be problematic and complex if the determination of the value of the patents would be left to the job of either the trial court or the Commissioners, assuming that the Courts utilize the latter in making a decision.[56] This may result in an improper valuation of the patent due to a possible lack of expertise or information on the patent as the IPO is not involved in valuating the invention, the circumstances surrounding it, and the taking in the first place. Thus, a recommendation to be considered is a clarification of the procedure for the use of emergency patents in the event that an invention is taken and exploited without the inventor's consent. This clarification should also explicitly provide the requirement for the involvement of the IPO in determining the value of the patent so that inventors can still be justly compensated for their inventions through proper valuation methods.

To cap the subject on procedure for emergency patents, a legal question would arise from the doctrine of the case of *NPC vs. CA*. The ruling of the case states that "the usual procedure of just compensation is waived when the

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lands in Angeles City that are near the Clark Air Base, and the facilities that obtain because of their nearness to the big sugar central of the Pampanga Sugar mills, and to the flourishing first class town of Floridablanca" (*Vda de Castellvi,* G.R. No. L-20620).

[54] National Power Corporation vs. Court of Appeals, G.R. No. 106804, August 12. 2004.

[55] The procedural doctrine in the case provides that the procedures for just compensation would be waived when the government violates procedural requirements. Thus, the plaintiff (or in this case, a patent owner) would have to file an action for damages.

[56] As provided by *NPC vs. CA*, a trial before commissioners is dispensable, thus it is the trial court's discretion on whether or not to utilize them.

government itself initially violates the procedural requirements." There must be an emphasis on the phrase "violates the procedural requirements" as it is questionable if the State did actually violate procedural requirements on just compensation when they take a patented invention without the inventor's consent but for public purposes/national emergencies. While the law provides for "adequate remuneration" for the use of the invention, it is quiet on the procedural aspect as the subject and procedure of eminent domain overlaps. This may possibly cause confusion on whether the proceedings should be under Rule 67 of the Rules of Court or the proceedings for Ordinary Civil Action. Since there is yet to be a case involving just compensation and the use of emergency patents, such a question would remain an academic one.

COMPETITION LAW AND ECONOMICS

The governing law for Competition law in the Philippines is RA 10667, which provides for the competition policy of the country, prohibits anti-competitive behavior and abuse of market dominance. The subject of antitrust came into the scope of the Philippine Congress due to the need for the country to enact antitrust laws as it was the only ASEAN-founding member that had yet to legislate such kind of law.57 Competition law was also deemed as a priority as stated by President Aquino during his 2010 State of the Nation Address. In fine, the act ensures the balance in promoting consumer interest while also leveling the playing field between large companies and small and medium enterprises (SMEs).

In relation to Competition law, patents give exclusive commercialization on a drug and, therefore, prevent competitors from the opportunity to make profit out of the newly patented drug. There is somewhat a contradiction when it comes to Patent law versus Competition law which is that the former focuses on a monopoly while the latter on an anti-monopoly lens. To reconcile this, the monopoly herein for patents only refers to a temporary period of time to reward the inventor for his knowledge and hardwork on inventing the drug. On the other hand, competition law does not necessarily prohibit monopolies but rather aims to prevent the abuse of market dominance by those who are deemed as monopolies. These monopolies are considered such because of factors such as their ingenious inventions and exemplary customer satisfaction.

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[57] Lim and Recalde, The Philippine Competiiton Act: Salient Points and Emerging Issues, Rex Printing Company, Inc., 3, 8 August 2016.

In the context of emergency patents, competition law plays a role as patents can be exploited without the consent of its inventors should the invention (particularly on patented drugs and medicine) not meet the market demand as provided for by sec. 74 (e), 93.6, 95.2 (d), and 95. 5 of the IP law. Comparatively, other nations such as the United Kingdom, and Germany also share the same idea when granting emergency patents (particularly on compulsory licenses).[58] In the United Kingdom, similar to the Philippines, the former's Patent Act of 1988 also takes into account market demand and the protection of the British economy as a ground for granting compulsory licenses under Sec. 48 and 51 of the mentioned law. For Germany, jurisprudence (Polyferon Case) provides that special circumstances must exist in order for the court to grant a compulsory license. This means that the Courts have to be cognizant of a variety of factors such as economic, socio-political, and medical factors as they deem it necessary to market's stability.[59]

Analyzing emergency patents, while it can be seen on face that the main consideration is of national emergencies and public health, the law also takes into consideration market demand and economic protection (on a macro and micro scale). From a macro perspective, courts require a great level of analysis when granting emergency patents as they still have to ascertain whether market demand for medicine is being met and if granting the license would result in possible abusive monopolistic acts. From a micro perspective, courts also have to consider possible factors such as the willingness to pay of consumers, income per capita, and availability of alternative products. Government bodies still have to be mindful of the possible effects in the entry of new competitors/alternatives as providing licenses to local companies may still result in abuses of market dominance by larger entities over smaller and independent inventors.

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[58] Kung-Chung Liu, The need and justification for a general competition-oriented compulsory licensing regime, Int.l Review of Intellectual Property and Competition Law 43, (6), 3, 2012.

[59] Kung-Chung Liu, supra note 58, at 13.

NON-LEGAL DISCUSSION

The implications of using emergency patents in the Philippines could be extrapolated from cases mentioned earlier as well as through intellectual property data, current and past events, and studies conducted relating to pharmaceutical patents and compulsory licenses on medicine. While there is limited quantitative data and judicial cases relating to emergency patents in the Philippines, the research attempts to deduce possible implications using the principles of the international data and knowledge obtained from various academic and institutional data.

SOCIO-POLITICAL

Policy makers must be vigilant in adopting and adapting legislation to the current demands resulting from current events, in this case, the COVID-19 pandemic. This is so that Filipinos and industries may be able to adapt to the pandemic as well as invoke their rights during this emergency situation. It also creates a good perception that policy makers address multiple areas of public policy to find ways to control the pandemic. Unfortunately, on the World Intellectual Property Office's (WIPO) website (as of January 20, 2022), the Philippines has yet to produce any emergency patent provisions that react to the COVID-19 pandemic. There were efforts however to create guidelines on the use of special compulsory licenses through a Joint Administrative Order by the DOH and IPO Philippines in early 2020.[60] As of February 2022, the said order has not been released and it was originally only meant to receive comments from the public. As of January 2022, no form of emergency patent issuance has been released by the intellectual property office. There are no legislations also that would pertain to the use of emergency patents (both government use and compulsory license) especially directed for use during the pandemic. Currently, the IPO Philippines has only released issuances on filing matters, intellectual property deadline extensions, and other adjustments pertaining to the pandemic. None of the issuances include a focus on the use of emergency patents nor realize the latter's potential to combat COVID.

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[60] Editha Hechanova, Philippines: IPOPHL posts proposed guidelines on compulsory licenses, 20 January 2020, https://www.managingip.com/article/b1kblk4tssz7kv/philippines-ipophl-posts-proposed-guidelines-on-compulsory-licences.

In a global survey conducted in April 2020 by Law Firm Norton Rose Fulbright,[61] a global law firm, conducted a global survey listing certain nations that have adopted an emergency patents provision as well as their response towards patents and COVID-19. For Canada, as mentioned earlier, it created provisions relating to its Patents Act (sec. 19.4) which allows for the use of a patented invention during public health emergencies and sets an expiration for such use. For France, while it does not directly deal with emergency patents, the country did introduce an emergency law[62] which authorizes the seizure of goods and services necessary to fight against the disaster (COVID Pandemic). This may arguably pertain to medical patents as one form of seizable goods should the French government deem it necessary. Israel, at the onset of the pandemic, has issued a compulsory license to import a generic version of an experimental drug to combat COVID, which is also an essential drug for treating HIV. Days later, a ripple effect from Israel's government action resulted in the Patent holder of the drug announcing that it would no longer enforce its patents. Such an act progressed the battle against HIV/AIDS as well as the treatment of COVID-19 for it significantly gave access to cheaper versions of the patented drug.[63]

The aforementioned examples, on a policy level, show the active prudence of policy makers to adapt and attempt to overcome national emergencies. In the situation of the Philippines, several legislative challenges concerning emergency patents have yet to be addressed. A notable one is the remuneration for the use of the patents, which may not be updated to existing global standards.[64] The prices of medicine may vary depending on the country and the quantity of orders a nation would procure. Philippine jurisprudence provides only the Director of Patents' decision to provide for the adequate compensation for the compulsory license. The jurisprudence did not state any rationale in forming for the rate of compensation given to the patent owner. At the onset of pharmaceutical companies producing massive quantities of medicine, a more detailed and transparent method of compensation should be conducted to show actual just compensation of the patent use. Failure to adequately compensate patent owners for the unconsented use of their

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[61] Sanft, et. al., Governmental use of patented inventions during a pandemic: a global survey**,** Norton Rose Fulbright, April 16. 2020.

[62] Emergency Law No. 2020-290.

[63] Perehudoff, et. al., Overriding drug and medical technology patents for pandemic recovery: a legitimate move for high income countries, too, BMJ Global Health Journal, 2, 2021.

[64] Mario Cerilles Jr. and Harry Fernan, Analyzing the interplay between the right to health and pharmaceutical patent rights in the introduction of a COVID-19 vaccine into the Philippines, Int.l Journal of Human Rights in Healthcare Vol. 14 (3), 240-254, 2021.

inventions discourages inventors and/or gives a negative perception of the country for its failure to protect IP rights.

The strengthening of intellectual property laws or, in this case, emergency patents, may result in the government being able to effectively and swiftly respond to health threats. This is because the use of emergency patents allows the government to properly utilize its powers to make medicine easily available, especially during circumstances of national emergency.[65]

On a non-policy level, the Philippines has challenges in its research and development compared to other developing countries.[66] For patents, the IPO Philippines' website records the patent filings growing continuously since 2015 (see tables 1 and 2 below) but a significant number of these are from the Patent Cooperation Treaty (PCT)[67], which means these are filed by international companies and are not filed by locals. In 2020, Patent applications declined and unusually contradicted the theory of Liu, et. al.[68] which stated that there is normally a pattern of patenting activities following a pandemic of human coronavirus. This is proven by figure 3 below taken from Liu et. al.'s study on patents relating to coronaviruses. This theory however, can be corrected in 2021 as the IPO Philippines released a news article that its intellectual property filings have increased by the 3rd quarter of said year.[69]

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[65] Remoquillio, supra note 1, at 43.

[66] Zuraida Cabilo, Philippine Intellectual Property Rights under the World Trade Organization, 1995-2005: Implementing the flexibilities under a TRIPS-Plus Commitment, Philippine Journal of Third World Studies 2009 24(1-2), 85, 2009.

[67] The Patent Cooperation Treaty (PCT) provides for a uniform standard on patent filing applications in order to protect inventions in different countries.

[68] Liu et. al., Global landscape of patents related to human coronaviruses**,** International Journal of Biological Sciences vol. 17 (6), 1592-1593, 2021.

[69] Intellectual Property Office of the Philippines, H1 Intellectual property filings record 20% growth, 30 Aug. 2021, https://www.ipophil.gov.ph/news/h1-intellectual-property-filings-record-20-growth/.

Table 1: Philippines' Patent Filings from 2015 to 2019 (Source: Intellectual Property Office of the Philippines)

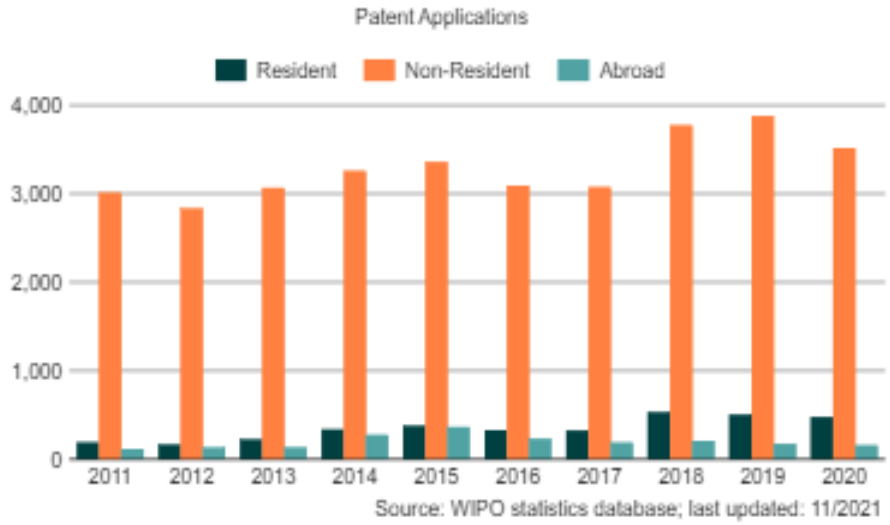
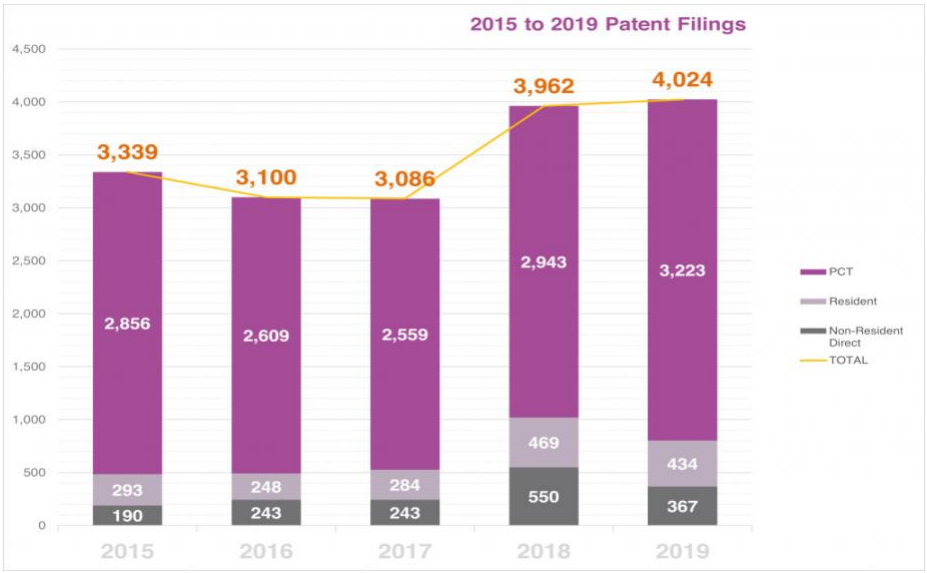


Table 2: Philippines' Patent Applications 2011-2020

(Source: World Intellectual Property Office)



Developing on the research and development subject with regard to Liu, et. al.'s study, emergency patents are available options capable of being catalysts to propel science and technology in the country. By obtaining and accessing inventions from other countries, Filipino scientists and researchers would be able to experiment and possibly concoct new and alternative forms of medicine that may help in combating COVID-19 as well as future variants of the disease and future pandemics. Government agencies and local universities may partner with foreign governments, companies, and universities to enable local scientists and inventors to obtain resources to develop new medicine. In figures 2 and 3 of Liu, et. al.'s study, there are a number of nations near the Philippines (e.g., China, Japan, India, South Korea)[70] that are significant contributors to patents with some being universities as well. Figure 1 contains multiple charts showing the constant increase in patents over the decades, especially when pandemics ensue as well as the number of publications on patents for coronaviruses. Additionally, charts C and D of figure 1 show the geographic distribution of patented inventions pertaining to coronaviruses, with China, Japan, India, and South Korea leading for Asia.

The relevance of these figures and charts is that it shows the near possibilities of establishing relationships with foreign entities to galvanize the use of emergency patents with the hope of developing better, cheaper, and more alternative medicine. With large patent producers neighboring the Philippines, the execution of emergency patents in response to the pandemic may create a ripple effect if a state were to follow Israel's steps. Applications of compulsory licenses and government-use of patented inventions could create access to a wide array of science and technology that would possibly spur some sort of cure for other diseases if not COVID alone. Politically, it would create better relations between nations as it would be publicly seen as a regional and/or continental effort to defeat diseases.

Access to medicine and poor-quality drugs go hand-in-hand with unsatisfactory research and development and insufficient scientists. In creating better partnerships and providing better incentives on science and R&D, the Philippines' pharmaceutical industry has a possibility of significantly improving thus, creating a snowball effect wherein local scientists may discover or invent medical solutions.

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[70] China (2,255 patents), Japan (224 patents), India (213 patents), South Korea (191 patents).

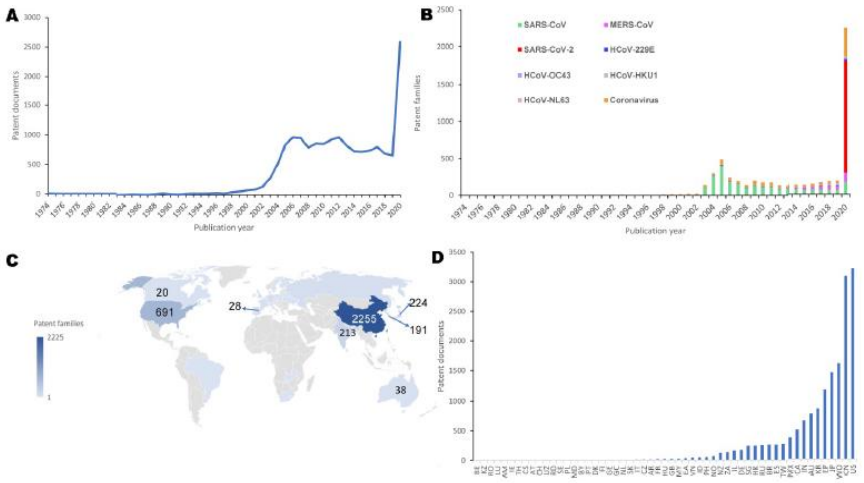

Figure 1. Temporal and geographic distribution of coronavirus patents. a. Publication trend (based on patent documents). b. Annual publication change of seven subtypes of human coronavirus and coronavirus type not announced patent (based on patent families). c. Geographic distribution by nationalities of patent inventors. The color intensity denotes the frequency of patent families. d. Geographic distribution by nationalities of jurisdictions (based on patent documents). The "Two-Letter codes" by full country names are shown in Supplementary Table S2.

Source: Liu, et. al., supra note 68, at 1590

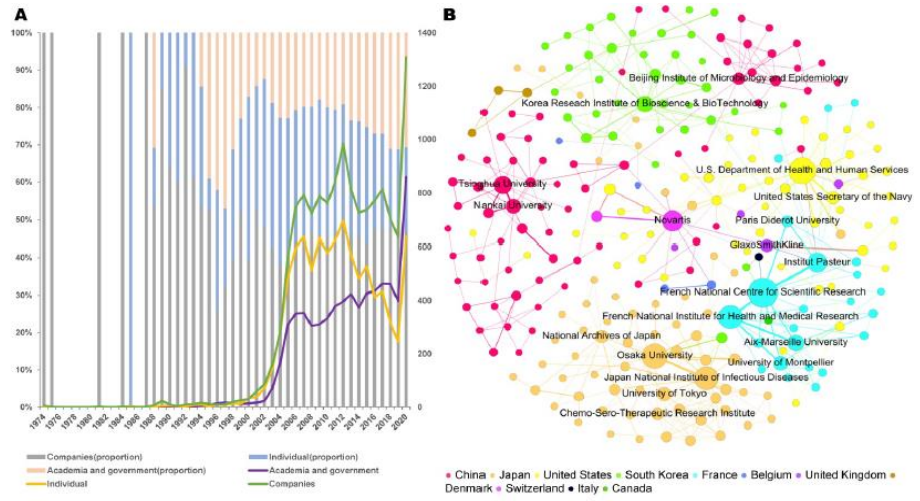

Figure 2. Types and cooperation of coronavirus patent assignees. a. Organizational types (based on patent families). b. Collaboration patterns. Institutional collaboration network, in which nodes denote assignees and edges represent co-assignee relations. The main collaboration relationships and patterns among assignees was extracted by network clusters detected using the Louvain modularity method, and labels names of top 20 active institutions. Node size is scaled to the number of patent families, while the thickness of each edge represents collaboration frequency. Countries mean regions in which assignees are located.

Source: Liu, et. al., supra note 68, at 1591

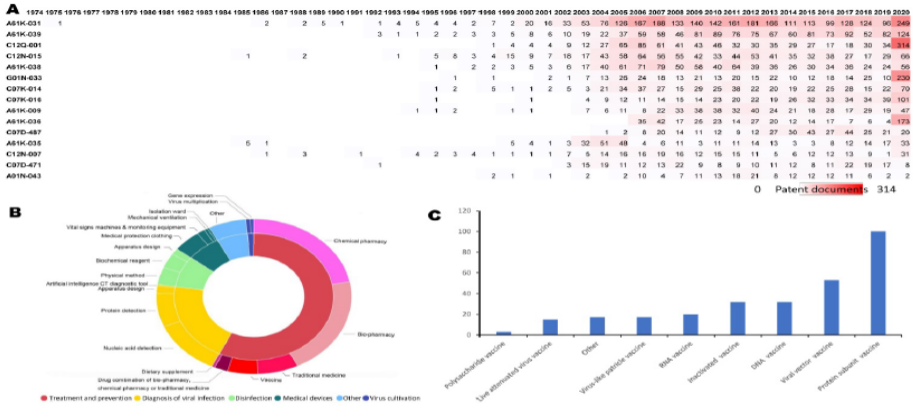

Figure 3. Technological categories of coronavirus patents. a. Annual changes of Top 15 International Patent Classification (IPC) codes based on patent families (for further information on IPC codes, visit https://www.wipo.int/classifications/ipc/en/). A61K-031 (Medicinal preparations containing organic active ingredients), A61K-039 (Medicinal preparations containing antigens or antibodies), C12Q-001(Measuring or testing processes involving enzymes, nucleic acids or microorganisms; compositions therefor; processes of preparing such compositions), C12N-015(Mutation or genetic engineering; DNA or RNA concerning genetic engineering, vectors, e.g. plasmids, or their isolation, preparation or purification; use of hosts therefor), A61K-038 (Medicinal preparations containing peptides), G01N-033(Investigating or analysing materials by specific methods), C07K-014(Peptides having more than 20 amino acids; gastrins; somatostatins; melanotropins; derivatives thereof), C07K-016(Immunoglobulins, e.g. monoclonal or polyclonal antibodies), A61K-009(Medicinal preparations characterised by special physical form), A61K-036(Medicinal preparations of undetermined constitution containing material from algae, lichens, fungi or plants, or derivatives thereof, e.g. traditional herbal medicines), C07D-487(Heterocyclic compounds containing nitrogen atoms as the only ring hetero atoms in the condensed system), A61K-035(Medicinal preparations containing materials or reaction products thereof with undetermined constitution), C12N-007(Viruses, e.g. bacteriophages; compositions thereof; preparation or purification thereof), C07D-471(Heterocyclic compounds containing nitrogen atoms as the only ring hetero atoms in the condensed system, at least one ring being a six-membered ring with one nitrogen atom), A01N-043(Biocides, pest repellants or attractants, or plant growth regulators containing heterocyclic compounds). b. Sunburst chart of technological categories (based on patent families). c. Vaccine categories (based on patent families)

Source: Liu, et. Al., supra note 68, at 1593

ECONOMIC

Economically, emergency patents could provide better accessibility to cheaper medicine, especially for the financially constrained due to the pandemic. Given that in early 2022, a new variant, the Omicron variant, caused a spike in cases in the Philippines and many other countries as well.[71]

While vaccines have been an immense help in mitigating the effects of COVID, many who contract the disease still experience certain symptoms such as coughs and colds. Thus, a bigger demand for over-the-counter medicine occurred. Due to the spike in demand, reports on overpricing and hoarding have become prevalent, especially when the pandemic was coupled with heavy monsoons in late December 2021.[72]

Emergency patents in relation to legislative change may create a positive impact on numerous issues on health such as accessibility and affordability of

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[71] Sebastian Strangio, Omicron driving COVID-19 Wave to new heights in the Philippines, TheDiplomat, 18 January 2022, https://thediplomat.com/2022/01/omicron-driving-covid-19-wave-to-new-heights-in- the-philippines/.

