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In Defense of Democracy: Walking the Tightrope to Justice and Justification

(Foreword by Vice President Maria Leonor "Leni" Robredo)

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LAW REVIEW

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MESSAGE

As lawyers whose duty is to promote the rule of law and protect the rights of each Filipino, we find ourselves in challenging times. This is an age where ideas are used to divide nations instead of generating discussion, where connections are used to sow hate instead of fostering friendships, and where democracies are constantly questioned both in relevance and application.

In a time when the judiciary faces attacks on all fronts, we fight to keep our democracy intact. Now more than ever, we are called to come together in defense of democracy, to safeguard the integrity of our institutions, and to stand firm in protection of human rights. We share a vision of a court that promotes due process instead of punitive measures: one that upholds the dignity of the last, the least, and the lost.

"In Defense Of Democracy: Walking The Tightrope to Justice and Justification," offers discussion on the challenges and developments that highlight our current political landscape. The issues presented here affect all Filipinos and call on each of us to review them in all their complexity. Only through awareness and understanding can we begin to craft solutions that are lasting and sustainable.

Thus, I encourage the reader to view the contents of this publication through the lens of nation building. Let your deeper knowledge propel you to empower the underrepresented, and to bolster the law's function to give voice to the powerless and defenseless.

Now is the time to take a stand and to speak out against the injustices we see every day. It is only through unity and shared courage that we may promote the highest standards of fairness, objectivity, and justice. May you be inspired to do so in your reading.

Mabuhay kayong lahat!

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Editor's Note

In Defense of Democracy: Walking the Tightrope to Justice and Justification

The strength of a democracy lies with the balance and integrity of its institutions and with the people it serves. It is not with the individuals in power. "Justice" and "Justification" should not be treated as alternatives but rather as part and parcel of an effective system of accountability – where there is justice for those who are wronged, and no justification for those who must be held responsible.

For this Edition, we decided to bring back digests but limited it to the most recent, relevant, and controversial cases, while also expanding the coverage to decisions made by lower courts and opinion of justices which we believe are consistent with the principles and values the Law Review holds.

We thank the Honorable Vice President Leni Robredo in gracing our publication with her kind words of encouragement. Her Office remains to be a glimmer of hope for the country and a model for what true leadership should be.

It has been my honor to serve the Law Review for three years – from Executive Editor to Editor-in-Chief. It was an invaluable learning experience. I would like to thank the Editors who worked tirelessly with our contributors throughout the year as well as for managing both the content here in the Publication as well as in social media. I hope that the Law Review would continue to have the courage to stand for what is right and speak for those not heard.

JOSIAH DAVID F. QUISING
Editor-in-Chief

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PROFANITY AND THE FREEDOM OF SPEECH

Atty. Aliakhbar A. Jumrani[1]

I. Introduction

In November 2018, the Baguio City Council passed Ordinance No. 118, series of 2018, banning profanity in schools, computer shops and business establishments frequented by children. The ordinance earned mixed reactions. Those who supported it claimed that it was necessary to promote good values among the youth, while those who were critical about it said that the ordinance violates the freedom of speech and expression. Not surprisingly, the Malacañang Palace was also quick to criticize it, claiming that it may be unconstitutional. With a President known for his foul language, it was not surprising that his office would be against the ordinance.

perhaps, the strongest, most important of all personal liberties. What one lacks in physical strength, one usually makes up with the power of his words. However, free speech, if not checked, can be hurtful, slanderous and degrading.

The ordinance was an issue in a recent debate between law schools on cable TV. The Affirmative Side (the Lyceum of the Philippines University College of Law) argued that the ordinance violates the freedom of speech, while the Negative Side (Cor Jesu College Law School) posited that the ordinance is valid and justified. The Negative Side won the debate, asserting the argument that the nation's moral character and the best interests of children justify the ban on profanity in schools, computer shops and business establishments frequented by children.

But what is profanity under Philippine legal definition? Is it protected under the Freedom of Speech?

[1]**Atty. Jumrani** is a practicing lawyer, a law professor at Far Eastern University, Institute of Law teaching Land Titles and Deeds, Children's Rights and Civil Law Review subjects, and Bar Review and MCLE Lecturer.

II. Freedom of Speech

The freedom of speech is enshrined under Section 4, Article III of the Constitution which provides that "[n]o law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances."[2] The freedom of speech covers every word, expression or opinion, written or otherwise. It also covers non-speech conduct and "silence". In *Diocese of Bacolod vs. COMELEC*[3], the Supreme Court ruled that:

> Speech is not limited to vocal communication. "[C]onduct is treated as a form of speech sometimes referred to as 'symbolic speech[,]'" such that "'when 'speech' and 'nonspeech' elements are combined in the same course of conduct,' the 'communicative element' of the conduct may be 'sufficient to bring into play the [right to freedom of expression].'"
>
> The right to freedom of expression, thus, applies to the entire continuum of speech from utterances made to conduct enacted, and even to inaction itself as a symbolic manner of communication.
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> Freedom of speech includes the right to be silent. Aptly has it been said that the Bill of Rights that guarantees to the individual the liberty to utter what is in his mind also guarantees to him the liberty not to utter what is not in his mind.[4]

Moreover, hurtful speech does not necessarily justify its curtailment. As a general rule, for as long as the speech is not libelous or for as long as it is a privileged communication, it is protected speech. In the decisions of the Supreme Court in *Lopez vs. People*[5] and *U.S. vs. Bustos*,[6] it was held that the freedom of speech and expression enjoys an exalted place in the hierarchy of constitutional rights and no liability should be incurred by any individual making full use of his free speech and expression.[7]

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[2] PHIL. CONST. art. III, § 4.
[3] Diocese of Bacolod v. COMELEC, G.R. No. 205728, Jan. 21, 2015.
[4] *Id.*
[5] G.R. No. 172203, Feb. 14, 2011.
[6] 37 Phil. 731 (1918).
[7] Lopez v. People, G.R. No. 172203, Feb. 14, 2011., U.S. v. Bustos, 37 Phil. 731 (1918).

In *Lopez vs. People*,[8] the accused Dionisio Lopez was convicted of libel under Art. 353 of the Revised Penal Code for putting up billboards/signboards with the words "CADIZ FOREVER, BADING AND SAGAY NEVER", which were perceived to be an attack on the reputation and honor of Salvador "Bading" Escalante, Jr., the incumbent mayor of Cadiz City.[9] Both the trial court and the Court of Appeals held that the words tended to induce suspicion on private respondent's character, integrity and reputation as mayor of Cadiz City.[10] However, in finding for the accused's innocence, the Supreme Court held that:

> Tested under these established standards, we cannot subscribe to the appellate court's finding that the phrase "CADIZ FOREVER, BADING AND SAGAY NEVER" tends to induce suspicion on private respondent's character, integrity and reputation as mayor of Cadiz City. There are no derogatory imputations of a crime, vice or defect or any act, omission, condition, status or circumstance tending, directly or indirectly, to cause his dishonor. Neither does the phrase in its entirety, employ any unpleasant language or somewhat harsh and uncalled for that would reflect on private respondent's integrity. Obviously, the controversial word "NEVER" used by petitioner was plain and simple. In its ordinary sense, the word did not cast aspersion upon private respondent's integrity and reputation much less convey the idea that he was guilty of any offense. Simply worded as it was with nary a notion of corruption and dishonesty in government service, it is our considered view to appropriately consider it as mere epithet or personal reaction on private respondent's performance of official duty and not purposely designed to malign and besmirch his reputation and dignity more so to deprive him of public confidence.
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> Truth be told that somehow the private respondent was not pleased with the controversial printed matter. But that is grossly insufficient to make it actionable by itself. "**[P]ersonal hurt or embarrassment or offense, even if real, is not automatically equivalent to defamation," "words which are merely insulting are not actionable as libel or slander *per se*, and mere words of general abuse however opprobrious, ill-natured, or vexatious, whether written or spoken, do not constitute bases for an action for defamation in the absence of an allegation for special damages. The fact that the language is offensive to the plaintiff does not make it actionable by itself,**" as the Court ruled in *MVRS Publications, Inc. v. Islamic Da' Wah Council of the Phils., Inc*.[11]

[8] G.R. No. 172203, Feb. 14, 2011.
[9] *Id.*
[10] *Id.*
[11] *Id.*

In *U.S. vs. Bustos*,[12] the defendants circulated and filed a petition for the removal of Roman Punsalan, the Justice of the Peace of Macabebe and Masantol, Pampanga, due to malfeasance in office.[13] The defendants were charged with and convicted of libel. In acquitting the accused, however, the Supreme Court held that:

> **The guaranties of a free speech and a free press include the right to criticize judicial conduct**. The administration of the law is a matter of vital public concern. Whether the law is wisely or badly enforced is, therefore, a fit subject for proper comment. If the people cannot criticize a justice of the peace or a judge the same as any other public officer, public opinion will be effectively muzzled. Attempted terrorization of public opinion on the part of the judiciary would be tyranny of the basest sort. The sword of Damocles in the hands of a judge does not hang suspended over the individual who dares to assert his prerogative as a citizen and to stand up bravely before any official. On the contrary, it is a duty which everyone owes to society or to the State to assist in the investigation of any alleged misconduct. It is further the duty of all who know of any official dereliction on the part of a magistrate or the wrongful act of any public officer to bring the facts to the notice of those whose duty it is to inquire into and punish them. In the words of Mr. Justice Gayner, who contributed so largely to the law of libel: "**The people are not obliged to speak of the conduct of their officials in whispers or with bated breath in a free government, but only in a despotism**."
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> A pertinent illustration of the application of qualified privilege is a complaint made in good faith and without malice in regard to the character or conduct of a public official when addressed to an officer or a board having some interest or duty in the matter. Even when the statements are found to be false, if there is probable cause for belief in their truthfulness and the charge is made in good faith, the mantle of privilege may still cover the mistake of the individual. But the statements must be made under an honest sense of duty; a self-seeking motive is destructive. Personal injury is not necessary. All persons have an interest in the pure and efficient administration of justice and of public affairs. **The duty under which a party is privileged is sufficient if it is social or moral in its nature and this person in good faith believes he is acting in pursuance thereof although in fact he is mistaken. The privilege is not defeated by the mere fact that the communication is made in intemperate terms**. A further element of the law of privilege concerns the person to whom the complaint should be made. The rule is that if a party applies to the wrong person through some natural and honest mistake as to the respective functions of various officials such unintentional error will not take the case out of the privilege.[14]

[12] 37 Phil. 731 (1918).
[13] *Id.*
[14] *Id.*

Be that as it may, there are limitations to the freedom of speech and expression. In *Chavez vs. Gonzales,*[15] the Supreme Court discussed the limits and restraints of free speech, *viz*:

> The exceptions, ***when expression may be subject to prior restraint,*** apply in this jurisdiction to only four categories of expression, namely: pornography, false or misleading advertisement, advocacy of imminent lawless action, and danger to national security.
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> Expression that may be subject to prior restraint is ***unprotected expression*** or low-value expression. By definition, prior restraint on unprotected expression is content-based since the restraint is imposed because of the content itself. In this jurisdiction, there are currently only four categories of unprotected expression that may be subject to prior restraint. This Court recognized false or misleading advertisement as unprotected expression only in October 2007.
>
> ***Only unprotected expression may be subject to prior restraint.*** However, any such prior restraint on unprotected expression must hurdle a high barrier. ***First,*** such prior restraint is presumed unconstitutional. ***Second,*** the government bears a heavy burden of proving the constitutionality of the prior restraint.[16]

In restraining free speech, *Chavez vs. Gonzales*[17] applied the following tests:

> Generally, restraints on freedom of speech and expression are evaluated by either or a combination of three tests, *i.e.*, (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."
>
> As articulated in our jurisprudence, we have applied either the **dangerous tendency doctrine** or **clear and present danger test** to resolve free speech

[15] G.R. No. 168338, Feb. 15, 2008.
[16] *Id.*
[17] G.R. No. 168338, Feb. 15, 2008.

challenges. More recently, we have concluded that we have generally adhered to the **clear and present danger test**.[18]

III. Is Profanity Protected Speech?

The Baguio City Ordinance No. 118, series of 2012,[19] defines "profanity" as **blasphemous or obscene language; vulgar or irreverent speech or action; expletive, oath, swearing, cursing or obscene expression usually of surprise or anger**.[20] The foregoing definition lumps together all hostile, intemperate and vulgar speech. Traditionally, however, per Black's Law Dictionary[21] profane and profanity are defined as follows:

> *Profane*. Irreverence toward God or holy things. Writing, speaking, or acting, in manifest or implied contempt of sacred things.
> *Profanity*. Irreverence towards sacred things; particularly, an irreverent and blasphemous use of the name of God. Vulgar, irreverent, or coarse language.[22]

In *Chaplinsky vs. New Hampshire,*[23] cited in *MVRS Publications vs. Islamic Da'wah Council,*[24] profanity was described as speech that has no social value and does not enjoy constitutional protection, thus:

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. **There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.** It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be

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[18] *Id.*
[19] Ordinance No. 2018-118, Sangguniang Panlungsof of Baguio City, An Ordinance instituting an Anti-Profanity Ordinance in All Schools, Computer Shops, Arcades and other Business Establishments Fequented by Children, High School and/or College Students in the City of Baguio [Anti-Profanity Ordinance of Baguio City], § 2 (Sept. 17 2018).
[20] *Id.*
[21] Black's Law Dictionary (6th ed. 1991).
[22] *Id.*
[23] R.L. McEwen and P.S.C. Lewis, Gatley on Libel and Slander, § 8, (1967).
[24] G.R. No. 135306, January 28, 2003.

> derived from them is clearly outweighed by the social interest in order and morality. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.[25]

However, it must be stressed that the classification of certain words or utterances as profane, obscene or vulgar largely depends on the context of their use and the maturity, values and education of the listener or reader. The fact is that there are some words that seem profane but are totally innocent in other local dialects, and there are words that may come as obscene when used literally but are harmless expressions to denote surprise, shock, anger or even fascination.

However, in *Soriano vs. Laguardia,*[26] the Supreme Court proclaimed that "profane" words or expressions may be treated as such, despite the context or intent, and therefore censurable, if made on a general-patronage rated TV program or **when they are uttered within earshot of children**, thus:

> A cursory examination of the utterances complained of and the circumstances of the case reveal that to an average adult, the utterances "*Gago ka talaga x x x, masahol ka pa sa putang babae x x x. Yung putang babae ang gumagana lang doon yung ibaba, [dito] kay Michael ang gumagana ang itaas, o di ba!*" may not constitute obscene but merely indecent utterances. They can be viewed as figures of speech or merely a play on words. In the context they were used, they may not appeal to the prurient interests of an adult. The problem with the challenged statements is that they were uttered in a TV program that is rated "G" or for general viewership, and in a time slot that would likely reach even the eyes and ears of children.
>
> **While adults may have understood that the terms thus used were not to be taken literally, children could hardly be expected to have the same discernment. Without parental guidance, the unbridled use of such language as that of petitioner in a television broadcast could corrupt impressionable young minds**.[27]

[25] *Id.*
[26] G.R. No. 164785, April 29, 2009.
[27] *Id.*

IV. Banning Profanity Justified by the Best Interest of the Child?

In a news report[28] dated September 26, 2018 published in Sun Star Baguio, the sponsor of Ordinance No. 118, series of 2018, Baguio City Councilor Lilia Fariñas, claimed:

> [i]t has been observed nowadays that cursing has become a normal practice in common places everywhere, that even children seem to have even accepted the habit as a customary routine in the society, oblivious of the repercussions that it may result to.
>
> [She] also claimed the revolting habit can be observed most often in computer shops where children of different ages play games, especially those that engage in war games and feudal battles which cause them to insult each other with indecent and profane language, as if it were okay to do so, and especially because their parents or guardians are not present to correct their actions.
>
> Farinas added that the habit of cursing has not only been confined to such places, but has already penetrated the schools and educational system, business establishments, and the society as a whole, that even the very fabric of morals and human decency has deteriorated to such a degree that it has to be prevented before the damage would become irreparable.
>
> She cited the said piece of legislation is necessary to imbue a legacy towards the preservation of the morals of the people and the Filipino youth, not only in the observance of the national children's month but as an everyday advocacy, to preserve the identity of the Filipinos as a decent and ethically upright people.[29]

That profanity is inimical to the best interests of the child is also expressed in Republic Act No. 10627,[30] otherwise known as the "Anti-Bullying Act of 2013". Section 2 of the law states that one of the acts of bullying is "any slanderous statement or accusation that causes the victim undue emotional distress like directing foul language or profanity at the target, name-calling, tormenting and commenting negatively on victim's looks, clothes and body."[31] Thus, it can be fairly argued that the anti-profanity ordinance which applies to schools, computer shops

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[28] Sun Star Baguio, *Anti-profanity measures approved,* SUN STAR, Sept. 26, 2018, available at https://www.pressreader.com/philippines/sunstar-Baguio/20180926/281560881718260 (last accessed May 31, 2019).
[29] *Id.*
[30] An Act Requiring An Elementary and Secondary Schools to Adopt Policies to Prevent and Address the Acts of Bullying in this Institutions [Anti-Bullying Act of 2013], republic Act No. 10627 (2013).
[31] *Id.* § 2.

and business establishments frequented by children complements Republic Act No. 10627's policy.

All these measures are in line with the State's duty to protect and promote the well-being of children. In *Soriano vs. Laguardia,*[32] the Supreme Court declared that:

> Indisputably, the State has a compelling interest in extending social protection to minors against all forms of neglect, exploitation, and immorality which may pollute innocent minds. It has a compelling interest in helping parents, through regulatory mechanisms, protect their children's minds from exposure to undesirable materials and corrupting experiences. The Constitution, no less, in fact enjoins the State, as earlier indicated, to promote and protect the physical, moral, spiritual, intellectual, and social well-being of the youth to better prepare them fulfill their role in the field of nation-building. In the same way, the State is mandated to support parents in the rearing of the youth for civic efficiency and the development of moral character.[33]

V. Standards for Enforcement

Clearly, the anti-profanity ordinance has a noble purpose. But is nobility of purpose enough?

In the case of the ordinance banning profanity, there is an immediate confusion in what context or cases certain words shall be considered profane, obscene, vulgar or irreverent. The rule that words are to be understood in their ordinary or usual sense cannot apply here because profanity is subjective. There is no universal meaning or definition of profanity. Due to diversity of the Filipino people, there are no uniform standards of profanity.

Then, there is the matter of the scope of the ordinance. It is addressed only to children and students in schools, but not to out-of-school youth. Finally, the ordinance is limited to schools, computer shops and business establishments. It does not cover homes, playgrounds and other public places, where profanities are uttered as well.

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[32] G.R. No. 164785, April 29, 2009.
[33] *Id.*

Under the *void-for-vagueness doctrine*, a law is facially invalid if men of common intelligence must necessarily guess at its meaning and differ as to its application.[34] But then again, it is for the court to decide whether the anti-profanity ordinance is in fact unconstitutional due to vagueness or unreasonableness. For the Baguio City residents and the people who sojourn to the Philippine Summer Capital, they must follow and abide by this ordinance. An ordinance, after all, enjoys the presumption of validity. In *Smart Communications vs. Municipality of Balagtas,*[35] the Supreme Court held that:

> An ordinance carries with it the presumption of validity. The question of reasonableness though is open to judicial inquiry. Much should be left thus to the discretion of municipal authorities. Courts will go slow in writing off an ordinance as unreasonable unless the amount is so excessive as to be prohibitive, arbitrary, unreasonable, oppressive, or confiscatory. A rule which has gained acceptance is that factors relevant to such an inquiry are the municipal conditions as a whole and the nature of the business made subject to imposition.[36]

More importantly, those who are affected by the anti-profanity ordinance can rest easy on the fact that any charge under the anti-profanity ordinance or any measure that seeks to restrict free speech should be determined by the court. In *Soriano vs. Laguardia*[37] the Supreme Court ruled that "obscenity (or profanity) is an issue proper for judicial determination and should be treated on a case to case basis and on the judge's sound discretion."[38]

VI. Conclusion

Speech is, perhaps, the strongest, most important of all personal liberties. What one lacks in physical strength, one usually makes up with the power of his words. However, free speech, if not checked, can be hurtful, slanderous and degrading. Thus, some types of speech can be subject to State regulation. Profanity is that kind of speech, especially when uttered or made to or in the presence of children. The reason is that children do not have the same discernment as

[34] Romualdez vs. COMELEC, G.R. No. 167011, December 11, 2008.
[35] G.R. No. 204429, February 18, 2014.
[36] *Id.*
[37] G.R. No. 164785, April 29, 2009.
[38] *Id.*

adults. What an adult does or says—even if wrong—can be right in the eyes and ears of children and may be emulated by them. It is, therefore, for the best interest of the child that speech in their presence or in their hearing must be consistent with their well-being. Profanity-laden speech is a poison that slowly creeps into children's minds, speech and actions. As Frank Outlaw said, "[w]atch your thoughts; they become words. Watch your words; they become actions. Watch your actions; they become habits. Watch your habits; they become character. Watch your character; it becomes your destiny."

NOTES AND OBSERVATIONS ON ARTICLE IX (JUDICIAL DEPARTMENT) OF THE PROPOSED FEDERAL CONSTITUTION

Atty. Manuel R. Riguera[1]

The proposed Federal Constitution (PFC for brevity) will make substantial changes on the article on the judicial department. This will be a revolutionary change from the American system of a single Supreme Court to a system where the broad powers of the present Supreme Court will be reduced and considerable powers vested in three other courts: a Federal Constitutional Court, a Federal Electoral Court and a Federal Administrative Court.

Constitutional cases will be tried by the Federal Constitutional Court. Election contests concerning the president, the vice president and members of Congress will be under the jurisdiction of the Federal Electoral Court, while review of the decisions of commissions and administrative and quasi-judicial entities will be vested in the Federal Administrative Court.

Retired Supreme Court Justice and Constitutionalist Vicente V. Mendoza has characterized these proposals as "so drastic that they amount to a total overhaul of the judicial department."[2]

Four High Courts

Section 1, Article IX of the PFC states that "[t]he judicial power shall be vested in the Federal Supreme Court, the Federal Constitutional Court, the Federal Administrative Court, the Federal Electoral Court, and in such other courts as may be established by law." A reading of the PFC readily shows that the Federal Courts are co-equal bodies which are independent and supreme in their own spheres. In essence, the PFC has created four high courts.

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[2] *Ex-Justice Mendoza: Concom Draft "impoverishes" Supreme Court,* posted at inquirer.net on 1 August 2018.

SECTION 1. The judicial power shall be vested in the Federal Supreme Court, the Federal Constitutional Court, the Federal Administrative Court, the Federal Electoral Court, and in other courts as may be established by law.

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government; Provided, that the Federal Constitutional Court may render advisory opinions on constitutional questions properly referred to it in accordance with Section 12 of this Article; Provided further, that the Federal Administrative Court may render advisory opinion on whether the Federal Commission on Elections has complied with the processes, procedures, and preparations relative to the conduct of the elections in accordance with subparagraph (b), Section 15 of this Article.

Section 1, Article IX of the PFC retains the provision of the 1987 Constitution in Section 1, Article VIII regarding the so-called "expanded jurisdiction" or "expanded *certiorari* jurisdiction" which provides that "judicial power includes the duty of the court of justice … to determine whether or not there has been a grave abuse of discretion amounting to lack of or excess of jurisdiction on the part of any branch or instrumentality of the Government."[3] This provision was included as "a reproof of the practice of the Marcos Supreme Court of shying away from reviewing abuse of discretion by the Chief Executive and using the political questions doctrine as an excuse."[4] It represents "a broadening of judicial power to enable the courts of justice to review what was before forbidden territory, to wit, the discretion of the political departments of the government."[5]

This will be a revolutionary change from the American system of a single Supreme Court to a system where the broad powers of the present Supreme Court will be reduced and considerable powers vested in three other courts: a Federal Constitutional Court, a Federal Electoral Court and a Federal Administrative Court.

It is suggested that this well-meaning but to my mind oft misinterpreted provision of the 1987 Constitution be deleted. It should be noted that the power is vouchsafed not only with the Supreme Court but with all courts. The expanded jurisdiction is practically untrammeled,

[3] PHIL. CONST. art. VIII, § 1.
[4] JOAQUIN G. BERNAS, THE 1987 CONSTITUTION, A COMPREHENSIVE REVIEWER 328 (2011 ed.).
[5] ISAGANI CRUZ, PHILIPPINE POLITICAL LAW 218 (1989 ed.).

circumscribed only by the open-ended phrase "grave abuse of discretion amounting to lack of or excess of jurisdiction."[6] This is a very elastic phrase that can expand or contract according to the disposition of the judiciary.

The extraordinary powers of the Supreme Court and other courts to set aside acts of any branch or instrumentality of the government which amount to grave abuse of discretion are already amply provided for in Section 5(1), Article VIII of the Constitution and in Rule 65 of the Rules of Court. Section 5(1) of Article VIII provides that the Supreme Court shall have the power to exercise original jurisdiction over petitions for *certiorari* and prohibition.[7] Under Rule 65 of the Rules of Court, the special civil action for certiorari lies against the exercise of judicial or quasi-judicial functions while the special civil action for certiorari lies against the exercise of judicial, quasi-judicial, and ministerial functions.[8]

The Supreme Court has however interpreted Section 1 of Article VII as vesting it with jurisdiction over petitions for certiorari and prohibition even if the acts amounting to grave abuse of discretion do not involve judicial, quasi-judicial, or ministerial functions.[9]

There is a good reason why the *certiorari* and prohibition jurisdictions of the courts extend only to judicial, quasi-judicial, or ministerial functions.[9] To extend the courts' *certiorari* jurisdiction to administrative or quasi-legislative functions would be for the courts to substitute their discretion for that of the legislative and executive branches thereby throwing a spanner into the sensitive system of checks and balances provided for by our Constitution.

Of course the courts are not powerless to step in and restrain or set aside such administrative and quasi-legislative actions if these transgress the law and the Constitution. In such cases, the remedies of declaratory relief and injunction are available. These cases fall within

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[6] Francis Lim, *Point of Law: SC's Power of Judicial Review*, Inquirer.Net, Jan. 12, 2017, *available at* https://business.inquirer.net/222809/scs-power-judicial-review (last accessed July 1, 2019).
[7] PHIL. CONST. art. VIII, § 5(1).
[8] 1997 RULES OF CIVIL PROCEDURE, rule 65.
[9] Araullo v. Aquino, 728 SCRA 1, 74 (2014) and Villanueva v. Judicial and Bar Council, 755 SCRA 182, 196 (2015). *Araullo* involved Department of Budget and Management issuances implementing the Disbursement Acceleration Program while *Villanueva* involved the JBC's policy of opening promotion to second-level courts only to incumbent judges of the first-level courts who have served in their current position for at least five years.

the original and exclusive jurisdiction of the regional trial court, thus freeing the Supreme Court from the workload of deciding these cases at the first instance.

Critique of provision on advisory opinions

Section 1, Article IX of the PFC provides for the rendition of advisory opinions by the Federal Constitutional Court and the Federal Administrative Court in the instances provided therein and under Section 12, Article IX.

> **SECTION 1**. xxx Provided, that the Federal Constitutional Court may render advisory opinions on constitutional questions properly referred to it in accordance with Section 12 of this Article; Provided further, that the Federal Administrative Court may render advisory opinion on whether the Federal Commission on Elections has complied with the processes, procedures, and preparations relative to the conduct of the elections in accordance with subparagraph (b), Section 15 of this Article.
>
> **SECTION 12**. The Federal Constitutional Court may, with leave, render advisory opinion when sought by:
> (a) The President, Senate President, or Speaker of the House of Representatives on the constitutionality of any enrolled bill of paramount importance; Provided, that the favorable opinion of the Court notwithstanding, and when such bill has become a law, any citizen of the Philippines may still question the validity if he claims it is unconstitutional as applied to him;
> (b) The Chairman of the Federal Commission on Elections on the constitutionality of any proposal to amend or revise the Constitution or enact, amend, or repeal any federal law by people's initiative.