[72] Mary Sagarino, NBI-7 warns hoarders of flue medicines, sellers of fake meds, Cebu Daily News, 18 January 2022, https://cebudailynews.inquirer.net/420938/nbi-7-warns-hoarders-of-flu-medicines-sellers-of-fake-meds.

Top 20 Pharmaceutical Companies in the Philippines in Terms of Market Data

		MAT Aug 2006	MAT Aug 2007	Growth	Share
	TOTAL MARKET	92,885,882,166	102,892,062,012	11%	100.00%
1	UNITED LAB	19,034,201,069	21,340,371,291	12%	20.74%
2	GLAXO SMITHKLINE	8,543,867,266	8,764,783,647	3%	8.52%
3	PFIZER INC	6,145,728,812	6,937,710,638	13%	6.74%
4	WYETH PHILIPPINES	5,836,145,207	6,367,694,864	9%	6.19%
5	SANOFI-AVENTIS	4,202,109,133	4,458,352,254	6%	4.33%
6	ASTRAZENECA	4,033,147,280	3,857,958,669	-4%	3.75%
7	ABBOTT LAB	3,106,255,279	3,781,479,968	22%	3.68%
8	NOVARTIS	3,351,197,241	3,406,871,792	2%	3.31%
9	ROCHE PHILIPPINES	2,695,489,288	3,250,050,495	21%	3.16%
10	JOHNSON	2,936,337,055	3,217,156,084	10%	3.13%
11	BOE. INGELHEIM	2,764,714,285	2,983,665,652	8%	2.90%
12	BRISTOL-MYERS SQB	2,940,439,895	2,885,443,947	-2%	2.80%
13	BAYER PHARM	2,193,442,530	2,333,639,382	6%	2.27%
14	PASCUAL LABS	1,847,106,515	2,233,335,226	21%	2.17%
15	SCHERING PLOUGH	1,543,215,799	1,658,449,759	7%	1.61%
16	MERCK SHARP&DOHME	1,578,695,824	1,613,525,693	2%	1.57%
17	SERVIER PHILS	1,386,312,437	1,546,608,332	12%	1.50%
18	NATRAPHARM	1,118,177,168	1,508,954,461	35%	1.47%
19	MERCK INC	1,139,948,191	1,153,087,258	1%	1.12%
20	GX INTERNATIONAL	869,120,456	1,058,297,390	22%	1.03%

medicine. In a comparative Patent study on the pharmaceutical industry of Japan and the Philippines, legislative changes in Japanese patent laws during the 1970s resulted in an increase on quality and affordability of Japanese pharmaceuticals, which in turn, helped Japanese pharmaceutical companies to compete with larger nations.[73]

The chart below is taken from the mentioned Japan-Philippine Patent study, wherein it shows that in the Philippines, there are only two local companies (United Laboratories and Pascual Laboratories) competing for a position in the list of top 20 Pharmaceutical companies in the country.[74] This may contribute to the theory that smaller local companies may not be able to compete with the big companies resulting in an oligopoly especially on essential medicine and supplies. From an optimistic perspective on local pharmaceutical companies, when the former is given access to such patents, generics medicine can be produced and said local companies are more able to compete with the larger companies.

Emergency patents may produce a multitude of benefits for the public. It can create access to a supply chain of medicine, especially for those financially-constrained. A case of using emergency patents to deal with diseases is

[73] Remoquillo, supra note 1, at 7.

[74] Remoquillo, supra note 1, at 13.

Remdesivir. The drug is the first therapy drug authorized for emergency use with patients afflicted with COVID-19. The drug is priced at around 3,000USD, but through deals and executions of emergency patents, it resulted in the production of generic medicines of Remdesivir in developing countries.[75] The problem, however, is the supply that consequently resulted in higher prices of the drug which is why Russia issued a compulsory license to allow a Russian company to produce a generic Remdesivir drug at a more competitive price (around 600-1000 USD).[76] This is one of many events wherein governments decided to use emergency patents as a means to obtain more affordable medicine for their constituents. Other examples include the U.S. State of Louisiana (2017) exploring its government use provision to lower the prices of patented Hepatitis treatments to negotiate for cheaper prices.[77] Another is the UK Parliament (2019) debating on the issuance of a compulsory license to purchase generic versions of a drug to treat cystic fibrosis. Summarily, access to drugs is dependent on pricing; something that may save or threaten an individual's life.[78]

These examples merely show the large possibilities of reducing drug prices and providing wider access to alternative and cheaper yet effective medicine through the use of emergency patents. Emergency patents may either be used directly or simply as a negotiating tool to lower prices.[79] This kind of power, however, could be at the expense of the Patent owner and inventors who would see the government "strong-arming" them and their inventions. Such actions could intimidate many inventors, especially smaller entities, and could possibly discourage them from further inventions. This is significant, especially when remuneration of their products are beaten by slow judicial and administrative processes.

From a micro perspective, the lowered costs would contribute greatly to the development of smaller local pharmaceutical companies and consumers in general. The former would be able to offer alternatives to the latter at a more affordable rate and for medical practitioners, they may prescribe the same instead of referring the public to branded or more expensive drugs. In sum, the development and entry of generic medicine would certainly lower prices

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[75] Perehudoff, et. al., Supra note 63, at 3.

[76] Meduza, Russian Authorities issue first-ever compulsory license for controversial coronavirus treatments, 14 January 2021, https://meduza.io/en/feature/2021/01/13/uncertain-benefits

[77] Amy Kapczynski and Aaron Kesselheim, 'Government patent use': a legal approach to reducing drug spending, Health Affairs 2016; 35:791, May 2016.

[78] Jacob Sherkow and Patricia Zettler, Epipen, Patents, and Life and Death, New York University Law Review, 165, August 2021.

[79] Perehudoff, et. al., Supra note 63, at 3.

for those essential medicines while also addressing the treatment of certain prevalent illnesses.

CONCLUSION

Emergency patents are large sources of solutions to mitigate the impact of the COVID-19 pandemic. While the end of the pandemic is not yet in sight, every form of solution is needed to address the medical problems in the country. The utilization of emergency patents opens up access to a larger array of medicaments to tackle the ongoing crisis and the act should be done urgently not only to reduce the number of deaths and cases of COVID but also to justify the use of the legal provisions. Additionally, government agencies should be taking notice of the worth that emergency patents bring in providing solutions to this pandemic and therefore, some form of issuance with regards to the IP Code should be written and released. Their expertise in their field will be needed as under sec. 74 (a) of the IP Code, the executive department is the entity responsible for determining if an invention should be exploited for public interest purposes. Applying the principle, departments such as the DOH, Department of Labor & Employment (DOLE), and the Department of Trade and Industry (DTI) are aware of the medical and economic situation of businesses and employees. Thus, if they deem that there is an urgency to provide medical inventions to private entities, they can easily obtain such through the execution of the emergency patent provisions.

In order to remedy such matters, recommendations include: an updated legislation for an adapted response to the pandemic, an issuance on the utilization of emergency patents, and guidelines or rules on the compensation scheme for the entities who have their inventions exploited due to national emergencies.

Approaching a legislative side on the pandemic, the Philippine Congress should be legislating on other possible means of alleviating the impact of COVID-19. In this case, a law providing for further amendments on the IP code, particularly on the provisions for emergency patents must be created. The content should state the value of emergency patents in creating better access to medicine in response to the pandemic. Furthermore, it should establish protection for the patent owner by specifying their rights as the patent owner of the exploited invention, the basis of their invention's valuation/compensation, and the exploitation period of the medical invention. Some considerations for the valuation should include the quantity of the medicine to be exploited, its purpose, the production costs, and even lost

contracts. Should Congress legislation be improbable, the participation of executive agencies in involving and adapting IP law would be a sound alternative.

The creation of issuances by administrative bodies also has a large and essential role in the utilization of emergency patents. As provided under the IP Code, government use and the special compulsory licenses can be initiated by a government agency (e.g., DOH, DTI, DOLE) in order to answer a national emergency. These government agencies have the most knowledge and experience in their respective fields and, therefore, can best argue and justify the use of emergency patents in response to certain national emergencies. Additionally, they may also be more able in producing the guidelines in compensation, duration, etc., as they have the legal expertise and field knowledge, especially during the pandemic. With the assistance of the IPOPHL, government agencies can easily craft joint-issuances pertaining to emergency patents and pinpoint valuable inventions to utilize against the pandemic.

In organizing the legislative recommendations, see below a proposed brief outline in amending the emergency patents provision:

> **EMERGENCY PATENTS**:
>
> Determination of national emergencies
>
> Government Use
>
> Scope and duration of exploitation
>
> Who may use the invention
>
> Compulsory Licenses
>
> Who may use the invention
>
> Criteria to determine the entity to exploit the invention
>
> Valuation Schemes for Emergency Patent Use
>
> Factors to consider in remunerating inventors
>
> Rights of the patent owner
>
> Negotiation Requirement
>
> Procedure
>
> Applications, appeals, and termination of exploitation
>
> Involvement of the IPO and other relevant government agencies and entities in determination of Just Compensation

On the judiciary's side, courts and quasi-judicial agencies should be wary of the legal implications of granting emergency patents in spite of the probable benefits. Legal issues such as due process and antitrust largely play a big role when it comes to the grant of these patents. For procedure, it is insisted that courts be required to involve relevant government agencies in identifying the proper valuation of an invention so as to observe the constitutional right of an individual to be justly compensated for the use of their property.

Careful study must be done as to the impact of grants as it could economically affect the local pharmaceutical companies. If done wrong, entry of certain drugs could bring anti-competitive actions of larger and more influential pharmaceutical companies. If done right, on the other hand, it may pave the way for easier access to cheaper and more affordable medicine and a more competitive local pharmaceutical industry.

By exempting certain medical inventions for the pursuit of a solution to end the pandemic, a country can encourage the stimulation of innovative ideas and reveal crucial information either about COVID or any national emergency.[80] Jurisprudence, locally and internationally, is rife with justifications on the use of emergency patents and the use of such only further amplifies the field of science and technology. Academics and legal scholars have written plenty of studies on such Patents and its effects are far-reaching. Only time will tell if the government will take action to utilize the available research to expand and refine intellectual property policy. Therefore, it can be safe to say that from socio-political, economic, and legal perspectives, emergency patents may be able to be justified should the right entities act upon it.

[80] Rachel Halpern, National Emergency Exemption: Patents in the Time of Coronavirus, Columbia Undergraduate Law Review Online Journal, June 20. 2020, https://www.culawreview.org/journal/national-emergency-exemption-patents-in -the-time-of-coronavirus.

RECENT JURISPRUDENCE

POLITICAL LAW

IN THE MATTER OF PETITION FOR WRIT OF AMPARO OF VIVIAN A. SANCHEZ

VIVIAN A. SANCHEZ v. PSUPT. MARC ANTHONY D. DARROCA, ET AL.

G.R. No. 242257, 15 June 2021, EN BANC RESOLUTION, (Leonen, J.)

DOCTRINE OF THE CASE

In inferring conclusions involving power deficits in relationships, judges must be careful not to be gender-blind. In denying the Petition for the writ of amparo, the Regional Trial Court echoed respondents' statement that the taking of petitioner's photo and the threats of obstruction of justice thrown at her were part of "the conduct of a logical investigation." It could not see, or it refused to see that these actions, together with the surveillance done, were actual or imminent threats against Sanchez and her children.

Thus, in determining the existence of substantial evidence to support a petition for a Writ of Amparo, judges should also be cognizant of the different power dynamics at play when assessing if there is an actual or future threat to a petitioner's life, security, or liberty. Refusing to acknowledge this might lead to an outright denial of protection to those who need it the most.

FACTS

On October 15, 2019, the Court granted the Petition for a Writ of Amparo after finding that Vivian A. Sanchez (Sanchez) proved with substantial evidence that she and her children became persons of interest and were put under surveillance because of her dead husband's suspected affiliation with the New People's Army (NPA), thereby "creating a real threat to their life, liberty, or security."

Further, the Court pointed out that spousal and filial privileges, which continue to exist after the death of a spouse, protected Sanchez, and her children from inquiries regarding her husband's activities. The Court likewise castigated the

police officers' brusque treatment of Sanchez and their surreptitious surveillance. It was stressed that if they wanted to interview Sanchez, they should have formally done so by holding the interview in an intimidation-free environment and ensuring that she was ably assisted by legal counsel.

Finally, the Court called on the lower courts to be more perceptive in ferreting out the different dynamics at play between police officers and civilians, and to not make their privileged status be the benchmark when rendering judgment.

ISSUE

Did the Court, in the assailed decision, err in granting Sanchez's petition for a Writ of Amparo?

RULING

NO. The totality of Sanchez's evidence convincingly showed that she and her family became subject of unwarranted police surveillance due to their relationship with a suspected NPA member resulting in an actual threat to their life, liberty, and security due to the government's unparalleled zeal in eradicating communism.

Here, two tiers of power were at play: (1) law enforcer-civilian; and (2) male-female. Specifically, male police officers investigated and monitored Sanchez and her children due to their relationship with an alleged NPA member. Sanchez was targeted because she initially refused to divulge her relationship with her dead husband when she went to the funeral parlor.

In inferring conclusions involving power deficits in relationships, judges must be careful not to be gender-blind. In denying the Petition for the Writ of Amparo, the Regional Trial Court (RTC) echoed the police officers' statement that the taking of Sanchez's photo and the threats of obstruction of justice thrown at her were part of "the conduct of a logical investigation." It could not see, or it refused to see that these actions, together with the surveillance done, were actual or imminent threats against Sanchez and her children.

Moreover, in rendering judgment, judges must not impose a standpoint viewed from their implicit status in society. They must look beyond their status as well-connected people who can assert themselves against men in uniform and who have no filial relation to one tagged as a communist. By ignoring Sanchez's not so

unique predicament as the spouse of a labeled communist, the RTC created standards that would deny protection to those who need it most.

Thus, in determining the existence of substantial evidence to support a petition for a Writ of Amparo, judges should also be cognizant of the different power dynamics at play when assessing if there is an actual or future threat to a petitioner's life, security, or liberty. Refusing to acknowledge this might lead to an outright denial of protection to those who need it the most.

SOCIAL SECURITY SYSTEM *v.* COMMISSION ON AUDIT

G.R. No. 217075, 22 June 2021, *EN BANC*, (Rosario, *J.*)

DOCTRINE OF THE CASE

In ruling that only rank-and-file employees are entitled to the benefits and/or incentives arising from the execution of the CNA and the high-level employees who are not parties-in-interest to the CNA are not entitled thereto, the COA applied different laws and regulations.

Allowances, honoraria, and other fringe benefits which may be granted to government employees shall be subject to the approval of the President as stated in Section 5 of Presidential Decree No. 1597. In turn, Section 3 of Executive Order No. 180 s. 1987, states that high-level employees, whose function as normally considered as policy-making or managerial or whose duties are of a highly confidential nature shall not be eligible to join the organization of rank-and-file government employees. Further, Section 3(b) of Administrative Order No. 103 s. 2004, suspends the grant of new or additional benefits to full-time officials and employees and officials, except CNA Benefits, which are to be given only upon strict compliance with PSLMC Resolution No. 4 s. 2002 and PSLMC Resolution No. 2 s. 2003. In turn, the PSLMC Resolutions 4 and 2 provide for the grant of CAN benefits only to rank-and-file employees of government-owned and controlled corporations, government financial institutions, national government agencies, local government units, and state universities and colleges. Finally, Section 4.2 of Department of Budget and management (DBM) Budget Circular 2006-1 defines rank-and-file employees as those who are not managerial employees; not coterminous employees; and not highly confidential employees.

Taking all the foregoing provisions together, high-level managerial and confidential employees are not entitled to CNA benefits because they cannot become members of the negotiating unit. Moreover, the Court found that the grant of "counterpart" CNA incentives in the fixed amount of PHP 20,000.00 is contrary to Section 5.6 of DBM Budget Circular No. 2006-1 insofar as the same prescribes that no incentive amount shall be predetermined in the CNAs since the amount of incentive ought to be dependent on the cost-cutting measures specified under the CNA or its supplements.

FACTS

The Social Security Commission (SSC) issued Resolution No. 259, Series of 2005, granting the following:

(1) P20,000.00 Collective Negotiation Agreement (CNA) incentive to each Social Security System (SSS) employee covered within the collective negotiation unit; and
(2) Counterpart benefit to the CNA Incentive (counterpart CNA benefit) of equivalent amount to SSS personnel who are not covered by the collective negotiating unit, which include confidential, coterminous, and contractual employees, lawyers, and executives.

On post-audit, the SSS Supervising Auditor, under a Notice of Disallowance (ND), disallowed the above the counterpart CNA benefit for violation of Section 3, Paragraph (b) of Administrative Order No. 103 and Section 3 of Executive Order No. 180. These provisions prohibit the grant of CNA to high-level and confidential employees and to those who are not eligible to join the organization of rank-and-file government employees for purposes of collective negotiation, since collective negotiation (CN) benefits arise out of membership in the collective negotiation unit.

The SSS appealed the disallowance to the Legal Services Sector (LSS) of the Commission on Audit (COA). However, LSS denied the same, holding that only rank-and-file employees are entitled to the benefits and/or incentives arising from the execution of the CNA, and high-level employees, who are not considered party-in-interest to the CNA, are not entitled thereto.

The SSS filed a petition for review before the COA Commission Proper *En Banc* which denied the SSS' petition for lack of merit and affirming the decision of the LSS.

ISSUES

(1) Was the instant petition timely filed?
(2) Did the COA commit grave abuse of discretion in denying SSS' motion for reconsideration through the assailed notice?
(3) Is the disallowance of the grant of CNA incentives to non-members of the negotiating unit proper?

RULING

(1) **NO.** Section 3, Rule 64 of the Rules of Court (ROC) provides that petition shall be filed within thirty (30) days from notice of the judgement

or final order, or resolution sought to be reviewed. The filing of a motion for new trial or reconsideration of said judgement or final order or resolution, if allowed under the procedural rules of the Commission concerned, shall interrupt the period herein fixed. If the motion is denied, the aggrieved party may file the petition within the remaining period, but which shall not be less than five (5) days in any event, reckoned from notice of denial.

SSS admits that the COA Decision was promulgated on May 8, 2014, and it received a copy thereof on May 15, 2014. Thus, the 30 day-period should have ended on June 14, 2014. However, following Section 3, Rule 64 of the Rules Court, the period was interrupted when SSS filed a motion for reconsideration (MR) on June 11 2014, leaving three (3) days which extended to five (5) days by the same Rule within which to file this petition.

Since SSS received a copy of the Notice denying its MR on February 4, 2015, it had five (5) more days from said date, or until February 9, 2015 to file its petition before the Court. However, the record shows that SSS filed its petition only on March 20, 2015 or 39 days after the last day of filing. Thus, there is no dispute that SSS belatedly filed the instant petition before the Court.

(2) **NO.** COA Resolution No. 2013-018 amending Section 12, Rule X of the 2009 Revised Rules of Procedure of the COA, prescribes the format of the Notice when the COA Commission Proper denies a MR.

SSS' stance on rejecting the Notice officially prescribed by the COA Rules of Procedure, yet conveniently adopting a mere letter, dated March 12, 2015, as the reckoning point of the period to file a petition before the Court highlights its awareness that when it filed the instant petition on March 20, 2015, which was filed beyond the 30-day reglementary period prescribed in Rule 64 of the ROC.

(3) **YES.** In Madera *v.* Commission on Audit, *et al.,* the Court stated that the Constitution vests the broadest latitude in the COA in discharging its role as the guardian of public funds and properties. In recognition of such constitutional empowerment, the Court has generally sustained the

COA's decisions or resolutions in deference to its expertise in the implementation of the laws it has been entrusted to enforce. Thus, the Constitution and the ROC provide the remedy of a petition for Certiorari in order to restrict the scope of inquiry to errors of jurisdiction or to grave abuse of discretion amounting to lack or excess of jurisdiction committed by the COA. In this case, the COA committed no such abuse.

In ruling that only rank-and-file employees are entitled to the benefits and/or incentives arising from the execution of the CNA and the high-level employees who are not parties-in-interest to the CNA are not entitled thereto, the COA applied different laws and regulations.

Allowances, honoraria, and other fringe benefits which may be granted to government employees shall be subject to the approval of the President as stated in Section 5 of Presidential Decree No. 1597. In turn, Section 3 of Executive Order No. 180 s. 1987, states that high-level employees, whose function as normally considered as policy-making or managerial or whose duties are of a highly confidential nature shall not be eligible to join the organization of rank-and-file government employees. Further, Section 3(b) of Administrative Order No. 103 s. 2004, suspends the grant of new or additional benefits to full-time officials and employees and officials, except CNA Benefits, which are to be given only upon strict compliance with PSLMC Resolution No. 4 s. 2002 and PSLMC Resolution No. 2 s. 2003. In turn, the PSLMC Resolutions 4 and 2 provide for the grant of CAN benefits only to rank-and-file employees of government-owned and controlled corporations, government financial institutions, national government agencies, local government units, and state universities and colleges. Finally, Section 4.2 of Department of Budget and management (DBM) Budget Circular 2006-1 defines rank-and-file employees as those who are not managerial employees; not coterminous employees; and not highly confidential employees.