It is suggested that the provision on the rendition of advisory opinions by the Federal Constitutional Court and the Federal Administrative Court be deleted. Constitutional issues are of paramount importance since they affect not only the parties involved therein but the public at large. Hence constitutional issues are best resolved through the crucible of adversarial proceedings in the proper judicial forum where there are vigorous arguments raised by the contending parties with the court thus making an informed and well-reasoned judgment as a result.

Furthermore, the Federal Constitutional Court and the Federal Administrative Court would be placed in an awkward situation if a matter on which they have rendered an advisory opinion

comes up to them for judicial review. One need not be an expert on psychology to see that these courts would be loathe to take a position contrary to that they had taken in their advisory opinions, resulting in effect in the prejudgment of these cases.[10]

The Federal Supreme Court

Under the PFC, the Supreme Court will be reincarnated as a Federal Supreme Court, albeit shorn of its heart and soul: the power of judicial review.

The composition and the qualification of members of the Federal Supreme Court are provided for by Sections 6 and 7 of the PFC.

> SECTION 6. The Federal Supreme Court shall be composed of a Chief Justice and eight (8) Associate Justices of whom three (3) including the Chief Justice, shall be appointed by the President, three (3) Associate Justices by the Commission on Appointments, and three (3) by the Federal Constitutional Court *en banc*. Each appointing authority may adopt its own selection process. All such appointments shall not require confirmation. Any vacancy shall be filled within ninety (90) days from the occurrence thereof by the same appointing authority; Provided, that no appointment shall be made three (3) months before a Presidential election up to the end of the term of the incumbent President.
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> SECTION 7. No person shall be appointed member of the Federal Supreme Court, unless he is a natural-born citizen of the Philippines, at least fifty (50) years of age on the date of his appointment, and must have been for fifteen (15) years or more, a judge of a lower court or engaged in the practice of law in the Philippines. All cases and administrative matters before the Court shall be decided en banc with the concurrence of at least five (5) of its members.

The jurisdiction of the Federal Supreme Court is provided for in Section 8, Article IX of the PFC:

> SECTION 8. The Federal Supreme Court shall have the following powers:
> (a) Exercise original jurisdiction over cases:

[10] It is opined that the present system of seeking opinions from the Secretary of Justice is a more prudent way of seeking advisory opinions and should be strengthened.

1) Involving conflicts between branches and agencies within the Federal Government, conflicts between the Federal Government and the Federated Regions, and conflicts between and among the Federated Regions;
2) Involving ambassadors, other public ministers and consuls; and
3) Involving petitions for *certiorari*, prohibition, *mandamus*, *quo warranto*.

(b) Review, revise, reverse, modify, or affirm on appeal or certiorari, as the law or the Rules of Court may provide, cases involving:

1) Final judgments and orders of lower courts except those within the exclusive jurisdiction of the Federal Constitutional Court, Federal Administrative Court, or of the Federal Electoral Court;
2) The jurisdiction of any lower court;
3) The legality of any tax, impost, assessment, or toll, or any penalty imposed in relation there to;
4) Criminal offenses in which the penalty imposed is reclusion perpetua or higher, and
5) *Error or question of law*.[11]

It appears that there are clerical errors in the arrangement and drafting of Section 8(b), which provides for the appellate jurisdiction of the Federal Supreme Court. One can hardly imagine that it is the intent of the drafters that the Federal Supreme Court would have appellate jurisdiction of final judgments and orders of virtually all lower courts or over all cases in which there is an error or question of law, since the overwhelming majority of appeals raise legal questions. This would clog the dockets of the Supreme Court with a plethora of appeals. I have thus taken the liberty of redrafting or re-arranging Section 8(b) in a manner which I think reflects the actual intent of the framers.

(b) Review, revise, reverse, modify, or affirm on appeal or certiorari,[12] as the law or the Rules of Court may provide, **final judgments and orders of lower courts except those within the exclusive jurisdiction of the Federal Constitutional Court, Federal Administrative Court, or of the Federal Electoral Court** in cases involving:

1) The jurisdiction of any lower court;

2) The legality of any tax, impost, assessment, or toll, or any penalty imposed in relation there to;

3) Criminal offenses in which the penalty imposed is reclusion perpetua or higher, and

[11] Italics supplied.
[12] The certiorari referred to here is a petition for review on certiorari under Rule 45 of the Rules of Court, as distinguished from the special civil action for certiorari under Rule 65, which is the one referred to Section 8(a)(3) of the PFC.

4) Only an error or question of law.[13]

Federal Supreme Court's original jurisdiction

Section 8(a)(3) of Article IX of the PFC provides that the Federal Supreme Court shall exercise original jurisdiction over cases involving petitions for *certiorari*, prohibition, *mandamus*, and quo warranto.

Noteworthy is the deletion of petitions for *habeas corpu*s from the list. It is suggested that this deletion be reconsidered. *Habeas corpus* proceedings in cases involving detention pursuant to a process issued by the Court of Appeals or Sandiganbayan would necessarily have to be filed with the Supreme Court pursuant to the doctrine of hierarchy of courts. A person detained through process issued by these courts would be left without recourse to the exigent writ of *habeas corpus*.

Federal Supreme Court's appellate jurisdiction

As earlier stated, the heart of the Supreme Court, its power of judicial review, will be torn away from it and transplanted to the Federal Constitutional Court.

The power of judicial review is the Supreme Court's power to declare a law, treaty, international or executive agreement, presidential decree, proclamation, order, instruction, ordinance, or regulation unconstitutional.[14]

The Federal Supreme Court's appellate jurisdiction is provided for in Section 8(b), Article IX of the PFC:

> (b) Review, revise, reverse, modify, or affirm on appeal or *certiorari*, as the law or the Rules of Court may provide, final judgments and orders of lower courts except those within the exclusive jurisdiction of the Federal Constitutional Court, Federal Administrative Court, or of the Federal Electoral Court in cases involving:

[13] Redrafted, rearranged and renumbered provisions in bold print.
[14] BERNAS, *supra* note 4, at 337.

1) The jurisdiction of any lower court;
2) The legality of any tax, impost, assessment, or toll, or any penalty imposed in relation there to;
3) Criminal offenses in which the penalty imposed is reclusion perpetua or higher, and
4) Only an error or question of law.[15]

Noteworthy is that the Supreme Court's power to review, on appeal or on certiorari, judgment or final orders of lower courts involving the constitutionality or validity of any treaty, international or executive agreement, presidential decree, etc., has been taken away from it and transferred to the Federal Supreme Court. The Supreme Court's power of judicial review has been reduced to passing upon, on appeal or *certiorari*, the legality of any tax, impost, assessment, or toll, or any penalty imposed in relation thereto. Justice Mendoza states that this proposed change will weaken the Supreme Court and reduce it to a shadow of its former self.[16]

It is suggested that Section 8(b) (3) be amended by adding the phrase "by the Court of Appeals, Sandiganbayan, or Court of Tax Appeals." This will make clear that judgments of the RTC imposing the penalty of *reclusion perpetua* or higher are not directly appealable to the Supreme Court.[17]

Federal Supreme Court's rule-making power

The Federal Supreme Court's rule-making power is provided for in Section 8(c), Article IX of the PFC:

> (e) Promulgate rules concerning pleading, practice, and procedure in all courts, except the Federal Constitutional Court, Federal Administrative Court, and Federal Electoral Court, the admission to the practice of law, the integrated bar, and legal assistance to the underprivileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights.

[15] Version as redrafted, rearranged, and renumbered by the author.
[16] *Supra* note 2.
[17] See People v. Mateo, 433 SCRA 640 (240); Section 3(c), Rule 122 of the Rules of Court.

It is suggested that the Federal Supreme Court be relieved of the burdensome duty of regulating admission to the practice of law and disciplining members of the bar. This duty could be given to the Integrated Bar of the Philippines, which has a vested interest in seeing to it that only those deserving gain admittance to the bar and in weeding its ranks of misfits and recreants.

Federal Constitutional Court

The composition of the Federal Constitutional Court and the qualifications of its members are provided for in Sections 9 and 10, Article IX of the PFC:

> SECTION 9. The Federal Constitutional Court shall be composed of a Chief Justice and eight (8) Associate Justices of whom three (3), including the Chief Justice, shall be appointed by the President, three (3) shall be appointed by the Commission on Appointments, and three (3) shall be appointed by the Federal Supreme Court. All such appointments shall not require confirmation. Any vacancy shall be filled within ninety (90) days from the occurrence thereof by the same appointing authority; Provided, that no appointment shall be made three (3) months before a Presidential election up to the end of the term of the incumbent President.
>
> SECTION 10. No person shall be appointed Member of the Federal Constitutional Court unless he is a natural-born citizen of the Philippines, a recognized expert in constitutional law, at least fifty (50) years of age at the time of his appointment, and for not less than fifteen (15) years, a judge of a lower court or engaged in the practice of law in the Philippines. It shall sit en banc, and decide all cases and matters before it with the concurrence of at least five (5) members.

The judicial powers of the Federal Constitutional Court are provided for in Section 11(a), (b), and (c) of Article IX of the PFC:

> SECTION 11. The Federal Constitutional Court shall have the following powers:
>
> (a) Exercise exclusive and original jurisdiction over:
>
> 1) Disputes involving the constitutionality of a law, treaty, international or executive agreement, including those involving the constitutionality, application, or operation of presidential decrees, proclamations, orders, instructions, ordinances, and other regulations, administrative issuances by

the Federal Government or any of its departments and agencies, as well as the laws of the legislative assemblies of the Federated Regions, and the acts and issuances of their executive departments;

2) Any dispute or matter involving questions of constitutionality.

(b) Exercise original jurisdiction over cases involving writ of habeas corpus, writ of amparo, writ of habeas data, and writ of kalikasan.

(c) Hear and decide impeachment cases; Provided, that a judgment of conviction must be concurred in by at least six (6) members. However, when a member of the Constitutional Court is impeached, the Federal Administrative Court shall act as the Impeachment Court. A judgment of conviction must be concurred in by at least six (6) of its members.

Exclusive and original jurisdiction over constitutional cases and disputes

Under the proposal, the Federal Constitutional Court will have "exclusive and original jurisdiction" on disputes pertaining to the constitutionality of "a law, treaty, international or executive agreement" and more broadly couched, over "any dispute or matter involving questions of constitutionality." Note that what had been only appellate jurisdiction under the Constitution would become exclusive and original jurisdiction under the PFC.

I agree with the observation of retired Justice Vicente V. Mendoza that the jurisdiction of the Federal Supreme Court is too wide-ranging. It could be saddled with a myriad of cases because of the sweeping tenor of Section 11(a) (2) which provides that the Federal Constitutional Court will exercise exclusive and original jurisdiction over "[a]ny dispute or matter involving questions of constitutionality." Mendoza cited the possibility of parties to an ejectment case questioning before the federal court the constitutionality of the Rent Control Law.[18]

Cases involving constitutional questions could be handled adequately at the first instance by the regional trial courts under a petition for declaratory relief or in an action for injunction or in a special civil action for *certiorari* and *mandamus*, where judicial, quasi-judicial, or ministerial functions are involved. But a single court, even if dedicated solely to the resolution

[18] *Id*. at note 2.

of constitutional cases, could find itself swamped with a deluge of cases, with every litigant invoking constitutional issues in order to have the ear of the Federal Constitutional Court.

It is suggested therefore that the system under the Constitution, in which the Supreme Court only has **appellate jurisdiction** over constitutional cases, unless falling within its certiorari or prohibition jurisdiction, be maintained.

In fact, I believe that the creation of a Federal Constitutional Court would be an unnecessary expenditure of scarce and vital public funds. There is already an adequate system of judicial review of constitutional issues provided for under our law. An interested or aggrieved party may avail of the remedies of a petition for declaratory relief under Rule 63, an action for injunction with the Regional Trial Court, and the special civil actions of certiorari, prohibition, and mandamus under Rule 65 with the RTC, Court of Appeals, Sandiganbayan, COMELEC, Court of Tax Appeals, and the Supreme Court.

Actions for declaratory relief and injunction, being incapable of pecuniary estimation, fall within the jurisdiction of the regional trial court[19] while there are several courts and bodies which have certiorari jurisdiction: RTC, Court of Appeals, Sandiganbayan, Court of Tax Appeals,[20] and the COMELEC.[21] Moreover, the Sandiganbayan, Court of Tax Appeals, and the COMELEC can be expected to have expertise in the *certiorari* cases falling within their respective jurisdictions.

Original jurisdiction over cases involving writs of habeas corpus, writ of amparo, writ of habeas data, and writ of kalikasan.

The extraordinary writs of amparo, habeas data, and writ of kalikasan have no statutory basis but were enacted by the Supreme Court pursuant to its power to "[p]romulgate rules concerning the protection and enforcement of constitutional rights." This seems to be a tenuous

[19] An Act Reorganizing the Judiciary, Appropriating Funds Therefor, and for Other Purposes [The Judiciary Reorganization Act of 1980], Batas Pambansa Blg. 129, § 19(1) (1981).
[20] *City of Manila v. Grecia-Cuerdo*, 715 SCRA 182 (2014).
[21] 1987 RULES OF CIVIL PROCEDURE, rule 65, § 4.

basis for extending the term "constitutional rights"[22] to these newly created writs. The issuance of these writs appear to skirt the boundaries of legislation. For instance the Rule on the Writ of Amparo and the Rule on the Writ of Habeas Data have provisions which are very similar to those on subject-matter jurisdiction, albeit captioned, "where filed." These rules also have provisions on evidentiary presumptions, standards of diligence, and reliefs that may be awarded by the judgment, which are arguably provisions dealing with substantive rights.

This provision addresses this concern by giving a concrete constitutional basis to these extraordinary writs aside from the unstable anchor of "rules concerning the protection of constitutional rights."[22]

The Federal Administrative Court

The composition and qualifications of the Federal Administrative Court are set forth in Sections 13 and 14, Article IX of the PFC:

> SECTION 13. The Federal Administrative Court shall be composed of a Chief Justice and eight (8) Associate Justices. The Chief Justice and three (3) Associate Justices shall be appointed by the President, three (3) Associate Justices shall be appointed by the Commission on Appointments, and three (3) by the Federal Supreme Court en banc. All such appointments shall not require confirmation. Any vacancy shall be filled within ninety (90) days from the occurrence thereof by the same appointing authority; Provided, that no appointment shall be made three (3) months before a Presidential election up to the end of the term of the incumbent President.
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> SECTION 14. No person shall be appointed Member of the Federal Administrative Court, unless he is a natural-born Filipino citizen, at least fifty (50) years of age at the time of his appointment, a recognized expert in administrative law, and must have been for at least fifteen (15) years, a judge of a lower court, or engaged in the practice of law.
>
> In all cases and matters brought before it, the Federal Administrative Court in accordance with its rules, may sit en banc or in divisions of three (3) justices each, and decisions shall be reached by concurrence of a majority of the court en banc or the division, as the case may be.

[22] PHIL. CONST. art. VIII, § 5(5).

The Federal Administrative Court's jurisdiction is provided for in Section 15(a), Article IX of the PFC:

> SECTION 15. (a) The Federal Administrative Court shall exercise exclusive jurisdiction to review on appeal or certiorari,[23] in accordance with its rules, the decisions, judgments, or final orders or resolutions of the Federal Civil Service Commission, the Federal Commission on Elections, the Federal Commission on Audit, the Federal Commission on Human Rights, the Federal Ombudsman Commission, and the Federal Competition Commission, and of all administrative and quasi-judicial bodies in the Federal Republic.

The creation of a Federal Administrative Court is a salutary provision. The Court of Appeals has already too much on its table just taking into account from the RTCs. A Federal Administrative Court, which essentially has appellate jurisdiction over judgments and final orders of administrative and quasi-judicial bodies, would allow the Court of Appeals to concentrate on its principal role as the appellate tribunal from decisions of the RTCs.

It is suggested however that the phrase "in the exercise of its quasi-judicial functions" be added after the phrase "all administrative and quasi-judicial bodies," similar to the wording of Section 1, Rule 43 of the Rules of Court. This will make explicit the jurisdictional parameter that the appeal be taken against a decision, judgment, final order, or resolution of a commission or quasi-judicial agency in the exercise of its quasi-judicial functions. Hence acts which are purely administrative or quasi-legislative in character should be beyond the review of the Federal Administrative Court.

In *Basiana Mining Exploration Corp. v. Secretary of the Department of Environment and Natural Resources*,[24] at issue was the DENR Secretary's act of approving a mining company's application for a Mineral Production Sharing Agreement (MPSA) and entering into a MPSA with the mining company. The Supreme Court held that such act cannot be reviewed by the

[23] The use of the ambiguous term "certiorari," an imprecision in the 1987 Constitution, should be avoided. The draft should state particularly whether it is a "petition for review on certiorari" or a "petition for writ of certiorari." From a reading of the section and from the interpretation given to the term under the 1987 Constitution, it appears that what is referred to is a petition for review on certiorari analogous to that in Rule 45 of the Rules of Court.
[24] 785 SCRA 527 (2016).

Court of Appeals under Rule 43 since said rule is applicable only to judgments, orders, and issuances of a quasi-judicial body in the exercise of its quasi-judicial functions.[25]

The Court held that the power to approve and enter into a MPSA is unmistakably administrative in nature as it springs from the mandate of the DENR under the Revised Administrative Code of 1987, which provides that "[t]he [DENR] shall x x x be in charge of carrying out the State's constitutional mandate to control and supervise the exploration, development, utilization, and conservation of the country's natural resources."[26]

Observation

I have always had a feeling of unease at the system of judgments and final orders of specialist tribunals and agencies being reviewed on appeal by a "generalist" court.

Specialist tribunals and agencies play a vital role in our economy as they resolve disputes in vital industries and sectors of our economies. Investors and players have a right to expect competence and stability in the resolutions of these bodies Of course there is always the fear of abuse or partiality in the decision-making process but the solution lies in strengthening the qualifications of those appointed to these bodies, the alignment of the compensation to make these at least on par with the private sector, and ensuring or fortifying the independence of these quasi-judicial agencies rather than providing for another level of appellate review which will only lead to delay or instability of rulings.

My proposal therefore is that instead of a review by appeal, the oversight function of the Federal Administrative Court should be invoked only by way of a special civil action for certiorari under Rule 65 of the Rules of Court. Thus the Federal Administrative Court may set aside the decisions of the commissions and quasi-judicial agencies if there is grave abuse of discretion amounting to lack of or excess of jurisdiction. This is similar to the review of decisions of the National Labor Relations Commission by the Court of Appeals. I go further and

[25] *Id.*
[26] *Id.* at 538.

suggest that this certiorari jurisdiction apply only to judgments or final orders of the commissions and quasi-judicial agencies and not to interlocutory orders, similar to the prohibition found in the Rules of Summary Procedure and the Rules on Small Claims Cases. This will avoid the specter of delay in the resolution of the main case caused by interlocutory orders being subjected to certiorari or prohibition petitions.

The Federal Electoral Court

The composition and qualifications of the Federal Electoral Court are set forth in Sections 16 and 17 of Article IX of the PFC:

> SECTION 16. There shall be a Federal Electoral Court composed of a Chief Justice and fourteen (14) Associate Justices. The Chief Justice and four (4) Associate Justices of the Federal Electoral Court shall be appointed by the President, five (5) Associate Justices by the Commission on Appointments, and five (5) by the Federal Constitutional Court sitting en banc. All such appointments shall not require confirmation. Any vacancy shall be filled within ninety (90) days from the occurrence thereof by the same appointing authority; Provided, that no appointment shall be made three (3) months before a Presidential election up to the end of the term of the incumbent President.
>
> SECTION 17. No person shall be appointed Member of the Federal Electoral Court unless he is a natural-born Filipino citizen, at least fifty (50) years of age at the time of his appointment, an election law expert, must have been a judge of lower courts or engaged in the practice of law for at least fifteen (15) years, and must not have been a candidate for any elective position in the immediately preceding election.
>
> In all cases and matters brought before it, the Federal Electoral Court, in accordance with the rules it will promulgate, may sit en banc or in divisions of three (3) justices each, and decisions shall be reached by concurrence of a majority of the court en banc or the division, as the case may be.

The creation of a specialist tribunal to handle election contests for the position of President and Vice-President and for positions in the Senate and House of Representatives is a wise move. Hopefully, a court dedicated to trying these election cases would result in their more expeditious resolution. It need not be gainsaid that the speedy resolution of these election contests is of paramount public importance.

The membership of the Federal Electoral Tribunal should be insulated from partisan politics as much as it can be. Providing that five of the members would be appointed by the President and five by the Commission on Appointments would not achieve this end. Experience has shown that the influence of the appointing power does not simply disappear as if by magic once the appointee has assumed his or her office.

It is thus recommended that five members be appointed by the Federal Supreme Court, five by the Federal Constitutional Court, and five, including the Chief Justice, by the President of the Philippines. This should avoid the situation where the Senate Electoral Tribunal (SET) and the House of Representatives Electoral Tribunal (HRET) tend to vote along party lines, with the Supreme Court members, who are expected to be nonpartisan, being reduced to a minority bloc.

The Federal Electoral Court's exclusive original jurisdiction is provided for in Section 18(a), Article IX of the PFC, while its exclusive appellate jurisdiction is provided for in Section 18(b):

> SECTION 18. The Federal Electoral Court shall have the following powers:
> (a) Exercise exclusive original jurisdiction over all contests relating to the elections, returns, and qualifications of the President, Vice President, Members of both Houses of Congress; Provided, that contests relating to the President and Vice President shall be decided by the Federal Electoral Court en banc; Provided further, that contests relating to the Members of Congress shall be heard and decided by the Federal Electoral Court in division and proceedings shall be held within the region where the case arose. Decisions of the Federal Electoral Court shall be reached by the concurrence of a majority of the Court en banc or in Division as the case may be. Any decision of the Court in Division may be elevated to the Court en banc only on questions of law in accordance with its rules of procedure.
> (b) Exercise exclusive jurisdiction to review, on appeal or certiorari, all decisions, resolutions, and orders of:
>
> 1) Trial courts of proper jurisdiction in all contests relating to the elections, returns, and qualifications of other elective regional, provincial, city, municipal, and barangay officials; and
>
> 2) The Commission on Elections with respect to all questions affecting elections, including the qualifications of candidates and political parties, and other pre-election controversies, and the conduct of plebiscites and referenda;

The Federal Electoral Court will take over the powers and jurisdiction of the Presidential Electoral Tribunal with respect to contests relating to the election, returns, and qualifications of the President or Vice-President,[27] and that of the SET and HRET with respect to contests relating to the election, returns, and qualifications of their respective members.[28]

It is suggested that the Federal Electoral Court be also granted certiorari jurisdiction over interlocutory orders in cases provided for under Section 18(b)(1) above, similar to that granted to the COMELEC over acts and omissions of the MTCs and RTCs under Section 4, Rule 65 of the Rules of Court.

CONCLUSION

To recapitulate, I recommend against the creation of a Federal Constitutional Court and suggest instead a re-examination of the expanded jurisdiction provided for in Section 1, Article VIII of the Constitution. To my mind, an expansive interpretation of said provision by an activist Supreme Court has led to the court taking on too many and being deluged with too many cases all crying the wolf of constitutional violation. This has resulted to a clogging of the Supreme Court's dockets, which has in turn led to calls for the creation of a Federal Constitutional Court.

I am in favor of the creation of a Federal Administrative Court but suggest instead that its jurisdiction be changed from appellate to an original certiorari jurisdiction. This means that a "generalist" court would intervene in the decisions and final orders of the specialist tribunals only in cases of grave abuse of discretion amounting to lack of or excess of jurisdiction and thus foster the faster disposition of cases and the stability of the rulings by the specialist tribunals.

I find the creation of a Federal Electoral Court to be a wise move but suggest a different method of selecting its membership in order to avoid the specter of partisan influence in its decision-making.

[27] PHIL. CONST. art. VII, § 4.
[28] PHIL. CONST. art VI, §17.

TRIBAL LABOR IN THE GLOBAL SPOTLIGHT: Getting to know ILO Convention 169

Atty. Manuel A. Rodriguez II[1]

INTRODUCTION

The adoption of international instruments particularly protecting the rights of indigenous peoples at the international stage, namely the International Labour[2] Organization (ILO) Indigenous and Tribal Convention, 1989 (No. 169), and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), are considered momentous milestones in the encouragement and defense of human rights. These international instruments articulate the rights of indigenous peoples considering their specific culture, history, social status, and economic standing.

ILO Convention No. 169 provides for the indigenous peoples an additional platform, at the international level, where resort can be made in cases of violation of their rights. The ratification will also strengthen the government's commitment to its duty of respect, promotion and protection of the rights of its indigenous **Speech is,**

During the 2014 World Conference on Indigenous Peoples, member states of the United Nations (UN) collectively made a reaffirmation of their respective commitments to respect, promote and advance and in no way lessen the rights of indigenous peoples and to uphold the principles of the Declaration and encouraged those States that had not yet done so to consider ratifying Convention No. 169.[3] The

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[2] Labor is the preferred spelling in American English, and labour is preferred throughout the rest of the English-speaking world with Australia as an exception. This article shall use the latter spelling as it is consistent with the official name of the ILO.

World Conference also highlighted the contribution of indigenous peoples to sustainable development and to climate change mitigation and adaptation[4]

Convention No. 169 is a unique international document. Adopted by the International Labour Conference (ILC) in 1989 during its 76th session, in cooperation with the UN no less, it represents a consensus reached by ILO tripartite constituents. Indigenous peoples are among the groups of concern to the ILO as it pursues its undertaking to promote the internationally recognized labour rights.

The ILO's concern for indigenous peoples dates back to the 1920s and originated in the quest to overcome the discriminatory working conditions they live under. In recognition of the complexities and specificities of indigenous peoples' situations, Convention No. 169 takes a holistic approach covering a wide range of issues that affect the lives and wellbeing of these peoples.

INDIGENOUS PEOPLES IN THE PHILIPPINES

As an archipelagic country, the Philippines is composed of sixty two (62) Indigenous Cultural Communities (ICCs)/ Indigenous Peoples (IPs) distributed in different islands of the country. Through the years the Philippine government has maintained series of agencies that looked into their welfare.

ICCs /IPs refer to a group of people or homogenous societies identified by self-ascription and ascription by others, who have continuously lived as organized community on communal bounded and defined territory, and who have under claims of ownership since time immemorial, occupied, possessed and utilized such territories, sharing common bonds of language, customs, traditions and other distinctive cultural traits, or who have, through resistance to political, social

[3] Outcome document of the high-level plenary meeting of the UN General Assembly known as the World Conference on Indigenous Peoples, adopted by the UN General Assembly in resolution 69/2 of 22 September 2014, paragraphs 4, 6, and 34.
[4] *Ibid*., paragraphs 34-37

and cultural inroads of colonization, non-indigenous religions and cultures, became historically differentiated from the majority of Filipinos.

ICCs/IPs shall likewise include peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, at the time of conquest or colonization, or at the time of inroads of non-indigenous religions and cultures, or the establishment of present state boundaries, who retain some or all of their own social, economic, cultural and political institutions, but who may have been displaced from their traditional domains or who may have resettled outside their ancestral domains.[5]

THE INTERNATIONAL LABOUR ORGANIZATION (ILO)

The International Labour Organization was created in 1919. The ILO is a standard-setting specialized agency of the UN system which aims to improve living and working conditions for working people all over the world without discrimination as to race, gender or social origin. The ILO believes that poverty anywhere is a danger to prosperity everywhere. It adopts Conventions or treaties and assists governments and others in putting these into practice.