Taking all the foregoing provisions together, high-level managerial and confidential employees are not entitled to CNA benefits because they cannot become members of the negotiating unit. Moreover, the Court found that the grant of "counterpart" CNA incentives in the fixed amount of PHP 20,000.00 is contrary to Section 5.6 of DBM Budget Circular No. 2006-1 insofar as the same prescribes that no incentive

amount shall be predetermined in the CNAs since the amount of incentive ought to be dependent on the cost-cutting measures specified under the CNA or its supplements.

Therefore, the Court found that the COA committed no grave abuse of discretion in upholding the disallowance of the grant of CNA "counterpart" incentives to highly confidential and coterminous employees of the SSS who are not members of the negotiating unit, including lawyers and executives.

ATTY. HOWARD M. CALLEJA, *et al. v.* EXECUTIVE SECRETARY, *ET AL.*

G.R. No. 252578-, 7 December 2021, *EN BANC*, (CARANDANG, *J.*)

DOCTRINES OF THE CASE

Section 1, Article VIII of the 1987 Constitution provides that judicial power includes the duty of the courts of justice not only "to settle actual controversies involving rights which are legally demandable and enforceable," but also "to determine whether or not there has been grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."

The Court found that this case mainly called for the exercise of the Court's expanded judicial power. This is because the issue of the 37 petitions pertains to the constitutionality of the ATA. Moreover, the 37 petitions ascribed grave abuse of discretion amounting to lack or excess of jurisdiction on the part of Congress in enacting a law violating fundamental rights.

Facial challenge is "an examination of the entire law, pinpointing its flaws and defects, not only on the basis of its actual operation to the parties, but also on the assumption or prediction that its very existence may cause others not before the court to refrain from constitutionally protected speech or activities." Jurisprudence also dictates that facial challenges on legislative acts are permissible only if they curtail the freedom of speech and its cognate rights based on overbreadth and the void-for-vagueness doctrine.

The Court granted due course to these consolidated petitions as challenges only in relation to the provisions of the ATA which involve and raise chilling effects on freedom of expression and its cognate rights in the context of actual and not mere hypothetical facts.

Said proviso invaded areas of protected freedoms and is void for vagueness as it has a chilling effect on an average person. Before the protester can speak, he must first guess whether his speech would be interpreted as a terrorist act pursuant to Sec. 4 of R.A. No. 11479 and whether he might be indicted, arrested, and/or detained for it. The clause likewise shifts the burden to the accused in explaining

his intent. It would then allow for law enforcers to take an "arrest now, explain later" approach in the application of the ATA to protesters and dissenters. The vagueness of such provision would likely result in an arbitrary flexing of the government muscle which is equally aversive to due process.

The Court struck down the "Not Intended Clause" as unconstitutional and categorically affirmed that all individuals, in accordance with Section 4 of Article III of the 1987 Constitution, are free to protest, dissent, advocate, peaceably assemble to petition the government for redress of grievances, or otherwise exercise their civil and political rights, without fear of being prosecuted as terrorists under the ATA.

Sec. 4 of the R.A. No. 11479, circumscribes Sec. 10 of R.A. No. 11479, including the act of "voluntarily and knowingly joining any organization, association or group of persons knowing that such organization, association or group of persons is organized for the purpose of engaging in terrorism." There is no disagreement that overt acts of terrorism are clearly defined in Sec. 4 of R.A. No. 11479. Consequently, any ordinary man on the street, would know that Sec. 10 of R.A. No. 11479 pinpoints to organizations whose purpose is to engage in any of the five (5) types of overt acts defined under Sec. 4 of R.A. No. 11479 as terrorism.

The last paragraph of Sec. 10 of R.A. No. 11479 should be read in pari materia with Sec. 4 of R.A. No. 11479 in order to give effect to the Legislature's intent. A statute must be so construed so as to harmonize and give effect to all its provisions whenever possible. Therefore, the "standards" or "guidelines" for which the purpose (of an organization suspected of being formed in view of terrorism) is to be determined are provided in the very definition of terrorism itself which is found in Sec. 4 of the R.A. No. 11479

Even if a compelling state interest exists, a governmental action would not pass the strict scrutiny test if the interest could be achieved in an alternative way that is equally effective yet without violating the freedom of expression and its allied rights.

The Court noted that the first mode of designation is narrowly tailored and the least restrictive means to achieve the objective of the State as it is merely an implementation of the country's standing obligation under international law to enforce anti-terrorism and related measures in accordance with doctrine of

incorporation, whereby the Philippines adopts the generally accepted principles of international law and international jurisprudence as part of the law of the land and adheres to the policy of peace, cooperation, and amity with all nations.

While the State has established a compelling interest, the means employed under the second mode of designation of Sec. 25 of R.A. No. 11479 is not the least restrictive means to achieve such a purpose. This mode of designation does not pass the strict scrutiny test and is equally overboard.

In order to define "designation" by determining its nature, it is necessary to resort to other parts of the ATA by identifying the effects of its issuance. Based on the fourth paragraph of Sec. 25 of R.A. No. 11479 it was deduced that the effect of designation is to subject an individual, group, organization, or association to the AMLC's authority to freeze according to Section 11 of the Terrorism Financing and Prevention Act (TFPSA).

In the case of the AMLC's power to issue twenty (20)-day ex parte freeze orders, it is justified for being a precautionary and provisional measure intended to prevent the greater evil of infliction of massive casualties brought about by terrorism. Under the "principle of effective judicial protection," aggrieved parties are entitled to question the basis of the AMLC's ex parte freeze orders before the CA; provided that the same remedy is pursued within the 20-day period from issuance of such orders. Here, procedural due process is not violated when the deprivation of a right or legitimate claim of entitlement is just temporary or provisional. When adequate means or processes for recovery or restitution are available to a person deprived of a right or legitimate claim of entitlement are in place, everyone is assured that the State — even in the legitimate exercise of police power — cannot summarily confiscate these rights or entitlements without undergoing a process that is due to all.

The Court stated that the counterterrorism measure of proscription was enacted in line with the State's efforts to address the complex issue of terrorism in the country. Therefore, there is no question that there is a compelling State interest or lawful purpose behind proscription.

Likewise, in satisfaction of strict scrutiny and overbreadth, proscription under Sections 26, 27, and 28 of R.A. No. 11479 constitutes a lawful means of achieving the lawful State purpose considering that it provides for the least restrictive means by which the freedom of association is regulated.

A law is deemed unconstitutional under the overbreadth doctrine if it achieves a governmental purpose by means that are unnecessarily broad thus, invading areas of protected freedoms, while the strict scrutiny standard is a two-part test wherein a government act is constitutional only if it achieves a compelling state interest, and that such means is the least restrictive and narrowly tailored to protect such interest.

Sec. 29 of R.A. No. 11479 passes the strict scrutiny standard. It is clear that the state has a compelling interest to detain individuals suspected of having committed terrorism. Based on Senate deliberations, Congress thought that the 3-day maximum period under the HSA was insufficient for purposes of: (1) gathering admissible evidence for a prospective criminal action against the detainee; (2) disrupting the transnational nature of terrorist operations; (3) preventing the Philippines from becoming an "experiment lab" or "safe haven" for terrorists; and (4) putting Philippine anti-terrorism legislation at par with those of neighboring countries whose laws allow for pre-charge detention between 14 to 730 days, extendible, in some cases, for an indefinite period of time.

FACTS

This Court resolves thirty-seven (37) separate petitions all challenging and assailing the constitutionality of Republic Act No. 11479 (R.A. No. 11479), otherwise known as the Anti-Terrorism Act of 2020 (ATA). Signed by President Rodrigo R. Duterte (Duterte) on July 3, 2020, the legislation ultimately repealed Republic Act No. 9372 (R.A. No. 9372), otherwise known as the Human Security Act (HSA) of 2007, and likewise complemented Republic Act No. 9372 (R.A. No. 10168), otherwise known as the "Terrorism Financing Prevention and Suppression Act of 2012."

Both predecessor laws to the ATA were aimed to counter terrorism in the country, but only did little to combat it. Therefore, the need to have a new law to be immediately enacted has been recognized "to address the urgent need to strengthen the law on anti-terrorism and effectively contain the menace of terrorist acts for the preservation of national security and the promotion of general welfare."

Despite the legislature's efforts to pass the law, petitioners primarily assailed the validity and constitutionality of the ATA. Petitioners asserted that Sections 4 to 12 of the ATA, due to their perceived facial vagueness and overbreadth that "purportedly repress free speech." Furthermore, it is argued that the unconstitutionality of the definition of the word "terrorism" and its variants will leave it with "nothing to sustain its existence." Petitioners who defied the constitutionality of the ATA came from different sectors of society inter alia members of party-lists, former and incumbent members of Congress, members of socio-civic and non-governmental organizations, members of Indigenous Peoples' (IPs) groups, Moros, journalists, taxpayers, registered voters, members of the Integrated Bar of the Philippines (IBP), students, and members of the academe.

In the case at bar, the Court exerted effort in elucidating several petitions to demonstrate the petitioners' legal standing and how the enactment of the ATA personally affected them. One of the petitions mentioned was that of Carpio, et al. v. Anti-Terrorism Council, et al., which is led by two (2) former members of the Judiciary, former Senior Associate Justice Antonio Carpio and former Associate Justice and Ombudsman Conchita Carpio-Morales. The petition has primarily asserted that they would sustain direct injury upon passing the law for they are staunch activists and critics of the Duterte administration.

Another petition that was mentioned by the Court was the Rural Missionaries of the Philippines (RMP), who alleged that the Anti-Money Laundering Council (AMLC) caused the freezing of five (5) bank accounts belonging to the RMP-Northern Mindanao Sub-Region and RMP-Metro Manila "for allegedly being connected to terrorism under R.A. No. 10168."

Petitioner Sisters' Association in Mindanao (SAMIN) also asserted that its members experienced harassment due to their critical stand against the militarization of Moro and Lumad communities. Further, one of its members, Sr. Emma Cupin, MSM, is now allegedly facing trumped-up charges of robbery-arson and perjury. This was based on a complaint filed by the military in relation to a purported New People's Army (NPA) attack on a military detachment.

In addition, petitioners averred that the National Task Force to End Local Communist Armed Conflict (NTF-ELCAC), on various occasions, has allegedly identified some of the religious or church groups, who are petitioners in the case, as established by the Communist Party of the Philippines (CPP)/NPA in its social

media accounts. Petitioners assailed that these foregoing instances "demonstrate the credible threat of prosecution they face under the ATA."

Petitioner General Assembly of Women for Reforms, Integrity, Equality, Leadership and Action, Inc. (GABRIELA), another staunch critic of the government, has also averred that "they have been targets of human rights violations perpetuated by state forces and are constant targets of red-baiting and red-tagging." Lastly, alongside the other petitioners, the petition of the members of the academe has also maintained that the ATA would have a destructive chilling effect on academic freedom. According to them, their free thoughts and ideas to open debates and academic discussions on various issues about the government and society would expose them to potential prosecution under the ATA.

Following the passage of the ATA, the Department of Justice (DOJ) has commenced the crafting of the law's implementing rules and regulations (IRR) in August 2020. Succeeding this, the Anti-Terrorism Council (ATC) has automatically adopted the list of designated terrorists by the United Nations Security Council (UNSC) and likewise directed concerned agencies "to impose and implement the relevant sanction measures without delay, from the time of designation made by the UNSC and its relevant Sanctions Committee." Additionally, the ATC has also taken grave measures to implement the ATA, which include designating CPP/NPA and other sixteen (16) organizations associated with the Islamic State and "other Daesh-affiliated groups in the Philippines," ten (10) individuals for their alleged membership in extremist groups, and nineteen (19) other individuals due to their alleged ties with the CPP/NPA, all as terrorists. Similarly, AMLC also issued Sanction Freeze Orders against the CPP/NPA and the Daesh-affiliated groups. Likewise, the ATC issued several resolutions wherein several individuals were designated as terrorists for their alleged membership in extremist groups and/or alleged ties with the CPP/NPA.

Incidentally, two (2) Aetas were arrested in August 2020, during the implementation of the ATA. They were reported to be the first individuals charged in violation of Section 4 of R.A. No. 11479 after allegedly firing at the military, which led to the death of one soldier to the side of the latter. However, in an Order released by the Regional Trial Court (RTC) of Olongapo, it granted the Demurrer of Evidence of the accused and ordered their dismissal on the ground of insufficiency of evidence.

ISSUES

Should the Court grant due course to 35 out of 37 petitions;

Should facial challenge or applied challenge be used in analyzing the ATA;

Is the "Not Intended Clause" in the proviso of Section 4 constitutional;

Is the phrase "organized for the purpose of engaging in terrorism" in the third paragraph of Section 10 constitutional;

Is the first mode of designation under Section 25 of R.A. No. 11479 constitutional;

Is the second mode of designation under Section 25 of R.A. No. 11479 constitutional;

Is the third mode of designation under Section 25 of R.A. No. 11479 constitutional;

Are the provisions on proscription in Sections 26 to 28 of R.A. No. 11479 constitutional; and

Is Section 29 of R.A. No. 11479 on arrest and detention without judicial warrant constitutional.

RULING

YES. The Court gave the petitions due course only in part.

Section 1, Article VIII of the 1987 Constitution provides that judicial power includes the duty of the courts of justice not only "to settle actual controversies involving rights which are legally demandable and enforceable," but also "to determine whether or not there has been grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."

The Court found that this case mainly called for the exercise of the Court's expanded judicial power. This is because the issue of the 37 petitions pertains to the constitutionality of the ATA. Moreover, the 37 petitions ascribed grave abuse of discretion amounting to lack or excess of jurisdiction on the part of Congress in enacting a law violating fundamental rights.

The Court may exercise its power of judicial review upon compliance with the following requisites:

An actual and appropriate case and controversy exists;

A personal and substantial interest of the party raising the constitutional question;

The exercise of judicial review is pleaded at the earliest opportunity; and

The constitutional question raised is the very lis mota of the case.

First, the Court ruled that there is an actual case or controversy that exists when there is a conflict of legal rights, an assertion of opposite legal claims, susceptible of judicial resolution as distinguished from a hypothetical dispute. In this case, the consolidated petitions sufficiently raised concerns regarding freedom of speech, expression, and its cognate rights which only on these bases that the Court ruled upon the constitutionality of the law. As such, the petitions present a permissible facial challenge to the ATA. Furthermore, certain provisions of the ATA have sufficiently shown that there was a credible and imminent threat of injury.

Second, the Court declared that there was a personal and substantial interest that concerns legal standing or the "right of appearance in a court of justice on a given question." The Court found that the petitioners had sufficiently alleged the presence of credible threat of injury for being constant targets of "red-tagging" or "truth-tagging." Furthermore, the Court held that even if some of the petitioners had not come under the actual operation of the ATA, there would still have been no legal standing impediments to grant due course to the petitions because they presented actual facts that also partook a facial challenge in the context of free speech and its cognate rights.

Third, the Court held that the exercise of judicial review of "earliest opportunity" was complied with because the issue of constitutionality was directly filed with the Court at the first instance.

Lastly, the Court found that there was presence of lis mota which means that the Supreme Court will not pass upon a question of unconstitutionality, although properly presented, if the case can be disposed of on some other ground. It further held that lis mota was complied with by the very nature of the constitutional challenge raised by petitioners against the ATA which dealt squarely with the freedom of speech, expression, and its cognate rights. Nevertheless, the Court

dismissed Balay Rehabilitation Center, Inc. v. Duterte and Yerbo v. Offices of the Honorable Senate President and Honorable Speaker of the House of Representative. The Balay Rehabiliation Center, Inc. was dismissed based on the ground of lack of merit since the arguments were hinged on existing laws and not the Constitution. On the other hand, Yerbo was dismissed for being fundamentally flawed both in form and substance.

YES. Facial challenge is "an examination of the entire law, pinpointing its flaws and defects, not only on the basis of its actual operation to the parties, but also on the assumption or prediction that its very existence may cause others not before the court to refrain from constitutionally protected speech or activities." Jurisprudence also dictates that facial challenges on legislative acts are permissible only if they curtail the freedom of speech and its cognate rights based on overbreadth and the void-for-vagueness doctrine.

The Court grants due course to these consolidated petitions as challenges only in relation to the provisions of the ATA which involve and raise chilling effects on freedom of expression and its cognate rights in the context of actual and not mere hypothetical facts.

Section 4 of R.A. No. 11479 consists of two distinct parts: the main part and the proviso. The main part of Sec. 4 of R.A. No. 11479 provides three components. The first component enumerates the conduct which consists of the actus reus of terrorism or the overt acts that constitute the crime. The second component enumerates the purposes of the actus reus or the mens rea. The third component provides for the imposable penalty. In contrast, the proviso purports to allow for advocacies, protests, dissents, stoppages of work, industrial or mass actions, and other similar exercises of civil and political rights to be punished as acts of terrorism if they are "intended to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to public safety." Thus, it is evident that the main part chiefly pertains to conduct, while the proviso innately affects the exercise of the freedom of speech and expression.

The main part of Sec. 4 of R.A. No. 11479 cannot be assailed through a facial challenge as it is evident that the enumeration refers to punishable acts, or those pertaining to bodily movements that produce an effect in the external world, and not speech. The acts constitutive of the crime of terrorism under paragraphs (a) to (e) are clearly forms of conduct unrelated to speech, while the proviso are forms of speech or expression, or are manifestations thereof. Thus, the perceived

vagueness and overbreadth of the main part of Section 4 may be inconsistent with the delimited facial challenge framework as discussed.

Terrorism, as defined in Sec. 4 of R.A. No. 11479, is not impermissibly vague. The Court did not agree that Sec. 4 of R.A. No. 11479 deserved total invalidation due to the perceived vagueness and imprecision of the definition of terrorism as crime. The main part of Sec. 4 of R.A. No. 11479 has three components with the first component providing the actus reus and the second component providing the mens rea. It is from these first two components that the crime of terrorism should be construed.

A textual review of the main part of Sec. 4 of R.A. No. 11479 shows that its first and second components provide a clear correlation and a manifest link as to how or when the crime of terrorism is produced. When the two components of the main part of Section 4 are taken together, they create a valid and legitimate definition of terrorism that is general enough to adequately address the evolving forms of terrorism, but neither too vague nor too broad as to violate due process or encroach upon the freedom of speech and expression and other fundamental liberties.

It is well-settled that penal laws, such as the ATA, inherently have an in terrorem effect which is not reason enough to invalidate such laws. Otherwise, the state may be restricted from preventing or penalizing socially harmful conduct. Moreover, lawmakers have no positive constitutional or statutory duty to define each and every word in an enactment, as long as the legislative will is clear.

In Dans v. People, the Court used a simpler test which consists merely of asking the question: "What is the violation?" Here, petitioners failed to demonstrate that a person of common intelligence can understand that Sec. 4 (a) of R.A. No. 11479 punishes an "act intended to cause death, serious physical injury, or danger to another person." He cannot, under the guise of "vagueness," feign ignorance and claim innocence because the law had not specified, in exacting detail, the instances where he might be permitted to kill or seriously endanger another person to intimidate the government. The same goes for all the other acts listed in Sec. 4 (b) to (e) of R.A. No. 11479 in conjunction with the mens rea components.

A cursory examination of each of the general terms in the main part of Section 4 betrays no reasonable or justifiable basis to hold them as unconstitutionally

vague. Firstly, the Court is not without authority to draw from the various aids to statutory construction, such as the legislative deliberations, to narrowly construe the terms used in the ATA and thus limit their scope of application. Secondly, the meaning of the other terms used in the main part of Section 4 can be found in jurisprudence as well as in dictionaries.

In the same vein, Sec. 4 of R.A. No. 11479 penalizes any of the enumerated acts under subsections (a) to (e) regardless of the stage of execution is not vague. The three stages of execution are defined under Article 6 of the RPC. The Court noted that Article 10 of the RPC shall have supplementary effect to special penal laws, such as the ATA.

Terrorism as defined in the ATA is not overbroad. The language employed in Sec. 4 of R.A. No. 11479 is almost identical to the language used in other jurisdictions. This simply shows that Congress did not formulate the definition of terrorism out of sheer arbitrariness, but out of a desire to be at par with other countries taking the same approach. The Court also recognized that the general wording of the law is a response to the ever-evolving nature of terrorism.

NO. The "Not Intended" clause of Section 4's proviso is unconstitutional under the (1) strict scrutiny test, (2) void for vagueness, and (3) overbreadth doctrines.

The proviso under Sec. 4 of R.A. No. 11479 states that "Provided, That, terrorism as defined in this section shall not include advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights, which are not intended to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to public safety."

Said proviso invaded areas of protected freedoms and is void for vagueness as it has a chilling effect on an average person. Before the protester can speak, he must first guess whether his speech would be interpreted as a terrorist act pursuant to Section 4 and whether he might be indicted, arrested, and/or detained for it. The clause likewise shifts the burden to the accused in explaining his intent. It would then allow for law enforcers to take an "arrest now, explain later" approach in the application of the ATA to protesters and dissenters. The vagueness of such provision would likely result in an arbitrary flexing of the government muscle which is equally aversive to due process.

The "Not Intended Clause" renders the proviso overbroad. Section 4 supposes that the speech that is "intended to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to public safety" is punishable as terrorism. This abridges free expression since this kind of speech ought to remain protected for as long as it does not render the commission of terrorism imminent as per the Branderburg standard, which is the proper standard to delimit the prohibited speech provisions, such as inciting to terrorism, proposal, and threat.

By plainly punishing speech intended for such purposes, the imminence element of the Branderburg standard is discounted as a factor and as a result, the expression and its mere intent, without more, is enough to arrest or detain someone for terrorism. This is a clear case of the chilling of speech.

Lastly, the "Not Intended Clause" also failed the strict scrutiny test. The said test can additionally be used to determine the validity of the clause, being a government regulation of speech. Thus, applying this test, the government has the burden of proving that the regulation is necessary to achieve a compelling state interest; and that it is the least restrictive means to protect such interest or the means chosen is narrowly tailored to accomplish the interest.

In this case, the Government failed to show that said clause passed strict scrutiny. While there appears to be a compelling state interest, such as to forestall possible terrorist activities considering the global efforts to combat terrorism, punishing speech intended "to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to public safety" was not the least restrictive means to achieve the same.