In 1969, the ILO was granted the Nobel Peace Prize for its work.[6] It is unique among other agencies of the United Nations because it is not composed only of States. It is tripartite as it is composed of government, employers, and workers.

The ILO is anchored on cooperation and continuous dialogues within the members of the tripartite, with each representative taking decisions independently. When the UN was established in 1945, the ILO which is an already existing international organization was the first agency to become part of the UN system. The ILO is composed of three main organs namely; (1) The International Labour Conference, (2) The Governing Body, and (3) The International Labour Office.

[5] Claridades, Alvin T., Philippine Environmental Laws, Policies and Case Remedied: An Academic Dissertation, 2016, p. 153
[6] ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169): A manual, Geneva, International Labour Office, 2003

The International Labour Conference

The Conference provides a forum for debate and discussion on important social and labour issues. It adopts standards and is the principal policy-making body of the Organization. Each of the ILO's 177-member States is represented by four delegates to the annual ILO Conference. Two are from the government, and one each from the national workers' and employers' organizations.[7]

The Governing Body

The ILO programme and budget are set by the Governing Body, and approved by the Conference. It also sets the Conference agenda. The Governing Body elects the Director-General of the ILO, its chief executive official, for a period of five years. And it supervises the day-to-day operations of the Office. The Governing Body is composed of 56 members: 28 government members, 14 employer members and 14 worker members.[8]

The International Labour Office

The International Labour Office is the focal point to carry out the activities of the Organization. It is the permanent secretariat, and a research and documentation centre. Its headquarters is in Geneva, Switzerland and it has 58 regional and area offices.[9]

REGULAR MONITORING OF ILO CONVENTIONS

Reporting on ILO Conventions is governed by Article 22[10] of the ILO Constitution. One year after the entry into force of a Convention that it has ratified, the government has to send its

[7] *Id*. at 2
[8] *Id*.
[9] *Id.*
[10] Article 22. Annual reports on ratified Conventions.

first report on the implementation of the Convention to the ILO. After this, reports are due at regular intervals. For example, the normal reporting period for Convention No. 169 is every five years. However, if the situation needs to be followed closely, the ILO supervisory bodies may request a report outside the regular reporting cycle.

In accordance with Article 23[11] of the ILO Constitution, the government has to submit a copy of its report to the representative workers' and employers' organizations to enable them to make comments on the report, if any. These organizations may also send their comments directly to the ILO and shall be brought to the attention of the appropriate supervisory bodies.

The ILO bodies undertaking the regular monitoring of the implementation of ratified Conventions are the Committee of Experts on the Application of Conventions and Recommendations (CEACR; Committee of Experts) and the Committee on the Application of Standards (CAS) of the International Labour Conference.

The Committee of Experts is a body of independent experts, who meet annually in Geneva in November and December. The Committee's mandate is to examine the reports submitted by ILO member States on the measures taken to give effect to ratified Conventions and to assesses the conformity of the country's law and practice with its obligations under the Convention. In these tasks, the Committee also relies on information received from workers' and employers' organizations, as well as, inter alia, official United Nations documents, judicial decisions and legislation.[12]

Comments from the Committee on Experts

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1. Each of the members agrees t make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request.

[11] Article 23. Examination and communication of reports.

1. The Director -*General shall lay before the next meeting of the Conference a summary of the information and reports communicated to him by Members in pursuance of articles 19 and 22.*
2. *Each Member shall communicate to the representative organizations recognized for the purpose of article 3 copies of the information and reports communicated to the Director-General in pursuance of articles 19 and 22.*

[12] Monitoring Indigenous and Tribal Peoples' Rights Through ILO Conventions: A compilation of ILO supervisory bodies'comments 2009-2010, ILO, 2010

Following the examination of a report, the Committee may address comments to the government concerned requesting further information on specific points and indicating measures that need to be taken to bring law and practice in line with the obligations under the Convention. The comments of the Committee of experts come in two forms:

- "Observations", which are comments published in the Committee of experts' annual report on the application of ILO Conventions; and
- "Direct requests", which are sent directly to the government in question, and generally ask for more information on specific subjects.

The Committee of experts' annual report is presented to the International Labour Conference, which meets in June. This report is debated at the Conference by the Committee on the Application of Standards (CAS), a tripartite body made up of governments', employers' and workers' delegates. The CAS's main task is to examine a number of individual cases concerning the application of ratified Conventions which have been the subject of observations by the Committee of experts. At the end of the discussion of each case, the CAS adopts conclusions. The information obtained from this tripartite debate feeds in the supervisory procedures.[13]

The Role of the Indigenous Peoples in the ILO Supervision

Although indigenous peoples do not have direct access to the ILO supervisory bodies, they can ensure that their concerns are dealt with in the regular supervision process of ILO Conventions in several ways:

- By sending verifiable information directly to the ILO on, for example, the text of a new policy, law, or court decision.
- By strengthening alliances with workers' or employers' organizations in order for information other than the kind mentioned above, to be officially taken into account by the ILO, it must be sent by one of the ILO constituents. Usually, workers' organizations have a more direct interest in indigenous issues. Therefore, for the purposes of ensuring

[13] *Id.*

indigenous peoples' issues are raised, it is important that they strengthen their alliances with workers' organizations (trade unions).

- By drawing the attention of the ILO to relevant official information from other UN supervisory bodies, fora or agencies, including the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people and the UN Permanent Forum on Indigenous Issues.
- Through innovative approaches, for example, through establishment of formal relations and procedures between indigenous peoples and governments. For instance, Norway requested that the Sami Parliament[14] submit its own independent comments on the government's regular reports under the Convention, and that these comments be considered by the ILO alongside the government report.[15]

Special Procedures

In addition to the regular supervision, the ILO has "special procedures" to deal with alleged violations of ILO Conventions. The most commonly used form of complaint in the ILO system is called a "representation", as provided for under article 24 of the ILO Constitution. A Representation, alleging a Government's failure to observe certain provisions of a ratified ILO Convention can be submitted to the ILO by a workers' or employers' organization. These must be submitted in writing, invoke Article 24 of the ILO Constitution, and indicate the provisions of the Convention alleged to have been violated.

The ILO governing body has to decide whether the representation is "receivable" - that is, if the formal conditions have been met to file it. Once the representation has been found receivable, the governing body appoints a tripartite Committee (i.e. one government representative, one employer representative and one worker representative) to examine it. The tripartite Committee draws up a report, which contains conclusions and recommendations and

[14] The Sami Parliament of Norway is the representative body for people of Sami heritage in Norway. It acts as an institution of cultural autonomy for the indigenous Sami people.
[15] *Ibid.*

submits it to the governing body for adoption. The Committee of experts then follows-up on the recommendations in the context of its regular supervision.[16]

THE ILO CONVENTION 169

The ILO Convention No. 169 on indigenous and tribal peoples is an international treaty, adopted by the International Labour Conference of the ILO in 1989. The Convention represents a consensus reached by ILO tripartite constituents on the rights of indigenous and tribal peoples within the nation-States where they live and the responsibilities of governments to protect these rights. It is based on respect for the cultures and ways of life of indigenous peoples and recognizes their right to land and natural resources and to define their own priorities for development. The Convention aims at overcoming discriminatory practices affecting these peoples and enabling them to participate in decision making that affects their lives. Therefore, the fundamental principles of consultation and participation constitute the cornerstone of the Convention. Further, the Convention covers a wide range of issues pertaining to indigenous peoples, including regarding employment and vocational training, education, health and social security, customary law, traditional institutions, languages, religious beliefs and cross-border cooperation.[17]

Convention No. 169 revises Convention No. 107, marking a change in the ILO's approach to indigenous and tribal peoples. Protection is still the main objective, but it is based on respect for indigenous and tribal peoples' cultures, their distinct ways of life, and their traditions and customs. It is also based on the belief that indigenous and tribal peoples have the right to continue to exist with their own identities and the right to determine their own way and pace of development.[18]

[16] *Ibid.*
[17] Understanding the Indigenous and Tribal People Convention, 1989 (No. 169), Handbook for ILO Tripartite Constituents / International Labour standards department. International Labor Organization – Geneva, 2013
[18] ILO Convention on indigenous and tribal peoples, 1989 (No. 169): A manual, Geneva, International Labour Office, 2003

Since its adoption, Convention No. 169 has gained recognition as the foremost international policy document on indigenous and tribal peoples. As of January 2003, it had been ratified by 17 countries.

Convention No. 107 is now closed for ratification. However, it remains binding on those who have already ratified it, until they ratify Convention No. 169.[19]

Who are Indigenous and Tribal Peoples?

"Indigenous and tribal peoples" is a common denominator for more than 370 million people, found in more than 70 countries worldwide. They constitute approximately 5% of the world population but 15% of the world's poor. Indigenous and tribal peoples are found in all regions of the world, from the Arctic to the tropical forests. There is no universal definition of indigenous and tribal peoples, but ILO Convention No. 169 provides a set of subjective and objective criteria, which are jointly applied to identify who these peoples are in a given country.

Given the diversity of the peoples it aims to protect, the Convention uses the inclusive terminology of "indigenous" and tribal peoples and ascribes the same set of rights to both groups. In Latin America, for example, the term "tribal" has been applied to certain afro-descendant communities.

Indigenous and tribal peoples are often known by national terms such as adivasis, mountain dwellers, hill tribes, hunter-gatherers, and many countries have developed specific registers of these peoples. In some cases, where there has been a lack of clarity about the application of the subjective and objective criteria, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has analysed the circumstances and provided comments to the country concerned.[20]

[19] *Id.* at 5
[20] *Ibid.*

Do Indigenous Peoples have "special" rights?

The histories of indigenous peoples have been marked by discrimination, marginalization, ethnocide or even genocide and, unfortunately, violations of their fundamental rights still occur. Hence, Convention No. 169 reaffirms that indigenous and tribal peoples are entitled to the same human rights and fundamental freedoms as all other human beings. At the same time, this also implies that indigenous customs cannot be justified, if these are in violation of universal human rights. This is, for example, important in cases where indigenous women, with reference to customs or traditions, are deprived of fundamental rights, such as access to education or property. Indigenous peoples' rights are not "special" rights, but are articulations of universal human rights, as they apply to indigenous peoples.

This means contextualizing rights to the situation of indigenous peoples and taking the collective aspects of these rights into account. For example, indigenous children have the same right to education as all other children, but their distinct languages, histories, knowledge, values and aspirations should be reflected in education programmes and services. The Convention thus provides for special measures to ensure effective equality between indigenous peoples and all other sectors of a given society. However, the requirement for special measures does not mean that the Convention requires that indigenous peoples be given special privileges vis-à-vis the rest of the population.[21]

The ILO and the Indigenous Peoples' Labour Issue through the years

The issue was first looked into when the ILO focused on the situation of rural workers in the 1920s. There were a large number of indigenous and tribal workers among them. Between 1936 and 1957, the ILO adopted a number of conventions to protect workers, including some which apply to indigenous and tribal workers. These conventions address issues such as recruitment, work contracts and forced labour.

[21] *Id.* at 3.

The ILO also provided practical assistance. Between 1952 and 1972, it administered a multi-agency programme for indigenous peoples in Latin America - the Andean Indian Programme. This programme is believed to have assisted 250,000 indigenous people.[22]

Gradually, the ILO realized that it was necessary to have a legal standard which focused solely on indigenous and tribal peoples. This was to address their distinct characteristics, which are important to indigenous and tribal peoples. In 1957, it adopted the Convention on Indigenous and Tribal Populations (No. 107), the first international legal treaty on this subject. It addresses many issues important to indigenous and tribal peoples such as land rights, labour and education.

When Convention No. 107 was adopted, indigenous and tribal peoples were seen as "backward" and temporary societies. The belief at the time was that, for them to survive, they had to be brought into the national mainstream, and that this should be done through integration and assimilation.

As time went on, this approach came to be questioned. This was due largely to a growing consciousness, and increasing numbers of indigenous and tribal peoples participating at international fora, such as the United Nations Working Group on Indigenous Populations.

The ILO had to respond to face this challenge. In 1985, it called a meeting of experts, who decided that Convention No. 107 should be revised. This was to bring it up to date and to make it more relevant. The Governing Body supported this recommendation.

Between 1987 and 1989, the ILO revised Convention No. 107. During this process, a large number of indigenous and tribal people were consulted and actively participated at the meetings either through their own organizations, or as representatives of employers' and workers' organizations, and of governments. After two years of intense discussion and drafting, the Indigenous and Tribal Peoples Convention (No. 169) was adopted in June 1989.[23]

[22] *Ibid.*
[23] *Ibid.*

THE LEGAL STATUS OF ILO 169

Convention No. 169 is an international treaty that becomes legally-binding upon States through ratification. To date, it has been ratified by 22 member States of the ILO, located in Latin America, Asia, Africa and Europe and covering an estimated population of more than 50 million indigenous peoples. Beyond the ratifying countries, Convention No. 169 is an international reference point, which is cited and used by UN bodies, regional human rights bodies and national courts. It has inspired numerous development and safeguard policies and national legislative frameworks.

The decision to ratify Convention No. 169, like any other international labour Convention, is a sovereign and voluntary decision of a State. It is often preceded by a long process of dialogue between the government, indigenous peoples, workers' organizations and employers' organizations, as well as other sectors of society. Ratifying States have an obligation to implement the Convention in good faith in both law and practice and to ensure that indigenous peoples are consulted and can participate in the process.

This implies that States must review and adjust legislation, policies and programmes to the provisions of the Convention and ensure that it reaches the foreseen results in practice, including closing of socio-economic gaps between indigenous and non-indigenous sectors of society. In some of the ratifying countries, the Convention has the force of law upon ratification and can be invoked before domestic courts, which, in turn, can directly rely on its provisions. However, even in those countries where treaties are directly applicable, specific legislative provisions will normally be needed to ensure the effective application of the Convention.[24]

WAY FORWARD FOR THE PHILIPPINES

Currently, ILO 169 is open for ratification by states. As of date, the ILO 169 has been ratified by 22 countries. The Philippines, however, has not yet ratified ILO 169. In 1997, The Philippines however, has enacted the Indigenous Peoples' Rights Act of 1997 (IPRA), primarily

[24] *Id.* at 5

to safeguard culture and to uphold the rights of indigenous peoples, including their rights to their ancestral domains. While some have benefitted from the implementation of the IPRA, challenges remain which hinder indigenous peoples and their communities to fully realize their rights.[25]

ILO Convention 169 seeks to remove the assimilationist[26] orientation of the earlier standard (Convention 107). It aims to enable indigenous peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their own identities, languages, religions, within the framework of the states in which they live. It likewise aims to enable indigenous peoples to enjoy the fundamental human rights to the same degree as the rest of the population of the state in which they live. Finally the convention calls for the recognition of the distinctive contribution of indigenous peoples to the cultural diversity and social and ecological harmony of humankind and to international cooperation and understanding.

If the Philippines ratifies the convention, it will be the first country in South East Asia to do so. ILO Convention No. 169 will fortify the promotion and protection of the indigenous peoples' rights by addressing in greater profundity and importance the areas which the IPRA does not sufficiently cover.

ILO Convention No. 169 provides for the indigenous peoples an additional platform, at the international level, where resort can be made in cases of violation of their rights. The ratification will also strengthen the government's commitment to its duty of respect, promotion and protection of the rights of its indigenous inhabitants. It is also important to emphasize the supervisory role ILO would have over state commitments under ILO Convention No. 169.

The supervision processes of the ILO are unique in their emphasis on continuous dialogue with states and the likelihood of offering ILO technical assistance to resolve domestic labor problems. All supervisory comment contributes to a wider understanding of the implications of ILO Convention 169 in more precise contexts.

[25] International Labour Organization, Enhancing the rights of indigenous peoples in the context of ILO Convention 169, *available at* https://www.ilo.org/manila/WCMS_207584/lang--en/index.htm (last accessed June 20, 2019).
[26] Root word is "assimilation" which refers to the process of adapting or adjusting to the culture of a group or nation, or the state of being so adapted.

Widespread ratification of ILO Convention No. 169 will make it difficult for governments all over the world to overlook tribal peoples' rights. This means that the protection of tribal populations is a subject of international concern. Ratification of ILO Convention No. 169 would serve to guide development policy and assistance and to be aware of its positive involvement to international standards for the realization of universal human rights.

AN INDEPENDENT JUDICIARY: PROTECTOR AND ENFORCER OF HUMAN RIGHTS

Atty. Cyrus Victor T. Sualog, Ll.M.[1]

I. Introduction

A. Definition of Human Rights

Human Rights, taken collectively, refers to the supreme, inherent and inalienable rights to life, to dignity and to self-development. It is the essence of these that makes man human.[2]

B. Sources of Human Rights

The Peoples of the United Nations (UN), to which the Philippines was one of them, determined in its Charter[3] "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the

There is a need to have a judiciary that is free from any form of influence, pressure and/or interference from other branches of the government and other outside forces.

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[2] University of the Philippines National College of Public Administration and Governance, et al., Rights-Based Approach Systems and Tools Manual, Chapters 2, Page 9, citing Human Development Report, *available at* http://www.ombudsman.gov.ph/UNDP4/wp-content/uploads/2013/07/Right-based-appr0ach-systems.pdf (last accessed June 29, 2019).

[3] Signed in San Francisco, California on June 26, 1945.

obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom."[4] These determinations are of equally manifested in the present Philippine charter. The 1987 Philippine Constitution enshrines the State's firm and solemn commitment to human rights by devoting an Article on Social Justice and Human Rights, creating an independent Commission on Human Rights, and declaring it a State policy to value the dignity of every human person and guarantee full respect for human rights, including the rights of indigenous cultural communities and other vulnerable groups, such as women, children, migrants and persons with disabilities. By these constitutional mandates, the Philippines is committed to ensure that human rights and fundamental freedoms of everyone is fully respected, promoted and protected.

The main sources of human rights are the human rights instruments which are of two types: Human Rights Treaties and UN Standards.[5] Human Rights Treaties, also known as conventions or covenants, are formal legal texts to which States become parties and which create binding legal obligations on States concerned.[6] These human rights treaties, including international customs, are the framework of the international human rights laws. While UN Standards, also known as UN Principles, Rules and Declarations,[7] are adopted at the international level in order to contribute to the understanding, development and enforcement of these human rights laws. An example of a UN Declaration is the Universal Declaration of Human Rights (UDHR),[8] a milestone document in the history of human rights which was proclaimed by the United Nations General Assembly in Paris on 10 December 1948.

The following are the different human rights treaties:

1. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
2. International Covenant on Civil and Political Rights (ICCPR);
3. International Covenant on Economic, Social and Cultural Rights (ICESCR);

[4] UN Documents Gathering a body of global agreements, United Nations Charter: Preamble, Purposes and Principles. Retrieved from http://www.un-documents.net/ch-ppp.htm.
[5] Rights-Based Approach of Systems and Tools Manual, Chapters 2, Page 10. Retrieved from http://www.ombudsman.gov.ph/UNDP4/wp-content/uploads/2013/07/Right-based-appr0ach-systems.pdf.
[6] *Id.*
[7] *Id.*
[8] Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 (1948).

4. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
5. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
6. Convention on the Rights of the Child (CRC);
7. International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW);
8. International Convention for the Protection of All Persons from Enforced Disappearance (CPED); and,
9. Convention on the Rights of Persons with Disabilities (CRPD).

The Philippines ratified eight of the core human rights treaties including their respective optional protocols, except for the Convention for the Protection of All Persons from Enforced Disappearance.[9] In order to achieve the goals and objectives of these human rights treaties, the Philippine legislature enacted domestic legislations and/or amended existing laws consistent with the provisions of these instruments.

C. State's Human Rights Obligations

A State Party to human rights instruments is bound to respect, promote, protect and fulfill all human rights and fundamental freedoms for all persons.[10] Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, *inter alia* , by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice.[11] Also, each State shall adopt such legislative, administrative and other steps as may be necessary to ensure that such rights and freedoms are effectively guaranteed. In view of the foregoing, a State has a threefold responsibility: to respect, to protect, and to fulfill human rights. The Office of the UN High Commissioner for Human Rights expounded this threefold responsibility in this regard:

[9]United Nations Office of the High Commissioner, Ratification Status for Philippines, *available at* https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=137&Lang=EN (last accessed June 29, 2019).
[10] Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, G.A. Res. 53/144, U.N. Doc A/RES/53/144 (December 9, 1998).
[11] *Ibid.*

1. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights.
2. The obligation to protect requires States to protect individuals and groups against human rights abuses.
3. The obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights.[12]

Thus, the respect, promotion, protection for human rights are not only at the international level but also at the domestic level. A State through its government – executive, legislative and judicial departments – must establish a rule of law for the respect, promotion and protection for human rights. The legislature must enact domestic legislations and/or amend existing laws consistent with the provisions of the international human rights instruments. The executive must adopt measures and mechanisms that will ensure the enforcement of the international human rights instruments and human rights legislations. The judiciary will ensure that a law enacted by the legislature and approved and being enforced by the executive is compatible and compliant with the State's treaty obligations. The judiciary must likewise provide legal remedies and actions so that people may redress their grievances against human rights abuses and violence, and even the threat thereof. In sum, a State through its government must ensure that human rights are indeed respected, promoted, protected, enforced and fulfilled at the domestic level.

II. An Independent Judiciary for the Respect, Protection and Fulfillment of Human Rights

A. Judicial Independence

> "The judiciary is an indispensable department of every democratic government. It is trite to say that courts of justice are the bastion of the rights and liberties of the people…. There is no doubt that the success of the Republic will depend, in the last analysis, upon the effectiveness of the courts in upholding the majesty of justice and the principle that ours is a government of laws and not of

[12] Human Rights Advocacy and the History of International Human Rights Standards, Government Obligations, *available at* http://humanrightshistory.umich.edu/accountability/obligationr-of-governments/ (last accessed June 29, 2019).

men…Lacking this capacity, judges become no more than lackeys of the political departments cowed to do their bidding or instruments of their own interest scheming for self-aggrandizement. Without independence and integrity, courts will lose that popular trust so essential to the maintenance of their vigor as champions of justice."[13]

-Retired Supreme Court Justice Isagani Cruz

Judicial independence is a concept that emphasizes the independence of the courts and the judges thereof from the other branches of government, politicians, political ideology or public pressure. That is, courts should not be subject to improper influence from the other branches of government, or from private or partisan interests.[14]

The principle of judicial independence is designed to protect our system of justice and the rule of law, and thus maintain public trust and confidence in the courts.[15]

Judicial Independence refers to institutional independence of the Judiciary as a whole, and individual independence of each judge and justice composing the Judiciary. These two kinds of independence are both necessary for a court to render impartial justice based only on the facts and the law, without any improper influence from the executive, legislature, superior judges, litigants, special interests groups, relatives of the Judge, or any other source, including the personal bias or interest of the Judge.[16] A judiciary can be institutionally independent, but if the Judge rendering the decision has no individual independence, then one cannot expect impartial justice. If a judge is individually independent, but the judiciary is under the control of the executive, one cannot also expect impartial justice, especially if the government is the litigant.[17]

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[13] ISAGANI CRUZ, PHILIPPINE POLITICAL LAW (1996 ed.).
[14] Judicial Independence, Wikipedia, the free encyclopedia. Retrieved from http://en.wikipedia.org/wiki/Judicial_independence (last accessed June 29, 2019).
[15] *Segars-Andrews v. Judicial Merit Selection Commission*, 387 S.C. 109, **691 S.E.2d 453 (2010).**
[16] Associate Justice Antonio Carpio, Judicial Independence, available at http://sc.judiciary.gov.ph/speech/09-19-08.pdf (last accessed June 29, 2019).
[17] *Ibid.*

B. The Significance of an Independent Judiciary

To ensure that human rights are indeed respected, protected, and fulfilled at the domestic level, and to have a stronger culture of human rights in a country, there is a need to have a judiciary that is free from any form of influence, pressure and/or interference from other branches of the government and other outside forces. An independent judiciary that ensures that the executive and legislature will refrain from interfering with or curtailing the enjoyment of human rights through the enactment and the enforcement of a law; protects individuals and groups against human rights abuses and violence; and takes positive action to facilitate the enjoyment of basic human rights.

B.1. International Laws on the Independence of the Judiciary

The international community recognizes the significance of judicial independence in the administration of justice. Several international legal instruments have been formulated to provide minimum standards of judicial independence. Some of these instruments which deal with judicial independence are as follows: International Bar Association Minimum Standards of Judicial Independence, 1982[18]; Universal Declaration on the Independence of Justice, 1983[19]; UN Basic Principles on the Independence of the Judiciary, 1985[20]; Procedures for the Effective Implementation of the UN Basic Principles on the Independence of the Judiciary,

[18] The Standards are specifically termed "Minimum" Standards. As they are directed towards national judges they are split inter alia into the parts of "Judges and the Executive", "Judges and the Legislature. Retrieved from Judicial Independence, The Minerva Research Group *available at* http://www.mpil.de/ww/de/pub/forschung/forschung_im_detail/projekte/minerva_richterl_unabh/intdocs.htm

[19] The purpose of the Montreal Declaration is to secure and guarantee to international judges, national judges, lawyers, jurors, and assessors judicial independence. It is divided into five parts, each dealing with the issue of independence with regard to the different categories of practitioners. Retrieved from Judicial Independence, The Minerva Research Group *available at* http://www.mpil.de/ww/de/pub/forschung/forschung_im_detail/projekte/minerva_richterl_unabh/intdocs.htm

[20] The Basic Principles were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders. The Congress was convened in accordance with para. (d) of the Annex of General Assembly Resolution 415 (V) of 1 December 1950. The Basic Principles are supposed to "assist Member States in their task of securing and promoting the independence of the judiciary". They are addressed at Governments who should take them into account and respected them "within the framework of their national legislation and practice." The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist. Retrieved from Judicial Independence, The Minerva Research Group @ http://www.mpil.de/ww/de/pub/forschung/forschung_im_detail/projekte/minerva_richterl_unabh/intdocs.htm

1989[21]; Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995; Universal Charter of the Judge, 1999[22]; Guidelines on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights to ensure the effective implementation of the Harare Principles, 1998.[23]

B.2. International Human Rights Laws on the Independence of the Judiciary

The right of access to justice will not be realized when there is a lack of independent and impartial judiciary. The following human rights instruments recognize the necessity of having an independent judiciary in the protection and enforcement of human rights:

a. Articles 8 and 10 of the UDHR[24] state:

> Article 8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.[25]
>
> Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.[26]

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[21] The Procedures are based on the idea that the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in adopting the Basic Principles "recommended them for national, regional and interregional action and called upon the Committee on Crime Prevention and Control to consider, as a matter of priority, the effective implementation of that resolution." The underlying idea is that "[a]ll States shall adopt and implement in their justice systems the Basic Principles […] in accordance with their constitutional process and domestic practice." Retrieved from Judicial Independence, The Minerva Research Group *available at* http://www.mpil.de/ww/de/pub/forschung/forschung_im_detail/projekte/minerva_richterl_unabh/intdocs.htm

[22] The Statement contains principles of the independence of the judiciary, including the appointment of judges, tenure, judicial conditions, judicial administration, relationship with the executive and resources. Retrieve from Judicial Independence, The Minerva Research Group *available at* http://www.mpil.de/ww/de/pub/forschung/forschung_im_detail/projekte/minerva_richterl_unabh/intdocs.htm

[23] The Declaration contains recommendations on the safeguards of the judiciary, election and appointment of judges, qualification and training of judges, judicial review on constitutionality of laws, safeguards for the rights of the defense and a fair trial, women and the position of judge, and the International Criminal Court. Retrieved from Judicial Independence, The Minerva Research Group *available at* http://www.mpil.de/ww/de/pub/forschung/forschung_im_detail/projekte/minerva_richterl_unabh/intdocs.htm

[24] Universal Declaration on Human Rights, *supra* note 8.

[25] *Id.* art. 8.

[26] *Id.* art. 10.

b. Article 6 of the *ICERD*[27] states:

Article 6. States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered because of such discrimination.[28]

c. Article 14 (1) of the *ICCPR*[29] states:

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. xxx[30]

d. Article 37 (d) of the *CRC*[31] states:

Article 37

States Parties shall ensure that:

xxx

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.[32]

[27] International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195.
[28] *Id.* art 6.
[29] International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.
[30] *Id.* art 6.
[31] Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3.
[32] *Id.* art. 37 (d).

e. Article 18 (1) of the ICMW[33] states:

> Article 18
> 1. Migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals. In the determination of any criminal charge against them or of their rights and obligations in a suit of law, they shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[34]

f. Article 11 (3) of *CPED*[35] states:

> Article 11
> xxx
>
> 3. Any person against whom proceedings are brought in connection with an offence of enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings. Any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law.[36]

g. Article 13 of the *CRPD*[37] imposes the obligation to State Parties to ensure effective access to justice for persons with disabilities, to wit:

> Article 13 - Access to justice
> 1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
>
> 2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for

[33] International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families, *adopted on* Dec. 18, 1990, 2220 U.N.T.S. 3.
[34] *Id.* art. 18 (1).
[35] International Convention for the Protection of All Persons from Enforced Disappearance, *open for signature* Feb. 6, 2007, 2716 U.N.T.S. 3.
[36] *Id.* art. 11 (3).
[37] Convention on the Rights of Persons with Disabilities, *adopted on* Dec. 13, 2006, 2515 U.N.T.S. 3.

those working in the field of administration of justice, including police and prison staff.[38]

B3. In consonance with the Doctrine of Separation of Powers

Our constitutional system - with its bedrock principles of separation of powers and checks and balances - simply cannot survive without a robust and independent judiciary.[39] In the modern constitutional State, the principle of an independent Judiciary has its origin in the theory of separation of powers, whereby the executive, legislature and judiciary form three separate branches of government, which, in particular, constitute a system of mutual checks and balances aimed at preventing abuses of power to the detriment of a free society.[40] This independence means that both the judiciary as an institution and also the individual judges deciding particular cases must be able to exercise their professional responsibilities without being influenced by the executive, the legislature or any other inappropriate sources.[41]

The doctrine of separation of powers is intended to prevent a concentration of authority in one person or group of persons that might lead to an irreversible error or abuse in its exercise to the detriment of our republican institutions. The doctrine is intended to secure action, to forestall over action, to prevent despotism and to obtain efficiency.[42] The doctrine is observed in our country not only because it is regarded as a characteristic of republicanism but also for the reason that the major powers of government are actually distributed by the constitution among the several departments and constitutional commissions.[43]

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[38] *Id.* art 13.
[39] Paragraph 15 of the Answer of Chief Justice Corona to the Articles of Impeachment.
[40] Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers *available at* http://www.ohchr.org/Documents/Publications/training9Titleen.pdf (last accessed June 29, 2019).
[41] *Ibid.*
[42] ANTONIO B. NACHURA, POLITICAL LAW REVIEW (2006 ed.), (citing Pangasinan Transportation Co vs. Public Service Commission 40 O.G 8th Supp. 57.)
[43] ISAGANI CRUZ, *supra* note 13 at 74.

It is worthy to note the classical statements from 18th century Montesquieu's The Spirit of Laws[44] regarding the separation of judicial power from executive and legislative powers:

> Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.[45]

B4. Supports the System of Checks and Balances

Complementary with the doctrine of separation of powers is the principle of checks and balances. The doctrine of separation of powers embodied in the constitution does not intend the three great branches of government to be absolutely unrestrained and independent of each other.[46] The constitution provides for an elaborate system of checks and balances to secure coordination in the working of the various departments of the government.[47] A benefit of this concept is that no one branch is clothed with too much power because each branch exercise some "check" over the other branches.[48] Notably, the system of checks and balances ensure that one great branch of the government should never assert supremacy over the other.[49]

This principle of checks and balances means that every branch of our government does not encroach over the powers of another. The executive, legislative and judiciary observe separation of powers and at the same time watches over the exercise of the powers of each other. This principle was not created to make one stronger than the other, but to maintain harmony of the government as a whole.

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[44]CHARLES DE SECONDAT AND BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS, 221-237 (Thomas Nugent trans., 1777)
See also Fordham University, Modern History Sourcebook: Montesquieu: The Spirit of the Laws, 1748, *available at* https://sourcebooks.fordham.edu/mod/montesquieu-spirit.asp (last accessed June 29, 2019).
[45] *Id.*
[46] Francisco v. House of Representatives, G.R. No. 160261, November 10, 2003.
[47] *Ibid.*
[48] JOANNE B. HAMES AND YVONE EKERN, CONSTITUTIONAL LAW: PRINCIPLES AND PRACTICE, 30 (2nd ed.).
[49] Bryan Dennis G. Tiojanco and Leandro Angelo Y. Aguirre, *The Scope, Justifications and Limitations of Extradecisional Judicial Activism and Governance in the Philippines,* 84 Phil. L.J. 73 (2009-2010).

To further explain the point, the author uses the following illustrations:

1. When Congress passes a bill the President can veto such bill. Here, the President's veto power is a check on the power of Congress to legislate. Thus, Congress has no absolute power to pass any law which it may consider.

2. The Supreme Court, in the exercise of its power of judicial review, can declare a law passed by Congress as unconstitutional. Here, the Supreme Court's power to conduct judicial review is a check on the power of Congress to legislate, in order to ensure that no constitutional provision is infringed.

3. The Supreme Court may issue a writ of certiorari or prohibition in order to correct errors of jurisdiction committed by a tribunal, corporation, board or officer exercising judicial, quasi-judicial or ministerial functions, or to set right, undo and restrain any act of grave abuse of discretion amounting to lack or excess of jurisdiction by any branch or instrumentality of the Government, even if the latter does not exercise judicial, quasi-judicial or ministerial functions.[50]

III. The Powers of the Court in relation to Human Rights

The 1987 Constitution molded an even stronger and more independent judiciary.[51] Among others, it expanded the judicial power and enhanced the rule-making power of the Supreme Court.

A. Judicial Power

Judicial power is vested in one Supreme Court and in such lower courts as may be established by law.[52] Such lower courts include the Court of Appeals, Sandiganbayan, Court

[50] Araullo, et al. v. Aquino III, et al., G.R. No. 209287, February 3, 2015.
[51] In Re: Exemption of the National Power Corporation from Payment of Filing/ Docket Fees, A.M. NO. 05-10-20-SC, March 10, 2010.

of Tax Appeals, Regional Trial Courts, Shari'a District Courts, Metropolitan Trial Courts, Municipal Trial Courts and Municipal Circuit Trial Courts, and Shari'a Circuit Courts.[53]

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government.[54] The first part represents the traditional concept of judicial power while the second part represents the broadening of judicial power into determining the legality or propriety of the exercise of discretion of the political departments of government.[55] The second clause effectively limits the "political question" area, which was forbidden territory for the courts.[56]

In addition to its judicial power, the Supreme Court is vested with the power of judicial review which is the power to declare a treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation unconstitutional.[57] This power of judicial review also includes the duty to rule on the constitutionality of the application, or operation of presidential decrees, proclamations, orders, instructions, ordinances, and other regulations.[58]

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[52] PHIL. CONST. art. VIII, §. 1.
[53] Instituting the "Administrative Code of 1987" [ADMINISTRATIVE CODE OF 1987], Executive Order No. 292, Book II, Chapter 4 (1987).
[54] PHIL. CONST. art. VIII, § 1. See Kilusang Mayo Uno Labor Center v. Garcia, 239 SCRA 386 (1994).
[55] *See Oposa v. Factoran*, Jr., G.R. No. 101083, July 30, 1993, 224 SCRA 792, 810; quoting the comment of Justice Isagani Cruz on Section 1, Article VIII of the 1987 Philippine Constitution in his book, Philippine Political Law, 226-227 (1991 ed.).
[56] ANTONIO EDUARDO B. NACHURA, OUTLINE REVIEWER IN POLITICAL LAW, 309 (2009 ed.).
[57] Section 4(2), Article VIII of the Constitution reads:

> Sec. 4 xxx
>
> (2) All cases involving the constitutionality of a treaty, international or executive agreement, or law, which shall be heard by the Supreme Court en banc, and all other cases which under the Rules of Court are required to be heard en banc, including those involving the constitutionality, application, or operation of presidential decrees, proclamations, orders, instructions, ordinances, and other regulations, shall be decided with the concurrence of a majority of the Members who actually took part in the deliberations on the issues in the case and voted thereon.

[58] *Ibid. See* Biraogo v. Philippine Truth Commission of 2010, 637 SCRA 78, 176 (2010).

A.1 Power to Apply or Interpret

In the exercise of the Courts' judicial power, they either apply or interpret the mandates of the Constitution on human rights, and the human rights obligations set out under those international human rights instruments and their corresponding domestic legislations to a given case. Article 8 of the New Civil Code[59] even made it clear that application or interpretation of these laws forms a part of the legal system of the Philippines, to wit:

> Article 8. Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines.[60]

A.2 Examples of Cases wherein the Court either Applied or Interpreted the different International Human Rights Instruments

a. *Ang Ladlad LGBT Party v. Commission on Elections*[61]

Petitioner *Ang Ladlad* is an organization composed of men and women who identify themselves as lesbians, gays, bisexuals, or transgendered individuals (LGBTs). The case had its roots in the COMELEC's refusal to accredit *Ang Ladlad* as a party-list organization under the Party-List System Act based on moral grounds. In granting the petition of *Ang Ladlad*, the Supreme Court applied the provisions on the UDHR, and the International Covenant on Civil and Political Rights (ICCPR). The Court ratiocinated:

> Our Decision today is fully in accord with our international obligations to protect and promote human rights. In particular, we explicitly recognize the principle of non-discrimination as it relates to the right to electoral participation, enunciated in the UDHR and the ICCPR.[62]
>
> The principle of non-discrimination is laid out in Article 26 of the ICCPR, as follows:

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[59] AN ACT TO ORDAIN AND INSTITUTE THE CIVIL CODE OF THE PHILIPPINES [CIVIL CODE], ACT NO. 386, ART. 8 (1950).
[60] *Id.*
[61] G.R. No. 190582, April 8, 2010.
[62] *Id.*

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In this context, the principle of non-discrimination requires that laws of general application relating to elections be applied equally to all persons, regardless of sexual orientation. Although sexual orientation is not specifically enumerated as a status or ratio for discrimination in Article 26 of the ICCPR, the ICCPR Human Rights Committee has opined that the reference to 'sex' in Article 26 should be construed to include "sexual orientation." Additionally, a variety of United Nations bodies have declared discrimination on the basis of sexual orientation to be prohibited under various international agreements.

The UDHR provides:

Article 21.

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

Likewise, the ICCPR states:

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

> (c) To have access, on general terms of equality, to public service in his country.[59]

b. *Jesus C. Garcia v. The Hon. Ray Alan T. Drilon, Pres. Judge, RTC, Br. 41, Bacolod City, et al.*[63]

In 2004, Congress enacted Republic Act (RA) No. 9262,[64] entitled "An Act Defining Violence Against Women and Their Children, Providing for Protective Measures for Victims, Prescribing Penalties Therefor, and for Other Purposes." It is a landmark legislation that defines and criminalizes acts of violence against women and their children (VAWC) perpetrated by women's intimate partners, *i.e*, husband; former husband; or any person who has or had a sexual or dating relationship, or with whom the woman has a common child. The law provides for protection orders from the barangay and the courts to prevent the commission of further acts of VAWC; and outlines the duties and responsibilities of barangay officials, law enforcers, prosecutors and court personnel, social workers, health care providers, and other local government officials in responding to complaints of VAWC or requests for assistance.

The petitioner, a husband, was before the Court assailing the constitutionality of RA 9262 as being violative of the equal protection, among others.

The Court found that RA 9262 was based on a valid classification and did not violate the equal protection clause by favoring women over men as victims of violence and abuse to whom the State extends its protection.[65] The Court further stated:

> The enactment of RA 9262 aims to address the discrimination brought about by biases and prejudices against women. As emphasized by the CEDAW Committee on the Elimination of Discrimination against Women, addressing or correcting discrimination through specific measures focused on women does not discriminate against men. Petitioner's contention, therefore, that RA 9262 is discriminatory and that it is an 'anti-male,' 'husband-bashing,' and 'hate-men' law deserves scant consideration. As a State Party to the CEDAW, the Philippines

[63] G.R. No. 179267, June 25, 2013
[64] An Act Defining Violence Against Women and their Children, providing for Protective Measures for Victims, Prescribing Penalties Therefore, and for other purposes [Anti-Violence Against Women and their Children Act of 2004], Republic Act No. 9262 (March 2004).
[65] *supra* note 63.

bound itself to take all appropriate measures 'to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.' Justice Puno correctly pointed out that '(t)he paradigm shift changing the character of domestic violence from a private affair to a public offense will require the development of a distinct mindset on the part of the police, the prosecution and the judges.[66]

II. The classification is germane to the purpose of the law.

The distinction between men and women is germane to the purpose of RA. 9262, which is to address violence committed against women and children, spelled out in its Declaration of Policy, as follows:

> SEC. 2. Declaration of Policy. – It is hereby declared that the State values the dignity of women and children and guarantees full respect for human rights. The State also recognizes the need to protect the family and its members particularly women and children, from violence and threats to their personal safety and security. Towards this end, the State shall exert efforts to address violence committed against women and children in keeping with the fundamental freedoms guaranteed under the Constitution and the provisions of the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child and other international human rights instruments of which the Philippines is a party.

In 1979, the U.N. General Assembly adopted the CEDAW, which the Philippines ratified on August 5, 1981. Subsequently, the Optional Protocol to the CEDAW was also ratified by the Philippines on October 6, 2003. This Convention mandates that State parties shall accord to women equality with men before the law and shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations on the basis of equality of men and women. The Philippines likewise ratified the Convention

[66] *Id.*

on the Rights of the Child and its two protocols. It is, thus, bound by said Conventions and their respective protocols."

c. *Southern Luzon Drug Corporation v. Department of Social Welfare and Development, et al.*[67]

The Petitioner sought to prohibit the implementation of Section 4(a) of Republic Act (RA) No. 9257,[68] otherwise known as the "*Expanded Senior Citizens Act of 2003*" and Section 32 of RA No. 9442,[69] which amended the "*Magna Carta for Disabled Persons*," particularly the granting of 20% discount on the purchase of medicines by senior citizens and persons with disability (PWD), respectively, and treating them as tax deduction.

The petitioner is a domestic corporation engaged in the business of drugstore operation in the Philippines while the respondents are government agencies, office and bureau tasked to monitor compliance with RA Nos. 9257 and 9442, promulgate implementing rules and regulations for their effective implementation, as well as prosecute and revoke licenses of erring establishments.

The Petitioner claimed that RA No. 9442 was unconstitutional because, among others, it was ambiguous particularly in defining the terms 'disability' and 'PWDs,' such that it lacked comprehensible standards that men of common intelligence must guess at its meaning. The Court disagreed, and reasoned out:

Section 4(a) of RA No. 7277, the precursor of RA No. 94421 defines "disabled persons" as follows:

[67] G.R. No. 199669, April 25, 2017.
[68] An Act granting additional benefits and privileges to Senior Citizens amending for the purpose Republic Act No. 7432, otherwise known as "An Act to Maximize the Contribution of Senior Citizens to Nation Building, grant benefits and special privileges and for other purposes" [Expanded Senior Citizens Act of 2003], Republic Act No. 9257 (2004).
[69] An Act Amending Republic Act No. 7277, Otherwise Known As The "Magna Carta For Disabled Persons, And For Other Purposes" [Magna Carta for Disabled Persons], Republic Act No. 9442 (2006).

> (a) Disabled persons are those suffering from restriction or different abilities, as a result of a mental, physical or sensory impairment, to perform an activity in the manner or within the range considered normal for a human being[.]

On the other hand, the term 'PWDs' is defined in Section 5.1 of the. IRR of RA No. 9442 as follows:

> ***5.1. Persons with Disability*** are those individuals defined under Section 4 of [RA No.] 7277 [or] An Act Providing for the Rehabilitation, Self-Development and Self-Reliance of Persons with Disability as amended and their integration into the Mainstream of Society and for Other Purposes. This is defined as a person suffering from restriction or different abilities, as a result of a mental, physical or sensory impairment, to perform an activity in a manner or within the range considered normal for human being. Disability shall mean (1) a physical 1or mental impairment that substantially limits one or more psychological, physiological or anatomical function of an individual or activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.

The foregoing definitions have a striking conformity with the definition of 'PWDs' in Article 1 of the *United Nations Convention on the Rights of Persons with Disabilities* which reads:

> ***Persons with disabilities*** include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. (Emphasis and italics ours)

The seemingly broad definition of the terms was not without good reasons. It recognizes that 'disability is an evolving concept' and appreciates the 'diversity of PWDs.' The terms were given comprehensive definitions so as to accommodate the various forms of disabilities, and not confine it to a particular case as this

would effectively exclude other forms of physical, intellectual or psychological impairments.[70]

B. Rule Making Power

The constitutional rights as well as the human rights protection provisions in the Constitution would be a mere scrap of paper if there are no mechanisms for their enforcement. The need for mechanisms to protect human rights has never become as critical as they have become in the recent years. This is the gap which the present rule making power of the Supreme Court seeks to fill in. Thus, people would have the judicial fora for the protection and enforcement of their constitutional rights. The 1987 Constitution enhanced the rule making power of the Supreme Court.[71] Its Section 5(5), Article VIII provides:

> Section 5. The Supreme Court shall have the following powers:
>
> xxx
>
> (5) **Promulgate rules concerning the protection and enforcement of constitutional rights**, pleading, practice, and procedure in all courts, the admission to the practice of law, the integrated bar, and legal assistance to the underprivileged. **Such rules** shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and **shall not diminish, increase, or modify substantive rights.** xxx[72] (Emphases supplied)

The present constitution clearly granted the Supreme Court the power to promulgate rules concerning the protection and enforcement of the constitutional rights of the people. This constitutional provision provides for the Supreme Court's powers to protect constitutional rights which include human rights, and to ensure the enforcement of these rights. The present rule making power of the Supreme Court is expanded but complements the plenary legislative power of Congress.

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[70] Southern Luzon Drug Corporation v. Department of Social Welfare and Development, et al., G.R. No. 199669, April 25, 2017.
[71] In Re: Exemption of the National Power Corporation from Payment of Filing/ Docket Fees, A.M. No. 05-10-20-SC, March 10, 2010.
[72] PHIL. CONST. art. VIII, § 5(5).

By virtue of its rule-making power, the Supreme Court continues to advance the respect for human rights and puts in the mainstream the promotion of human rights awareness and enforcement. Recognizing the strong connection of human rights and constitutional rights, the Supreme Court has taken advantage of its rule-making authority in promulgating rules, procedures and guidelines concerning the protection and enforcement of human rights. They promulgated new court rules of procedure that provide the people with judicial remedies that would protect their constitutional right to life, liberty, and security; that accelerate and expedite the resolution of cases; that reduce judicial malfeasance; and that increase public confidence in the judiciary. These efforts of the Supreme Court would improve, directly or indirectly, the capacities of vulnerable and disadvantaged sectors (claimholders) and the rest of the civil society in escalating their human rights issues and concerns against the government (duty-bearers), and the efficiency of the courts and the members thereof in processing cases.

The following are some of the administrative matters that were promulgated by the Supreme Court for the protection and enforcement of constitutional rights which include human rights:

a. *The Rule on the Writ of Amparo (A.M. No. 07-9-12-SC)*[73]

In the case of *Secretary of National Defense v. Raymond and Reynaldo Manalo*,[74] the case at bar is the first decision on the application of the Rule on the Writ of *Amparo* (*Amparo* Rule), the Supreme Court through then Chief Justice Reynato Puno briefly discussed the beginning and the purpose of the writ of *amparo* in this way:

> The adoption of the *Amparo* Rule surfaced as a recurring proposition in the recommendations that resulted from a two-day National Consultative Summit on Extrajudicial Killings and Enforced Disappearances sponsored by the Court on July 16-17, 2007. The Summit was envisioned to provide a broad and fact-based perspective on the issue of extrajudicial killings and enforced disappearances, hence representatives from all sides of the political and social

[73] THE RULE ON THE WRIT OF AMPARO, A.M. No. 07-9-12-SC (Sept. 25, 2007).
[74] G.R. No. 180906, October 7, 2008.

spectrum, as well as all the stakeholders in the justice system participated in mapping out ways to resolve the crisis.

On October 24, 2007, the Court promulgated the *Amparo* Rule in light of the prevalence of extralegal killing and enforced disappearances. It was an exercise for the first time of the Courts expanded power to promulgate rules to protect our peoples constitutional rights, which made its maiden appearance in the 1987 Constitution in response to the Filipino experience of the martial law regime. As the *Amparo* Rule was intended to address the intractable problem of extralegal killings and enforced disappearances, its coverage, in its present form, is confined to these two instances or to threats thereof. Extralegal killings are killings committed without due process of law, *i.e.*, without legal safeguards or judicial proceedings. On the other hand, enforced disappearances are attended by the following characteristics: an arrest, detention or abduction of a person by a government official or organized groups or private individuals acting with the direct or indirect acquiescence of the government; the refusal of the State to disclose the fate or whereabouts of the person concerned or a refusal to acknowledge the deprivation of liberty which places such persons outside the protection of law.[75]

b. *The Rule on the Writ of Habeas Data (A. M. No. 08-1-16-SC)*[76]

In *Vivares v. St. Theresa's College*,[77] the Supreme Court described the writ of habeas data in this way:

The writ of habeas data is a remedy available to any person whose right to privacy in life, liberty or security is violated or threatened by an unlawful act or omission of a public official or employee, or of a private individual or entity engaged in the gathering, collecting or storing of data or information regarding the person, family, home and correspondence of the aggrieved party. It is an independent and summary remedy designed to protect the image, privacy, honor, information, and freedom of information of an individual, and to provide a forum to enforce one's right to the truth and to informational privacy. It seeks to protect a person's right to control information regarding oneself, particularly in instances in which such information is being collected through unlawful means in order to achieve unlawful ends.

In developing the writ of habeas data, the Court aimed to protect an individual's right to informational privacy, among others. A comparative law

[75] *Id.*
[76] THE RULE ON THE WRIT OF HABEAS DATA, A.M. No. 08-1-16-SC (Jan. 22, 2008).
[77] G.R. No. 202666, September 29, 2014.

> scholar has, in fact, defined habeas data as "a procedure designed to safeguard individual freedom from abuse in the information age.[78]

c. *The Rules of Procedure for Environmental Cases (A.M. No. 09-6-8-SC)*[79]

The Annotation to the Rules of Procedure for Environmental Cases[80] (Rules for brevity) sets out the following introductory statements about the Rules of Procedure for Environmental Cases:

> The effort to formulate this separate set of rules is a response to the long felt need for more specific rules that can sufficiently address the procedural concerns that are peculiar to environmental cases. Most of the provisions included here are therefore remedies that are directed to the actual difficulties encountered at present by concerned government agencies, corporations, practitioners, people's organizations, non-governmental organizations, and public-interest groups handling environmental cases.[81]

Cleary, the Rules addresses environmental justice issues more substantially. It is a remedy of the poor and vulnerable communities and those who are powerless against large-scale environmental aggressions. In addition, it supports Article 25 of the Universal Declaration of Human Rights which speaks of "the right to a standard of living adequate for the health and well-being"[82] of an individual and his family, and section 16 of Article II of the 1987 Constitution which provides for the "right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."[83]

Any real party in interest, including the government and juridical entities authorized by law, and any Filipino citizen in representation of others may file an action involving the enforcement or violation of any environmental law.

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[78] *Id.*
[79] RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, A.M. No. 09-6-8-SC (Apr. 13, 2010).
[80] Supreme Court, Annotation to the Rules of Procedure for Environmental Cases, *available at* http://philja.judiciary.gov.ph/assets/files/pdf/learning_materials/A.m.No.09-6-8-SC_annotation.pdf (last accessed June 29, 2019).
[81] *Id.*
[82] Universal Declaration of Human Rights, *supra* note 8, art. 25.
[83] PHIL. CONST. art II, § 16.

d. *Guidelines for Decongesting Holding Jails by Enforcing the Rights of Accused Persons to Bail and to Speedy Trial (A.M. NO. 12-11-2-SC)*[84]

In promulgating this administrative matter, the Supreme Court recognizes the need to effectively implement existing policies laid down by the Constitution, the laws and the rules respecting the accused's rights to bail and to speedy trial in the context of decongesting our detention jails and humanizing the conditions of detained persons pending the hearing of their cases. Moreover, the Supreme Court enjoins all trial courts, public prosecutors, public attorneys, private practitioners, and other persons involved in protecting and ensuring the grant to the accused of his rights to bail and to speedy trial to observe the provisions of the guidelines.

e. *Revised Guidelines for the Continuous Trial of Criminal Cases (A.M. NO. 15-06-10-SC)*[85]

The Revised Guidelines is intended to protect and advance the constitutional right of persons to a speedy disposition of their criminal cases, to reinforce and give teeth to the existing rules on criminal procedure and other special rules prescribing periods for court action and those which promote speedy disposition of said cases, and to introduce innovations and best practices for the benefit of the parties.

f. *Rule on Community Legal Aid Service (A.M. NO. 17-03-09-SC)*[86]

Section 2 of the Rule states its rationale, to wit:

> SECTION 2. Rationale. -The legal profession is imbued with public interest. As such, lawyers are charged with the duty to give meaning to the guarantee of access to adequate legal assistance under Article III, Section 11 of the 1987 Constitution by making their legal services available to the public in an efficient and convenient manner compatible with the independence, integrity and effectiveness of the profession. As a way to

[84] GUIDELINES FOR DECONGESTING HOLDING JAILS BY ENFORCING THE RIGHTS OF ACCUSED PERSONS TO BAIL AND TO SPEEDY TRIAL, A.M. No. 12-11-2-SC (March 18, 2014).
[85] REVISED GUIDELINES FOR THE CONTINUOUS TRIAL OF CRIMINAL CASES, A.M. No. 15-06-10-SC (Sept. 1, 2017).
[86] Rule on Community Legal Aid Services, A.M. No. 17-03-09-SC (Oct. 10, 2017).

> discharge this constitutional duty, lawyers are obliged to render pro bono services to those who otherwise would be denied access to adequate legal services.[87]

The Community Legal Aid Service applies prospectively to "Covered lawyers" who have successfully passed the Annual Bar Examinations and have signed the Roll of Attorneys for that particular year; for purposes of this Rule, it shall include those who will pass the 2017 Bar Examination and are admitted to the Bar in 2018.[88] Covered lawyers are required to render one hundred twenty (120) hours of *pro bono* legal aid services to qualified parties within the first year of the covered lawyers' admission to the Bar, counted from the time they signed the Roll of Attorneys.[89]

g. *Judicial Integrity Board and Corruption Prevention and Investigation Office (A.M. NO. 18-01-05-SC)*[90]

This measure is made pursuant to pursuant to Section 7(3), Article VIII of the 1987 Constitution, which mandates that members of the Judiciary must be of proven competence, integrity, probity and independence.[91] It is intended to strengthen integrity of the members of the Judiciary and prevent corruption in the Judiciary by creating a permanent body which has exclusive jurisdiction to investigate judicial misconduct and to recommend appropriate sanctions when proper.

IV. Conclusion

[87] *Id.* § 2.
[88] *Id.* § 4(a).
[89] *Id.* § 5(a).
[90] Supreme Court, A.M. No. 18-01-05-SC [Judicial Integrity Board and Corruption Prevention and Investigation Office] (Oct. 2, 2018).
[91] PHIL. CONST. art. VIII, § 7(3).