For speech to be penalized, it must pass the Brandenburg standard, which the "Not Intended Clause" completely discounts. Furthermore, there are already provisions that subsume such standard, such as the provision on Inciting to Terrorism. Thus, as it stands, the "Not Intended Clause" only blurred the distinction between terroristic conduct and speech. Hence, the said clause was not narrowly tailored to subserve the said State interest.

Therefore, the Court struck down the "Not Intended Clause" as unconstitutional and categorically affirmed that all individuals, in accordance with

Section 4 of Article III of the 1987 Constitution, are free to protest, dissent, advocate, peaceably assemble to petition the government for redress of grievances, or otherwise exercise their civil and political rights, without fear of being prosecuted as terrorists under the ATA.

NO. The Supreme Court, agreeing with the opinion of Chief Justice (CJ) Gesmundo, ruled that Sec. 4 of the R.A. No. 11479, circumscribes Section 10 of R.A. No. 11479, including the act of "voluntarily and knowingly joining any organization, association or group of persons knowing that such organization, association or group of persons is organized for the purpose of engaging in terrorism." There is no disagreement that overt acts of terrorism are clearly defined in Sec. 4 of R.A. No. 11479. Consequently, any ordinary man on the street, would know that Sec. 10 of R.A. No. 11479 pinpoints to organizations whose purpose is to engage in any of the five (5) types of overt acts defined under Section 4 as terrorism.

A law must not be read in truncated parts and its provisions must be read in relation to the whole law. Every part of the statute must be interpreted with reference to the context. Thus, in construing a statute, courts must take the thought conveyed by the statute as a whole: construe the constituent parts together; ascertain the legislative intent from the whole act; consider each and every provision thereof in the light of the general purpose of the statute; and endeavor to make every part effective, harmonious and sensible.

Accordingly, the last paragraph of Sec. 10 of R.A. No. 11479 should be read in pari materia with Sec. 4 of R.A. No. 11479 in order to give effect to the Legislature's intent. A statute must be so construed so as to harmonize and give effect to all its provisions whenever possible. This is consistent with the principle that every meaning to be given to each word or phrase must be ascertained from the context of the body of the statute since a word or phrase in a statute is always used in association with other words or phrases and its meaning may be modified or restricted by the latter. Therefore, the "standards" or "guidelines" for which the purpose (of an organization suspected of being formed in view of terrorism) is to be determined are provided in the very definition of terrorism itself which is found in Sec. 4 of R.A. No. 11479

YES. Even if a compelling state interest exists, a governmental action would not pass the strict scrutiny test if the interest could be achieved in an alternative way that is equally effective yet without violating the freedom of expression and

its allied rights. Per the provision of the ATA, the first mode of designation pertains to a mechanism of automatic adoption of the UNSC Consolidated List. Here, it was not shown that there is a less restrictive alternative to comply with the State's international responsibility pursuant to UNSC Resolution (UNSCR) No. 1373 and related instruments to play an active role in preventing the spread of the influence of terrorists included in the Consolidated List. Neither was it proven that the first mode of designation imposes burdens more than necessary to achieve the State's articulated interest.

The Court noted that the first mode of designation is narrowly tailored and the least restrictive means to achieve the objective of the State as it is merely an implementation of the country's standing obligation under international law to enforce anti-terrorism and related measures in accordance with doctrine of incorporation, whereby the Philippines adopts the generally accepted principles of international law and international jurisprudence as part of the law of the land and adheres to the policy of peace, cooperation, and amity with all nations. In automatically adopting the designation pursuant to UNSCR No. 1373, the Anti-Terrorism Council (ATC) does not exercise any discretion to accept or deny the listing, and it will not wield any power nor authority to determine the corresponding rights and obligations of the designee. Instead, it merely confirms a finding already made at the level of the UNSC, and affirms the applicability of sanctions existing in present laws. As such, while the ATA mentions only the country's obligations under UNSCR No. 1373, this reference should be understood as reflecting the country's commitments under the UN Charter.

Furthermore, the lack of prior notice and hearing in the process of designation is understandably justified by the exigent nature of terrorism, which is a relatively new global-phenomenon that must be met with commensurate effective response of the Nation-State. Nonetheless, due process is satisfied by an opportunity to be heard as designees will be subsequently notified of their designation in accordance with Rule 6.5 of the IRR. Even further, the Court noted that the UNSC also provides delisting process for those who are designated as terrorist.

Therefore, the first mode of designation under Section 25 of R.A. No. 11479 is constitutional as it is narrowly tailored and the least restrictive means to achieve the objective of the State, especially as there are adequate guidelines in the UNSCR No. 1373.

NO. While the State has established a compelling interest, the means employed under the second mode of designation of Sec. 25 of R.A. No. 11479 is not the least restrictive means to achieve such a purpose. This mode of designation does not pass the strict scrutiny test and is equally overbroad.

Similarly with the first mode, there are underlying compelling State interests and purposes for legislating the second mode of designation. However, the methods used are neither overly restricted nor specifically tailored to the State's compelling interest. The ATC is allowed unrestricted freedom in granting designation petitions based on its own judgment in this second manner of designation. Similarly, there appears to be no adequate criteria to follow when granting or declining such requests. The ATC is left to make its own decision based on a vague interpretation of "the criteria for designation of UNSCR No. 1373," with no more direction.

In addition, there are no adequate procedural safeguards or remedies for an incorrect designation in this regard. In comparison, the first manner of designation with the UNSC provides a system for delisting, which is specified in the UNSCR No. 1373 supplementing resolutions. As previously stated, Rule 6.9 of the ATA IRR recognizes two options for delisting under the first mode of designation. Furthermore, unlike Section 26 of R.A. No. 11479, there is no automatic review provision that applies to designations made under the second manner (on proscription). When the Court considers analogous counterterrorism measures taken by other nations, such as those described above, the lack of a remedy becomes even more apparent.

Aside from the lack of a remedy, there are other viable options that are significantly less intrusive and potentially harmful to protected rights. These include law enforcement authorities adopting an internal watchlist or maintaining a database to track prospective threats, as well as judicial proscription under Sec. 26 of R.A. No. 11479. As previously stated and as will be discussed further below, the effects of designation are nearly identical to those of proscription.

Because this measure has the unintended consequence of stifling free speech and related rights, it should not be implemented based on a decision made by an executive body that lacks adequate criteria and safeguards. In conclusion, the second manner of designation fails to withstand strict scrutiny and overbreadth for the reasons indicated, and is thus illegal.

YES. The ponencia was outvoted by a vote of 8-7. Eight (8) members of the Court, including CJ Gesmundo, voted that the third paragraph of Sec. 25 of R.A. No. 11479 is not unconstitutional. CJ Gesmundo explained that in order to define "designation" by determining its nature, it is necessary to resort to other parts of the ATA by identifying the effects of its issuance.

Based on the fourth paragraph of Sec. 25 of R.A. No. 11479, it was deduced that the effect of designation is to subject an individual, group, organization, or association to the AMLC's authority to freeze according to Section 11 of the Terrorism Financing and Prevention Act (TFPSA). A comparison of the two laws revealed that: 1) The AMLC may issue 20-day ex parte freeze orders; either: (a) motu proprio; (b) upon the ATA's request; or (c) in compliance with UN Security Council resolutions; 2) Pursuant to the "principle of effective judicial protection," parties aggrieved by the aforementioned ex parte freeze order may file a petition with the Court of Appeals (CA) to determine such order's basis; and 3) the properties of designated individuals, organizations, associations, or groups may be the subject of forfeiture proceedings under the TFPSA.

In the case of the AMLC's power to issue twenty (20)-day ex parte freeze orders, it is justified for being a precautionary and provisional measure intended to prevent the greater evil of infliction of massive casualties brought about by terrorism. Under the "principle of effective judicial protection," aggrieved parties are entitled to question the basis of the AMLC's ex parte freeze orders before the CA; provided that the same remedy is pursued within the 20-day period from issuance of such orders. Here, procedural due process is not violated when the deprivation of a right or legitimate claim of entitlement is just temporary or provisional. When adequate means or processes for recovery or restitution are available to a person deprived of a right or legitimate claim of entitlement are in place, everyone is assured that the State — even in the legitimate exercise of police power — cannot summarily confiscate these rights or entitlements without undergoing a process that is due to all.

Even assuming that the aggrieved parties fail to question the basis of the AMLC's ex parte freeze orders before the CA within the 20-day period from issuance of such orders, remedies are still available for the recovery of the use of such frozen assets. Sections 8 and 9 of the Rules on Civil Forfeiture, as made applicable by Section 18 of the TFPSA, affords parties aggrieved by the AMLC's ex parte freeze orders notice as well as opportunity to participate in the forfeiture proceedings. What this essentially means is that aggrieved parties may still have a

chance to assail the basis of freeze orders and to discharge the properties from State custody in their favor.

Furthermore, CJ Gesmundo stated that the power to determine probable cause is not only limited to magistrates of regular courts. Even law enforcers may resort to the determination of probable cause to prevent the effects or direct results of crimes being committed in flagrante delicto. Allowing or requiring law enforcers to determine the presence of probable cause in conducting in flagrante arrests and other preventive measures discourages and puts in check any arbitrariness or potential abuse on the part of State agents. The reason being is that the presence or absence of probable cause may be assailed by aggrieved parties during court proceedings. In this regard, law enforcers as well as statutorily authorized administrative agencies are inherently empowered to abate any nuisance per se.

Lastly, as to an aggrieved party's ability to timely file a petition with the CA to question the basis of an ex parte freeze order, Section 15 of the TFPSA provides a mode of notice for aggrieved parties. This particular provision on publication of the list of designated persons guarantees the due process rights of aggrieved parties to notice and opportunity to be heard. In this regard, an aggrieved party cannot reasonably complain of being denied due process in view of the statutorily mandated publication requirement.

Apart from judicial remedies, parties aggrieved by the AMLC's ex parte freeze order may also pursue the administrative remedy of delisting as provided under Section 22 of the TFPSA. Furthermore, Rule 6 of the IRR of the ATA provides for a detailed administrative procedure as regards delisting and exemption in addition to judicial guarantees. Under Rule 6.9, a designated party may file a verified request for delisting before the ATC within fifteen (15) days from publication of the designation based on specified grounds. The said Rules also ensure that parties aggrieved by the AMLC's ex parte freeze order can ventilate their grievances through an expedient administrative recourse such as delisting or exemption. In effect, such administrative procedure of delisting and exemption complements and strengthens an aggrieved party's due process rights already guaranteed by the "principle of effective judicial protection."

YES. The Court stated that the counterterrorism measure of proscription was enacted in line with the State's efforts to address the complex issue of terrorism in the country. Therefore, there is no question that there is a compelling State

interest or lawful purpose behind proscription. Likewise, in satisfaction of strict scrutiny and overbreadth, proscription under Sections 26, 27, and 28 of R.A. No. 11479 constitutes a lawful means of achieving the lawful State purpose considering that it provides for the least restrictive means by which the freedom of association is regulated.

There are proper procedural safeguards that the DOJ is required to observe to avoid an erroneous proscription. The DOJ, on its own, cannot apply for the proscription of a group of persons, organizations, or associations. Sec. 26 of R.A. No. 11479 requires that the application for proscription shall be with "the authority of the ATC upon the recommendation of the National Intelligence Coordinating Agency (NICA)." Thus, even before an application is filed with the CA, the matter has already passed through three levels of investigation.

The layers of protection ensure that the proscription mechanism under the ATA is narrowly tailored and constitutes the least restrictive means to achieve the compelling state interest. Section 27 of R.A. No. 11479 states that if the CA finds probable cause based only on the DOJ's application to prevent the commission of terrorism, it must issue a preliminary order of proscription within 72 hours of the application's filing. Allowing the issuance of a preliminary order of proscription would not result in the premature labeling of a group as a terrorist without the benefit of a judicial trial, contrary to the restriction on the enactment of bills of attainder, according to the Court.

The phrasing of Sec. 26 of R.A. No. 11479 implies that anyone who may be proscribed under the ATA will be given notice and a hearing, and the procedure will undoubtedly be judicial in nature. As a result, the challenged provision appears to be adequately limited in order to avoid an unwarranted infringement on protected freedoms. Because judicial proscription is such a potent counterterrorism instrument, the controls in place may not be enough to prevent abuse or misuse. Where the Court can properly assess the issues, the courts should not be barred from resolving matters impacting the real and practical application of these laws.

The Court recognized that existing procedural procedures may not be enough for the process of proscription, if and when such an application is made. The Court ruled that it is an appropriate moment to issue certain instructions for the bench, bar, and public to follow when asking for a proscription order under Sec. 26 of R.A. No. 11479. This is in accordance with the Court's rule-making

competence granted under Section 5, Paragraph (5) of Article VIII of the 1987 Constitution.

The Court orders the CA to create factual procedural rules based on the preceding recommendations for submission to the Committee on the Revision of the ROC, as well as final approval and promulgation by the Court En Banc.

YES. The general rule is that no arrest can be made without a valid warrant issued by a competent judicial authority. Warrantless arrests, however, have long been allowed in certain instances as an exception to this rule. The enumeration in Rule 9.2 of the IRR substantially mirrors Section 5, Rule 113 of the ROC.

Section 29 of R.A. No. 11479 is an exception to Article 125 of the RPC wherein the apprehending officer will not incur criminal liability for delay in the delivery of detained persons to the authorities so long as a written authorization from the ATC is secured. As a safeguard, Sec. 29 of R.A. No. 11479 requires the arresting officer to notify the judge of the court nearest the place of the apprehension in writing within 48 hours with the ATC and CHR being furnished copies of said notification.

Thus, the arrest and detention contemplated in Sec. 29 of R.A. No. 11479 did not divert from the rule that only a judge may issue a warrant of arrest. This was confirmed by Rule 9.2 of the ATA IRR which replicated the enumeration in Section. 5, Rule 113 relative to the crimes defined under the ATA. When the circumstances for a warrantless arrest under Sec. 5, Rule 113 of the ROC or Rule 9.2 are not present, the government must apply for a warrant of arrest with the proper court. The written authorization contemplated in Sec. 29 of R.A. No. 11479 does not substitute a warrant of arrest that only the courts may issue.

Sec. 29 of R.A. No. 11479 does not repeal nor overhaul Art. 125 of the RPC. These provisions are not irreconcilably inconsistent. The proper construction is to consider Article 125 of the RPC as the general rule that also applies to ATA-related offenses when the conditions under Sec. 29 of R.A. No. 11479 are not met. The periods under Sec. 29 of R.A. No. 11479 will only become operative once the arresting officer has secured a written authorization from the ATC, in compliance with the requirements of Sec. 29 of R.A. No. 11479.

Since Sec. 29 of R.A. No. 11479 applies exclusively to persons validly arrested without a warrant for terrorism and its related crimes under the ATA and written authorization is secured from the ATC, the 14-day detention period should then be read as supplementing the periods provided under Art. 125 of the RPC.

A law is deemed unconstitutional under the overbreadth doctrine if it achieves a governmental purpose by means that are unnecessarily broad thus, invading areas of protected freedoms, while the strict scrutiny standard is a two-part test wherein a government act is constitutional only if it achieves a compelling state interest, and that such means is the least restrictive and narrowly tailored to protect such interest.

Sec. 29 of R.A. No. 11479 passes the strict scrutiny standard. It is clear that the state has a compelling interest to detain individuals suspected of having committed terrorism. Based on Senate deliberations, Congress thought that the 3-day maximum period under the HSA was insufficient for purposes of: (1) gathering admissible evidence for a prospective criminal action against the detainee; (2) disrupting the transnational nature of terrorist operations; (3) preventing the Philippines from becoming an "experiment lab" or "safe haven" for terrorists; and (4) putting Philippine anti-terrorism legislation at par with those of neighboring countries whose laws allow for pre-charge detention between 14 to 730 days, extendible, in some cases, for an indefinite period of time.

It is worth remembering that the prolonged detention period under Sec. 29 of R.A. No. 11479 is not only for gathering the necessary evidence. Congress also intended it to be a practical tool for law enforcement to disrupt terrorism.

In light of the above, Sec. 29 of R.A. No. 11479clearly satisfies the compelling state interest requirement under the strict scrutiny standard. Moreover, the second prong of strict scrutiny, i.e. , least restrictive means, has also been complied with by Sec. 29 of R.A. No. 11479, if read in conjunction with Sections 30, 31, 32, and 33 of the R.A. No. 11479, because: (1) it only operates when the ATC issues a written authorization; (2) the detaining officer incurs criminal liability if he violates the detainee's rights; and (3) the custodial unit must diligently record the circumstances of the detention.

LABOR LAW AND SOCIAL LEGISLATION

ANICETO OCAMPO, JR. *v.* INTERNATIONAL SHIP CREW MANAGEMENT PHILS., INC. ET AL.

G.R. No. 232062, 26 April 2021, *THIRD DIVISION*, (Leonen, *J.*)

DOCTRINE OF THE CASE

A vessel's Master and Captain who discriminates against crew members based on their national and ethnic origin may be validly dismissed on the ground of serious misconduct. Racial discrimination is a grave issue. Racist attitudes have cost numerous lives and livelihoods in the past as in the present, and they should no longer be tolerated in any way.

Evidently, Ocampo's misconduct is considered serious. His ill treatment of his subordinates is inevitably related to the performance of his duties as Master and Captain, and it shows his unfitness to continue in such capacity. Thus, his dismissal for serious misconduct was done for a just cause.

FACTS

Aniceto Ocampo, Jr. (Ocampo) was hired by International Ship Crew Management, Philippines, Inc. (International Ship Crew Management), as a Master and Captain of MT Golden Ambrosia, an oil and chemical tanker flying under the Singaporean flag.

The International Ship Crew Management deployed Ocampo to Singapore to join the crew of MT Golden Ambrosia. Ocampo boarded the vessel and took command of it. He eventually found infirmities which were left unattended by the vessel's previous captain. Consequently, when the vessel arrived at a port in China, the crew started unloading its chemical cargo, methanol. However, the operation was interrupted when the Chief Officer was called to stop because there was an apparent over-discharge of methanol. It was soon found out that the Chief Officer had a miscalculation. He informed Ocampo of the situation, who then made arrangements to pump the excess methanol back into the vessel.

A week later, Ocampo received an email from the principal's Marine Safety and Crewing Director raising several issues such as the over-discharge of

methanol and his alleged racist attitude towards Myanmar crew members. It was said in the report that Myanmar crew felt extremely depressed, and they did not wish to keep on working. It further stated that the Myanmar crew felt that they have been treated very poorly and in an inhumane manner ever since Ocampo took over the vessel. The report also narrated that Ocampo shouted "profound vulgarities at the Myanmar crew and called them "animals." Moreover, it was discovered that drinking water was not initially provided, and Ocampo instructed that the drinking water for the Myanmar crew members be rationed.

Ocampo was relived from his duty and was repatriated. Subsequently, he filed a Complaint for illegal dismissal against International Ship Crew Management and its director and former president.

The Labor Arbiter (LA) dismissed the complaint as he found that Ocampo was validly terminated from his employment. The National Labor Relations Commission (NLRC) affirmed the LA's finding of valid dismissal. The Court of Appeals (CA) upheld the NLRC's Decision.

ISSUES

(1) Did the CA err in upholding Ocampo's dismissal from service on the ground of serious misconduct due to his racist behavior?
(2) Did the CA err in upholding Ocampo's dismissal from service on the grounds of gross negligence and loss of trust and confidence for the over-discharge of methanol from the vessel?

RULING

(1) **NO.** The elements of *serious misconduct* are:
    (a) The misconduct must be serious;
    (b) It must relate to the performance of the employee's duties showing that the employee has become unfit to continue working for the employer; and
    (c) It must have been performed with wrongful intent.

    Ocampo was dismissed based on serious misconduct due to his racist treatment of his subordinates. Particularly, Ocampo was reported to have called his Myanmar crew members "animals," and worse, he withheld drinking water from them and rationed it out despite its availability. This pattern of discriminatory treatment against the

Myanmar crew members showed that the acts were deliberately done. These incidents also displayed Ocampo's prejudice against his crew members who are of different national and ethnic origin. To refer to other human beings as "animals" reflects the sense of superiority Ocampo has for himself and how he sees others as subhuman.

Racial discrimination is a grave issue. Racist attitudes have cost numerous lives and livelihoods in the past as in the present, and they should no longer be tolerated in any way.

Evidently, Ocampo's misconduct is considered serious. His ill treatment of his subordinates is inevitably related to the performance of his duties as Master and Captain, and it shows his unfitness to continue in such capacity. Thus, his dismissal for serious misconduct was done for a just cause.

(2) **YES**. Jurisprudence also dictates that gross negligence implies want of care in the performance of one's duties, while habitual neglect imparts repeated failure to perform one's duties for a period of time, depending on the circumstances.

Here, the incident only occurred once. The records do not show other instances in the past where Ocampo was remiss in the performance of his duties. Thus, Ocampo is correct to say that he cannot be dismissed on this ground. This singular event cannot be considered as habitual.

The over-discharge of methanol was also used as a ground to dismiss Ocampo for loss of trust and confidence. Managerial employees may be dismissed on this ground if there is some basis for the loss of confidence. Ocampo, as the vessel's Master and Captain, is considered a managerial employee as he is in charge of directing the entire vessel as well as commanding its crew.

However, law and jurisprudence require that the loss of trust and confidence must result from a willful breach of trust. Thus, despite the less restrictive standard applicable to managerial employees on what

factual basis must be adduced, loss of trust and confidence must still be based on a willful breach.

Therefore, it cannot be said that Ocampo acted willfully, intentionally, knowingly, or purposely when the chemical cargo was over-discharged from the vessel. It was never shown that he intentionally disregarded his duty to supervise the Chief Officer in the unloading of the cargo, or that he even intentionally ordered the over-discharge. Certainly, there was carelessness on his part, and it caused financial losses. Nevertheless, such carelessness is not a ground for dismissal. It was not established that it amounted to a willful breach resulting in loss of trust and confidence.

NIPPON PAINT PHILIPPINES, INC. *v.* NIPPON PAINT PHILIPPINES EMPLOYEES' ASSOCIATION

G.R. No. 229396, 30 June 2021, *THIRD DIVISION* (Inting, *J.*)

DOCTRINE OF THE CASE

There is diminution of benefits when the following requisites are present:

(a) The grant or benefit is founded on a policy or has ripened into a practice over a long period of time;

(b) The practice is consistent and deliberate;

(c) The practice is not due to error in the construction or application of a doubtful or difficult question of law; and

(d) The diminution or discontinuance is done unilaterally by the employer.