Compliance with the mandates of the Constitution and human rights obligations set out under the different international human rights instruments and their corresponding legislations requires the concerted action of the government – executive, legislative and judiciary, and the different civil society organizations. This concerted action should be guided by the rule of law, all accepted human rights principles, our commitment to the universality of human rights standards, our desire to empower the vulnerable and disadvantaged sectors, and the principles of good governance.

Again, to ensure that human rights are indeed respected, protected, and fulfilled at a domestic level, and to have a stronger culture of human rights in a country, there is a need to have a judiciary that is free from any form of influence, pressure and/or interference from other branches of the government and other outside forces. An independent judiciary that ensures that the executive and legislature will refrain from interfering with or curtailing the enjoyment of human rights through the enactment and the enforcement of a law; protects individuals and groups against human rights abuses and violence; and takes positive action to facilitate the enjoyment of basic human rights.

THE KILLING JOKE:
Liability of States and Individuals in "*Inspiring*" Criminality

Josiah David F. Quising[1]

I. Introduction

When a President is seen as a king instead of a servant of the people, democracy decays into archaism where his words are treated as law – and when a jester sits at the throne of the palace, his "jokes" are as good as written in blood.

For three years, the Chief Executive has riddled the nation with remarks testing the boundaries of Filipino morality. After three (3) Presidential Spokespersons, the Palace's justification went from "jokes"[2] to "Visayan culture"[3] to "political style"[4]. When jokes begin to solicit beyond laughs, one should take a step back and ask, "Can we blame the Joker for his tricks?".

II. Attribution of Conduct to the State and to Individuals

While the doctrine of presidential immunity continues to conveniently shield the incumbent Chief Executive from suit, international law does not offer the same. The Author will discuss the possible liabilities of both the State and individuals who are proven to be complicit or have participated to the crimes done by persons under their influence.

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[2] Trisha Macas, *How to know when Duterte is serious or joking? Abella says listen to Palace clarifications,* GMA NEWS, February 9, 2017, *available at* https://www.gmanetwork.com/news/news/nation/598998/how-to-know-when-duterte-is-serious-or-joking-abella-says-listen-to-palace-clarifications/story/?related (last accessed June 29, 2019).

[3] Pia Ranada, *Roque: Visayas, Mindanao 'more liberal' in defining what is offensive,* RAPPLER, August 31, 2018, *available at* https://www.rappler.com/nation/210814-visayas-mindanao-people-more-liberal-defining-offensive (last accessed June 29, 2019).

[4] Pia Ranada, *Panelo on 'laway' remark: Duterte's speaking style made him President,* RAPPLER, October 29, 2018, *available at* https://www.rappler.com/nation/215470-panelo-statement-duterte-laway-remark-speaking-style-made-him-president (last accessed June 29, 2019).

A. State Liability in International Law

The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts or otherwise known as the Articles on State Responsibility ("ASR"),[5] adopted by the UN General Assembly in 2001 and considered by tribunals as customary international law.[6] It provides for instances where conduct may be attributed to the State.

The Author focuses on Articles 7 and 8, particularly the conduct in excess of authority or contravention of instructions and conduct directed by a State. Article 7[7] of the ASR states that:

> The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.[8]

Meanwhile, Article 8[9] states:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.[10]

Both Articles tackle conduct considered indirectly committed by the State through persons "empowered to exercise elements of governmental authority … even if it exceeds its authority or contravenes instructions"[11] and persons "acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[12]

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[5] Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A/56/83 (Dec. 12, 2001). [hereinafter ASR].
[6] Mr. Kristian Almas and Mr. Gier Almas v. Republic of Poland, PCA Case No. 2015-13, Award, 59, ¶206 (Perm. Ct. Arb. 2016).
[7] ASR, *supra* note 5, art.7.
[8] *Id.*
[9] *Id.* art. 8.
[10] *Id.*
[11] *Id.* art. 7.
[12] *Id.* art. 8.

i. Conduct of Government Authorities

Under Article 7 of the ASR, the State cannot hide behind its erring officers to escape liability under International Law.[13] It is not enough to argue that the actions were violative of the country's internal law for the Government to be excused. Merely branding them as *ultra vires* acts will not automatically exculpate them from their responsibility.

An early application of the rule found in Article 7 can be read in the case of *Way v United Mexican States*[14] where a Mexican *Alcalde*, a form of "judicial police" under Mexican law, issued a warrant of arrest against William T. Way, an American, who was then killed during the course of the arrest. The issued warrant was later found to be illegal as the *Alcalde* did not have the authority to issue such. The warrant is baseless as the accused was shown to have committed no offense. It is also void for failure to state any charge.[15] Evidence further indicated that the *Alcalde*, before the issuance of the warrant, "had given vent to expressions of malevolence" towards the American victim and gave oral instructions to the men who killed the latter.[16] The United States Government filed a case against Mexico on the ground of "miscarriage and denial of justice" when it failed to convict the *Alcalde* of murder.[17] The Mexican Government argued that it should not be held liable for the actions of the *Alcalde* and that no responsibility should attach to it as he was merely a "minor official".[18] The American-Mexican Claims Commission (officially known as the "General Claims Commission") disagreed and held that:

… historically, speeches made by influential individuals promoting unlawful actions toward a particular group of people, whether in jest or not, unsurprisingly result to the perpetration of crimes by persons under their power or influence.

> when misconduct on the part of persons concerned with the discharge of governmental functions, whatever their precise status may be under domestic law,

[13] *Id.* art. 7.
[14] William T. Way (U.S.A.) v. United Mexican States, 4 R.I.A.A. 391 (Gen. Claims Comm. 1928).
[15] *Id. at* 394.
[16] *Id. at* 395.
[17] *Id.* at 397.
[18] *Id.* at 399-400.

> results in a failure of a nation to live up to its obligations under international law, the delinquency on the part of such persons is a misfortune for which the nation must bear the responsibility.[19]

This rule was also upheld by the Commission in the case of *Caire v United Mexican States*[20] concerning the murder of a French national by Mexican military officers who shot and killed Gustave Caire in a local barracks after failing to extort money from him.[21] The Commission decided that the Mexican Government should be held responsible even if the officers have acted outside their authority because they have used their status as officers and used the means under its disposition by virtue of their official capacity to commit the crime.[22]

Neither can ignorance or lack of knowledge of a superior officer excuse the State from responsibility. In Communication No. 950/2000, or the case of *Sarma v Sri Lanka,*[23] regarding the abduction of Mr. S. Jegatheeswara Sarma's son by an officer of the Sri Lankan Army, the Human Rights Committee said that:

> for purposes of establishing State responsibility, irrelevant in the present case that the officer to whom the disappearance is attributed acted ultra vires or that superior officers were unaware of the actions taken by that officer. The Committee therefore concludes that, in the circumstances, the State party is responsible for the disappearance of the author's son.[24]

In these cases, the fact that the officials abused their power and has committed *ultra vires* acts did not free the State from liability under International Law. As was held by the Inter-American Court of Human Rights in the *Velasquez Rodriguez Case*[25] against the State of Honduras:

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[19] *Id.* at 400.
[20] Estate of Caire (Fr.) v. United Mexican States, 5 R.I.A.A. 516 (1929).
[21] *Id.*
[22] *Id.*
[23] Mr. S. Jegatheeswara Sarma v. Sri Lanka, Communication No. 950/2000, Human Rights Committee, ¶9.2 (2003).
[24] *Id.*
[25] Velasquez Rodriguez v. Honduras, Judgment, Inter-Am. Ct.H.R. (ser. C) no. 4, ¶170 (July 29, 1988).

> [t]his conclusion [that the State has violated international law] is independent of **whether the organ or official has contravened provisions of internal law or overstepped the limits of authority**: under international law a State is responsible for the acts of its agents ***undertaken in their official capacity and for their omissions***, **even when those agents act outside the sphere of their authority or violate internal law.**[26] (*Emphasis supplied)*

The rule, however, bears a qualification: the act must be committed by virtue of one's office or "undertaken in their official capacity,"[27] as opposed to "purely personal" actions which the State would not be held liable to.[28] This means that the State would only be liable if the official acted with "apparent authority."[29] Special Rapporteur Garcia-Amador, in his report on State Responsibility, explained that the essential point in this type of responsibility "is the fact that the act or omission which causes the injury may occur *precisely by reason* of the official function and authority of the agent."[30] (*emphasis supplied)*

As discussed in the case of *Way,*[31] the victim was killed by police officers while arresting him[32] in *Caire,*[33] armed soldiers tried to extort $5,000 dollars from Caire, and after failing to do so, executed him in their barracks,[34] and in the *Sarma* case, the son of the communication's author was abducted by members of the Army in the course of a military search operation.[35] In these cases, the State was held responsible despite the actions of their officials being deemed illegal under the State's own internal law because the wrongful act was committed *by virtue of or through* their official positions.

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[26] *Id.*
[27] *Id.*
[28] JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY – INTRODUCTION, TEXT AND COMMENTARIES 99 ¶13, 108 ¶8 (2002).
[29] *Id.*
[30] F.V. García-Amador (Special Rapporteur on State Responsibility), Second Rep. on State Responsibility, 110, U.N. Doc. A/CN.4/106 (Feb. 15, 1957).
[31] Way, *supra* note 12.
[32] *Id.*
[33] Caire, *supra* note 18, at 517-18.
[34] *Id.*
[35] Sarma, *supra* note 21, at ¶8.6.

In the case of *Prosecutor v Tadić*,[36] the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that the rationale behind this rule is to make the State accountable for acts of its organs stating that the "whole body of International Law on State responsibility is **based on a realistic concept of accountability**, which **disregards legal formalities** and aims at **ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions**, even when they act contrary to their directives"[37] (emphasis supplied). Justly so, as it would otherwise be difficult to make States answer for internationally wrongful acts if they can easily dismiss them as *ultra vires* and disown the actions of their own organs or agents.

ii. Orders and Instructions

Article 8 of the ASR[38] covers a broader set of people that can make the State liable, the only qualification being that they should be "acting on the instructions of, or under the direction or control of, that State in carrying out the conduct,"[39] whether or not they were public officials or government employees.

In *Tadic,*[40] the Appeals Chamber differentiated the degree of control required over armed groups and over private individuals for their conduct to be attributed to the State. For acts of individuals or non-militarized groups, it must be established that the State gave "specific instructions concerning the commission of that particular act" or at least "publicly endorsed or approved ex post facto" such act.[41] Meanwhile, for acts of subordinate armed forces, militias, or paramilitary units, there must be overall control by the State (more than mere financial assistance or military equipment or training); but does not have to include issuing specific orders or direction of each individual operation.[42] The actions of armed forces, militias, or paramilitary units "may be regarded as acts of *de facto* State regardless of any specific instruction by the

[36] Prosecutor v. Tadić, Case No. IT-94–1-A, Judgement, ¶121 (Int'l Crim. Trib for the Former Yugoslavia July 15, 1999).
[37] *Id.*
[38] ASR, *supra* note 5, art 8.
[39] *Id.*
[40] Prosecutor v. Tadić, *supra* note 37.
[41] *Id.* at ¶137.
[42] *Id.*

controlling State concerning the commission of each of those acts" as long as the State has "a role in organizing, coordinating, or planning the military actions of the military group".[43] The State may then be held liable upon proving that it has sufficient control over the actions of either private individuals or military forces.

Less strict rules apply to individuals who ordered or directed the commission of a crime. In cases decided by ICTY and the International Criminal Tribunal for Rwanda (ICTR), the Trial Chambers held several individuals criminally responsible for "planning, instigating, and ordering" the commission of the crime. The Trial Chamber of the *Akayesu*[44] case held that:

> [o]rdering implies a superior-subordinate relationship between the person giving the order and the one executing it. In other words, **the person in a position of authority uses it to convince another to commit an offence**. There is **no requirement that the order be in writing or in any particular form; it can be express or implied** . That an order was issued may be proved by circumstantial evidence.[45] (*Emphasis supplied*)

To emphasize: one does not have to explicitly enunciate the commission of the crime. It can be in any particular form, implied and proven by circumstantial evidence. In *Prosecutor v Blaškić,*[46] the risk taken by the accused in ordering an act likely to be abused by his subordinates was considered to be proof of his complicity to the eventual commission of the crime. It was explained that:

> [a]ny person who, in ordering an act, knows that there is a risk of crimes being committed and accepts that risk, shows the degree of intention necessary (recklessness) so as to incur responsibility for having ordered, planned or incited the commitment of the crimes.[47]

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[43] *Id.*
[44] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶483 (Int'l Crim. Trib. for Rwanda September 2, 1998).
[45] *Id.*
[46] Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶474 (Int'l Crim. Trib. For the Former Yugoslavia March 3, 2000).
[47] *Id.*

In this case, General Tihomir Blaškić knew that the troops he ordered to attack a particular area were previously guilty of many crimes against the Muslim population of Bosnia.[48] The attack resulted to a massacre of civilians.[49] It can be surmised from the facts and findings of the *Blaškić*[50] case that criminal responsibility can still arise from an otherwise legitimate order of a superior officer if it can be inferred that in placing such order, the intent of the accused to commit criminal acts shows.

Ordering to attack a particular area during war does not necessarily classify as a violation of international humanitarian law; however, the Trial Chamber in *Blaškić*[51] took into consideration the susceptibility of crimes being committed by virtue of such order by looking into the track records of the troops under General Blaškić as well as his several inflammatory speeches which encouraged the soldiers to commit genocide and crimes against humanity.[52]

B. Individual Criminal Responsibility for Incitement to Commit a Crime

Specific persons can also be held liable under international law for inciting or instigating the commission of international crimes.

Article 25(3)(b) of the Rome Statute[53] holds an individual criminally responsible for " [ordering, soliciting, or inducing] the commission of a crime which in fact occurs or is attempted."[54] Prior to the International Criminal Court (ICC), International Criminal Tribunals were established for Rwanda and the Former Yugoslavia. Article 6(1) of the Statute of the International Criminal Tribunal for Rwanda[55] provides for the individual criminal responsibility of "a person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of [genocide, crimes, and war crimes]."[56] Article 7(1) of the

[48] *Id.*
[49] *Id.*
[50] Prosecutor v. Blaškić, *supra* note 47.
[51] *Id.*
[52] *Id.*
[53] Statute of the International Criminal Court [Rome Statute] art.25(3)(b), July 1, 2002, 2187 U.N.T.S. 3.
[54] *Id.*
[55] Statute of the International Criminal Tribunal for Rwanda, art.6(1), November 11, 1994, 33 ILM 1598 (1994).
[56] *Id.*

Statute of the International Criminal Tribunal for the Former Yugoslavia has the same provision.[57] The International Military Tribunal (IMT), created for crimes committed by the European Axis Powers during the World War II, also specifically punished instigators "participating in the formulation or execution of a common plan or conspiracy to commit [crimes against peace, war crimes, and crimes against humanity]" and that they, alongside with leaders, organizers, and accomplices, are "responsible for all acts performed by any persons in execution of such plan."[58] Criminal participation can be in five forms: planning, incitement, ordering, actual commission, and aiding and abetting.[59]

Examining the jurisprudence of the International Criminal Tribunals regarding incitement and instigation, it can be observed that, in common, responsibility arises from the *act of encouraging or influencing* the commission of heinous crimes resulting to the crime being actually committed. The Tribunal in the case of *Prosecutor v Blaškić*[60] defined "instigation" as "prompting another to commit an offence", either through acts or omissions, express or implied.[61] Jurisprudence collectively have looked into the following factors or elements before considering the act of incitement to constitute an international crime and hold the instigator criminally responsible: (1) the character of the words used; (2) the existence of a causal connection between the instigation and the crime actually done; and (3) the intention of the instigator to provoke or induce the commission of a crime.

1. Character of the words used

In the Nuremburg Trial of the Major War Criminals, the IMT held Julius Streicher guilty of Crimes against Humanity for inciting murder. Streicher was widely known as "Jew-Baiter Number One" who spoke inflammatory speech against the Jews and published 600,000 issues of *Der Stürmer,* describing the Jew as "a parasite, an enemy, an

[57] Statute of the International Criminal Tribunal for the Former Yugoslavia, art.7(1), May 25, 1993 32 ILM 1159 (1993).
[58] Charter of the International Military Tribunal, art.6, August 8, 1945, 82 UNTS 279 (1945).
[59] Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence, ¶119-124 (Int'l Crim. Trib. for the Rwanda January 27, 2000).
[60] Prosecutor v. Blaškić, *supra* note 47 at ¶280.
[61] *Id.*

evildoer, a disseminator of diseases who must be destroyed in the interest of mankind."[62] In May 1939, a leading article of *Der Stürmer* stated that:

> a punitive expedition must come against the Jews in Russia. A punitive expedition which will provide the same fate for them that every murderer and criminal must expect: Death sentence and execution. The Jews in Russia must be killed. They must be exterminated root and branch.[63]

The IMT held that the "Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions constitutes a Crime against Humanity on the ground of persecution based on political and racial grounds."[64]

In *Prosecutor v Blaškić*,[65] decided by the ICTY, although General Blaškić did not personally commit the genocide and crimes against humanity, he was nevertheless held liable for ordering, aiding, abetting, and inciting the commission of the crimes.[66] The Trial Chamber found that the words the General used were "not strictly military and had emotional connotations which were such as to incite hatred and vengeance against the Muslim populations."[67] Order D267 in particular alleged that the "extremist Muslim forces intended to carry out 'ethnic cleansing' on the Croats in the region."[68] In Order D300, the opening paragraph began with – "[the] enemy continues to massacre Croats in Zenica where Muslim forces are using tanks to fire at people, mostly women and children."[69] General Blaškić continued give out similar orders in the same tone which the Trial Chamber found to be inflammatory, employing "radical words … which have connotations of [eradicating the Muslim population]."[70]

Unlike Streicher who constantly advocated the massacre of Jews, the case of General Blaškić shows that incitement does not need to explicitly advance the crime or crimes eventually committed by the inspired audience. It was enough that the words he used contained "emotional

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[62] United States of America, *et al* v. Goring, *et al.* , Judgment, ¶302 (Int'l Military Tribunal October 1, 1946).
[63] *Id.* at 303.
[64] *Id.* at 304.
[65] Prosecutor v. Blaškić, *supra* note 47 at ¶429.
[66] *Id.*
[67] *Id* at ¶644.
[68] *Id* at ¶469.
[69] *Id* at ¶644.
[70] *Id* at ¶646.

connotations [that] incite hatred and vengeance."[71] This is supported in the case of *Prosecutor v Akayesu.*[72] and further affirmed in *Prosecutor v Semanza,*[73] where their respective Trial Chambers under the ICTR held that instigation, in accordance with its ordinary meaning, need not be direct and public.[74]

2. Causal Connection

In *Prosecutor v Musema*[75] held that "instigation is punishable only where it leads to the actual commission of an offence intended by the instigator" with the exception of incitement to commit genocide where there is individual criminal liability regardless if said incitement produces a result.[76]

In *Semanza*[77] the Trial Chamber required proof of a "causal connection between the instigation and the commission of the crime" before finding the accused guilty of instigation. In this case, Laurent Semanza addressed a crowd, in the presence of commune and military authorities, and asked them "how their work of killing the Tutsis was progressing" and encouraged them to rape Tutsi women before killing them.[78] One of the witnesses testified that she heard Semanza say, "Are you sure you're not killing Tutsi women and girls before sleeping with them … [y]ou should do that and even if they have some illness, you should do it with sticks."[79] Immediately after, several men from the crowd went and raped two Tutsi women. The Chamber found that the encouragement of Semanza constituted instigation because it was "causally connected and substantially contributed to the actions of the principal perpetrator."[80]

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[71] *Id.*
[72] Prosecutor v. Akayesu, *supra* note 45 at ¶478.
[73] Prosecutor v. Semanza, Case No. ICTR-97-20-T.
[74] Judgment and Sentence, ¶381 (Int'l Crim. Trib. for the Rwanda May 15, 2003).
[75] Prosecutor v. Musema, *supra* note 60.
[76] *Id.*
[77] Prosecutor v. Semanza, *supra* note 74 at ¶476.
[78] *Id.*
[79] *Id* at ¶253.
[80] *Id*. at ¶478.

The Chamber also held that Semanza made his statement "intentionally with the awareness that he was influencing the perpetrator to commit the crime,"[81] bringing us to the third element, to commit an act of incitement.

3. Intent and Knowledge

In the cases decided by International Criminal Tribunals holding certain people guilty of incitement to a particular crime, the Trial Chamber found that the instigator had both the intent to instigate the commission of the crimes, and the knowledge that the crimes would be committed.[82]

In *Blaškić,*[83] the Trial Chamber held that the accused must be proven to have "directly or indirectly" intended the crime committed.[84] Under Article 30 of the Rome Statute,[85] "a person has intent where (a) in relation to conduct, the person means to engage in the conduct; (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events."[86] Intent can be either be proven via direct explicit evidence or can be inferred from the circumstances.[87]

In the case of *Prosecutor v Akayesu,*[88] the Trial Chamber found that the actions of the accused such as gathering a crowd of over a hundred people and urging the people to unite against the "sole enemy", as well as his other inflammatory speeches[89] showed that he "had the intent to directly create a particular state of mind in his audience necessary to lead to the destruction of the Tutsi group."[90]

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[81] *Id.*
[82] *See* Prosecutor v. Naletilić and Martinović, Case No. IT-98-34-T, Judgment, ¶237 (Int'l Crim. Trib. for the former Yugoslavia, March 31, 2003).
[83] Prosecutor v. Blaškić, *supra* note 45 at ¶278.
[84] *Id.*
[85] Rome Statute, *supra* note 54, art. 30.
[86] *Id.*
[87] Prosecutor v. Naletilić and Martinović, *supra* note 83 at 260.
[88] Prosecutor v. Akayesu, *supra* note 45 at ¶673.
[89] *Id.*
[90] *Id* at 674.

"Knowledge" is defined under the Rome Statute[91] as the "awareness that a circumstance exists, or a consequence will occur in the ordinary course of events."[92] In *Prosecutor v Naletilić and Martinović,*[93] the Trial Chamber held that for a person to be held criminally responsible for instigation, he must be "aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts."[94]

In *Semanza,*[95] the Trial Chamber took into consideration the influence of the accused, a National Assembly Representative in Rwanda, over the perpetrators and the fact that the crime was committed directly after the instigation of the accused in finding that the accused knew that he was "influencing the perpetrator to commit the crime."[96]

In the cases discussed, the instigators had targeted a particular group of people: for Streicher it was the Jews, for Gen. Blaškić it was the Muslims, and for Semanza and Akayesu it was the Tutsis. Genocide and crimes against humanity were eventually committed against these groups of people.

From Nazi Germany to Rwanda and the Former Yugoslavia, criminal tribunals have found that individuals, especially by those in high government positions, are to be held responsible not just for actions they directly committed, but also for those crimes committed by people by virtue of their power, influence, or inspiration.

III. Empowered and Emboldened

The cases decided by international courts and tribunals have shown that the State can be held liable for the unlawful acts of their officers and that individuals can be held criminally responsible for inciting the commission of crimes. Accordingly, the Philippine Government cannot simply disassociate itself from police officers or even private individuals who were found

[91] Rome Statute, *supra* note 54.
[92] *Id.*
[93] Prosecutor v. Naletilić and Martinović, *supra* note 78 at ¶60.
[94] *Id.*
[95] Prosecutor v. Semanza, *supra* note 74.
[96] *Id.*

to be involved in the murder and torture committed in the President's "drug war" by labeling them as *scalawags* or vigilantes.[97]

The Philippine President is infamous for his numerous controversial statements as early as his campaign for the 2016 Presidential Elections[98] which are constantly criticized by Human Rights groups.[99] President Duterte's anti-drug campaign, his flagship policy, brought him to the Malacañang Palace where he seemingly continued to advocate for vigilantism in numerous public speaking engagements.[100]

A. Liability of the Philippine Government in EJK cases

Responding to Senate Resolution 518[101] condemning extra-judicial killings (EJKs) in connection with the anti-drug campaign of the Executive branch, former Presidential Spokesperson Ernesto Abella assured the public that the said killings are not "state-sponsored" and that the Philippine National Police (PNP) was exerting "relentless effort" in carrying out "proper and legal operations against drug suspects," adding that the President is "equally appalled" by the actions of the police *scalawags* and that PNP's Internal Affairs Service has been conducting drug-related investigations against law enforcement officials.[102]

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[97] 93 Rambo Talabong, *Policing the PNP: Scalawags spoil Duterte vow to end crime,* RAPPLER, July 19, 2018, *available at* https://www.rappler.com/nation/207632-pnp-scalawags-spoil-duterte-vow-end-crime-philippines (last accessed June 29, 2019). and Alexis Romero, *Palace worries about vigilante killings,* PHILSTAR GLOBAL, September 11, 2016, *available at* https://www.philstar.com/headlines/2016/09/11/1622683/palace-worries-about-vigilante-killings (last accessed June 29, 2019).

[98] *See* Ryan Macasero, *Duterte says he'll 'finish drugs' two years after '3 to 6 months' promise,* PHILSTAR GLOBAL, November 16, 2008, *available at https://www.philstar.com/headlines/2018/11/16/1869195/duterte-says-hell-finish-drugs-two-years-after-3-6-months-promise* (last accessed June 29, 2019).

[99] *See* Michelle Xu, *Human Rights and Duterte's War on Drugs,* Council on Foreign Relations, December 16, 2016, *available at https://www.cfr.org/interview/human-rights-and-dutertes-war-drugs* (last accessed June 29, 2019).

[100] Katerina Francisco, *Shoot to kill? Duterte's statements on killing drug users,* RAPPLER October 5, 2016, *available at* https://www.rappler.com/newsbreak/iq/148295-philippines-president-rodrigo-duterte-statements-shoot-to-kill-drug-war (last accessed June 20, 2019).

[101] Resolution condemning in the strongest sense the extrajudicial killings and calling on the government to exert and exhaust all efforts to stop and resolve these extrajudicial and all other unresolved killings, Senate Resolution No. 518 (2017).

[102] Ruth Abbey Gita, *Palace shares Senate's concern about drug killings,* SUNSTAR, September 29, 2017, *available at* https://www.sunstar.com.ph/article/166705/Palace-shares-Senates-concern-about-drug-killings (last accessed June 20, 2019).

According to the PNP, between July 1, 2016 and April 30, 2018, there have been 4,251 drug suspects killed. However, critics of the government including independent groups such as the Human Rights Watch, report a higher count.[103]

Perhaps the most controversial case involving the Philippine Police and the President's drug war is the death of a 17-year old Kian delos Santos. Accused of being a drug courier, a CCTV footage caught the police dragging the minor to a dark alley and shot him.[104] The police claims that Kian shot them first and they were merely compelled to return fire.[105] In November 2018, the cops involved in the killing of delos Santos were found guilty by the trial court, prompting a statement from the Malacañang Palace describing that the conviction is proof of the country's "robust judicial system" and the President's policy against police abuse.[106]

Kian delos Santos' case is just one of the many cases involving deaths in the course of PNP's drug-related raids. According to a report by the Human Rights Watch in 2017, its research showed that PNP officers and unidentified "*vigilantes*" have killed over 7,000 people.[107] If proven true, the Philippine Government cannot hide behind the individual liability of abusive police officers by labeling them *scalawags* and, accordingly should, be held responsible under Article 7 of the ASR as previously discussed.

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[103] Jeannete I. Andrade, Melvin Gascon, & Inquirer Research, *PNP admits 4,251 killed in war on drugs*, INQUIRER.NET, *available at* https://newsinfo.inquirer.net/988352/pnp-admits-4251-killed-in-war-on-drugs (last accessed June 20, 2019).

[104] Jodesv Gavilan, *TIMELINE: Seeking justice for Kian delos Santos,* RAPPLER, November 28, 2018, *available at* https://www.rappler.com/newsbreak/iq/217663-timeline-justice-trial-kian-delos-santos (last accessed June 20, 2019).