Here, the Court found that Nippon Paint's grant of additional holiday pay for Eidul Adha to its employees for a period of two (2) years ripened into a company practice. Thus, it can no longer withdraw the grant of such additional holiday pay without violating the principle of non-diminution of benefits. The Court was not convinced that Nippon Paint merely erred in granting the additional holiday pay for Eidul Adha considering that companies such as Nippon Paint have a meticulous financial audit every year. Thus, a yearly audit of its finances particularly in the years 2010 and 2011 as reflected in its financial statements should have made the purported error evident to it. And yet, it did not immediately rectify the purported error as it took two years for it to stop the grant of the additional holiday pay for Eidul Adha. Furthermore, its allegation that it only discovered the error in the payment of additional holiday pay for Eidul Adha is unsubstantiated by any evidence.

FACTS

Nippon Paint Philippines, Inc. (Nippon Paint) and Nippon Paint Philippines Employees Association (NIPPEA) entered into a Collective Bargaining Agreement (CBA) which provided that Nippon Paint agreed to pay all of its employees their holiday remuneration pay every year on regular holidays listed therein. In 2009, Republic Act No. 9849 (R.A. No. 9849) was enacted into law declaring the celebration of *Eidul Adha* as a regular holiday.

Nippon Paint employees received their holiday pay for the enumerated regular holidays in 2010 and 2011, including an additional holiday pay for the *Eidul Adha*. However, upon the execution of a new CBA in 2012, the *Eidul Adha* was

not mentioned as one of the regular holidays. NIPPEA argued that consistent with the company practice, the employees were entitled to 200% of their regular daily rate for regular holidays, if unworked, and 300%, if worked. It claimed that the additional pay for the *Eidul Adha* has ripened into a company practice which Nippon Paint could no longer recover as it would be arbitrary, illegal, and tantamount to diminution of benefits.

The Voluntary Arbitrator (VA) ruled that the overpayment made by reason of payroll system error cannot be considered as a voluntary employer practice. The VA also noted that the 2007 CBA did not state that future regular holidays shall be automatically included in the list of holidays therein, and that being excluded from the list *Eidul Adha* cannot be deemed subsumed thereto. NIPPEA filed a Petition for Review before the Court of Appeals (CA).

The CA granted the petition and considered as company practice Nippon Paint's grant of an additional holiday pay for the *Eidul Adha* to its employees in addition to what was mandated by law. It declared that, as a rule, Nippon Paint employees have a vested right over the existing benefit which cannot be reduced, diminished, discontinued, or eliminated by the company.

ISSUE

Are Nippon Paint employees entitled to additional 100% pay in 2012 and 2013 for the *Eidul Adha* holiday?

RULING

YES. Article 100 of the Labor Code on the principle of non-diminution of benefits provides that employees have a vested right over existing benefits voluntarily granted to them by their employer. Any benefit and supplement being enjoyed by the employees cannot be reduced, diminished, discontinued, or eliminated by the employer.

There is diminution of benefits when the following requisites are present:

(a) The grant or benefit is founded on a policy or has ripened into a practice over a long period of time;
(b) The practice is consistent and deliberate;
(c) The practice is not due to error in the construction or application of a doubtful or difficult question of law; and

(d) The diminution or discontinuance is done unilaterally by the employer.

Here, the Court found that Nippon Paint's grant of additional holiday pay for *Eidul Adha* to its employees for a period of two (2) years ripened into a company practice. Thus, it can no longer withdraw the grant of such additional holiday pay without violating the principle of non-diminution of benefits. The Court was not convinced that Nippon Paint merely erred in granting the additional holiday pay for *Eidul Adha* considering that companies such as Nippon Paint have a meticulous financial audit every year. Thus, a yearly audit of its finances particularly in the years 2010 and 2011 as reflected in its financial statements should have made the purported error evident to it. And yet, it did not immediately rectify the purported error as it took two years for it to stop the grant of the additional holiday pay for *Eidul Adha*. Furthermore, its allegation that it only discovered the error in the payment of additional holiday pay for *Eidul Adha* is unsubstantiated by any evidence.

The Court found as immaterial to the case the fact that *Eidul Adha* was not included in the 2012 CBA's list of regular holidays for which Nippon Paint's employees would receive additional holiday pay. The source of the entitlement of its employees to the subject additional benefit is not the CBA but company practice. All told, the Court found that its payment of additional holiday pay for *Eidul Adha* in favor of its employees has ripened into a company practice which can no longer be withdrawn by Nippon Paint. Thus, Nippon Paint has the obligation to pay its employees additional holiday pay for *Eidul Adha*.

CIVIL LAW

AMADEA ANGELA K. AQUINO v. RODOLFO C. AQUINO and ABDULAH C. AQUINO

G.R. No. 208912, 07 December 2021, *EN BANC*, (Leonen, *J.*)

RODOLFO C. AQUINO v. AMADEA ANGELA K. AQUINO

G.R. No. 209018, 07 December 2021, *EN BANC*, (Leonen, *J.*)

DOCTRINE OF THE CASE

A child whose parents did not marry each other can inherit from their grandparent by their right of representation, regardless of the grandparent's marital status at the birth of the child's parent. The Court abandoned the presumption that nonmarital children are products of illicit relationships or that they are automatically placed in a hostile environment perpetrated by the marital family. The Court is not duty bound to uncritically parrot archaic prejudices and cruelties, to mirror and amplify oppressive and regressive ideas about the status of children and family life. The best interest of the child should prevail.

The Court adopts a construction of Art. 992 of the Civil Code that makes children, regardless of the circumstances of their births, qualified to inherit from their direct ascendants-such as their grandparent-by their right of representation. Both marital and nonmarital children, whether born from a marital or nonmarital child, are blood relatives of their parents and other ascendants.

Here, Angela claims to be a nonmarital child of Arturo, who was a marital child of Miguel Aquino, Angela's grandparent. Angela seeks to inherit from the estate of Miguel through her right of representation, hence, Article 982 of the Civil Code—which does not make any distinctions or qualifications as to the birth status of the "grandchildren and other descendants"—shall apply. However, the application of Article 982 does not automatically give Angela the right to inherit from Miguel's estate. Angela must still prove her filiation.

FACTS

Miguel Aquino (Miguel) died intestate leaving personal and real properties. The estate of his first wife, Amadea Aquino (Amadea), was already settled. Miguel was survived by: (1) Enerie Aquino, his second wife; (2) Abdulah Aquino (Abdulah)

and Rodolfo Aquino (Rodolfo), his sons with Amadea; and (3) the heirs of Wilfredo Aquino, his son with Amadea who also died earlier. Miguel was also predeceased by another son with Amadea, Arturo Aquino (Arturo).

On July 2, 2003, Amadea Angela Aquino (Angela) moved that she be included in the distribution and partition of Miguel's estate. She alleged that she was Arturo's only child as evidenced by a hospital Certification stating that she was Arturo and Susan Kuan's daughter.

Angela stated Arturo died before she was born on October 9, 1978. While her parents were not married, they did not suffer from any impediment to marry. Her parents were planning to marry before Arturo died.

Angela further claimed that her grandfather, Miguel, took care of her mother's expenses during her pregnancy with her. Angela also lived with her mother and the Aquino family at their ancestral home. Since her birth, her father's relatives had continuously recognized her as Arturo's natural child. Abdulah, her father's brother, was even her godfather. In support of this, Angela presented her baptismal certificate stating that she was Arturo's daughter.

Angela even claimed that Miguel provided for her needs and supported her education. Miguel also further instructed the distribution of his properties, wherein Angela was among the heirs who would receive portions of Miguel's estate. Miguel gave her a commercial lot, which rentals were now paid to her.

Later, Angela filed a Motion for Distribution of Residue of Estate or for Allowance to the Heirs. She alleged that as Arturo's natural child, she has a legal right to a monthly allowance like those given to Miguel's other heirs.

The Regional Trial Court (RTC) granted Angela's motions. Rodolfo filed a petition for certiorari before the Court of Appeals (CA) which was denied. Meanwhile, Abdulah appealed the RTC's orders before the CA, claiming that Angela failed to prove her filiation and, in any case, Angela could not inherit from Miguel ab intestato. The CA rendered a decision in favor of Abdulah.

ISSUES

(1) Can Angela, an alleged nonmarital child of Miguel's marital child, inherit from her grandfather's estate?

(2) Can Angela automatically inherit from Miguel's estate?

RULING

(1) **YES**. Intestate succession is based on the decedent's presumed will. Article 992 of the Civil Code assumes that the decedent's disposition of their property would not have included any nonmarital children, due to a supposed hostility between the marital family and the nonmarital child because the latter was the outcome of an extramarital affair.

However, a nonmarital child is not defined that way. Nonmarital children or "illegitimate children" as used under Article 165 of the Family Code are "children conceived and born outside a valid marriage." The phrase "outside a valid marriage" does not necessarily mean an extramarital affair. Parents may choose not to get married despite having no legal impediment to marry.

If there is a legal impediment, it does not necessarily follow that the impediment is that either or both parents are married to another person. It is entirely possible that one or both of them are below marriageable age. Another reason why a child could have been born "outside a valid marriage" is because their mother was a victim of sexual assault who did not marry the perpetrator. There are also times when the father of an unborn child may have died before being able to marry the child's mother, as what has been alleged in Angela's case.

Children born from these circumstances are also considered "illegitimate." Yet, there may be no "antagonism or incompatibility," "hate," or "disgraceful looks" to speak of. If Art. 992 of the Civil Code merely recognizes existing conditions, then it should be construed to account for other circumstances of birth and family dynamics.

The Court abandoned the presumption that nonmarital children are products of illicit relationships or that they are automatically placed in a hostile environment perpetrated by the marital family. The Court is not duty bound to uncritically parrot archaic prejudices and cruelties, to mirror and amplify oppressive and regressive ideas about the status of children and family life. The best interest of the child should prevail.

The Court adopts a construction of Art. 992 of the Civil Code that makes children, regardless of the circumstances of their births, qualified to inherit from their direct

ascendants-such as their grandparent-by their right of representation. Both marital and nonmarital children, whether born from a marital or nonmarital child, are blood relatives of their parents and other ascendants.

This interpretation likewise makes Art. 992 of the Civil Code more consistent with the changes introduced by the Family Code on obligations of support among and between the direct line of blood relatives.

Accordingly, when a nonmarital child seeks to represent their deceased parent to succeed in their grandparent's estate, Article 982 of the Civil Code shall apply. The said article provides:
ARTICLE 982. The grandchildren and other descendants shall inherit by right of representation, and if any one of them should have died, leaving several heirs, the portion pertaining to him shall be divided among the latter in equal portions.

The language of Art. 982 of the Civil Code does not make any distinctions or qualifications as to the birth status of the "grandchildren and other descendants" granted the right of representation. Moreover, to allow grandchildren and other descendants, regardless of their birth status, to inherit by right of representation will protect the legitime of the compulsory heir they represent; otherwise, the legitime will be impaired, contrary to protections granted to this legitime in other areas of the law on succession.

This ruling will only apply when the nonmarital child has a right of representation to their parent's share in her grandparent's legitime. It is silent on collateral relatives where the nonmarital child may inherit by themself. The Court is not ruling on the extent of the right of a nonmarital child to inherit in their own right. Those will be the subject of a proper case.

(2) **NO**. The application of Article 982 does not automatically give Angela the right to inherit from Miguel's estate. Angela must still prove her filiation.

Jurisprudence dictates illegitimate children who were still minors at the time the Family Code took effect and whose putative parent died during their minority are given the right to seek recognition under Article 285 of the Civil Code for a period of up to four (4) years from attaining majority age. This vested right was not impaired by the passage of the Family Code.

Hence, Angela, who was not yet born when the Family Code took effect, has the right to prove that she was her father's daughter under Article 285 of the Civil Code within four years from attaining the age of majority. Under Article 402 of the Civil Code, the age of majority is 21 years old. Angela attained majority on October 9, 1999. She had until October 9, 2003 to assert her right to prove her filiation with Arturo. Thus, when she moved to be included in the distribution and partition of Miguel's estate on July 17, 2003, she was not yet barred from claiming her filiation.

However, resolving several factual matters raised in the parties' pleadings and during the oral arguments requires receiving additional evidence, which the Court is not equipped to do. Documents may need to be presented and authenticated; witnesses' testimonies received and examined; and DNA testing ordered and conducted, to determine the truth or falsity of the allegations raised by the parties before the Court. The Court finds it prudent to remand the cases to their court of origin for reception of evidence, in conformity with the legal principles articulated in the present case.

COMMERCIAL LAW

TOTAL OFFICE PRODUCTS, INC. *v.* JOHN CHARLES CHANG, JR., ET AL.

G.R. Nos. 200070-71, 06 December 2021, *EN BANC*, (Inting, *J.*)

DOCTRINE OF THE CASE

The elements of doctrine of corporate opportunity are:

(1) The corporation is financially able to exploit the opportunity;
(2) The opportunity is within the corporate's line of business;
(3) The corporation has an interest or expectancy in the opportunity; and
(4) By taking the opportunity for his own, the corporate fiduciary will be placed in a position inimical to his duties to the corporation.

The Court ruled that even if the incorporation of TOPGOLD, et.al. were with the full knowledge of the members of the Ty Family, this does not equate to consent to the prejudicial transfer and acquisition of properties and opportunities of TOPROS which Chang, through his corporations, has shown to have committed. Indeed, TOPROS was correct in pointing out that the doctrine of "corporate opportunity" applies in the case.

FACTS

Total Office Products, Inc. (TOPROS) filed before the Securities and Exchange Commission (SEC) a Petition for Injunction, Mandatory Injunction, and Damages (With Urgent Motion for Issuance of Writ of Preliminary Attachment), which was later refiled as an Amended Petition for Accounting and Damages with Prayer for the Issuance of a Writ of Preliminary Attachment (Amended Petition) against TOPGOLD Philippines, Inc. (TOPGOLD), Golden Exim Trading and Commercial Corporation (Golden Exim), Identic International Corp. (Identic) (TOPGOLD, *et.al.*), John Charles Chang, Jr. (Chang), Saul Mari Chang, Hector Katigbak (Hector), Cecilia Katigbak (Cecilia), Rosario Sarah Fernando, and Elizabeth Jay (Elizabeth) (Chang, *et.al.*), who are all incorporators of the TOPGOLD, *et.al.*

Spouses Ramon (Ramon) and Yaona Ang Ty (Yaona) (Spouses Ty) wanted to establish a corporation that would be the sole distributor of Minolta

plain paper copiers in the Philippines. Chang, a former employee of Pantrade, Inc., (Pantrade), a company also owned by the Ty Family, was given the duty to manage the new corporation. The Ty Family gave Chang 10% shares in the corporation with the assurance from Chang that he would render competent, exclusive, and loyal service. TOPROS was incorporated with an authorized capital stock of P4,000,000.00. Among the incorporators, Chang was the only one who is not a member of the Ty Family.

The Ty Family elected Chang as President and General Manager and entrusted to him the management and the funds of TOPROS. Meanwhile, Yaona served as Treasurer and Jennifer Ty (Jennifer) stood as Corporate Secretary. Upon Chang's request, Elizabeth, Hector, and Cecilia Katigbak (Cecilia), all Pantrade employees, were transferred to TOPROS.

TOPROS grew into a multi-million enterprise; thus, Spouses Ty increased its authorized capital stock to Pl0,000,000.00 and Chang's share to 20%. TOPROS included in its line of business the distribution of various office equipment and supplies. However, despite its success, no substantial cash dividends were distributed to the stockholders because, according to Chang, the corporation was investing its funds in several real properties in Metro Manila, Visayas, and Mindanao.

The Ty Family sensed irregularities in Chang's dealings when their friends and relatives began questioning the manner in which products and services from TOPROS were issued receipts and vouchers from TOPGOLD, *et.al.* The Ty Family requested Chang to return all corporate records of TOPROS. However, Chang offered to buy them out of their interest at TOPROS. This prompted the Ty Family to conduct an investigation which revealed that Chang, *et.al.* incorporated the TOPGOLD, *et.al.* to siphon the assets, funds, goodwill, equipment, and resources of TOPROS. According to TOPROS, Chang used its properties in organizing the TOPGOLD, *et.al.* and obtained opportunities properly belonging to it and its stockholders to their damage and prejudice. Chang was, thereafter, ousted as Corporate Director and officer of TOPROS.

The Regional Trial Court (RTC) rendered a Decision in favor of TOPROS. The CA reversed and set aside the RTC Decision.

ISSUES

Did Chang violate the "doctrine of corporate opportunity"?

RULING

YES. The elements of doctrine of corporate opportunity are:

(1) The corporation is financially able to exploit the opportunity;
(2) The opportunity is within the corporate's line of business;
(3) The corporation has an interest or expectancy in the opportunity; and
(4) By taking the opportunity for his own, the corporate fiduciary will be placed in a position inimical to his duties to the corporation.

There is no dispute that Chang established TOPGOLD, *et.al.* which were in the same line of business and while still an officer and director of TOPROS. The Articles of Incorporation of Golden Exim and TOPGOLD showed that Chang owned 80% of the Golden Exim shares and 99.76 of the TOPGOLD shares. The General Information Sheet of Identic also showed that Chang owned 65% of Identic.

The service report of Linde, as well as the provisional receipts issued by Golden Exim, showed that Golden Exim entered into a service contract with the same client at the same time that TOPROS was servicing it. TOPGOLD published printed advertisements which were strikingly similar to those previously printed by TOPROS.

Chang, as President and General Manager of TOPGOLD, signed a deed of assignment with Hector as Service and Operations Manager of TOPROS which made it appear that TOPROS assigned its rights under several rental agreements with different entities for the lease of various kinds of office equipment to TOPGOLD. It also authorized the corresponding rental payments on the rental agreements to be paid to TOPGOLD. Furthermore, TOPGOLD used the same address as TOPROS which not only gave it the opportunity to use TOPROS' resources but led the public to believe that they are one and the same entity.

Even if admitted, the circumstances cited by Chang, which suggest of knowledge, tolerance, or even acquiescence of TOPROS to his establishment of the TOPGOLD, *et.al.* which are in the same business as TOPROS, do not amount to the compliance required of Section 34 of the Corporation Code to absolve a director of disloyalty. The law explicitly requires that where a director, by virtue

of his office, acquires for himself a business opportunity which should belong to the corporation, he must account to the latter for all profits by refunding them, unless his act has been ratified by a vote of the stockholders owning or representing at least two-thirds of the outstanding capital stock.

The Court ruled that even if the incorporation of TOPGOLD, *et.al.* were with the full knowledge of the members of the Ty Family, this does not equate to consent to the prejudicial transfer and acquisition of properties and opportunities of TOPROS which Chang, through his corporations, has shown to have committed. Indeed, TOPROS was correct in pointing out that the doctrine of "corporate opportunity" applies in the case.

To determine the exact liability of Chang, however, the instant case should be remanded to the trial court for the reception of additional evidence and the reevaluation of evidence already submitted, guided by the parameters aforementioned. That is, TOPROS as claimant bears the burden of proving the specific business opportunities that gave rise to its claim of damages under Section 34 of the Corporation Code.

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 Court abandoned its earlier rulings that a judicial declaration of absolute nullity of the first and/or second marriages cannot be raised as a defense by the accused in a criminal prosecution for bigamy. The Court held that a judicial declaration of absolute nullity is not necessary to prove a void ab initio prior and subsequent marriages in a bigamy case. Consequently, a judicial declaration of absolute nullity of the first and/or second marriages presented by the accused in the prosecution for bigamy is a valid defense, irrespective of the time within which they are secured.

The parties are not required to obtain a judicial declaration of absolute nullity of a void ab initio first and subsequent marriages in order to raise it as a defense in a bigamy case. The same rule now applies to all marriages celebrated under the Civil Code and the Family Code. Art. 40 of the Family Code did not amend Art. 349 of the RPC, and thus, did not deny the accused the right to collaterally attack the validity of a void ab initio marriage in the criminal prosecution for bigamy.

However, if the first marriage is merely voidable, the accused cannot interpose an annulment decree as a defense in the criminal prosecution for bigamy since the voidable first marriage e is considered valid and subsisting when the second marriage was contracted. The crime of bigamy, therefore, is consummated when the second marriage was celebrated during the subsistence of the voidable first marriage. The same rule applies if the second marriage is merely considered as voidable.

Applying the foregoing, Pulido may validly raise the defense of a void ab initio marriage in the bigamy charge against him. In this case, while Pulido and Arcon's marriage contract bears a marriage license number issued in 1983, there is doubt as to the fact of its existence and issuance as per the certification dated in 2008 issued by the Civil Registrar which essentially affects the validity of their marriage. Thus, there is a reasonable doubt whether indeed Pulido and Arcon had a marriage license when they entered into marriage in 1983. 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, and the subsequent judicial declaration of nullity of Pulido and Arcon's marriage, the prosecution failed to prove that the crime of bigamy is committed. Therefore, the acquittal of Pulido from the bigamy charge is warranted.

FACTS

In 1983, Luisito Pulido (Pulido) married Nora Arcon (Arcon) in a civil ceremony in Cavite, and they lived together until 2007 when Pulido stopped going home to their conjugal dwelling. Pulido admitted that he was having an affair with Rowena Baleda (Baleda). Arcon also learned that Pulido and Baleda entered into a marriage in 1995. Thus, Arcon charged Pulido and Baleda with Bigamy.

In their defense, Pulido insisted that he cannot be held criminally liable for bigamy because both his marriages were null and void. He claimed that his marriage with Arcon in 1983 is null and void for lack of a valid marriage license, while his marriage with Baleda is null and void for lack of a marriage ceremony. Meanwhile, Baleda countered that she only knew of Pulido's prior marriage in April 2007; that before the filing of the bigamy case, she had already filed a petition to annul her marriage with Pulido; and that in a decision the Regional Trial Court (RTC) declared her marriage with Pulido null and void for being bigamous.

The RTC convicted Pulido of bigamy and acquitted Baleda. The Court of Appeals (CA) affirmed the RTC Decision. The CA held 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 and without first having obtained a judicial declaration of the nullity of the prior marriage with Arcon. The CA anchored its ruling on Article 40 of the Family Code which requires one to first secure a judicial declaration of nullity of marriage prior to contracting a subsequent marriage. It held that Article 40 applies even if the marriage of Pulido with Arcon was governed by the Civil Code. The CA also ruled that the subsequent judicial declaration of the second marriage for being bigamous in nature does not bar the prosecution of Pulido for the crime of bigamy as jurisprudence dictates that one may still be charged with bigamy even if the second marriage is subsequently declared as null and void so long as the first marriage was still subsisting during the celebration of the second marriage.

ISSUES

(1) Does Article 40 of the Family Code have retroactive application?
(2) Does the subsequent declaration of nullity of the first and second marriage constitute a valid defense in bigamy?
(3) Is a judicial declaration of nullity of marriage necessary to establish the invalidity of a void *ab initio* marriage in a bigamy prosecution?

RULING

(1) **YES.** Article 40 of the Family Code applies retroactively on marriages celebrated before the Family Code in so far as it does not prejudice or impair vested or acquired rights. Thus, a judicial declaration of nullity is required for prior marriages contracted before the effectivity of the Family Code, but only for purposes of remarriage.

Prior to the effectivity of the Family Code, the trend of jurisprudence held that a void *ab initio* marriage can be raised as a defense in a bigamy case even without a judicial declaration of its nullity. When both the prior and subsequent marriages were contracted prior to the effectivity of the Family Code, a void *ab initio* marriage can be raised as a defense in a bigamy case even without a judicial declaration of its nullity. Nonetheless, the Court recognized that an action for nullity of the second marriage is a prejudicial question to the criminal prosecution for bigamy.

However, Pulido's first marriage with Arcon was contracted in 1983 or before the effectivity of the Family Code while his second marriage with Baleda was celebrated in 1995, during the effectivity of the said law. Pulido assailed the retroactive application of Article 40 of the Family Code on his case which required him to obtain a judicial declaration of absolute nullity before he can contract another marriage.

When the prior marriage was contracted prior to the effectivity of the Family Code while the subsequent marriage was contracted during the effectivity of the said law, the Court recognizes the retroactive application of Art. 40 of the Family Code but only in so far as it does not prejudice or impair vested or acquired rights. The Court declared in *Atienza v. Brillantes, Jr.,* and reiterated in *Jarillo* and in *Montanez v. Cipriano* that Art. 40 of the Family Code, which is a rule of procedure, should be applied retroactively because Article 256 of the Family Code itself provides that

said "Code shall have retroactive effects insofar as it does not prejudice or impair vested or acquired rights."

Applying the foregoing jurisprudence and the purpose of the provision, the Court held that Art. 40 of the Family Codehas retroactive application on marriages contracted prior to the effectivity of the Family Code but only for the purpose of remarriage, as the parties are not permitted to judge for themselves the nullity of their marriage. In other words, in order to remarry, a judicial declaration of nullity is required for prior marriages contracted before the effectivity of the Family Code. 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 nullity if the first marriage was celebrated before the effectivity of the Family Code.

In this case, 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. Hence, Pulido is required to obtain a judicial declaration of absolute nullity of his prior void *ab initio* marriage but only for purposes of remarriage. As regards the bigamy case, however, Pulido may raise the defense of a void *ab initio* marriage even without obtaining a judicial declaration of nullity.

(2) **YES.** The Court abandoned its earlier rulings that a judicial declaration of absolute nullity of the first and/or second marriages cannot be raised as a defense by the accused in a criminal prosecution for bigamy. The Court held that a judicial declaration of absolute nullity is not necessary to prove a void *ab initio* prior and subsequent marriages in a bigamy case. Consequently, a judicial declaration of absolute nullity of the first and/or second marriages presented by the accused in the prosecution for bigamy is a valid defense, irrespective of the time within which they are secured.

The Family Code specifically provides that certain marriages are void *ab initio* namely, Articles 35, 36, 37, 38, 44, and 53. Void marriages, like void contracts, are inexistent from the very beginning. A void marriage produces no effects except those declared by law concerning the properties of the alleged spouses, co-ownership or ownership through actual joint contribution, and its effect on the children born to void

marriages as provided in Article 50 in relation to Articles 43 and 44 as well as Articles 51, 52, and 54 of the Family Code.

Therefore, its invalidity can be maintained in any proceeding in which the fact of marriage may be material, either direct or collateral, in any civil court between any parties at any time. Jurisprudence under the Civil Code states that no judicial decree is necessary to establish the nullity of marriage; the exception to this is Art. 40 of the Family Code. However, the requirement of Article 40 is merely for purposes of remarriage and does not affect the accused's right to collaterally attack the validity of the void *ab initio* marriage in criminal prosecution for bigamy.

In contrast, voidable marriages under Article 45 of Family Code are considered valid and produces all its civil effects until it is set aside by a competent court in an action for annulment. It is capable of ratification and cannot be assailed collaterally except in a direct proceeding. It is considered valid during its subsistence and only ceases upon finality of the decree of annulment of a competent court.

Clearly, when the first marriage is void *ab initio,* one of the essential elements of bigamy is absent, *i.e.* a prior valid marriage. There can be no crime when the very act which was penalized by law, *i.e.* contracting another marriage during the subsistence of a prior legal or valid marriage, is not present. It is but logical that a conviction for said offense cannot be sustained where there is no first marriage to begin with. Thus, an accused in a bigamy case should be allowed to raise the defense of a prior void *ab initio* marriage through competent evidence other than the judicial decree of nullity.

Apropos, with the retroactive effects of a void ab initio marriage, there is nothing to annul nor dissolve as the judicial declaration of nullity merely confirms the inexistence of such marriage. Thus, the second element of bigamy, *i.e.* that the former marriage has not been legally dissolved or annulled, is wanting in case of void *ab initi*o prior marriage. What Article 349 of the Revised Penal Code (RPC) contemplates is contracting a subsequent marriage when a voidable or valid first marriage is still subsisting. Hence, Art. 349 of the RPC should be construed to pertain only to valid and voidable marriages.

As such, when the first marriage is void *ab initio,* the accused cannot be held liable for bigamy as the judicial declaration of its nullity is not tantamount to annulment or dissolution but merely a declaration of status or condition that no such marriage exists. In the same manner, when the accused contracts a second or subsequent marriage that is void *ab initio,* other than it being bigamous, he/she cannot be held liable for bigamy as the effect of a void marriage signifies that the accused has not entered into a second or subsequent marriage, being inexistent from the beginning. Thus, the element, "that he or she contracts a second or subsequent marriage" is lacking. A subsequent judicial declaration of nullity of the second marriage merely confirms its inexistence and shall not render the accused liable for bigamy for entering such void marriage while the first marriage still subsists. Consequently, the accused in bigamy may validly raise a void *ab intiio* second or subsequent marriage even without a judicial declaration of nullity.

True, a marriage is presumed to be valid even if the same is void *ab initio* without a judicial declaration of its absolute nullity in view of Art. 40 of the Family Code. However, the accused in a bigamy case should not be denied the right to interpose the defense of a void *ab initio* marriage; which effectively retroacts to the date of the celebration of the first marriage.

(3) **NO.** Art. 40 of the Family Code requires a judicial declaration of absolute nullity for purposes of remarriage but not as a defense in bigamy. Art. 40 of the Family Code did not amend or repeal Art. 349 of the RPC.

The case of *Domingo* elucidated the intent behind the provisions of Article 40 of the Family Code. The Court clarified in the said case that the requirement under Article 40, *i.e.* final judgment declaring previous marriage void, need not be obtained only for purposes of remarriage. The word "solely" qualifies the "Final judgment declaring such previous marriage void" and not "for purposes of remarriage."

In effect, judicial declaration of absolute nullity may be invoked in other instances for purposes other than remarriage. Nonetheless, *Domingo* declares that other evidence, testimonial or documentary, may

also prove the absolute nullity of the previous marriage in the said instances. The said case did not specifically include criminal prosecutions for bigamy in the enumeration of instances where the absolute nullity of marriage may be proved by evidence other than the judicial declaration of its nullity. However, the enumeration in *Domingo* did not purport to be an exhaustive list. Moreover, the discussion in the minutes plainly shows that the Civil Law and Family Committees did not intend to deprive the accused or defendant to raise the defense of the absolute nullity of a void *ab initio* marriage in the same criminal proceeding.

Plainly, Art. 40 of the Family Code does not categorically withhold from the accused the right to invoke the defense of a void *ab initio* marriage even without a judicial decree of absolute nullity in criminal prosecution for bigamy. To adopt a contrary stringent application would defy the principle the penal laws are strictly construed against the State and liberally in favor of the accused.

Accordingly, Art. 349 of the RPC and Art. 40 of the Family Code must be harmonized and liberally construed towards the protection of the sanctity of marriage and the presumption of innocence of the accused. With the retroactive effects of a void *ab inito* marriage, the marriage is considered non-existent from the time of the celebration of the marriage.

All told, the Court rules that in criminal prosecutions for bigamy, the accused can validly interpose the defense of a void *ab initio* marriage even without obtaining a judicial declaration of absolute nullity. 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.

Applying the foregoing, Pulido may validly raise the defense of a void *ab initio* marriage in the bigamy charge against him. In this case, while Pulido and Arcon's marriage contract bears a marriage license number issued in 1983, there is doubt as to the fact of its existence and issuance as per the certification dated in 2008 issued by the Civil Registrar which essentially affects the validity of their marriage. Thus, there is a reasonable doubt whether indeed Pulido and Arcon had a marriage license when they

entered into marriage in 1983. 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, and the subsequent judicial declaration of nullity of Pulido and Arcon's marriage, the prosecution failed to prove that the crime of bigamy is committed. Therefore, the acquittal of Pulido from the bigamy charge is warranted.

As to the absolute nullity of the accused's second marriage with Baleda, it was declared void *ab initio* because of being bigamous and not because it lacked any of the essential requisites of a marriage. Hence, Pulido cannot use the same as a defense in his prosecution for bigamy.

PEOPLE OF THE PHILIPPINES *v.* SHERYL LIM

G.R. No. 252021, 10 November 2021, *EN BANC* (Inting, *J.*)

DOCTRINE OF THE CASE

Section 6 (a) and (c) of RA 9208, as amended, respectively provides that the offense of Trafficking in Persons is qualified when the person trafficked is a child and it is committed in large scale, i.e., against three (3) or more persons, individually or as a group.

Here, the prosecution was able to prove that AAA, BBB, CCC, and DDD were children at the time of the commission of the offense. Their minority was sufficiently alleged in the Information and proven during trial. In fact, the prosecution established that Lim had obtained fake birth certificates and identification cards for them to make it appear that they were of legal age. Also, the offense was in large scale because it was committed against more than three (3) persons. Thus, Lim committed the offense of Qualified Trafficking in Persons.

FACTS

Sheryll Lim (Lim) recruited AAA, BBB, CCC, DDD, EEE and FFF (AAA, *et.al.*) to work as entertainers in her videoke bar in San Fernando City, La Union.

AAA, *et.al.* and GGG, a male companion, were lodged at a hotel for their travel to San Fernando City, La Union. Lim provided them with fake birth certificates and identification cards to make it appear that they were of legal age. The next day, they boarded a bus to Cagayan De Oro. Then, they traveled to Manila by ship. Lim, who was with them, paid for their fares. When the ship was nearing Manila, Lim revealed to them that they would not be working as entertainers but as prostitutes so that they could earn more money and pay her back for their travel expenses. AAA, *et.al.* had no choice but to follow Lim because they were in an unfamiliar city and had no money to go back home in Zamboanga del Sur.

As soon as they reached the videoke bar in San Fernando City, La Union, Lim ordered them to start working by displaying themselves in front of the bar to attract male customers. She further instructed them to wear makeup and sexy dresses, sit beside customers, and convince them to pay a bar fine. The bar fine, amounting from P1,000.00 to P1,500.00 for short time, and P2,500.00 if

overnight, would entitle a customer to take out a girl for sex in a nearby motel. Should AAA, *et.al.* refuse, a fine will be imposed upon them ranging from P500.00 to P5,000.00.

AAA, *et.al.* indulged in sex with customers ranging from at least four (4) to eight (8) times. Lim received all the payments of the bar fine but did not give AAA, *et.al.* their respective shares. She explained to them that whatever salary due them would first be considered as payment for the travel, food, and daily expenses.

As for DDD, Lim sold her for an amount of P4,400.00 to an unknown person.

EEE, FFF, and GGG went to the police station to report their situation. A team of police officers immediately proceeded to the videoke bar and rescued three (3) minor girls and arrested Lim. DDD was also rescued.

Lim was charged Qualified Trafficking in Persons before the Regional Trial Court (RTC). The RTC found Lim guilty of Qualified Trafficking in Persons. The Court of Appeals (CA) affirmed the RTC Decision.

ISSUE

Did Lim commit Qualified Trafficking in Persons?

RULING

YES. As defined under Section 3 (a) of Republic Act No. 9208 (R.A. 9208), as amended by Republic Act No. 10364 (R.A. 10364), otherwise known as the Expanded Anti-Trafficking in Persons Act of 2012, trafficking in persons refers to "the recruitment, obtaining, hiring, providing, offering, transportation, transfer, maintaining, harboring, or receipt of persons with or without the victim's consent or knowledge, within or across national borders by means of threat, or use of force, or other forms of coercion, abduction, fraud, deception, abuse of power or of position, taking advantage of the vulnerability of the person, or, the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation which includes at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery, servitude or the removal or sale of organs."

The elements of *trafficking in persons* have been expanded to include the following acts:

(a) The act of "recruitment, obtaining, hiring, providing, offering, transportation, transfer, maintaining, harboring, or receipt of persons with or without the victim's consent or knowledge, within or across national borders;"
(b) The means used include "by means of threat, or use of force, or other forms of coercion, abduction, fraud, deception, abuse of power or of position, taking advantage of the vulnerability of the person, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person;" and
(c) The purpose of trafficking includes "the exploitation or the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery, servitude or the removal or sale of organs."

The prosecution satisfactorily established the presence of all the elements of the offense.

First, it was Lim who recruited AAA, *et.al.* and offered them work as entertainers with the promise of a big amount of money. When they accepted the employment offers, Lim transported them and paid for their travel expenses to San Fernando, La Union to work in her videoke bar.

Second, fraud and deception were present because Lim promised AAA, *et.al.* that they would work as entertainers or waitresses with a big salary. Lim only revealed to them the true nature of their work when the ship they boarded was already about to dock in Manila and AAA, *et.al.* could no longer back out as they had no money and were unfamiliar with the place.

Third, as soon as the AAA, *et.al.* arrived at the videoke bar, Lim ordered them to wear skimpy clothes and display themselves in front of the bar to attract customers. Upon payment of a bar fine, AAA, *et.al.* would indulge in sex with the customers. Thus, the purpose of Lim in recruiting the AAA, *et.al.* was to exploit them by forcing the latter to engage in sex with customers in exchange for money. In other words, Lim recruited the AAA, *et.al.* for prostitution purposes.

Section 6 (a) and (c) of RA 9208, as amended, respectively provides that the offense of Trafficking in Persons is qualified when the person trafficked is a

child and it is committed in large scale, *i.e.*, against three (3) or more persons, individually or as a group.

Here, the prosecution was able to prove that AAA, BBB, CCC, and DDD were children at the time of the commission of the offense. Their minority was sufficiently alleged in the Information and proven during trial. In fact, the prosecution established that Lim had obtained fake birth certificates and identification cards for them to make it appear that they were of legal age. Also, the offense was in large scale because it was committed against more than three (3) persons. Thus, Lim committed the offense of Qualified Trafficking in Persons.

FRANCIS D. MALAKI AND JACQUELINE MAE A. SALANATIN-MALAKI *v.* PEOPLE OF THE PHILIPPINES

G.R. No. 221075, 15 November 2021, *THIRD DIVISION*, (Leonen, *J.*)

DOCTRINE OF THE CASE

Article 180 of the Muslim Code provides that when married in accordance with the Muslim Code's provisions or the Muslim law before the Muslim Code's effectivity, a male Muslim shall not be indicted for bigamy when he subsequently marries. However, Article 3 of the Muslim Code further declares that its provisions shall not be construed to the prejudice of a non-Muslim.

Moreover, Article 186 of the Muslim Code directs its prospective application on past acts and that nothing shall affect their validity or operate to extinguish any right acquired or liability incurred thereby, except as otherwise specifically provided. Acts done prior to the effectivity of the Muslim Code remain governed by the Civil Code, the then pre-existing law of general application. In case of conflict with a general law, the Muslim Code prevails. However, Article 13, Section 2 of the Muslim Code explicitly spells out that the Civil Code governs marriages where either party is non-Muslim, and which were not solemnized in Muslim rites.

Here, the nature, consequences, and incidents of Francis' prior and subsisting marriage to Nerrian remain well-within the ambit of the Civil Code and its counterpart penal provisions in the RPC. Francis' conversion to Islam before or after his marriage with Jacqueline consummates the crime of bigamy. Francis cannot successfully invoke the exculpatory clause in Article 180, considering that the Muslim Code finds no application in his then subsisting marriage with Nerrian, the marriage recognized by law that bars and penalizes a subsequent marriage.

FACTS

Nerrian Maningo-Malaki (Nerrian) and Francis D. Malaki, Sr. (Francis) were married under the religious rites of Iglesia ni Cristo where they begot two (2) children. Francis then left the family home for to find a job and later abandoned his family. Consequently, Nerrian discovered that Francis was cohabiting with Jacqueline Mae A. Salanatin (Jacqueline) and that the two eventually contracted marriage. Hence, Nerrian filed a complaint of bigamy against Jacqueline and Francis.

Francis and Jacqueline admitted that they got married while Francis' marriage to Nerrian was subsisting. However, they claimed that they could not be penalized for bigamy since they converted to Islam prior to their marriage.

The Regional Trial Court (RTC) found Francis and Jaqueline guilty beyond reasonable doubt of bigamy. The Court of Appeals (CA) affirmed the RTC ruling.

ISSUE

Did Francis and Jacqueline commit bigamy despite their conversion to Islam before marriage?

RULING

YES. Under Article 349 of the Revised Penal Code (RPC) provides the elements of bigamy which are as follows:

(a) That the offender has been legally married;
(b) That the first marriage has not been legally dissolved or, in case his or her spouse is absent, the absent spouse could not yet be presumed dead according to the Civil Code;
(c) That he contracts a second or subsequent marriage; and
(d) That the second or subsequent marriage has all the essential requisites for validity.

Francis' and Jacqueline's admissions that: (1) Francis was legally married to Nerrian; (2) the marriage was not dissolved; and (3) they subsequently married despite the subsistence of Francis' marriage to Nerrian sufficiently established all the elements of bigamy proving that Francis and Jacqueline are guilty beyond reasonable doubt.

The Muslim Code applies to marriages, their nature, consequences, and incidents between fellow Muslims, between a male Muslim and a non-Muslim solemnized in Muslim rites, between spouses who both converted to Islam after their marriage, and between a male Muslim and a non-Muslim entered prior to the Code's effectivity. It also penalizes specific offenses relative to marriages.

Article 180 of the Muslim Code provides that when married in accordance with the Muslim Code's provisions or the Muslim law before the Muslim Code's effectivity, a male Muslim shall not be indicted for bigamy when he subsequently

marries. However, Article 3 of the Muslim Code further declares that its provisions shall not be construed to the prejudice of a non-Muslim.

Moreover, Article 186 of the Muslim Code directs its *prospective* application on past acts and that nothing shall affect their validity or operate to extinguish any right acquired or liability incurred thereby, except as otherwise specifically provided. Acts done prior to the effectivity of the Muslim Code remain governed by the Civil Code, the then pre-existing law of general application. In case of conflict with a general law, the Muslim Code prevails. However, Article 13, Section 2 of the Muslim Code explicitly spells out that the Civil Code governs marriages where either party is non-Muslim and which were not solemnized in Muslim rites.

Here, the nature, consequences, and incidents of Francis' prior and subsisting marriage to Nerrian remain well-within the ambit of the Civil Code and its counterpart penal provisions in the RPC. Francis' conversion to Islam before or after his marriage with Jacqueline consummates the crime of bigamy. Francis cannot successfully invoke the exculpatory clause in Article 180, considering that the Muslim Code finds no application in his then subsisting marriage with Nerrian, the marriage recognized by law that bars and penalizes a subsequent marriage.

Furthermore, Article 27 of the Muslim Code which conditionally allows the Muslim husband's subsequent marriage in exceptional cases. The general rule is that a married Muslim cannot marry another. However, in exceptional cases, the male Muslim may do so if "he can deal with them with equal companionship *and* just treatment as enjoined by Islamic law."

Article 162 spells out the formal requisites for the Muslim husband's subsequent marriage:

(a) The Muslim husband must first notify the Shari'a Circuit Court, where his family resides, of his intent to contract a subsequent marriage.
(b) The clerk of court shall then serve a copy to the wife or wives.
(c) If any of them objects, the Muslim Code mandates the constitution of the Agama Arbitration Council, which shall hear the wife.
(d) Ultimately, the Shari'a Circuit Court decides whether to sustain the wife's objection.

Absent the wife's consent or the court's permission, the exculpatory provision of Article 180 shall not apply, since it only exempts from the charge of

bigamy a Muslim husband who subsequently marries "in accordance with the provisions of the Muslim Code."

The Muslim Code classifies marriages with infirmities into *batil* (void)and *fasid* (irregular). However, there is no provision on the status of a male Muslim's subsequent marriage which failed to comply with the formal requisites laid down in Article 162. Renowned Shari'a jurists opine that it is bigamous. As a bigamous marriage, it is declared as void from the beginning by the Family Code and penalized under the RPC.

In any case, even granting that the parties' circumstances fell exclusively within the coverage of the Muslim Code, noncompliance with the condition precedent to subsequent marriages belies their good faith and manifests their intent to circumvent the law.

CHRISTIAN CADAJAS Y CABIAS *v.* PEOPLE OF THE PHILIPPINES

G.R. No. 247348, 16 November 2021, *EN BANC*, (Lopez, *J.*)

DOCTRINE OF THE CASE

The 1987 Constitution highlights the importance of the right to privacy and its consequent effect on the rules on admissibility of evidence, however, one must not lose sight of the fact that the Bill of Rights was intended to protect private individuals against government intrusions. Hence, its provisions are not applicable between and amongst private individuals. Meanwhile, the violation of the right to privacy among private individuals is governed by the provisions of the Civil Code, the Data Privacy Act (DPA), and other pertinent laws, while its admissibility shall be governed by the rules on relevance, materiality, authentication of documents, and the exclusionary rules under the Rules on Evidence.

Here, the photographs and conversations in the Facebook Messenger account that were obtained and used as evidence against Cadajas, which he considers as fruit of the poisonous tree, were not obtained through the efforts of the police officers or any agent of the State. Rather, these were obtained by a private individual. Since the evidence was obtained by a private individual, the admissibility of an evidence cannot be determined by the provisions of the Bill of Rights; it should be the New Civil Code.

The act of AAA cannot be said to have violated Cadajas' right to privacy. Cadajas' expectation of privacy emanates from the fact that his Facebook Messenger account is password protected. However, he never asserted that his Facebook Messenger account was hacked or the photos were taken from his account through unauthorized means. Rather, the photos were obtained from his account because AAA, to whom he gave his password, had access to it. In effect, he has authorized AAA to access the same. Cadajas' reasonable expectation of privacy, in so far as AAA is concerned, had been limited. Thus, there is no violation of privacy to speak of.