[105] Interaksyon,'Nanlaban' death of Kian Lloyd delos Santos raises big stink; cops sacked, probe started, *available at* http://www.interaksyon.com/breaking-news/2017/08/19/91815/watch-nanlaban-death-of-kian-lloyd-delos-santos-raises-big-stink-cops-sacked-probe-started/ (last accessed June 20, 2019).

[106] Patricia Lourdes Viray, *Palace hails 'triumph of justice' in conviction of Kian killers,* PHILSTAR GLOBAL, November 29, 2018, *available at* https://www.philstar.com/headlines/2018/11/29/1872761/palace-hails-triumph-justice-conviction-kian-killers (last accessed June 20, 2019).

[107] Human Rights Watch, "License to Kill" Philippine Police Killings in Duterte's "War on Drugs, *available at* https://www.hrw.org/report/2017/03/02/license-kill/philippine-police-killings-dutertes-war-drugs# (last accessed June 20, 2019).

Relating to the cases above mentioned, more particularly the *Velasquez Rodriguez* case,[108] the Philippine Government should be held liable for the conduct of its police officers even if their actions violated the Philippine law. Extra-judicial killings committed by the PNP is the accountability of the Philippine Government under international law.

C. Incitement and Instigation

As seen previously in the cases under the ICTR and ICTY, the Trial Chambers have held specific individuals criminally responsible not just for crimes they directly committed but for the words they have spoken which prompted or inspired people to eventually commit international crimes.

ii. Accountability to Police Brutality

In the Philippines, one of the President's most infamous pronouncements was that of his December 19, 2016 speech at the Presidential Awards for Filipino Individuals and Organizations Overseas where he said:

I don't know if the other guy would have won the presidency. I do not know *kung kaya talaga* (if it could be done). But somehow, I must stop it because it will continue to contaminate and contaminate and so to the last man I said, to the law enforcer, to the military guys: Destroy the apparatus. And I said, 'O, Sir, if they are there, destroy them also. Especially if they put up a good fight**. O*, 'pag walang baril, walang – bigyan mo ng baril* (If he has no gun – give him a gun). "Here's a loaded gun. Fight because the mayor said let's fight."**[109] (*Emphasis supplied*)

In several separate occasions in 2016, the President stated that he will grant pardon to police officers involved in his drug war, even stating that he would produce "pre-signed" copies of

[108] Velasquez Rodriguez v. Honduras, *supra* note 23.
[109] Rappler, *TRANSCRIPT: 'Pag walang baril, bigyan mo ng baril' – Duterte*, RAPPLER, August 19, 2017, *available at* https://www.rappler.com/nation/179242-transcript-duterte-police-give-guns-drug-suspects (last accessed June 20, 2019).

pardon papers,[110] and reassuring the police a month after, saying, "I will see to it that nobody goes to prison just exactly for doing your duty. *Kasi kung magkamali sila* (If they commit a mistake), pardon. The President can grant pardon — absolute or conditional."[111] As early as July 2016, or days after his oath-taking, the President said in a speech, "[d]o your duty, and if in the process you kill one thousand persons because you were doing your duty, I will protect you," and that killing drug suspects would be justified "if the suspect resists or fights back" as such would constitute self-defense.[112] It should be remembered that "self-defense" is one of the popular justifications of the PNP for the deaths of alleged drug suspects during their raids.[113]

The Command Memorandum Circular for the PNP Anti-Illegal Drugs Campaign, otherwise known as "Project: Double Barrel" was an issue tackled during the Oral Arguments in the Supreme Court regarding the Philippine Government's War on Drugs. In the Circular, it was stated that its purpose is the "neutralization of illegal drug personalities nationwide."[114] Discussing the term "neutralization", Senior Associate Justice Caprio quoted former PNP Chief Director General Dela Rosa defining "neutralization" as "surrender, arrested, or **killed**"[115] (emphasis supplied).

Historically, persons of authority have influenced their subordinates in committing crime by indirect statements. In the case of *Blaškić*[116] the General issued several military orders using inflammatory speech which instigated the massacre of Muslim populations by describing them as

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[110] Christina Mendez, *Duterte to pardon cops in drug killings*, PHILSTAR GLOBAL, July 19, 2016, *available at* https://www.philstar.com/headlines/2016/07/19/1604381/duterte-pardon-cops-drug-killings (last accessed June 20, 2019).
[111] Alex Ho, *Duterte: No prison term for soldiers, police carrying out duty*, CNN PHILIPPINES, August 7, 2016, *available at* http://cnnphilippines.com/news/2016/08/06/Duterte-full-back-up-AFP.html (last accessed June 20, 2019).
[112] Christina Mendez, *Duterte to PNP: Kill 1,000, I'll protect you,* PHILSTAR GLOBAL, July 2, 2016, *available at* https://www.philstar.com/headlines/2016/07/02/1598740/duterte-pnp-kill-1000-ill-protect-you. (last accessed June 20, 2019).
[113] *See* Janvic Mateo, *DOJ, PNP urged: File 'nanlaban' cases in courts*, PHILSTAR GLOBAL, August 29, 2019, *available at* https://www.philstar.com/nation/2018/08/29/1846665/doj-pnp-urged-file-nanlaban-cases-courts (last accessed June 20, 2019).
[114] National Police Commission, Office of the Chief NPN, Command Memorandum Circular No. 16-2016, PNP Anti-Illegal Drugs Campaign Pan – Project: "Double Barrel" (2016).
[115] ABSCBN News, *Carpio: 'Neutralize' does not only mean to kill*, ABS-CBN NEWS, November 21, 2017, *available at* https://news.abs-cbn.com/news/11/21/17/carpio-neutralize-does-not-only-mean-to-kill (last accessed June 20, 2019).
[116] Prosecutor v. Blaškić, *supra* note 47 at ¶433-434.

terrorists with terroristic intentions[117] and ordered to attack them.[118] According to several witnesses, the soldiers said that they were given orders to kill all Muslims.[119] The Prosecutor found that the orders were given to all units to destroy and burn the Muslims' houses, to kill the Muslim civilians, and to destroy their religious institutions.[120] The orders given were described by General Blaškić as "defense orders",[121] but the Trial Chamber disagreed and held that the orders "[remain] an order to attack".[122] In one order, it stated that "in the event of open attack activity by the Muslims, those units should neutralize them and prevent their movement with precise fire."[123]

The Trial Chamber agreed with the Prosecutor that the subordinates of General Blaškić "clearly understood that certain types of illegal conduct were acceptable and would not lead to punishment"[124] and that the actions of the General show a degree of intention to commit the massacre.[125]

The case of *General Blaškić* shows that the intention to actually commit crimes can be inferred from circumstantial evidence. Quoting the *Akayesu* case, the Trial Chamber agreed that an order to commit such crimes need not be explicit and that it is "irrelevant whether the illegality of the order was apparent on its face."[126] In the case of *Blaškić,*[127] the Trial Chamber found that the "defense orders" were in fact attack orders, taking into consideration the language the General used.[128]

"Defense" as an excuse to murder was not accepted by the *Blaškić* Trial Chamber as the opposite is evident from surrounding circumstances.[129] Gen. Blaškić demonized the Muslims and

[117] *Id* at ¶430.
[118] *Id*.
[119] *Id* at ¶472.
[120] *Id* at ¶430.
[121] *Id* at ¶404.
[122] *Id* at ¶437.
[123] *Id* at ¶435.
[124] *Id* at ¶487.
[125] *Id*.
[126] *Id*.
[127] *Id*.
[128] *Id* at ¶281.
[129] *Id* at ¶404.

painted them as extremists and terrorists in the eyes of the soldiers who then proceeded to "neutralize" their victims under the expectation that they would not be punished.

For emphasis, the *Blaškić* case teaches us that an official who have encouraged or inspired his subordinated, through speeches and orders, to commit illegal conduct against a particular group of people, in the pretense of exemption from future punishment, is guilty of inciting the commission of the crimes eventually committed.

i. "Justice" in the hands of Outlaws and Incitements beyond the "Drug War"

Issues with the drug war did not start and end with Philippine police brutality. Private individuals taking the law into their own hands have their own contribution. Early into the current Administration, from June 30, 2016 to the end of October of the same year, there were 536 verified drug-related killings by citizen vigilantes or gun-for-hires; 106 of which were found with "*wag tularan"* placards.[130]

It may be remembered that hours after the President's inaugural speech, in a crowd in Manila, he said, "If you know of any addicts, go ahead and kill them yourself as getting their parents to do it would be too painful."[131] Then Chief Legal Counsel, and now Presidential Spokesperson Salvador Panelo interpreted it as merely "asking the public to cooperate with the campaign."[132] In July 2016, he then called for the NPA's support and asked them to use their "kangaroo courts to kill [drug traffickers]."[133]

Aside from passionate statements in his anti-drug crusade, the President has also issued several other tirades that seemingly encourage murder and robbery.

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[130] Sara Isabelle Pacia, *Story in numbers war on drugs,* INQUIRER.NET, October 16, 2016, *available at* https://newsinfo.inquirer.net/825678/story-in-numbers-war-on-drugs (last accessed June 20, 2019).
[131] Agence France-Presse, *Philippines tells UN: Duterte not committing crime,* ABS-CBN NEWS, August 19, 2016, *available at* https://news.abs-cbn.com/news/08/19/16/philippines-tells-un-duterte-not-committing-crime (last accessed June 20, 2019).
[132] *Id*.
[133] ABSCBN News, *NPA backs Duterte fight vs drugs,* ABS-CBN NEWS, July 4, 2016, *available at* https://news.abs-cbn.com/news/07/04/16/npa-backs-duterte-fight-vs-drugs (last accessed June 20, 2019).

Last June 2018, during the 29th Annual National Convention of the Vice Mayors' League of the Philippines, President Duterte said to his audience,"the earlier you do away with your mayor, the earlier you become the mayor. Kidnap them, too avoid any leak, just do it yourself. And tell your mayor, Mayor, I will kill you and nobody paid me. Duterte directed me if I want so that you finish yourself earlier."[134] Since the President took office, 12 mayors and seven vice mayors have since been killed; and out of such, four mayors and three vice mayors has been assassinated from the time the President has issued the aforequoted statement.[135]

Aside from drugs and local government politicians, the President has been taking on the Roman Catholic Church in his speeches, more specifically, with threats to the bishops' lives. In November 2018, President Duterte "warned" that he would "cut off" a bishop's head if the latter was to be found selling illegal drugs.[136] The month after, he then told his audience in a speech, that they should kill "useless bishops."[137] Last January 2019, he said that bystanders should instead steal from bishops and kill them because they have lots of money.[138] In a seemingly unbreaking pattern, he made another statement last February 2019 during the proclamation rally of the President's party, PDP-Laban, saying that people should rob and kill Catholic bishops.[139]

Going back to the elements that show the participation of an individual in the commission of the crime through incitement (character of the words used, causal connection, and intent and knowledge), it may be observed that the aforequoted statements made by the Chief Executive are similar to the ones found by International Criminal Tribunals as "inciting".

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[134] Christina Mendez, *Duterte to vice mayors: Kidnap, hex your mayors*, PHILSTAR GLOBAL, June 30, 2018, *available at* https://www.philstar.com/headlines/2018/06/30/1829212/duterte-vice-mayors-kidnap-hex-your-mayors (last accessed June 20, 2019).
[135] Jodesv Gavilan, *Mayors, vice mayors killed under Duterte gov't,* RAPPLER, July 2, 2018, *available at* https://www.rappler.com/newsbreak/iq/206262-list-mayors-vice-mayors-killed-since-july-2016-duterte-goverment (last accessed June 20, 2019).
[136] Judy Quiros, *Duterte threatens to have bishop's head cut off,* INQUIRER.NET, November 27. 2018, *available at* https://newsinfo.inquirer.net/1057402/duterte-threatens-to-cut-off-bishops-head (last accessed June 20, 2019).
[137] Dharel Placido, *'Patayin ninyo': Duterte says bishops better off dead,* ABS-CBN NEWS, December 5, 2018, *available at* https://news.abs-cbn.com/news/12/05/18/patayin-ninyo-duterte-says-bishops-better-off-dead (last accessed June 20, 2019).
[138] Pia Ranada, *Duterte to tambays: Steal from, kill 'rich' bishops,* RAPPLER, January 10, 2019, *available at* https://www.rappler.com/nation/220692-duterte-tells-tambays-steal-from-kill-rich-bishops (last accessed June 20, 2019).
[139] ABS CBN, *Pagka lumaban, patayin mo': Duterte tells people to rob, kill Catholic bishops,* ABS-CBN NEWS, February 15, 2019, *available at* https://news.abs-cbn.com/news/02/15/19/pagka-lumaban-patayin-mo-duterte-tells-people-to-rob-kill-catholic-bishops (last accessed June 20, 2019).

In summary, for emphasis, International Criminal Tribunals made the following conclusions regarding the elements of incitement:

1. Words having "emotional connotations which incite hatred and vengeance", were found to have caused the massacre that happened after.[140]
2. Statements that encourage murder and rape, even though informally made or in a *joking* manner, were found to be "casually connected" and have "substantially contributed" to the crimes done by the actual perpetrators, subsequently after hearing the provocative statements by the instigator.[141]
3. The creation of a "particular state of mind in his audience" by categorizing certain people as the "sole enemy" of the State, urging the listening crowd to "unite" against them, was found to be proof that the instigator intended the eventual destruction of the target group of people.[142]
4. Knowledge that the crime would eventually or likely be committed can be surmised from the awareness of the instigator that he has influence over his audience.[143]

The cases discussed above, as decided by International Criminal Tribunals, established legal doctrines on State and individual criminal liability under international law. More importantly, the cases also show that, historically, speeches made by influential individuals promoting unlawful actions toward a particular group of people, whether in jest or not, unsurprisingly result to the perpetration of crimes by persons under their power or influence.

IV. Conclusion

A nation "*under the Red Hood"* is a nation of chaos and anarchy. Persons tasked to serve and protect cannot conduct their duty as if beyond the bounds of law and order – like birds of prey acting on the orders of an "all-knowing" oracle. States cannot acquit itself of liability for the

[140] Prosecutor v. Blaškić, *supra* note 47 at ¶ 644.
[141] Prosecutor v. Semanza, *supra* note 74 at ¶ 478.
[142] Prosecutor v. Akayesu, *supra* note 45 at ¶673.
[143] Prosecutor v. Semanza, *supra* note 74 at ¶ 478.

actions of their uniformed officials nor for the crimes of private individuals who commit "publicly endorsed" crimes.[144]

From the German publicist – Julius Streicher to the Rwandan Assembly Representative – Laurent Semanza and the Croatian general – Tihomir Blaškić, we have seen that those who kill thousands do not pull the trigger, but merely fan the flames. The Philippine Government cannot afford, or rather should not have risked, brandishing a two-faced policy: on one hand promising respect for due process and the rule of law,[145] while on the other hand carrying a crow bar.

Words have power to build as well as corrupt. The Government's adherence to the rule of law should be unwavering – both in words and in action – because there is no justice in a society of vengeance and *vigilantes*.

[144] Prosecutor v. Tadić, *supra* note 37 at ¶137.
[145] Rappler, *FULL TEXT: President Rodrigo Duterte's inaugural speech,* RAPPLER, June 30, 2016, *available at* https://www.rappler.com/nation/138132-full-text-president-rodrigo-duterte-inaugural-speech (last accessed June 20, 2019).

COURTS REVISITED: COMPARATIVE ANALYSIS OF MILITARY AND CIVILIAN COURTS

Angelica Joy Quinto Bailon[1]

Discipline is the soul of an army. It makes small numbers formidable; procure success to the weak, and esteem to all. ~ George Washington

INTRODUCTION

On August 31, 2018, President Rodrigo Duterte signed and issued Proclamation No. 572 declaring void *ab initio* the amnesty granted by former President Benigno Aquino III to Senator Antonio Trillanes IV. Trillanes then filed a Petition for *Certiorari* with a Prayer for a Temporary Restraining Order (TRO) with the Supreme Court. The Court *en banc* denied his petition on the ground that the Court took judicial notice of President Duterte's pronouncement that Trillanes will not be apprehended, detained or taken into custody unless a warrant of arrest has been issued by the trial court. On October 22, 2018, Judge Andres Soriano, of the Makati Regional Trial Court (RTC) Branch 148, rejected the prayer of the government to arrest Trillanes. While the decision upheld the legality of the proclamation, it also held that the proclamation's factual basis for voiding the amnesty was wrong. Rumors on a possible military arrest circulated, especially when President Duterte thru Proclamation No. 572 ordered the police and the military to employ all lawful means to apprehend Trillanes.

As a brief overview, Trillanes was a former Lieutenant Senior Grade of the Philippine Navy. He, along with several other junior officers from the Armed Forces of the Philippines, were involved in the Oakwood Mutiny in July 2003. After eighteen (18) hours of mutiny, Trillanes and the other soldiers surrendered to the authorities. They were detained in Fort

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Bonifacio and were charged before a military court with violations of Articles of War.[2] On November 29, 2017, Trillanes and other soldiers walked out during a hearing and went to the Manila Peninsula Hotel where they held a press conference calling for then President Gloria Macapagal-Arroyo's ouster. They eventually surrendered and were charged with rebellion. Then President Aquino III signed Proclamation No. 50 granting amnesty to active and former soldiers involved in the mutiny and siege. After which, Trillanes was eventually freed from detention.

Shortly after President Duterte's proclamation nullifying the amnesty granted to Trillanes, the Armed Forces of the Philippines began the process of constituting the general court martial. According to AFP spokesperson Col. Edgard Arevalo[3], since the amnesty was voided, Trillanes is now back to his military status, thus conferring the court martial the jurisdiction over him. Even the chief of the Department of National Defense (DND) Internal Audit Service Atty. Ronald Patrick Rubin said that the jurisdiction of the court martial was long established or was acquired during the time that Trillanes was still active in the military service.[4]

While our justice system, both civilian and military, shares the basic objectives of discovering the truth, punishing the guilty and acquitting the innocent, military justice by its mandate and nature also serves to enhance discipline throughout the Armed Forces in order to provide an effective national defense.

This has been the subject of much discussion not only because of its novelty, but more importantly because it can dramatically affect the foundation of our justice system. Many people were questioning the legality of establishing a military tribunal to hear Trillanes' case. The demarcation of jurisdiction between military and civilian courts seems uncertain to say the least.

[2] Michael Bueza and Alex Evangelista, TIMELINE: Trillanes, from mutiny to amnesty, RAPPLER, October 22, 2018, *available at* https://www.rappler.com/newsbreak/iq/211894-timeline-antonio-trillanes-iv-mutiny-to-amnesty (last accessed December 21, 2018).
[3] ABS CBN News, Trillanes to face court martial, says AFP, ABS CBN, September 4, 2018, *available at* https://news.abs-cbn.com/news/09/04/18/trillanes-to-face-court-martial-says-afp (last accessed Dec 21, 2018).
[4] Francis Wakefield, Court martial jurisdiction established when Trillanes was still in military service – DND, MANILA BULLETIN, September 5, 2018, *available at* https://news.mb.com.ph/2018/09/05/court-martial-jurisdiction-established-when-trillanes-was-still-in-military-service-dnd/ (last accessed December 21, 2018).

Little is also known about court martials and there is dearth of available resources available to the public on the procedures and organization of court martials. Hence, to better understand the nature of military courts *vis-à-vis* the civilian courts, this article aims to provide readers with essential information about the organization, functions, and procedures followed in court martials and the comparative analysis of military justice system operating in parallel with civilian courts.

BRIEF HISTORY OF MILITARY COURTS

For more than 300 years, the Philippines was colonized by Spain. Eventually, the Philippines attained its independence from Spain on June 12, 1898. The declaration of independence was fortified by the formation of the Malolos Revolutionary Congress on September 15, 1898, as well as the establishment of the first Philippine Republic on January 23, 1899, both headed by Emilio Aguinaldo. Despite the success of the Philippine revolution, it became apparent that the United States has interest over the Philippines. On December 10, 1898, through the Treaty of Paris, Spain relinquished the Philippines to the United States for 20 million dollars. Shortly after, the Philippine-American war erupted. The United States eventually declared an end to the war in 1902 and began establishing the Commonwealth Government, under the guise of the "Benevolent Assimilation". The Armed Forces of the Philippines was formally organized during the Commonwealth era through the National Defense Act of 1935. Three years later, or on September 14, 1938, the legislature passed Commonwealth Act No. 408, or more commonly known as the Articles of War.[5]

Commonwealth Act No. 408,[6] was the first military law enacted by the National Assembly of the Philippines. It prescribes the rules of procedure, including modes of proof in cases before court-martials, courts of inquiry, military commissions and other military tribunals in the Armed Forces of the Philippines.[7] In 1900, the Department of Interior and Local Government Act emphasized the civilian character of the Philippine National Police (PNP) and

[5] Concepcion v. Jalandoni, 75 Phil. 655 (1945).
[6] An Act for making further and more effectual provision for the natioan defense by establishing a system of military justice for persons subject to military law [Articles of War], commonwealth Act No. 408, (1938).
[7] *Id.*

removed from the court martial the exclusive jurisdiction over cases involving the police.[8] At present, four government offices are authorized to handle disciplinary cases in the PNP, namely: the National Police Commission, PNP Internal Affairs Service, People's Law Enforcement Board and the Office of the Ombudsman.[9]

The Articles of War was first amended on June 12, 1948 by the passage of Republic Act No. 242. amending 36 provisions[10] of the instrument. It was further amended by Republic Act No. 516[11] in June 14, 1950. R.A. No. 516 expanded the definitions, enumerated the different kinds of court martials, laid down the procedures for each court martials, added provisions on rehearing and petition for new trial and repealed Article 43 of the Articles of War. On June 24, 1977, then President Ferdinand Marcos issued Presidential Decree No. 1166,[12] amending Article 94 of the Articles of War by including the clause "*in time of peace, officers and enlisted men of the Philippine Constabulary shall not be triable by courts-martial for any felony, crime, breach of law, or violation of municipal ordinances committed under this Article*".[13] Seeing that the disciplinary powers of the commanding officers have not provided the desired deterrent against commission of transgressions by members of the Armed Forces of the Philippines, President Marcos amended Article 105 of the Articles of War through Presidential Decree No. 1968[14] on January 11, 1985. It basically strengthened the disciplinary powers of the commanding officers and expanded the disciplinary punishments that can be imposed by the officers.

While little is known about the operational framework of courts martial, it is pretty much clear that courts martial are agencies of executive character, and unlike courts of law, they are

[8] An Act Establishing the Philippine National Police under a reorganized Department of the Interior and Local Government, and for other purposes, Republic Act No. 6975, (1990).
[9] Raul J. Palabrica, *Discipline breakdown in the PNP*, INQUIRER, February 14, 2017, *available at* https://opinion.inquirer.net/101640/discipline-breakdown-pnp (last accessed December 21, 2018).
[10] Articles 1, 2, 4, 8, 9, 14, 18, 19, 23, 31, 34, 47, 49, 50, 54, 55, 57, 58, 59, 60, 61, 63, 71, 72, 80, 83, 93, 95, 96, 105, 107, 108, 109, 110, 133-A, and 120
[11] An Act to amend or repeal certain section of Commonwealth Act Numbered four hundred and eight, otherwise known as the Articles of War, as amended by Republic Act Numbered two hundred and forty-two, Republic Act No. 516, (1950).
[12] Amending the 94th Article of the Articles of War, Presidential Decree No. 1166 (1977).
[13] *Id.* § 1.
[14] Further Amending Article 105 of Commonwealth Act No. 408, otherwise known as the Articles of War, Armed Forces of the Philippines, as amended by Republic Act Numbered 242 and 516, Presidential Decree No. 1968 (1985).

not a portion of the Judiciary. As pointed out by Justice Tuason in *Ruffy v. The Chief of Staff*,[15] court-martials, not belonging to the judicial branch of the government, are simply instrumentalities of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the army and navy and enforcing discipline therein and utilized under his orders or those of his authorized military representatives.[16] Even Republic Act No. 7055[17] recognizes civilian supremacy over the military and returns to the civilian courts the jurisdiction over certain offenses involving certain members of the Armed Forces, except when such crime is service-connected, in which case it shall be tried by a court-martial.[18]

PARALLELISM OF MILITARY COURTS AND CIVILIAN COURTS

Military courts or tribunals are not courts within the Philippine judicial system. As a separate institution from the civilian courts, the military has its own sets of laws, policies and regulations embodied in the Manual for Court Martial and circulars implemented to discipline its members. Perhaps the best way to understand how military courts operate is to compare it with the civilian courts in terms of jurisdiction, composition, proceedings, remedies, punishments and punishable acts covered.

Jurisdiction

Military law is *sui generis*. It is applicable only to military personnel because the military constitutes an armed organization requiring a system of discipline separate from that of civilians.[19] While courts-martial are governed by the Articles of War and other rules and regulations by the Armed Forces of the Philippines, civilian courts are essentially administered by the procedural rules promulgated by the Supreme Court such as the Rules of Court. However, in the case of *Magno vs. De Villa*,[20] the Supreme Court explicitly recognized that even though

[15] Ruffy v. The Chief of Staff, Philippine Army, G.R. No. L-533, August 20, 1946.
[16] *Id.*
[17] An Act Strengthening Civilian Supremacy over the Military Returning to the Civil Courts the Jurisdiction over certain offenses involving members of the Armed Forces of the Philippines, other persons subject to Military Law, and the members of the Philippine National Police, repealing for the purpose certain Presidential Decrees, Republic Act No. 7055 (1991). [hereinafter Republic Act No. 7055]
[18] *Id.*
[19] Lt. Sg. Gonzales et al. v. Gen. Abaya et al., G.R. No. 164007, August 10, 2006.
[20] Magno v. General Renato De Villa, GR 92606, July 26, 1991.

the Rules of Court is not applicable to courts-martial, there is no legal obstacle in adopting the rules in its proceedings, to wit:

> Consequently, the Rules of Court, which this Court adopted pursuant to its power and authority under the Constitution to govern pleading, practice and procedure in all courts of the Philippines, is not applicable to pleading, practice and procedure in courts-martial. However, no legal obstacle bars certain guidelines relating to court-martial proceedings from adopting statutes relating to preliminary investigations of ordinary criminal cases triable by regular courts.[21]

With regard to who may be tried by these courts, Rule 110 of the Revised Rule of Criminal Procedure[22] provides that the complainant shall be in the name of the People of the Philippines and against all persons who appear to be responsible for the offense involved.[23] On the other hand, Article 2 of the Articles of War[24] circumscribes the jurisdiction of military law only over four categories of individuals, to wit:

> Art. 2. Persons Subject to Military Law. The following persons are subject to these articles and shall be understood as included in the term any person subject to military law or persons subject to military law, whenever used in these articles:
> (a) All officers and soldiers in the active service of the Armed Forces of the Philippines or of the Philippine Constabulary; all members of the reserve force, from the dates of their call to active duty and while on such active duty; all trainees undergoing military instructions; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same;
> (b) Cadets, flying cadets, and probationary second lieutenants;
> (c) All retainers to the camp and all persons accompanying or serving with the Armed Forces of the Philippines in the field in time of war or when martial law is declared though not otherwise subject to these articles;
> (d) All persons under sentence adjudged by courts-martial.[25]

Section 1 of Republic Act No. 7055,[26] laid down the general rule that members of the AFP and other persons subject to military law, including members of the Citizens Armed Forces Geographical Units, who commit crimes or offenses penalized under the Revised Penal Code,

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[21] *Id.*
[22] 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 110, § 2.
[23] *Id.*
[24] Articles of War, art. 2.
[25] *Id.*
[26] Republic Act No. 7055, § 1.

other special laws or local ordinances shall be tried by the proper civil court.[27] It also provides for the exception: when the civil court, before arraignment, has determined the offense to be service-connected, then the soldier shall be tried by a court martial.[28] This exception also admits an exception when in the interest of justice, the President of the Philippines may direct before arraignment that any such crimes be tried by the civilian court.[29] Under Section 10 of the Manual for Courts-Martial, Philippine Army,[30] court-martial jurisdiction over officers in the military service of the Philippines ceases on discharge or separation from the service.[31]

Composition/Organization

The civilian court system is composed of the Supreme Court, the lower courts such as the Court of Appeals, Regional Trial Courts, Metropolitan Trial Court, Municipal Trial Courts, Municipal Circuit Trial Court and special courts such as the Court of Tax Appeals and Sandiganbayan. Pursuant to the 1987 Constitution, the Supreme Court is composed of a Chief Justice and 14 Justices who serve until the age of 70 years old.[32] The Court of Appeals consists of a Presiding Justice and 68 Associate Justices who shall be appointed by the President of the Philippines.[33] There are 720 Regional Trial Court Judges commissioned among 13 regions in the Philippines.[34] The law also mandates that in each metropolitan area, there shall be created a Metropolitan Trial Court; in each of the other cities or municipalities, a Municipal Trial Court; and in each circuit comprising such cities or municipalities grouped together, there shall be established a Municipal Circuit Trial Courts.[35] For the special courts, the Sandiganbayan as a

[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Office of the Army Provost Marshal, Philippine Army Manual 11-07 Army Operations, *available at* https://www.army.mil.ph/home/pdf_files/Promulgated_PA_Doctrine_Manuals (last accessed June 21, 2019).
[31] In the matter of the petition for Habeas Corpus of Rolando Abadilla v. Gen. Fidel Ramos, G.R. No. 79173, December 1, 1987.
[32] PHIL. CONST. art. VIII, § 11.
[33] An Act Creating additional divisions in the court of appeals, increasing the number of court of appeals justices from fifty-one (51) to sixty-nine (69), amending for the purpose Batas pambansa Bilang 129, as amended, otherwise known as the judiciary reorganization act of 1980, appropriating funds therefor, and for other purposes, Republic Act No. 8246, § 1 (1996).
[34] An Act Reorganizing the Judiciary, appropriating funds therefor, and for other purposes [The Judiciary Reorganization Act of 1980], Batas Pambansa Blg. 129, § 14 (1981).
[35] *Id.* § 25.

special graft court comprise of one Presiding Justice and 14 Associate Justices[36] while the Court of Tax Appeals is composed of one Presiding Judge and five Associate Justices who are vested with exclusive appellate jurisdiction over appeals from the decisions of the Commissioner of Internal Revenue and the Commissioner of Customs.[37]

On the other hand, the military equivalent is a panel normally composed of military officers. There are three kinds of court-martials: (1) General Courts-Martial, (2) Special Courts-Martial and (3) Summary Courts-Martial.[38] General Courts-Martial may consist of any number of members not less than five, who shall be appointed by the President of the Philippines, Chief of Staff of the AFP, and other officers authorized by the President.[39] The authority appointing a General Court-Martial shall detail as one of the members thereof a member of the Bar, who shall be an officer of the Judge Advocate General's Service, or an officer of some other branch of service.[40] General Courts martial shall have the power to try any person subject to military law for any crime or offense, made punishable by the Articles of War.

Special Courts-Martial, on the other hand, may consists of any number of members not less than three, who shall be appointed by the commanding officer of a major command, task force, military area or division and other officers empowered by the President. It shall have the power to try any person subject to military law, for any non-capital crime or offense punishable under the Articles of War. Summary Court-Martial, on the other hand, shall consist of one qualified Officer who shall try any person subject to military law, except an officer, a member of the nurse corps, a cadet, or a flying cadet for any non-capital crime or offense punishable by the Articles of War.

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[36] An Act Further Defining the Jurisdiction of the Sandiganbayan, amending for the Purpose Presidential Decree No. 1606, as amended, providing funds therefor, and for other purposes, Republic Act No. 8249, § 1 (1997).
[37] An Act Expanding the Jurisdiction of the Court of Tax Appeals (CTA), elevating its rank to the level of a Collegiate Court with Special Jurisdiction and Enlarging its membership, amending for the Purpose Certain Sections or Republic Act No. 1125, as amended, otherwise known as the law creating the Court of Tax Appeals, and for other purposes, Republic Act No. 9282, § 1 (2004).
[38] Articles of War, art. 3.
[39] *Id*. art. 5.
[40] *Id*. art. 8.

Punishable offense

The second paragraph of Section 1 of R.A. No. 7055 explicitly specified what are considered "service-connected crimes or offenses" which shall be limited to those defined in Articles 54 to 70, Articles 72 to 92 and Articles 95 to 97 of Commonwealth Act No. 408, as amended.[41] It includes fraudulent enlistment, disrespect toward the president, vice-president, Congress of the Philippines or Secretary of National Defense, mutiny or sedition, failure to suppress mutiny or sedition, and conduct unbecoming an officer and gentleman. Regular courts, on the other hand, have broader authority to try disputes involving crimes punishable by the Revised Penal Code or special laws.

In 2014, the Office of the Ombudsman, headed by Ombudsman Conchita Carpio Morales, and the Armed Forces of the Philippines, headed by Chief of Staff General Gregorio Pio Catapang Jr., entered into a Memorandum of Agreement[42] wherein they specifically determined the punishable acts covered by their respective jurisdiction. The Agreement explicitly stated that the Office of the Ombudsman through the Office of the Deputy Ombudsman for the Military and Other Law Enforcement Offices (OMB-MOLEO) has exclusive jurisdiction over criminal and administrative cases where the acts complained of involves graft and corruption arising from, but not limited to, violation of the Anti-Graft and Corrupt Practices Act, the Government Procurement Reform Act, Anti-Red Tape Act and pertinent provisions of the Revised Penal Code.[43] On the other hand, the Armed Forces of the Philippines shall have exclusive jurisdiction over crimes and administrative offenses identified under the Articles of War which strictly affect military order, organization and discipline, and those classified as war offenses such as desertion,[44] advising or aiding another to desert,[45] absence without leave,[46] mutiny or sedition,[47] misbehavior of sentinel,[48] provoking speeches or gestures,[49] among others.

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[41] Republic Act No. 7055, § 1(2).
[42] Office of the Ombudsman, Memorandum of Agreement, *available at* https://www.ombudsman.gov.ph/docs/references/MOA_OMB-AFP.pdf (last accessed June 21, 2019).
[43] *Id.*
[44] Articles of War, art. 59.
[45] *Id.* art. 60.
[46] *Id.* art. 62.
[47] *Id.* art. 67.
[48] *Id.* art. 87.
[49] *Id.* art. 91.

It also has exclusive jurisdiction over cases involving the salary, benefits, remuneration and promotion of military personnel. It also has jurisdiction over those violations of the economic provisions of the Republic Act No. 9262 or the Anti-Violence Against Women and their Children Act.

Trillanes was charged for violation of Article 96 or conduct unbecoming an officer and a gentleman, to wit:

> Art. 96. Conduct Unbecoming an Officer and Gentleman. - Any officer, cadet, flying cadet, or probationary second lieutenant, who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.[50]

While there is a proposition that such offense is absorbed by *coup d' etat* and other political felony, it is the opinion of the Justices Dante Tinga and Romeo Callejo Jr. in the celebrated case of *Gonzales v. Abaya*[51] that Article of War 96 warrants special consideration, as it differs in character from other Articles of War.[52] Considering that military law is *sui generis*, Justice Antonio Carpio also explained that the doctrine of 'absorption of crimes' is peculiar to criminal law and generally applies to crimes punished by the same statute, unlike here where different statutes are involved.[53] The doctrine applies only if the trial court has jurisdiction over both offenses. Since Section 1 of R.A. 7055 deprives civil courts of jurisdiction over service-connected offenses, including Article 96 of the Articles of War, the doctrine of absorption of crimes is not applicable to this case.

Complaint

In regular proceedings, the filing of a complaint-affidavit must be made with the City Prosecutor where the crime was committed. The City Prosecutor will then issue a subpoena against the accused requiring the him/her to file his Counter-Affidavit. If the circumstances warrant, a preliminary investigation will be conducted. Preliminary investigation is an inquiry or

[50] *Id.* art. 96.
[51] Gonzales, et. al., v. Abaya, G.R. No. 164007, August 10, 2006.
[52] *Id.*
[53] *Id.*

proceeding to determine whether there is sufficient ground to engender a well-founded belief that a crime has been committed and the respondent is probably guilty thereof and should be held for trial.[54] If there is probable cause to indict the accused, the Prosecutor will have to file an Information in court, otherwise the Prosecutor shall dismiss the case.[55]

On the other hand, the formal written accusation in court-martial practice consists of two parts: the technical charge and the specification. The charge, where the offense alleged is a violation of the articles, merely indicates the article the accused is alleged to have violated while the specifications sets forth the specific facts and circumstances relied upon as constituting the violation. The first part of Article 71 of the Articles of War categorically provides that charges and specifications must be signed by a person subject to military law who states under oath that he either has personal knowledge of, or has investigated, the matters set forth therein and that the same are true in fact, to the best of his knowledge and belief.[56] Further, the second paragraph of Article 71 explicitly provides that no charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made.[57] A charge is made followed by a thorough and impartial investigation and if the result of the investigation so warrants, the charge is referred to the general court martial.

Unlike regular court proceedings where anyone can file their complaint-affidavit with the Prosecutor within prescriptive period, Article 71 makes no qualification that there can be a charge against a person subject to military law only if a pre-trial has been completed and the case has been referred to a court martial. Article 71 instructs that no charges may be referred to a general court-martial for trial until after a thorough and impartial investigation has been made. Article 71 does not make the thorough and impartial investigation a pre-requisite before charges may be filed against a person subject to military law. It is the charge that sets into motion the investigation.[58]

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[54] 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 110, § 2.
[55] *Id.*
[56] Articles of War, art. 71(1).
[57] *Id.* art. 71(2).
[58] In the Matter of the Petition for a Writ of Habeas Corpus of the person of Army Major Jason Laureano Aquino, PA, Maria Fe S. Aquino v. Lt. Gen. Hermogenes Esperon, AFP, G.R. No. 174994, August 31, 2007.

Rights of the Accused

The right to a fair trial is a fundamental right guaranteed in both military and civilian courts. It protects individuals from arbitrary and unlawful restrictions of their liberty. The Bill of Rights and Rule 115 of the Rules of Court laid down the rights of the accused in criminal prosecutions. The accused has the right to be presumed innocent until proven guilty beyond reasonable doubt; to be informed of the nature and cause of the accusation; to be present and defend himself in court; to have speedy, impartial and public trial and to appeal in all cases.[59]

In the same way, the accused in military courts has the right to be represented by the counsel of his choice. Also, no witness before a military court, commission, court of inquiry, or board, or before any officer conducting investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate himself, or to answer any question not material to the issue, when such answer might tend to degrade him.[60] Article 39 of the Articles of War also provides that no person, without his consent, shall be tried a second time for the same offense.[61] While there is no explicit appeal process provided for to the accuses, Article 50 of the Articles of War provides that before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President, under the provisions of Article 47 or Article 51, is submitted to the President, such record shall be examined by the Board of Review.[62] When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not heretofore been duly ordered, he may authorize or direct a rehearing.[63]

Arrest

[59] PHIL. CONST. art. III, § 14(2). and 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 115.
[60] Articles of War, art. 24.
[61] *Id.* art. 39.
[62] *Id.* art. 50.
[63] *Id.* art. 50-A.

In civilian courts, the judge upon finding probable cause, shall issue a warrant of arrest or a commitment order if the accused has already been arrested. There are also instances, as enshrined in Rule 113 of the Rules of Court,[64] when warrant of arrest is not necessary: *in flagrante delicto*, hot pursuit and when accused escaped from a penal institution.[65]

Evidently, Article 70 of the Articles of War empowers the commanding officer to place, in confinement or in arrest, any person subject to military law who is charged with a crime or with a serious offense under the Articles of War.[66] Article 70 is the authority for enabling the proper military personnel to put an instant end to criminal or unmilitary conduct, and to impose such restraint as may be necessary upon the person of a military offender, with a view of his trial by court-martial.[67]

Punishments

To ensure the highest degree of military efficiency, the court-martial has become an indispensable instrumentality in enforcing discipline upon offenders, both in times of war and in peace. Unlike in the regular courts which impose the common punishments of imprisonment and fine, offenders of military law can be dealt with by way of formal or informal punishment systems constituting demotion, deprivation of liberty or even being ostracized by the military community. Court martials may even order that the offender be discharged, separated, dismissed from the service or dropped from the rolls. Even military commanders are empowered to impose punishments upon offenders such as admonition, reprimand, withholding of privileges, restriction to certain specified limits, forfeiture, detention, deprivation of liberty and arrest in quarters.[68] Still, a court martial is still a court of law and justice and is subject to the constitutional prohibition against excessive fines, cruel and degrading inhuman punishment, which is in fact explicitly stated under Article 40 of the Articles of War.[69]

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[64] 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 112, § 5.
[65] *Id*. rule 1113.
[66] Articles of War, art. 70.
[67] In the Matter of the Petition for a Writ of Habeas Corpus of the person of Army Major Jason Aquino vs. Lt. Gen. Esperon, G.R. No. 174994, August 31, 2007.
[68] Articles of War, art. 105.
[69] *Id*. art. 40.

Limitations

Not all offenses committed by the military must be brought to the court-martial. Under Article of War 105, the commanding officer of any detachment, company, battalion, squadron, commissioned vessel or higher command, is empowered to impose disciplinary punishments upon persons of his command for minor offenses without the intervention of a court-martial.

Under the 2014 Memorandum of Agreement[70] between the Ombudsman and the AFP, which took effect on December 1, 2014, it was explicitly agreed upon that the Office of the Ombudsman or the AFP shall be precluded from acting on the complaint which has already been taken cognizance by the other after having been informed such fact. However, both institutions are not precluded from forming a joint-fact finding investigation team subject to the proper rules of procedure of forming such.[71]

The Constitution expressly vested the President, as the Commander-in-Chief, with the supreme power over the Armed Forces.[72] While the day-to-day operational command was delegated to subordinate military officers, they were still under the exclusive control of the Commander-in-Chief. In addition, military and civilian authorities must cooperate and coordinate with each other in maintaining peace and order in the country. Unfortunately, distrust and competition often prevent this spirit of cooperation among military and civilian authorities. This is when the Legislature comes in – by promulgating laws that can prevent the jurisdictional complications between civilian courts and military courts. The law must clarify the differences in jurisdiction and functions of said courts.

Congress also exercises control over the military through the appointment of its officers, establishing, maintaining and regulating military forces and appropriation of budget.[73] Clearly,

[70] Office of the Ombudsman, *supra* note 42.
[71] *Id.*
[72] PHIL. CONST. art. VII, § 18.
[73] PHIL. CONST. art. VI.

the powers to establish and regulate military organizational standing are vested solely with the Congress. This authority is based on the constitutional mandate of Congress to promulgate laws on matters of military justice and discipline of the armed forces.

Even the regular courts play a significant role in limiting military jurisdiction. In *Olaguer v. Military Commission*,[74] the Court reasserted that military tribunals cannot try and exercise jurisdiction over civilians for offenses committed by them and which are properly cognizable by the civil courts.[75] To have it otherwise would be a derogation of the constitutional right to due process of the civilian concerned. The authority of the Supreme Court to review decisions of the court-martial was also affirmed in *Ognir v. Director of Prisons*,[76] and should be recognized in light of the judicial power of the Supreme Court under the 1987 Constitution, which extends to determining grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.[77]

Clearly then, as stated by the separate opinion of Justice Tinga in the case of *Gonzales, et al., v. Abaya*,[78] while court-martial under military law may be *sui generis*, it is not *supra legem*, meaning it is not above the law.[79] The power to try by court-martial is established, defined and limited by statute and by the ideals of fair play and justice, even if it arises as a consequence of the power of the President as Commander-in-Chief.

CONCLUSION

Indeed, the military and civilian criminal justices, by virtue of what they intend to do and under what conditions they operate, are necessarily different. Under military law, commanders may decide whether an allegation of wrongdoing is to be subjected to their disciplinary power or whether to send such allegation to military courts for formal investigation and trial. In cases arising outside the military service, the national and local enforcement authorities have the right to investigate and prosecute the offender. Yet, both are courts of law and justice, subject to the

[74] Olaguer v. Military Commission, G.R. No. L-54558, May 22, 2987.
[75] *Id.*
[76] Ognir v. The Director of Prisons, G.R. No. L-1870, February 27, 1948.
[77] *Id.*
[78] Gonzales, et. al., v. Abaya, G.R. No. 164007, August 10, 2006.
[79] *Id.*

recognized limitations by the Constitution, by the statute and by the interest of justice. Justice Callejo's quotation of a commentary regarding the role of court martial is enlightening:

> Victory in battle is the ultimate aim of every military commander, and he knows that victory cannot be attained, no matter how superior his forces may be, in men and materials, if discipline among the rank-and-file is found wanting. For, "if an Army is to be anything but an uncontrolled mob, discipline is required and must be enforced." For this reason, in order to set an effective means of enforcing discipline, all organized armies of the world have promulgated sets of rules and regulations and later, laws as embodied in the articles of war, which define the duties of military personnel and distinguish infractions of military law and impose appropriate punishment for violation thereof.[80]

Indeed, military justice system is essential in maintaining the morale and discipline necessary not only for battlefield success but also for the proper administration of its affairs. While our justice system, both civilian and military, shares the basic objectives of discovering the truth, punishing the guilty and acquitting the innocent, military justice by its mandate and nature also serves to enhance discipline throughout the Armed Forces in order to provide an effective national defense.

The issue of the court-martial's jurisdiction over Trillanes could trigger military instability, division and distrust within the military system, which ironically are the very things court-martials are trying to avoid. We must always remember that *the Armed Forces of the Philippines is the protector of the people and the State. Its goal is to secure the sovereignty of the State and the integrity of the national territory*.[81] It defends the honor of the country with life and blood. By the very nature of its mandate, every soldier must possess the following qualities: courage, integrity and loyalty.[82] Courage, to welcome any suffering that comes from doing what is right; Integrity, to preserve moral soundness at all times; and Loyalty, to possess a long-term

[80] Gloria, Philippine Military Law Annotated, as cited in Justice Callejo's concurring opinion in Gonzales v. Abaya, G.R. No. 164007, August 10, 2006.
[81] PHIL. CONST. art. II, § 3.
[82] This is the Philippine Military Academy's Motto.

commitment of sacrificial support and defense to their comrades. These qualities are the moral fortress that safeguard the honor of the Armed Forces of the Philippines. When such stronghold collapses or when dispute among the military arises, the Court Martial plays a vital and unique role in the administration of discipline and justice among the military. But just like any institution of the State, it must adhere to the ideals of justice and fair play. It must decide on the basis of evidence, not emotions; on the basis of what the law says and not what the higher officials say; on the basis of truth and not personal interest. And until our courts recognizes its true mandate, our justice system will forever be a court of men and not a court of law.

THE POWER OF THE PEOPLE'S RATIFICATION

Yves Mikka B. Castelo[1]

Prologue

Sovereignty resides in the people and all government authority emanates from them.[2] Thus, any amendment to or revision of the Constitution will be valid only when such change is ratified by the people.[3]

The ratification requirement means more than just numbers. It signifies the sovereign's assent to the proposal that pleads their approval. Without this genuine assent, there can never be a true ratification, thus defeating the very purpose that the requirement of ratification seeks to serve.

The Basic Law of the Land

As elementary as it is, it is at this time more than ever that the importance of the Constitution must be emphasized. The Constitution is the fundamental and supreme law of the land. All laws, ordinances and regulations must abide by it. Any governmental issuance which content is inconsistent with it must be stricken down. As the enduring pact entered into by the people who ratified it, the Constitution is the bedrock of the nation's stability.[4] It is not the one to adjust to the orders of any public officer. On the contrary, public

The ratification requirement means more than just numbers. It signifies the sovereign's assent to the proposal that pleads their approval.

[1] Yves Mikka B. Castelo earned her Bachelor of Arts degree in Political Science from Adamson University in 2011. She believes that one should not stick to his or her first stand if the reason for such has already ceased. She believes that history will honor those who, after having been fully enlightened, made decisions in accordance with what was appropriate at the time of deciding

[2] PHIL. CONST. ART. II, § I.

[3] PHIL. CONST. ART. VII, § IV.

[4] Lambino vs. Commission on Elections, 505 SCRA 160 (2006).

officers, as well as the rest of the people within the territory, must defer to the words of the Constitution. Thus, it is not only proper but also prudent to scrutinize any proposed change to the Constitution – the set of rules that would essentially govern the people's lives for usually a long period of time.

The average life expectancy of a constitution in Southeast Asia is thirteen (13) years.[5] The Philippines has had six (6) Constitutions within a period of eighty-eight (88) years since 1899 to 1987.[6] The preceding constitution was the 1973 Constitution, which had been in force for fourteen (14) years until the 1987 Constitution was adopted. This means that for fourteen (14) years, a fixed set of rules governed the lives of the citizens. To illustrate how different constitutions differently affect the people, take for example citizenship. The 1973 Constitution defined a natural-born citizen as follows:

> A natural-born citizen is one who is a citizen of the Philippines from birth without having to perform any act to acquire or perfect his Philippine citizenship.[7]

Thus, for fourteen (14) years since the effectivity of the 1973 Constitution, *those whose mothers are citizens of the Philippines and upon reaching the age of majority, elect Philippine citizenship,*[8] would not fall within the definition of a natural-born citizen, since they had to do an act, *i.e.* election of Philippine citizenship, to acquire or perfect their Philippine citizenship.[9] This in effect deprived such citizens of the privileges granted to a natural-born citizen, *e.g.* to run for certain positions in the government. In the 1987 Constitution, a few words were added to correct the irregular situation generated by the aforementioned *proviso,* where one born of a Filipino father and an alien mother was automatically accorded the status of a natural-born citizen, while one born of a Filipino mother and an alien father would still have to elect Philippine citizenship

[5] Aurel Croissant, Ways of Constitution-Making in Southeast Asia: Actors, Interests, Dynamics, *available at* https://www.researchgate.net/publication/265754779_Ways_of_Constitution-Making_in_Southeast_Asia_Actors_Interests_Dynamics (last accessed March 1, 2019).
[6] HECTOR S. DE LEON & HECTOR M. DE LEON, JR., PHILIPPINE CONSTITUTIONAL LAW PRINCIPLES AND CASES (VOLUME 1) 55 (1999 EDITION).
[7] 1973 CONST. ART. VI § 4.
[8] 1935 CONST. ART. III § 1.
[9] Vilando vs. House of Representatives Electoral Tribunal, 656 SCRA 17 (2011).

yet if so elected, was not conferred natural-born status.[10] Thus, a natural-born citizen is now defined as follows:

> Natural-born citizens are those who are citizens of the Philippines from birth without having to perform any act to acquire or perfect their Philippine citizenship. Those who elect Philippine citizenship in accordance with paragraph (3),[11] Section 1 hereof shall be deemed natural-born citizens.[12]

As it stands, *those born before January 17, 1973, of Filipino mothers, who elect Philippine citizenship upon reaching the age of majority*,[13] are considered as natural-born citizens, even if they technically would have to do an act, *i.e.* election of Philippine citizenship, to acquire or perfect their Philippine citizenship. As natural-born citizens, they are eligible for positions that require being a natural-born citizen as qualification, *e.g.* President of the Republic of the Philippines. This is just an example of a privilege that was not available to certain citizens during the effectivity of the previous constitution.

Senator Franklin Drilon rightly stated that amending the Constitution has a lot of imponderables and implications that can affect our people of today and of the generations to come.[14] This makes it necessary for all those concerned - and that means all the citizens - to make their voices heard lest they become for years subject to a rule that for them is not appropriate at all. History tells us that a constitution of which the approval of the citizens is in doubt may not end in a constitutional way. However, in spite of such ending, it may still nevertheless pave way for a constitution that is truly authorized by the people.

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[10] *Id.*
[11] PHIL. CONST. ART. IV, § I (3).
Section 1. The following are citizens of the Philippines:
Xxx
(3) Those born before January 17, 1973, of Filipino mothers, who elect Philippine citizenship upon reaching the age of majority; and
[12] PHIL. CONST. ART. IV, § 2.
[13] PHIL. CONST. ART. IV, § I (3).
[14] *Do not rush Charter change, Drilon appeals,* Senate of the Philippines Press Release, *available at* http://www.senate.gov.ph/press_release/2018/0715_drilon1.asp (last accessed March 1, 2019).

Ratification of the 1973 Constitution

On March 16, 1967, Congress passed Resolution No. 2 which called for a convention to propose amendments to the then-in-force 1935 Constitution. Resolution No. 2 was implemented on August 24, 1970 by Republic Act No. 6132, otherwise known as the *"The 1971 Constitutional Convention Act."* Pursuant to R.A. No. 6132, the 1971 Constitutional Convention began to perform its functions on June 1, 1971. While the convention was in session on September 21, 1972, then President Ferdinand E. Marcos (Marcos) issued Proclamation No. 1081, placing the entire Philippines under martial law. On November 30, 1972, Marcos issued Presidential Decree No. 72, submitting to the Filipino people for ratification or rejection the proposed constitution by the 1971 Constitutional Convention. This prompted Charito Planas, and other petitioners subsequently, to seek judicial intervention.[15] Among others, it was contended that there was no proper submission to the people of the proposed constitution set for ratification on January 15, 1973, less than two months from the time it could have possibly been presented to the people for scrutiny. There being no freedom of speech, press and assembly, and there being no sufficient time, the people could not have been properly informed of the contents of the proposed constitution.[16] However, the members of the Supreme Court did not reach the necessary number of votes in order to be able to declare that the 1973 Constitution was not in force. Thus, by a vote of 6-4,[17] the cases filed to assail the ratification of the proposed constitution were dismissed. Consequently, the 1973 Constitution was recognized to have effectively replaced the 1935 Constitution.

While the prescribed process was seemingly followed in order to replace the 1935 Constitution, the circumstances during that time could not have permitted the needed opposition against the government. Indeed, the majority of the Filipinos then could not have been expected to express their criticisms because of what happened to the personalities who were considered as threats to the Marcos regime. As early as the day after martial law was declared, then Senator Benigno S. Aquino was already arrested. The following day, a hundred more personalities were already detained in Camp Crame. The military had also shut down mass media. Flights were also

[15] Planas vs. Commission on Elections, 49 SCRA 105 (1973).
[16] Javellana vs. Executive Secretary, 50 SCRA 30 (1973).
[17] *Id.*

canceled and incoming overseas calls were prohibited. All of these happened when it was only at 3:00 P.M. of September 23, 1972 when then Press Secretary Francisco Tatad went on air to read the text of Proclamation No. 1081.[18] However, despite the power and control exercised by the government, the people would soon rise up against it in order to redeem their freedom.