FACTS

Christian Cadajas (Cadajas) was then twenty-four (24) years old when he met AAA who was only 14 years old. Cadajas and AAA started a relationship, which was eventually discovered by BBB, AAA's mother. BBB discovered the relationship because AAA frequently borrows her cellphone to access her Facebook account. BBB was able to read AAA's communication with Cadajas

when AAA forgets to log out her account. BBB disapproved of their relationship because AAA was still young. However, Cadajas and AAA continued their romantic relationship.

Later, BBB was disheartened when she read that Cadajas was sexually luring AAA to meet with him in a motel. She confronted Cadajas and told him to stay away because AAA was still a minor. Eventually, BBB was shocked when she read the conversation between Cadajas and AA, wherein Cadajas was coaxing AAA to send him phots of the latter's breast and vagina. AAA relented and sent Cadajas the photos that he was asking. When AAA learned that BBB read their conversation, AAA rushed to delete her messages, but BBB was able to force her to open Cadajas's Facebook account to get a copy of their conversation.

Cadajas was charged for: (1) violation of Section 10, paragraph (a) of Republic Act No. 7610 (R.A. No. 7610), otherwise known as the Special Protection of Children Against Abuse, Exploitation, and Discrimination Act, and; (2) child pornography defined and penalized under Section 4, Paragraph (c), Sub-paragraph (2) of Republic Act No. 10175 (R.A. No. 10175), otherwise known as the Cybercrime Prevention Act, in relation to Section 4, Paragraph (a), Section 3, Paragraphs (b) and (c), Sub-paragraph (5) of Republic Act No.9775 (R.A. No. 9775), otherwise known as the Anti-Child Pornography Act.

The Regional Trial Court (RTC) acquitted Cadajas for violation of Sec. 10, Par. (a) of R.A. 7610, but found him guilty beyond reasonable doubt of the charge regarding child pornography as provided by Sec. 4, par. (c), subparagraph (2) of R.A. No. 10175 in relation to Sec. 4, par. (a), Sec. 3, pars. (b) and (c)(5) of R.A. No. The Court of Appeals (CA) affirmed the RTC judgment.

ISSUES

(1) Did the prosecution's evidence violate Cadajas' right to privacy?
(2) Did the RTC and CA gravely err in convicting Cadajas?
(3) Is the sweetheart doctrine used by Cadajas as a defense tenable?

RULING

(1) **NO.** Article III, Section 3 of the 1987 Constitution expressly recognizes the right to privacy which is defined as "the right to be free from unwarranted exploitation of one's person or from intrusion into one's private activities in such a way as to cause humiliation to a person's ordinary sensibilities." It is the right of an individual "to be free from

unwarranted publicity, or to live without unwarranted interference by the public in matters in which the public is not necessarily concerned." Simply put, the right to privacy is "the right to be let alone."

The 1987 Constitution highlights the importance of the right to privacy and its consequent effect on the rules on admissibility of evidence, however, one must not lose sight of the fact that the Bill of Rights was intended to protect private individuals against government intrusions. Hence, its provisions are not applicable between and amongst private individuals. Meanwhile, the violation of the right to privacy among private individuals is governed by the provisions of the Civil Code, the Data Privacy Act (DPA), and other pertinent laws, while its admissibility shall be governed by the rules on relevance, materiality, authentication of documents, and the exclusionary rules under the Rules on Evidence.

Here, the photographs and conversations in the Facebook Messenger account that were obtained and used as evidence against Cadajas, which he considers as fruit of the poisonous tree, were not obtained through the efforts of the police officers or any agent of the State. Rather, these were obtained by a private individual. Since the evidence was obtained by a private individual, the admissibility of an evidence cannot be determined by the provisions of the Bill of Rights; it should be the New Civil Code.

The pieces of evidence presented by the prosecution were properly authenticated when AAA identified them in open court. The DPA allows the processing of data and sensitive personal information where it relates to the determination of criminal liability of a data subject, such as a violation of R.A. No. 10175 in relation to R.A. No. 9775 and when necessary for the protection of lawful rights and interests of persons in court proceedings, as in this case where the communications and photos sought to be excluded were submitted in evidence to establish AAA's legal claims before the prosecutor's office and the courts.

The act of AAA cannot be said to have violated Cadajas' right to privacy. Cadajas' expectation of privacy emanates from the fact that his Facebook Messenger account is password protected. However, he never asserted that his Facebook Messenger account was hacked or the photos

were taken from his account through unauthorized means. Rather, the photos were obtained from his account because AAA, to whom he gave his password, had access to it. In effect, he has authorized AAA to access the same. Cadajas' reasonable expectation of privacy, in so far as AAA is concerned, had been limited. Thus, there is no violation of privacy to speak of.

(2) **NO.** The elements of *child pornography* are:

(a) That the victim is a child;
(b) That the victim was induced to coerced to perform in the creation or production of any form of child pornography; and
(c) That he said commission of child pornography was performed through visual, audio, or written communication thereof by electronic, mechanical, digital, optical, magnetic, or any other means.

In this case, the Court has concluded that the prosecution was able to establish the said facts beyond reasonable doubt. The Court further ruled that it was uncontroverted that: (a) AAA was only 14 years old at the time of the incident; (b) Cadajas was well-aware of this fact; (c) AAA's mother has already warned Cadajas and told him to stay away from his daughter because the latter was still a minor; (d) Cadajas induced AAA to send him photos of her private parts via Facebook Messenger; and (e) Cadajas was the one who gave specific orders to AAA, by telling her to send nude photos and for her to further spread her legs near the camera so that he can see her bare nether region. Thus, Cadejas' act of inducing AAA to send photos of her breasts and vagina constitutes child pornography and explicit sexual activity.

(3) **NO.** In Bangayan *v.* People, the Court held that the sweetheart doctrine was given serious consideration because the accused and the alleged victim were able to show that the alleged rape incident was consensual and a product of love. Here, the accused and the alleged victim had two (2) children and had lived together even after the filing of the rape charges.

However, in this case, AAA was led to believe that she was in a relationship with Cadajas. Although it was undisputed that AAA was the one who first pursued Cadajas as she had a crush on him. Still, it can be

gleaned that Cadajas took advantage of her innocence and vulnerability. Furthermore, it should also be pointed out that AAA was only 14 years old at the time of the incident while Cadajas was 24 years old. Such huge age disparity placed Cadajas in a stronger position over AAA, which enabled him to wield his will on the latter.

REMEDIAL LAW

ROSS SYSTEMS INTERNATIONAL, INC *v.* GLOBAL MEDICAL CENTER OF LAGUNA, INC.

GR No. 230112 and 230119, 11 May 2021, *EN BANC* (Caguioa, *J.*)

DOCTRINE OF THE CASE

The Court held that the direct recourse of an appeal of a CIAC award on questions of law directly to this Court is the rule, pursuant to Executive No. 1008 (E.O. No. 1008) otherwise known as the Construction Industry Arbitration Law and Republic Act No. 9285 (R.A. No. 9285) otherwise known as Alternative Dispute Resolution of 2004, notwithstanding Rule 43 of the Rules of Court on the CA's jurisdiction over quasi-judicial agencies, and Rule 45 of the Rules of Court in its exclusive application to lower courts. Thus, an appeal from an arbitral award of the CIAC may take either of two tracks, as determined by the subject matter of the challenge.

The CA misapplied its appellate function when it delved into settling the factual matters and modified the mathematical computation of the CIAC with respect to the presence or absence of an outstanding balance payable to RSII. This mathematical re-computation is an error not because the new ruling on judicial review of CIAC awards is applicable to this case (as it applies prospectively) but RSII because the amounts reimbursable to were not specifically raised by the RSII as an issue in its Rule 43 petition before the CA, since the issues raised before it were confined to the release of the amount deducted by GMCLI from its Progress Billing No. 15 to cover the CWT of 2% on payments for the first fourteen (14) Progress Billings. In addition, that the CA made a precipitate factual conclusion of the correctness of RSII's mathematical computation over that of GMCLI after citing gossamer-thin basis perhaps betrays the general impropriety of an appellate court's review of factual findings of more specialized tribunals and quasi-judicial agencies, which were legally ascribed primacy.

FACTS

Global Medical Center of Laguna, Inc. (GMCLI) engaged the services of Ross Systems International, Inc. (RSII) for the construction of its hospital in Laguna, in accordance with a Construction Contract (Contract) which value the entire construction project at ₱248,500,000.00, with 15% of 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, all taxes on the services rendered were for the account of RSII. Finally, an arbitration clause additionally stipulated the parties' resort to arbitration in the event of dispute.

In 2015, RSII submitted to GMCLI its Progress Billing No. 15, which indicated that 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. GMCLI, after its internal audit, 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). Thus, 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 (2) demand letters to GMCLI, claiming that it still had a balance of ₱4,884,778.92 to collect from the latter, under the following allegations: (1) GMCLl's outstanding obligation under Progress Billing No. 15 should have been P8,131,474.83, and not merely P7,043,260.00; and (2) GMCLI should not have belatedly withheld the 2% CWT on Progress Billings Nos. 1 to 14, but 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 Construction Industry Arbitration Commission (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. The CIAC's Final Award contained the following: (1) The CIAC has jurisdiction over the instant case as it involves a construction dispute; (2) GMCLI is not authorized to withhold and remit the CWT of 2% on the cumulative amount based on Progress Billings Nos. 1 to 15; (3) RSII is not entitled to the release of the amount of P4,884,778.92 as the balance for Progress Billing No. 15; (4) GMCLI is not entitled to moral damages; (5) No attorney's fees shall be paid by either party to the other; (6) The cost arbitration shall be shouldered by the Parties in proportion to their respective claims.

Aggrieved, RSII filed a petition for review under Rule 43 of the Rules of Court 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. 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 to RSII's computation for the amount due for Progress Billing No. 15. Both parties filed for a Motion for Reconsideration, which where both denied by the CA.

ISSUE

Was the appeal before the CA under Rule 43 proper?

RULING

NO. The Court held that the direct recourse of an appeal of a CIAC award on questions of law directly to this Court is the rule, pursuant to Executive No. 1008 (E.O. No. 1008) otherwise known as the Construction Industry Arbitration Law and Republic Act No. 9285 (R.A. No. 9285) otherwise known as Alternative Dispute Resolution of 2004, notwithstanding Rule 43 of the Rules of Court on the CA's jurisdiction over quasi-judicial agencies, and Rule 45 of the Rules of Court in its exclusive application to lower courts. Thus, an appeal from an arbitral award of the CIAC may take either of two tracks, as determined by the subject matter of the challenge.

On the one hand, if the parties seek to challenge a finding of law of the tribunal, then the same may be appealed only to this Court under Rule 45 of the Rules of Court. To determine whether a question is one of law which may be brought before the Court under Rule 45 of the of the Rules of Court, it is useful to recall that a question of law involves a doubt or controversy as to what the law is on a certain state of facts, as opposed to a question of fact which involves a doubt or difference that arises as to the truth or falsehood of facts, or when the query necessarily calls for a review and reevaluation of the whole evidence, including the credibility of witnesses, existence of specific surrounding circumstances, and the decided probabilities of the situation. The test here is not the party's characterization of the question before the Court, but whether the

Court may resolve the issue brought to it by solely inquiring as to whether the law was properly applied and without going into a review of the evidence.

On the other hand, if the parties seek to challenge the CIAC's finding of fact, the same may only be allowed under either of two premises, namely assailing the very integrity of the composition of the tribunal, or alleging the arbitral tribunal's violation of the Constitution or positive law, in which cases the appeal may be filed before the CA on these limited grounds through the special civil action of a petition for certiorari under Rule 65 of the of the Rules of Court.

Further, the resort to a petition for certiorari under Rule 65 of the of the Rules of Court is confined to assailing the integrity of the arbitral tribunal based on any of the aforementioned factual scenarios (e.g., corruption, fraud, evident partiality of the tribunal), or the constitutionality or legality of the conduct of the arbitration process and may not remain unqualified as to embrace other badges of grave abuse. The design and intent of the relevant laws on judicial review of CIAC arbitral awards do not empower the CA to look into the factual findings of the CIAC apart from the foregoing circumscribed grounds, lest the authoritative and conclusive factual findings of the CIAC be nevertheless defeated, albeit via a petition other than Rule 43 of the of the Rules of Court.

The CA misapplied its appellate function when it delved into settling the factual matters and modified the mathematical computation of the CIAC with respect to the presence or absence of an outstanding balance payable to RSII. This mathematical re-computation is an error not because the new ruling on judicial review of CIAC awards is applicable to this case (as it applies prospectively) but RSII because the amounts reimbursable to were not specifically raised by the RSII as an issue in its Rule 43 petition before the CA, since the issues raised before it were confined to the release of the amount deducted by GMCLI from its Progress Billing No. 15 to cover the CWT of 2% on payments for the first fourteen (14) Progress Billings. In addition, that the CA made a precipitate factual conclusion of the correctness of RSII's mathematical computation over that of GMCLI after citing gossamer-thin basis perhaps betrays the general impropriety of an appellate court's review of factual findings of more specialized tribunals and quasi-judicial agencies, which were legally ascribed primacy.

HAZEL MA. C. ANTOLIN-ROSERO *v.* PROFESSIONAL REGULATION COMMISSION, ET AL.

G.R. NO. 220378, 30 JUNE 2021, *THIRD DIVISION*, (INTING, *J.*)

DOCTRINE OF THE CASE

For the right to information to be comparable by mandamus, a petitioner must establish the following requisites:

(a) The information sought must be in relation to matters of public concern and public interest; and

(b) It must not be exempt by law from the operation of the constitutional guarantee.

Here, the Court conceded that national board examinations, such as the CPA Board Exams, are matters of public concern as the populace in general and the examinees in particular would understandably be interested in the fair and competent administration of these exams in order to ensure that only those qualified are admitted into the accounting profession.

FACTS

A petition for *mandamus* with damages before the Regional Trial Court (RTC) was filed by Hazel Ma. C. Antolin-Rosero (Rosero) against the Board of Accountancy (BOA) and its members, Conchita L. Manabat, Abelardo T. Domondon (Domondon), Reynaldo D. Gamboa (Gamboa), Jose A. Gangan (Gangan), Violeta J. Josef (Josef), Jose V. Ramos (Ramos), and Antonieta Fortuna-Ibe (Ibe); and later, also against the Professional Regulation Commission (PRC) (BOA, *et.al.*)

Rosero took the 1997 Certified Public Accountant (CPA) Board Exams conducted by the BOA. The 1997 CPA Board Exam's list of passers was released on October 29, 1997. Unfortunately, she did not make it. She then wrote to Domondon, Acting Chairman of the BOA, and requested that her answer sheets be reconnected. However, the BOA only showed her answer sheets which merely consisted of shaded marks. Thus, Rosero was unable to determine why she failed the exam.

Thus, Rosero again wrote to the BOA to request for copies of (a) the questionnaire in each of the seven subjects; (b) her answer sheets; (c) the answer keys to the questionnaires; and (d) an explanation of the grading system used in

each subject (the examination documents) so that she could refer them to an expert for checking.

However, Domondon denied her request on two (2) grounds. First, Section 36, Article III of the Rules and Regulations Governing the Regulation and Practice of Professionals (RRG), as amended by PRC Resolution No. 332, only permitted access to her answer sheet, which she had been shown previously; and that a reconsideration of her examination result is only proper under the grounds stated therein. Second, the BOA is precluded from releasing the examination documents, other than her answer sheet, by Section 20 of PRC Resolution No. 338. Under Sec. 20 of PRC Resolution No. 338, the act of providing, getting, receiving, holding, using, or reproducing questions that have been given in the examination constitutes prejudicial, illegal, grossly immoral, dishonorable, or unprofessional conduct, except if the test bank for the subject has on deposit at least 2,000 questions.

Later on, BOA informed Rosero that it found no mechanical error in the grading of her test papers.

Thus, Rosero filed a petition for *mandamus* with damages against the BOA and its members before the RTC. During the pendency of the case before the RTC, Rosero took and passed the May 1998 CPA Board Exams. She then took her oath as a CPA. As a result, the RTC dismissed Rosero's application for a writ of preliminary mandatory injunction and ruled that the matter had become moot. Subsequent to the RTC's disposition, three (3) separate petitions for *certiorari* were filed before the Court of Appeals (CA).

As to the petition of Domondon, Gamboa, Gangan, Josef, and Ramos (Domondon, *et al.*) in CA-G.R. SP No. 76498, the CA vacated and set aside the RTC Orders and reinstated the Order dismissing the petition for *Mandamus*. In CA-G.R. SP No. 76545, the CA dismissed the petition filed by the BOA due to *litis pendentia*. As to respondent Ibe's petition in CA-GR SP No. 76546, the CA granted the petition for *certiorari* and dismissed the petition for *Mandamus* on the ground that the latter has become moot. In its Omnibus Order, the RTC granted the motion for judgment on demurrer to evidence and consequently dismissed the petition for *mandamus* against *Domondon, et al.*

ISSUES

(1) Did Rosero violate the rule on forum shopping?
(2) Did Rosero timely assail the RTC Omnibus Orders?
(3) Did the RTC err in dismissing the petition for *mandamus* on the ground that Rosero's constitutional right to have access to the examination documents is restricted?
(4) Is Section 20 of PRC Resolution No. 338 reasonable?

RULING

(1) **NO.** The test to determine the existence of forum shopping is as follows:
   (a) identity of parties, or at least such parties as representing the same interests in both actions;
   (b) identity of rights asserted, and reliefs prayed for, the relief being founded on the same facts; and
   (c) identity of the two preceding particulars, such that any judgment rendered in the other action will, regardless of which party is successful, amount to res judicata in the action under consideration. Said requisites are also constitutive of the requisites for auter action *pendant* or *lis pendens*.

Here, the Court found no similarity between the present petition filed by Rosero's and Ibe's appeal. There is no question that there is an identity of parties in the present petition and the appeal in CA-G.R. SP No. 143078. However, it must be emphasized that while both the present petition and the appeal in CA-G.R. SP No. 143078 assail the Decision dated July 20, 2015, and Omnibus Order dated September 11, 2015, there is no identity of rights asserted and the reliefs prayed for.

In the present petition, Rosero prayed for the Court to direct Domondon, *et.al.* to give her the examination documents or copies thereof as would enable her to determine whether respondents fairly administered the 1997 CPA Board Exams and correctly grade her performance therein. On the other hand, Ibe's appeal in CA-G.R. SP No. 143078 dealt with the RTC's dismissal of the counterclaim for damages and attorney's fees through the RTC Decision July 20, 2015 and Omnibus Order dated September 11, 2015.

Evidently, the reversal of the dismissal of the petition for *Mandamus*, and the reversal of the dismissal of Ibe's counterclaim for damages and attorney's fees prayed for in the appeal in CA-G.R. SP No. 143078 are different reliefs, albeit related as they arose from the same case.

(2) **YES.** Rosero timely assailed in this present Petition for Review on *Certiorari* the RTC Omnibus Orders.

Section 1, Rule 41 of the 2019 Rules of Court provides that the aggrieved party may file a petition for *certiorari* under Rule 65 of the 2019 Rules of Court in the enumerated cases where no appeal may be taken.

Thus, Rosero could have either filed a petition for *certiorari* of the Omnibus Orders dated December 19, 2013 and April 8, 2014 under Rule 65 of the Rules of Court on errors of jurisdiction or she could have awaited the RTC's dismissal of the petition for the mandamus as to the rest of Domondon, *et.al.* thru RTC Decision dated July 20, 2015 and/or Omnibus Order dated August 6, 2015 so that she may appeal both the two sets of disposition by the RTC on the ground of errors of judgment.

(3) **NO**. Under Section 3, Rule 65 of the Rules of Court, the appropriate court may issue a Writ of *Mandamus* in two situations: (1) 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; and (2) when any tribunal, corporation, board, office or person unlawfully excludes another from the use and enjoyment of a right or office to which the other is entitled.

However, it must be emphasized that the writ will issue only if the legal right to be enforced is well defined, clear, and certain. *Mandamus* is a remedy only when there is no appeal, nor any plain, speedy, and adequate remedy in the ordinary course of law. The Court recognized that the right to information is not absolute as it is limited to "matters of public concern," and is further "subject to such limitation as may be provided by law." Similarly, the Court emphasized that the State's policy of full disclosure is limited to "transactions involving public interest," and is "subject to reasonable conditions prescribed by the law."

For the right to information to be comparable by *mandamus*, a petitioner must establish the following requisites:

(c) The information sought must be in relation to matters of public concern and public interest; and
(d) It must not be exempt by law from the operation of the constitutional guarantee.

Here, the Court conceded that national board examinations, such as the CPA Board Exams, are matters of public concern as the populace in general and the examinees in particular would understandably be interested in the fair and competent administration of these exams in order to ensure that only those qualified are admitted into the accounting profession.

In connection with the second requisite, Section 5, Paragraph (e) of Republic Act. No. 6713 (R.A. 6713), otherwise known as Code of Conduct and Ethical Standards for Public Officials and Employees, does not give Rosero an absolute right to access information and documents. R.A. 6713recognizes that not all kinds of information in the possession of public officials and employees may be made available to the public. Thus, while Sec. 5, Par. (e) of R.A. 6713 provides that "All public documents must be made accessible to and readily available for inspection by the public within reasonable working hours," it must be read together with Section 7, Paragraph (c) of R.A. 6713 which prohibits public officials and employees from disclosing and misusing confidential information. Thus, confidential information is exempt from the mandate of making public documents available for inspection within reasonable working hours.

Further, as to what constitutes confidential information under the purview of Sec.7, Par. (c) of R.A. 6713, the Internal Rules and Regulations of Civil Service Commission on R.A. 6713provides for the exceptions from the rule that every department, office, or agency shall provide official information, records, or documents to any requesting public.

(4) **YES.** The Court found that Section 20 of PRC Resolution No. 338 constitutes a valid limitation to petitioner's right to access and inspect public documents within reasonable working hours under Sec. 5, Par. (e)

of R.A. 6713 and her constitutional right to information under Section 7, Article III of the 1987 Constitution. Moreover, the Court finds that the examination documents are confidential and exempt from the constitutional guarantee of the right to information. Specifically, the test questions sought by petitioner fall within the concept of established privilege or recognized exceptions as may be provided by law or settled policy or jurisprudence under Sec.7, Par. (c) of R.A. 6713

As to the reasonableness of Sec. 20 of PRC Resolution No. 338 as a restriction on Rosero's right to information, the Court explained that "More than the mere convenience of the examiner, it may well be that there exist inherent difficulties in the preparation, generation, encoding, administration and checking of these multiple-choice exams that require that the questions and answers remain confidential for a limited duration."

Thus, to preserve the integrity and fairness of the examinations for future applicants, the questions in the test banks must be kept confidential subject only to the conditions provided by law and the relevant rules for their availability. Besides, Sec. 20 of PRC Resolution No. 338 does not constitute an absolute prohibition on the release of test questions that have been given in the CPA Board Exams. A petitioner must only show that the condition provided in Sec. 20 of PRC Resolution No. 338 has been satisfied, i.e., that the test bank for each subject has at least 2,000 questions. Suffice it to state that this condition is a reasonable limitation on the availability of the test questions to the public taking the inherent difficulties surrounding the preparation of the test questions and the need to preserve the integrity of the CPA Board Exams.

KUWAIT AIRWAYS CORPORATION *v.* THE TOKIO MARINE AND FIRE INSURANCE CO., LTD and TOKIO MARINE MALAYAN INSURANCE CO., INC.

G.R. No. 213931, 17 November 2021, *THIRD DIVISION*, (Carandang, *J.*)

DOCTRINES OF THE CASE

Section 4, Rule 130 of the 2019 Rules of Court provide that an original document may consist of a "duplicate" produced by means of photography, mechanical or electronic re-recording, or by other equivalent techniques which accurately reproduce the original. A photocopy of an original, therefore, may consist of a "duplicate" if there is no question that it is an accurate reproduction of the original.

Here, TMMICI and TMFICL formally offered the MIASCOR receipt as proof of their respective contents. In addition, the Court ruled that both the aforementioned receipts were not authenticated as required by Sec. 20, Rule 132 of the Rules of Court. TMMICI and TMFICL's witnesses also did not testify that they saw the receipts and the notations of damage being executed or written. As such, the photocopies of said receipts are inadmissible and have no evidentiary value.

The Court further elaborated that in any case, the evidence does not show whether the receipts of the inspection was conducted on the goods upon the vehicle's arrival in the Philippines. As such, the Court held that the photographs of the cargo are competent to prove the damage as they were taken when the cargo has already arrived at FCPCP's premises.

FACTS

Fujitsu Europe Limited (FEL) engaged the services of O'Grady Air Services (OAS) for the transport of pallets containing crates of disk drives from FEL's address in the United Kingdom (UK) to the consignee's, Fujitsu Computer Products Corporation of the Philippines (FCPCP), addressed in the Philippines. From UK, the pallets were loaded onto Kuwait Airways Corporation's (KAC) aircraft and was insured with Tokio Marine and Fire Insurance Co., Ltd. (TMFICL).

The shipment arrived at the Ninoy Aquino International Airport (NAIA). The lower courts did not narrate the circumstances of the shipment's unloading,

however, according to a photocopy of MIASCOR Storage and Delivery Receipt (MIASCOR Receipt), wherein it was noted that one crate had a hole on the side and another was dented.

Thereafter, FCPCP filed a claim on the insurance policy. Consequently, Tokio Marine Malayan Insurance Co., Inc. (TMMICI) hired the services of Toplis Marine to survey the alleged damage. Further, the report of the survey was done *via* the provided photocopies of the MIASCOR receipt which showed that multiple cartons were deformed. Lastly, the survey also deduced that the denting of the shipment was due to the rigor of voyage during the various stages loading to or discharging from the KAC.

As such, FCPCP formally claimed from KAC for the damage sustained by the shipment. When the claim was not acted upon, FCPCP claimed for insurance to which TMMICI complied with. Subsequently, FCPCP transferred all its rights and interests on the damaged cargo to respondent TMFICL. Hence, TMMICI and TMFICL filed a complaint against OAS and KAC for actual damages.

The Regional Trial Court (RTC) dismissed both TMMICI and TMFICL complaint and KAC's counterclaim. The Court of Appeals (CA) reversed the ruling of the RTC.

ISSUES

(1) Are the MIASCOR Storage and Delivery Receipt and the Japan Cargo Delivery Receipt adequate proofs of damage to the goods?
(2) May annotations of the MIASCOR receipt be considered *prima facie* evidence of damage to the goods as "entries in the course of business"?
(3) May the doctrine of *res ipsa loquitur* be applied in the instant case?

RULING

(1) **NO.** Section 4, Rule 130 of the 2019 Rules of Court provide that an original document may consist of a "duplicate" produced by means of photography, mechanical or electronic re-recording, or by other equivalent techniques which accurately reproduce the original. A photocopy of an original, therefore, may consist of a "duplicate" if there is no question that it is an accurate reproduction of the original.

Further, Section 5, Rule 130 of the 2019 Rules of Court provides that a party is allowed to submit secondary evidence to prove the contents of a lost or destroyed document by a copy, a recital of its contents in some authentic document, or the testimony of witnesses, provided that the offeror of the secondary evidence proves:

(a) that the original existed and duly executed;

(b) it was lost or destroyed; and

(c) its unavailability is not due to bad faith on his or her part.

However, regardless of whether an exhibit is an original, a "duplicate" of a document, or secondary evidence, it must still be presented at trial in the manner provided for by the Rules on Evidence before it can be admitted into evidence. For such purposes, it is important to distinguish between public or private documents.

Public documents are admissible in evidence without further proof of their due execution and genuineness. On the other hand, under Section 20, Rule 132 of the Rules Court provides that a private document cannot be admitted into evidence unless its due execution and authenticity is proven by:

(a) anyone who saw the document executed or written;

(b) evidence of the genuineness of the handwriting of the maker; or

(c) other evidence showing its due execution and authenticity.

Here, TMMICI and TMFICL formally offered the MIASCOR receipt as proof of their respective contents. In addition, the Court ruled that both the aforementioned receipts were not authenticated as required by Sec. 20, Rule 132 of the Rules of Court. TMMICI and TMFICL's witnesses also did not testify that they saw the receipts and the notations of damage being executed or written. As such, the photocopies of said receipts are inadmissible and have no evidentiary value.

The Court further elaborated that in any case, the evidence does not show whether the receipts of the inspection was conducted on the goods upon the vehicle's arrival in the Philippines. As such, the Court held that the photographs of the cargo are competent to prove the damage

as they were taken when the cargo has already arrived at FCPCP's premises.

(2) **NO.** Since the Rules of Evidence has already been amended, "entries in the course of business" have now been replaced with "records of regularly conducted business activity" under Section 45, Rule 130 of the 2019 Rules of Court.

In Canque *v.* CA, the Court provided for the requisites for admission in evidence of entries in the course of business:

(a) the person who made the entry is dead, outside the country, or unable to testify;
(b) the entries were made at or near the time of the transactions to which they refer;
(c) the person who made the entry was in position to know the facts stated in the entries;
(d) the entries were made in a professional capacity or in the performance of a duty; and
(e) the entries were made in the ordinary or regular course of business or duty.

Here, the first, second, and third requisites were not proven at trial because TMMICI and TMFICL failed to establish who made the annotation in the MIASCOR receipt that the cargo was damaged.

(3) **NO.** The doctrine of *res ipsa loquitur* provides a mode of ascribing negligence upon a defendant in certain circumstances. The requisites of *res ipsa loquitur* are:

(a) the accident is of a kind that ordinarily does not occur in the absence of someone's negligence;
(b) it is caused by an instrumentality within the exclusive control of the defendant or defendants; and
(c) the possibility of contributing conduct that would make the plaintiff responsible is eliminated.

In the instant case, the first requisite has not been met because no injury or damage was proven to begin with. It was not proven by competent evidence that an accident had indeed occurred.

LEGAL AND JUDICIAL ETHICS

OFFICE OF THE COURT ADMINISTRATOR *v.* ELENA M. ARROZA

A.M. No. P-19-3975, 07 July 2021, *THIRD DIVISION*, (Inting, *J.*)

DOCTRINE OF THE CASE

Based on several jurisprudence, the Court decided that the act of remittance as a mitigating circumstance that warrants the imposition of the lower penalty of suspension of one (1) month without pay. It also considered the subsequent remittance of the entire amount and her health in imposing a penalty of a fine instead of dismissal. It likewise considered respondent's lack of bad faith, the subsequent full remittance of the collection, and the lack of outstanding accountabilities in imposing the penalty of a fine. It also found that the penalty of P40,000.00 fine is sufficient considering that it was respondent's first offense, and that the respondent immediately returned the withdrawals and complied with the directives of the audit team. Lastly, it also considered the respondent's advanced age, years of service, and the fact that it was respondent's first offense in imposing a fine of P50,000.00.

Similarly, Arroza already remitted the entire amount P415,512.30 in compliance with the Court Resolution and has no outstanding accountabilities. She also fully cooperated with the audit team during the investigation of her infractions and soon submitted the financial records without any irregularities. Verily, her act of taking full responsibility for the infractions committed and the fact that this is her first infraction, may be duly appreciated in imposing the penalty. Moreover, for humanitarian considerations, especially during this period of Coronavirus Disease 2019 pandemic, the Court found that dismissal from service may be too harsh. Instead, the Court imposes a fine of an amount equivalent to one (1) month salary to be deducted from her withheld salaries.

FACTS

Elena M. Arroza (Arroza) was the Clerk of Court (COC) II of a Muncipal Circuit Trial Court (MCTC). The Office of Court Administrator (OCA) discovered that Arroza continuously failed to submit the required monthly financial reports and non-remittance of collections for the judiciary funds. The OCA requested the Court to withhold the salaries and allowances of Arroza which was granted by then Chief Justice Teresita Leonardo-De Castro.

In her Letter, Arroza admitted that she used the funds in her personal affairs but did not provide any explanations on the delay in the remittance and the shortage in the fiduciary collections. She asked for a second chance to continue

her work in the judiciary. She states that her son who is in college is only relying on her salary as her husband has an unstable job due to his previous imprisonment in Dubai. Arroza filed a Manifestation with Motion to Release Withheld Salaries and Other Allowances requesting for the release of her withheld salaries and benefits from October 2018 to the present because she had already restituted all her cash shortages. She averred that she had suffered enough for the consequences of her actions and begs for compassion especially in this period of the pandemic.

The OCA recommended that the withheld salaries and allowances of Arroza may be released without prejudice to the outcome of the administrative matter filed against her for failure to deposit the collections of the Court within the prescribed period.

ISSUE

Should Arroza be dismissed from service due to the personal use of the Court's fund and failure to submit financial reports?

RULING

NO. A Clerk of Court has a very delicate function being the designated custodian of the Court's funds, revenues, records, properties, and premises. Any loss, shortages, destruction or impairment of funds and property of the Court shall constitute gross neglect of duty resulting to administrative liability.

Arroza, by her own admission, committed Gross Neglect of Duty and Grave Misconduct when she failed to turn over the funds of the Judiciary that were placed in her custody. As a grave offense, the proper penalty is dismissal from service even for the first offense. Nevertheless, the Court has in the past mitigated the administrative penalties imposed upon erring judicial officers and employees for humanitarian reasons.

Based on several jurisprudence, the Court decided that the act of remittance as a mitigating circumstance that warrants the imposition of the lower penalty of suspension of one (1) month without pay. It also considered the subsequent remittance of the entire amount and her health in imposing a penalty of a fine instead of dismissal. It likewise considered respondent's lack of bad faith, the subsequent full remittance of the collection, and the lack of outstanding accountabilities in imposing the penalty of a fine. It also found that the penalty of P40,000.00 fine is sufficient considering that it was respondent's first offense, and that the respondent immediately returned the withdrawals and complied with the directives of the audit team. Lastly, it also considered the respondent's advanced

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Similarly, Arroza already remitted the entire amount P415,512.30 in compliance with the Court Resolution and has no outstanding accountabilities. She also fully cooperated with the audit team during the investigation of her infractions and soon submitted the financial records without any irregularities. Verily, her act of taking full responsibility for the infractions committed and the fact that this is her first infraction, may be duly appreciated in imposing the penalty. Moreover, for humanitarian considerations, especially during this period of Coronavirus Disease 2019 pandemic, the Court found that dismissal from service may be too harsh. Instead, the Court imposes a fine of an amount equivalent to one (1) month salary to be deducted from her withheld salaries.

OFFICE OF THE COURT ADMINISTRATOR v. JUDGE CANDELARIO V. GONZALES

A.M. No. RTJ-16-2463, 27 July 2021, *EN BANC,* (*Per Curiam*)

DOCTRINE OF THE CASE

The rules prescribing the period within which to decide and resolve cases are mandatory in nature. Section 15(1), Article VIII of the Constitution enjoins that cases or matters must be decided or resolved within three months for the lower courts. In relation to this, Rule 3.05, Canon 3 of the Code of Judicial Conduct mandates judges to dispose of the court's business promptly and decide cases within the required periods. Additionally, Section 5, Canon 6 of the New Code of Judicial Conduct for the Philippine Judiciary, judges shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly, and with reasonable promptness.

There is no doubt as to the guilt of Judge Gonzales. He has been remiss in the performance of his responsibilities. He failed to decide cases and resolve pending incidents within the reglementary period, without any authorized extension from the Court. Unreasonable delay in deciding cases and resolving incidents and motions, including orders of inhibition, constitute gross inefficiency which cannot be tolerated. Judge Gonzales also admitted the delay in the resolution of pending incidents and deciding cases. He attributed the delays to heavy pressure in work, serious health condition, and the absence of his two (2) stenographers. The Court commiserates with Judge Gonzales on his illnesses and professional struggles. Even so, these excuses are not sufficient to absolve him of disciplinary action.

In meritorious cases involving difficult questions of law or complex issues, the Court, upon proper application, grants additional time to decide beyond the reglementary period. In these situations, the judge would not be subjected to disciplinary action. Regrettably, for Judge Gonzales, a scrutiny of the records does not disclose any attempt by him to request for a reasonable extension of time to dispose of his pending cases. Despite the availability of this remedy which consists in simply asking for an extension of time from the Court, he altogether passed up this opportunity. Judge Gonzales' inaction to seek additional time reflected his indifference to the prescriptive periods provided by law to resolve cases. The Court thus found no reason to exonerate him.

FACTS

In a Memorandum of the Office of the Court Administrator (OCA), the judicial audit team reported that as of audit date, Branch 45, Regional Trial Court (RTC), Bais City, Negros Oriental had a total caseload of 962 active cases, consisting of 649 criminal cases and 313 civil cases.

The audit team's general adverse findings stated that: (a) out of Judge Candelario V. Gonzales' (Judge Gonzales) 100 criminal cases that were submitted for decision, 61 were decided beyond the required period; (b) Judge Gonzales

inhibited himself in several criminal cases and transferred all of these cases to another judge in several Orders; (c) Judge Gonzales has 54 criminal cases and 17 civil cases with unresolved motions; (d) Judge Gonzales made no requests for any extension of time to decide and resolve the motions; (e) although the data showed that Judge Gonzales had 178 cases submitted for decision as of January 2014, 177 as of February 2011, 181 as of March 2014, 179 as of April 2014, 176 as of May 2014, 176 as of June 2014, 178 as of July 2014, 185 as of August 2014, 189 as of September and October 2014, and 172 as of November 2014, the certified copies of the Certificates of Service of Judge Gonzales from January 2013 to December 2014 indicated that there were no cases submitted for decision or pending motions before him; (f) the case records were neither stitched or held together by fasteners nor paginated or chronologically arranged; (g) there was no actual physical inventory of pending cases in the court; (h) there were documents attached to the records without time and date of receipt; (i) at the time of audit, the latest Monthly Report of Cases submitted to the Statistical Reports Division was for September 2014 and there was no Semestral Docket Inventory for 2014; and (j) the court's docket books for criminal and civil cases were likewise not updated. Irregularities with regard to cases involving annulment of marriages and declaration of nullity of marriages were also found.

The OCA directed Judge Gonzales: (a) to explain in writing why he should not be administratively charged with gross dereliction of duty, gross inefficiency, gross incompetence, and gross dishonesty; (b) to explain why his salaries and allowances should not be withheld for his failure to decide 211 cases submitted for decision, to resolve 71 cases with pending incidents or motions, and to indicate these cases in his Certificates of Service for 2013 and 2014; (c) to refrain from acting on manifestations signed by parties without the assistance of counsel; (d) to physically conduct the actual inventory of active cases with the Branch Clerk of Court; and (e) to submit compliance with the other directives within 30 days from receipt thereof. The OCA further ordered Judge Gonzales: (1) to show cause why he should not be disciplined for issuing orders of inhibition in several cases which were all submitted for decision; and (2) to immediately refrain from issuing orders of inhibition involving cases already submitted for decision.

Judge Gonzales explained that he had decided almost all 211 cases submitted for decision and left only a few unresolved motions. On the appealed cases, he averred that he requested the OCA and the Regional Court Administrator Office for authority to forward the cases to Judge Gerardo Paguio. As he did not receive any response from any of the offices, he did not act on the appealed cases. In addition, he stated that he underwent angioplasty and angiogram procedures at the Cardinal Santos Medical Center in May 2013. He attached a copy of the Medical Certificate, showing that he was admitted at the Silliman University Medical Center from April 12 to 18, 2013 for intestinal

amoebiasis with moderate dehydration, among others; and that the hospitalization of one of his two stenographers and the contraction of pneumonia of the other contributed to the delay.

This notwithstanding, the OCA directed anew Judge Gonzales to: (1) explain (a) why he failed to file requests for extension of time to decide the 211 cases and resolve the pending incidents or motions in 71 cases within the reglementary period, as well as to indicate these cases in his Certificates of Service for the years 2013 and 2014; and (b) why he issued orders of inhibition in several cases which were all submitted for decision earlier on; (2) submit his manifestation on the directives for him to refrain from acting on manifestations signed by parties without the assistance of counsel and the conduct of physical inventory of active cases; and (3) take appropriate action on the remaining cases that require his action.

The OCA recommended that Judge Gonzales be suspended for six (6) months without salaries and allowances for Gross Dereliction of Duty, Gross Inefficiency, Gross Incompetence for Undue Delay in the Disposition of Cases, and Gross Dishonesty.

ISSUE

Is Judge Gonzales guilty of the charges against him?

RULING

YES. The rules prescribing the period within which to decide and resolve cases are mandatory in nature. Section 15(1), Article VIII of the Constitution enjoins that cases or matters must be decided or resolved within three months for the lower courts. In relation to this, Rule 3.05, Canon 3 of the Code of Judicial Conduct mandates judges to dispose of the court's business promptly and decide cases within the required periods. Additionally, Section 5, Canon 6 of the New Code of Judicial Conduct for the Philippine Judiciary, judges shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly, and with reasonable promptness.

There is no doubt as to the guilt of Judge Gonzales. He has been remiss in the performance of his responsibilities. He failed to decide cases and resolve pending incidents within the reglementary period, without any authorized extension from the Court. Unreasonable delay in deciding cases and resolving incidents and motions, including orders of inhibition, constitute gross inefficiency which cannot be tolerated. Judge Gonzales also admitted the delay in the resolution of pending incidents and deciding cases. He attributed the delays to heavy pressure in work, serious health condition, and the absence of his two (2) stenographers. The Court commiserates with Judge Gonzales on his illnesses and

professional struggles. Even so, these excuses are not sufficient to absolve him of disciplinary action.

In meritorious cases involving difficult questions of law or complex issues, the Court, upon proper application, grants additional time to decide beyond the reglementary period. In these situations, the judge would not be subjected to disciplinary action. Regrettably, for Judge Gonzales, a scrutiny of the records does not disclose any attempt by him to request for a reasonable extension of time to dispose of his pending cases. Despite the availability of this remedy which consists in simply asking for an extension of time from the Court, he altogether passed up this opportunity. Judge Gonzales' inaction to seek additional time reflected his indifference to the prescriptive periods provided by law to resolve cases. The Court thus found no reason to exonerate him.

As to the false monthly Certificates of Service for 2013 and 2014 and docket inventory, aside from Judge Gonzales' gross inefficiency, the records show that despite the herein pending cases, he was able to collect his salaries upon his certification that he has no pending cases to resolve.

A certificate of service is an instrument essential to the fulfillment by judges of their duty to dispose of their cases speedily as mandated by the Constitution. On this score, judges are expected to be more diligent in preparing their Monthly Certificates of Service by verifying every now and then the status of the cases pending before their *sala*. Judge Gonzales failed to indicate the 211 cases submitted for decision in his Certificates of Services for 2013 to 2014. He stated in the certificates that he had "decided and resolved all cases or incidents within three (3) months from the date of submission." However, the audit report reveals that there were 211 cases not decided within the 90-day reglementary period. The same is true with the 71 motions and incidents submitted for resolution left pending beyond the same period.

Judges are duty bound not only to be faithful to the law, but also to maintain professional competence. Judge Gonzales obviously failed in this aspect. His submission of false monthly reports and docket inventory undermines the speedy disposition of cases and administration of justice and is prejudicial to the interest of the parties. What is more, his admitted negligence in not reviewing the monthly reports of cases and the docket inventory violated the rules on administrative duties outlined in the Code of Judicial Conduct.

Judge Gonzales' violations of the New Code of Judicial Conduct for the Philippine Judiciary and the Code of Judicial Conduct constitute gross misconduct. Gross misconduct is a serious charge and is punishable by dismissal from the service.

Judge Gonzales is guilty of the serious charge of gross misconduct for his submission of false monthly reports and docket inventory, and the less serious charges of: (1) delay in rendering a decision and (2) making untruthful statements in the certificate of service and docket inventory. Significantly, in *Boston Finance and Investment Corp. v. Gonzales*, Judge Gonzales was found guilty of Gross Ignorance of the Law and Undue Delay in Rendering an Order.

Considering that Judge Gonzales has been previously found guilty of a serious offense, the Court was constrained to impose the penalty of dismissal against him, and separately, a fine for the less serious charges of (1) delay in rendering decisions, and (2) making untruthful statements in his Certificates of Service and Docket Inventory.

No less than the Constitution states that a member of the judiciary "must be a person of proven competence, integrity, probity and independence." It is, therefore, highly imperative that a judge should be conversant with basic legal principles. When a judge displays an utter lack of familiarity with the rules, he erodes the public's confidence in the competence of our courts. Judge Gonzales failed to live up to the exacting standards of his office. His delay in rendering judgments, submission of false monthly certificates of service and docket inventory, and violations of the New Code of Judicial Conduct for the Philippine Judiciary and the Code of Judicial Conduct cast a heavy shadow on his moral, intellectual, and attitudinal competence and render him unfit to don the judicial robe and to perform the functions of a magistrate.