Ratification of the 1987 Constitution

The 1986 EDSA Revolution, which paved the way for the promulgation of the present 1987 Constitution, was done in defiance of the provisions of the 1973 Constitution. The revolution successfully abrogated the 1973 Constitution, thus leaving the Philippines with no governing constitution for the time being.[19] Without question, Corazon Aquino's rise to the presidency was not due to constitutional processes. In fact, it was achieved in violation of the provisions of the 1973 Constitution as a Batasang Pambansa resolution had earlier declared Mr. Marcos as the winner in the 1986 presidential election. The organization of the Aquino government, which was met by little resistance, signaled the point where the 1973 Constitution - ratified under the Marcos regime - had ceased to be obeyed by the Filipino.[20]

The 1987 Constitution was approved in a national plebiscite held on February 11, 1987.[21] Unlike the 1973 Constitution which was judicially recognized as valid only because there were not enough votes to nullify it, the present constitution has been commended for being an expression of the sovereign will of the Filipinos in response to their experiences under the previous administration.[22]

The Proposed Constitution Under the Duterte Administration

Sooner or later, the people could again be called upon to approve a new constitution, following the intention of President Rodrigo Roa Duterte (Duterte) to change the current unitary

[18] *Declaration of Martial Law*, Official Gazette, available at https://www.officialgazette.gov.ph/featured/declaration-of-martial-law/ (last accessed March 1, 2019).
[19] Republic vs. Sandiganbayan, 407 SCRA 10 (2003).
[20] Letter of Associate Justice Reynato S. Puno, 210 SCRA 589 (1992).
[21] Lambino vs. Commission on Elections, 505 SCRA 160 (2006).
[22] *Id.*

system to a federal system of government. A change in the constitution is required before the federal system of government could be adopted since the present constitution contemplates a unitary system. The present administration has already begun the process. On December 7, 2016 - five months after assuming the office of the President - Duterte issued Executive Order No. 10 creating a consultative committee which shall study, conduct consultations, and review the provisions of the 1987 Constitution.[23] On July 17, 2018, the consultative committee released the final draft of the proposed federal constitution. Then, just last October 31, 2018, the Office of the President, through Executive Secretary Salvador C. Medialdea, issued Memorandum Circular No. 52 which established an Inter-Agency Task Force on Federalism, the primary duty of which is to integrate, harmonize and coordinate ongoing efforts towards federalism and constitutional reform.[24] As in the past, the government would need the ratification of the people so that the proposed constitution could be validly enforced. However, this ratification could only serve its true purpose if the people could give an informed consent to its effectivity.

According to a survey by the *Social Weather Station (SWS),* 75 percent of 1,200 respondents only learned about the federal system during the conduct of the survey, which was fielded from March 23 to 27 of 2018.[25] The polling firm also noted that the support for the federal system of government was directly related to people's trust in Duterte, their satisfaction with his performance as president and their satisfaction with the overall Duterte administration.[26] Based on another poll, taken from June 15 to June 21 of 2018 by another firm, *Pulse Asia,* 67 percent of Filipinos were against charter change while only 18 percent were in favor.[27] Then Presidential spokesman Harry Roque said that lack of information regarding federalism could explain its unpopularity among Filipinos.[28] Considering that the approval of the citizens is a condition *sine qua non* before the Constitution of the Philippines could be changed, whose duty

[23] Office of the President, Creating a Consultative Committee to Review the 1987 Constitution, Executive Order No. 10, s. 2016 (December 7, 2016).
[24] Office of the President, Creating the Inter-Agency Task Force on Federalism and Constitutional Reform, Memorandum Circular No. 52, s. 2018 (October 31, 2018).
[25] Gaea Katreena Cabico, *SWS: Only 1 in 4 Filipinos aware of federal government,* PHILSTAR, June 28, 2018, *available at* https://www.philstar.com/headlines/2018/06/28/1828712/sws-only-1-4-filipinos-aware-federal-government (last accessed March 1, 2019).
[26] *Id.*
[27] Helen Flores, *Poll: Filipinos oppose charter change, federalism,* PHILSTAR, July 17, 2018, *available at* https://www.philstar.com/headlines/2018/07/17/1834204/poll-filipinos-oppose-charter-change-federalism (last accessed March 1, 2019).
[28] *Id.*

is - if there is any such duty to begin with - it to explain the proposed change to the people so that they could cast an informed vote for or against it, in compliance with the ratification requirement of the constitution?

The Essence of Ratification

In the case of *Lambino v. COMELEC,*[29] the Supreme Court stated that no amount of signatures can change our Constitution contrary to the specific modes that the people, in their sovereign capacity, prescribed when they ratified the Constitution.[30] In that case, the court dismissed the petition for *mandamus* filed by the Lambino group against the COMELEC to compel it to give due course to their initiative petition to change the 1987 Constitution. One of the grounds for the dismissal was due to the petitioners' failure to comply with the procedure laid down by the constitution for proposing amendments to it through people's initiative.[31] As found by the Court, when the signature sheet was passed around in order to gather the required number of signatures, the actual text of the proposed changes to the constitution was not attached. This was not what was contemplated during the deliberations of the framers as records show that they intended that the draft of the proposed constitutional amendments should be ready and shown to the people *before* they sign such proposal. Without the actual proposal, it could not be positively claimed that those who signed indeed knew why they were signing the signature sheet.[32] At this point, it is appropriate to quote from a decision of the Supreme Court of Massachusetts, which was also cited by the court in the Lambino decision. In *Capezzuto v. State Ballot Commission,*[33] it was declared:

> A signature requirement would be **meaningless** if the person supplying the signature has not first seen what it is that he or she is signing. **Further, and more importantly, loose interpretation of the subscription requirement can pose a significant potential for fraud.** A person permitted to describe orally the contents of an

[29] Lambino vs. Commission on Elections, 505 SCRA 160 (2006).
[30] *Id.*
[31] PHIL. CONST. ART. XVII, § 2.
[32] Lambino vs. Commission on Elections, 505 SCRA 160 (2006).
[33] Capezzuto v. State Ballot Law Commission, 407 Mass. 949 (1990).

> initiative petition to a potential signer, without the signer having actually examined the petition, could easily mislead the signer by, for example, omitting, downplaying, or even flatly misrepresenting, portions of the petition that might not be to the signer's liking. **This danger seems particularly acute when, in this case, the person giving the description is the drafter of the petition, who obviously has a vested interest in seeing that it gets the requisite signatures to qualify for the ballot.**[34] (Emphasis supplied)

Clearly, what was contemplated was not simply quantity. Unfortunately, there can be no mathematical formula for the determination of an informed consent. An informed consent is not even required under the constitution. The framers could have already thought that expressly requiring proof of informed consent would practically render the process for changing the constitution meaningless because what could be produced at most is only *prima facie* proof. Nevertheless, as in the Rules of Evidence under the Rules of Court, circumstantial evidence could suffice if (a) there is more than one circumstance; (b) the facts from which the inferences are derived are proven; and (c) the combination of all the circumstances is such as to produce a conviction beyond reasonable doubt.[35] For the record, this reference to circumstantial evidence is not a proposal to apply the Rules of Court so that a measure of informed consent can be had, since informed consent was not even mentioned under the constitution in the first place. At any rate, the objective is not to have a new constitution in force only because it has been recognized judicially, like what happened in the case of *Javellana.*[36] Instead, the objective is to have a constitution that the people could claim as one that indeed has their approval. To attain this, circumstantial evidence is needed not for purposes of convincing the courts of justice, but for purposes of convincing the sovereign.

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[34] *Id.*
[35] RULES OF COURT, RULE 133 § IV.
[36] Javellana vs. Executive Secretary 50 SCRA 30, (1973).

The Extent of the Government's Legal Duty to Inform the People

The mere presence of the freedom of the Filipinos to criticize the then proposed 1987 Constitution cast little doubt as to whether it really speaks the voice of the overwhelming majority who approved it; the 16,622,111 voters comprising 76.3 percent of the total votes cast.[37] This is in contrast with the inability - for well-founded reasons - of the people to speak against the government during the Marcos era. However, even if freedom of speech is being enjoyed today, it may not be enough considering that the government has an interest in getting the people to approve its advocacy. Thus, even though the government's exercise of its duty is subject to more scrutiny now, the fact that the government has the public funds at its disposal poses a question that needs an answer: can the people demand the government to be fully transparent about the implications of its proposal, even if it means having to speak against its interest?

Truth be told, it cannot be denied that inasmuch as the Constitution is a special covenant between the government and the people, it is also a set of legal provisions. Indeed, the Constitution is not primarily a lawyer's document. Not being meant to be a lawyer's document, its language should be understood in the sense that it may have in common use, or in that language that an ordinary person could comprehend. Its words should be given their ordinary meaning except where technical terms are employed.[38] However, assuming for the sake of argument that the proposed Constitution uses ordinary words, it would still not be enough to simply leave it all up for the people to understand it on their own, especially when the government uses its resources to promote it. It just would not be fair to the rest of the people who would be affected by a constitution that is meant to last for long.

As shown by the SWS survey previously mentioned, the support for the federal system of government was directly related to people's trust in Duterte, their satisfaction with his

[37] Proclamation No. 58, s. 1987, *available at* https://www.officialgazette.gov.ph/1987/02/11/proclamation-no-58-s-1987-2/ (last accessed March 1, 2019).
[38] People vs. Derilo, 271 SCRA 633 (1997).

performance as president and their satisfaction with the overall Duterte administration.[39] The support was not because the people agree with what the proposed changes meant. Since the initiative to change the system of government came from the government itself, it would be wishful thinking to expect it to fully discuss the potentially negative implications of the new system that it is campaigning for. As the advocate for the change, the government has an interest in making sure that its proposal gets approved. With this reality in mind, should the people not expect the government to fully explain the proposed changes to them, even when these changes would definitely govern them for an indefinite period? Can there be a legal demand for that kind of transparency?

The government is duty-bound to fully inform the people of the implications of changing the constitution, and these implications include those that may be adverse to the interest of the government itself. This duty flows from the mandate of the present governing Constitution which provides that the prime duty of the government is to serve and protect the people.[40] Government exists and should continue to exist for the benefit of the people governed.[41] The people is the sovereign, and the sovereign must know everything that would have an impact on them. An impact on the people in general is an impact involving public interest. In this regard, the Constitution adopts a policy of public disclosure. Section 28 of Article 2[42] provides:

> Subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transactions involving public interest.[43]

In a similar way, Section 7 of the Bill of Rights[44] provides:

[39] Gaea Katreena Cabico, *SWS: Only 1 in 4 Filipinos aware of federal government*, PHILSTAR, June 28, 2018, available at https://www.philstar.com/headlines/2018/06/28/1828712/sws-only-1-4-filipinos-aware-federal-government (last accessed March 1, 2019).
[40] PHIL. CONST. ART. II, § 4.
[41] DE LEON, *supra* note 6, at 66.
[42] PHIL. CONST. ART. II, § 28.
[43] *Id.*
[44] PHIL. CONST. art. III.

> The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.[45]

The policy of public disclosure covers all State transactions involving public interest, *i.e.*, transactions which the people have a right to know, particularly those involving expenditures of public funds.[46] Take note that Section 28 of Article 2 speaks of disclosure of *transactions,* and Section 7 of Article 3[47] speaks of disclosure of *official records, documents and papers pertaining to official acts, transactions, decisions, and government research data used as basis for policy development.*[48] These provisions allow people to examine official records. However, these are mere clerical records. The proposed federal constitution is more than a record that must be visible to the eye in order to claim transparency.

Not Just Another Law

To put things into context, a brief comparison of the process of enacting a law and the process of changing the constitution is in order.

To initiate the passage of a statute, a bill is first introduced by any member of the House of Representatives or the Senate, except for some measures that must originate only in the House of Representatives. The first reading involves only a reading of the number and title of the measure and its referral by the Senate President or the Speaker of the House to the proper committee for study. The bill may be "killed" in the committee or it may be recommended for approval, with or without amendments, sometimes after public hearings are first held thereon. If there are other bills of the same nature or purpose, they may all be consolidated into one bill

[45] PHIL. CONST. art. III, § 7.
[46] DE LEON, *supra* note 6, at 179.
[47] PHIL. CONST. art. III, § 7.
[48] PHIL. CONST. art. III, § 7.

under common authorship or as a committee bill. Once reported out, the bill shall be calendared for second reading. It is at this stage that the bill is read in its entirety, scrutinized, debated upon and amended when desired. The second reading is the most important stage in the passage of a bill. Then, the bill as approved on second reading is printed in its final form and copies thereof are distributed at least three days before the third reading. On the third reading, the members merely register their votes and explain them if they are allowed by the rules. No further debate is allowed at this stage. Once the bill passes third reading, it is sent to the other chamber, where it will also undergo three readings. If there are differences between the versions approved by the two chambers, a conference committee representing both Houses will draft a compromise measure that if ratified by the Senate and the House of Representatives will then be submitted to the President for his consideration. The bill is enrolled when printed as finally approved by the Congress, thereafter authenticated with the signatures of the Senate President, the Speaker, and the Secretaries of their respective chambers, and approved by the President.[49] Under the Constitution, a bill may become a law when the President (1) signs it; (2) vetoes it but the veto is overridden by two-thirds vote of all the members of each House; or (3) does not act upon the measure within thirty days after it shall have been presented to him.[50] Here, the final act is with the president.

While the enactment of a statute requires undergoing readings on different days and then the approval, veto or inaction of the President, the process of rewriting the constitution generally requires only two steps, to wit: (1) proposal; and (2) ratification. *Proposal* is the motion of initializing suggestions or proposals on the amendment or revision, which may either be by the Congress, constitutional convention, or through people's initiative. Under the present Duterte Administration, the shift to the federal system is through the proposal of the constitutional convention. On the other hand, *ratification* is the sovereign act vested in the Filipino people to either approve or reject the proposals to amend or revise the constitution.[51] In changing the constitution, the final act is with the Filipino people.

[49] ISAGANI A. CRUZ, PHILIPPINE POLITICAL LAW 152 (2002).
[50] PHIL. CONST. ART. VI, § 27.
[51] ROLANDO A. SUAREZ, PRINCIPLES, COMMENTS AND CASES IN CONSTITUTIONAL LAW VOLUME I 21 (2011).

As has also been noted by retired Supreme Court Associate Justice Isagani A. Cruz, in case of a mere statute, it suffices that it is enacted by their chosen representatives pursuant to their mandate. But where it is the constitution that is being framed or amended, it is imperative and proper that the approval come directly from the people themselves.[52] Now, questions becomes more apparent: is free speech enough to level the playing field between the citizens and the government as regards the latter's move to revise the constitution?

There is a Need to Level the Playing Field

The process of promulgating a new constitution is not under the same category as that of the process enacting a new statute. As the fundamental law of the land, changes to the constitution must be carefully scrutinized. Unlike statutes where the approval is subject to the action, veto or inaction of the President who is a political figure, the promulgation of a new constitution requires not the act of a politician but that of the sovereign for its effectivity. Here comes the dilemma. The President's duty as regards the approval of bills is found under the constitution. It is the president's task. It is the president's job. The president is paid through public money to perform his duties under the law. Thus, the president has consultants, cabinet members and the rest of his legal staff, all paid through public funds in order to review and scrutinize bills submitted for approval. Therefore, when the President signs a bill into law, there can somehow be an assurance that it was carefully examined, although this does not discount other possibilities. Anyway, there is a presumption that official duty has been regularly performed.[53]

The playing field is not the same when the people ratifies the constitution. First, it rarely happens. For purposes of counting time and without reference to the contents of the previous constitutions, look at the gap in time: 1899, 1902, 1916, 1935, 1943, 1973, 1986, 1987. There is a gap of eighty-eight (88) years between the promulgation of the first constitution and the present constitution of the Philippines. Assuming that an eighty-eight-year-old Filipino has been able to give his or her assent to all the Constitutions that the Philippines has had - and this is assuming

[52] CRUZ, *supra* note 49 at 381.
[53] Bustillo vs. People, 620 SCRA 483 (2010).

that he or she started to vote at the age of one - this frequency alone would still not suffice to make a person an adept in scrutinizing constitutions. Mathematically speaking, this exaggerated scenario would only allow the person to cast a vote on a constitutional change once in more than ten years. There is no suggestion that only those who are adept with the law should cast their votes. What this context puts forward for consideration is that there must be a way for those not in the field of law to still be able to cast their vote based on well-founded reasons, thus giving life to the spirit of ratification.

Citizen's Arm

It is submitted that having free speech is not enough to be on par with the ability of the government to campaign for its cause.

The government is able to run and operate because of public money. As such, it has been an accepted principle in taxation that taxes are the lifeblood of the government. Without taxes, the government would be paralyzed for lack of the motive power to activate and operate it.[54] Be that as it may, the power to tax is not absolute.[55] One of the inherent limitations to the government's power to collect enforced contributions is that the money collected must be appropriated for public purpose.[56] In this regard, it has been aptly explained by jurisprudence that a governmental appropriation is still considered as one for public purpose even if it does not personally benefit each and every taxpayer. Thus, it follows that a governmental appropriation cannot be struck down as invalid on the sole ground that not every citizen has approved the project for which the appropriation was made. However, since the government cannot be expected to speak against its advocacy, even if it is aware of its advocacy's negative implications, there has to be a way for the people to decide with reason that is based on the proposal of the government itself. It is respectfully submitted that the promulgation of a new constitution, just like the election of public officials, needs more participation from citizens independently from the government. In line with this, it is proposed that a non-partisan citizens' arms be accredited to conduct an independent information dissemination regarding the proposed

[54] Commissioner of Internal Revenue vs. Algue, Inc., 158 SCRA 9, (1988).
[55] Dumaguete Cathedral Credit Cooperative (DCCCO) vs. Commissioner of Internal Revenue, 610 SCRA 652 (2010).
[56] Planters Products, Inc. vs. Fertiphil Corporation, 548 SCRA 485 (2008).

constitution. This accreditation would give governmental recognition to an organization or organizations that could be expected to discuss the proposals without bias, thus allowing the people to really know the pros and cons of the changes offered before making their votes count.

Having a citizens' arms with the objective of ensuring the integrity of a constitutional process is not new in the Philippines. Under the Constitution, one of the functions of the Commission on Elections (COMELEC) is to accredit citizens' arms during elections.[57] Thus, the Philippines has the National Citizens' Movement for Free Elections (NAMFREL), which is also known as the country's election watchdog. NAMFREL is a non-partisan, nationwide organization of individual citizens and civic, religious, professional, business, labor, educational, youth and non-government organizations, voluntarily working for the cause of free, orderly and honest elections. Since 1984, it has participated in Philippine national and local elections as an accredited citizens' arm of the COMELEC. As a non-partisan volunteer organization, NAMFREL is funded neither by the government nor by any political party or partisan institution. It draws upon contributions made by many civic-minded citizens who support its mission.[58] As an entity separate and distinct from the government, NAMFREL can be expected to present its election advocacies without bias. It is also for this reason that its parallel vote count during elections is also being covered by the media. A substantial discrepancy between the count of NAMFREL and that of the COMELEC could raise questions as to the integrity of the counting of votes.

A similar framework with that of NAMFREL can be adopted for the process of changing the constitution. As a matter of fact, it may be said that a citizens' arm is necessary during constitutional changes since it is mainly a political process wherein the proponent, the government, has the public funds at its disposal.

Epilogue

[57] PHIL. CONST. ART. IX-C, § 2 (5).
[58] NAMFREL Brochure, *available at* http://www.namfrel.com.ph/v2/aboutus/brochures/091813-Namfrel-brochure-PDF.pdf (last accessed March 1, 2019).

To a layman, the proposed change from the unitary system to a federal system might seem nothing more than a formal change in government offices, considering that the persons who would actually occupy such offices would more or less still be the same. On the other hand, a person versed in the law would know that it would mean more than that. Be that as it may, the fact that citizens of the same state have different perspectives on the issue should not keep any citizen from participating in the process. Interested in the system of government or not, once approved, all citizens would be affected by this change. Regardless of the status in life, Filipinos would share the same fate as an effect of a new constitution. Each has a duty to make sure that this fate would benefit the future generations to come. The government has the duty to be transparent to the people. The people, on the other hand, must assert its sovereignty and demand for transparency, in fulfillment to its duty to its fellowmen.

CHILD TRAFFICKING IN THE PHILIPPINES AND THE LEGAL IMPLICATIONS OF THE EXPANDED ANTI-TRAFFICKING IN PERSONS ACT OF 2012

Jemima Elaine S. Busaing[1]

"Our lives begin to end the day we become silent about the things that matter" – Martin Luther King Jr.

INTRODUCTION

With the growth of a country and its economy, the influx of opportunities for development carries the advantages and disadvantages of a rapidly-advancing society. Different aspects of societal development also call for more efficient sources of technology, manpower and law enforcement.

The height of development, however, also comes with the proliferation of opportunists who gain through illegitimate or unlawful means; one of which is the exploitation of persons, or simply, trafficking in persons. This differs in several of ways, wherein its victims also vary. They include adults, as well as the vulnerable groups, such as women and children. Most are victims of a society that has peaked its development, but its law and order has degenerated and cannot keep up in patrolling against all kinds of illicit activity within its borders.

Most victims including children are exploited on the guise of employment or economic benefit. All these kinds of reasons, still all boil down to one intent: the intent to exploit other persons and using them as a means to an end.

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In the Philippines, exploitation is a rampant scenario which the government has responded to by adopting laws to prevent and hinder the commission of human trafficking. Particularly, trafficking in persons, especially children, is a rampant crime in our country committed not only by the locals, but also the foreigners who take advantage of the vulnerability of children. Instigators, perpetrators, or principals may range from the most crucial persons, such as parents who willingly exploit their children for pedophiles, and pimps who transacts physically or over the internet. These perpetrators exploit children in exchange of money or economic benefit by offering them to customers or patrons who then take advantage of these children's minority and most often engage them to prostitution or child labor. In that line, the Philippines as a country has been considered both as a source and destination country of traffickers and trafficked persons by to the United Nations Office on Drugs and Crime (UNODC). It only means that while the country's citizens fall victim to exploitation, citizens of other nations are also come to the country to commit the acts of exploitation. Most often these cases remain hidden from the lens of law enforcers as these perpetrators operate beyond government regulation.

The government for this matter should focus its resources on the protection and upliftment of the rights of the children instead of pushing legislation such as lowering the age of criminal responsibility that is contrary to the best interests of a child.

PREVALENCE OF CHILD TRAFFICKING CASES

The development of the Philippine economy also comes with the widening gap of income distribution among different sectors of the country. Most of our marginalized communities remain to be a helpless sector to which the government must give its focus on in order to alleviate their condition and to accord them their rights to live a dignified life. Due to limited opportunities in the country, several Filipinos seek employment abroad to find greener pastures. Some have already succeeded, but several unfortunately fell prey to opportunistic human traffickers, promising a fulfilling job, but end up nowhere near as promised. Taking in point, the

cases of children from financially-challenged sectors of society who gamble at a young age to seek employment, not only domestically but also abroad through tampered documents by making it appear as if they are of age. Once transported through fraudulent means, such as supplying false information to documents, or legitimate channels such as recruitment agencies, there is the dilemma for overseas Filipino workers who end up maltreated or become unpaid laborers. However, the dilemma for women or young girls is different as they become sex workers experiencing physical and sexual abuse, threats, inhumane living conditions, non-payment of salaries, and withholding of travel and identity documents.[2] It is important to note that some of these workers may also include vulnerable minors whose identities are tampered in order for them to travel outside the Philippines or to work in hazardous conditions within the country. Children who experience poverty or are deprived of their basic rights most often become the vulnerable victims of exploitation due to their tenderness and lack of understanding of their rights as children. It can also be said that neglected children may also be vulnerable to these abuses.

In an article featured in The Manila Times, it was reported that 4,500,000 people around the globe fall victim to human traffickers wherein 33% of these cases constitute those involving minor victims of various age groups.[3] The vulnerability of minors predisposes them to being lured into unlawful activities, such as forced labor, or be engaged into child sex trafficking carried out through pimps or bar owners, to support their impoverished families, or for other economic benefits. In the Philippines, the article accounts that around 70% of the trafficked children are young girls who are victims of domestic sexual abuse at the age of 13.[4] However, regardless of gender, Filipino children still fall victim to these trafficking activities.[5]

[2] Mark Saludes, Philippines Struggles in War Against Human Trafficking *available at* https://www.ucanews.com/news/philippines-struggles-in-war-against-human-trafficking/81683 (last accessed Jan. 25, 2019).
[3] Cullen, S., Human Trafficking a Crime Against Children, June 8, 2017, The Manila Times *available at* http://www.manilatimes.net/human-trafficking-crime-children/333417/ (last accessed June 29, 2019).
[4] *Id.*
[5] *Id.*

The United Nations Children's Fund (UNICEF) provided a data that around eight (8) to ten (10) Filipino minors are in danger of online sexual abuse in the country.[6] They estimated that around 100,000 Filipino children aged 18 years old and below are being exploited every year in the Philippines, particularly on sex-related activities.[7] The article from Manila Times even highlighted that child traffickers may range from illegal syndicates to relatives or neighbors, live-in partners of unknowing mothers, and even their biological fathers, uncles, grandfathers, or relatives within the concept of extended families.[8] Trafficking in persons especially with children is not only a crime against humanity, it is also considered to be a form of modern-day slavery.[9]

In the Country Narrative submitted by the Philippines for the Trafficking in Persons Report 2018 issued by the United States Department of State, the Philippine Government, through its law enforcement activities, was able to identify 1,839 potential victims of trafficking activities within the country,[10] 1,422 of which were women and around 410 were identified to be minors.[11] In that line, the Department of Social Welfare and Development (DSWD) reported serving around 1,659 possible trafficking victims which may include women and children.[12] The DSWD accounts around 516 of these assisted cases to be victims of sex trafficking, 646 victims are related to labor trafficking, and around 298 victims relate to illegal recruitment.[13]

The Philippines has been considered both as a source and destination country for traffickers and trafficked persons by the UNODC. This shows that victims are not limited to Filipino nationals but may also include foreign nationals. The prevalence of trafficking in persons in the country, especially of children has pushed the Congress to pass laws to address the rise of

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[6] Yuji Vinci Gonzales, *8 of 10 Filipino children risk online sexual abuse–Unicef*, PHILIPPINE DAILY INQUIRER, available at https://technology.inquirer.net/48286/8-in-10-filipino-children-at-risk-of-online-sexual-abuse-unicef, 07 June 2016 (last accessed 23 July 2019).
[7] *Id.*
[8] *supra* note 3.
[9] *Id.*
[10] Office to Monitor and Combat Trafficking in Persons *available at* https://www.state.gov/j/tip/rls/tiprpt/countries/2018/282731.htm (last accessed Jan. 13,2019) and Trafficking in Persons Report 2018, U.S. Department of State *available at* https://www.state.gov/documents/organization/282798.pdf (last accessed Jan. 13, 2019).
[11] *Id.*
[12] *Id.*
[13] *Id.*

trafficking in persons by passing a law in 2003[14] that penalizes trafficking in persons which was further amended in 2012.[15]

THE ELEMENT OF EXPLOITATION

There are different forms of trafficking in persons or child trafficking. The element that distinguishes an act to be considered as a form of trafficking in persons is the exploitation or intent to exploit persons, including children. In prosecuting cases for Trafficking in Persons or Child Trafficking (TIP for brevity) in the Philippines, mere intent is considered sufficient to consummate the crime.[16]

According to the UNODC Optional Protocol, there are three elements of human trafficking, which include the following: first, the *act*, which may include recruiting, transporting and offering; second, the *means* using force and violence; and, third, the *purpose* or *intent*, which is exploitation.[17] In the Philippines, the Expanded Anti-Trafficking in Persons Act of 2012, or Republic Act 10364, has also included instances, which involve the recruitment, transportation, transfer, harboring, adoption, or receipt of a child for the purpose of exploitation, or when the adoption is induced by any form of consideration for exploitative purposes.[18] Under RA 10364, the previous acts mentioned involving children shall also be considered as 'trafficking in persons' even if it does not involve any of the means such as force and violence.[19]

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[14] An Act To Institute Policies to Eliminate Trafficking In Persons Especially Women and Children, Establishing the Necessary Institutional Mechanism 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 (2003).
[15] 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 10364, § 3(a) (2012).
[16] International Justice Mission, *Anti-Trafficking in Persons Prosecution Guidebook*, available at http://docshare.tips/anti-trafficking-guide-book_574f96ceb6d87f7d0a8b6403.html (last accessed 23 July 2019) (2008).
[17] United Nations Convention against Transnational Organized Crime and the Protocols Thereto *available at* https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf (last accessed February 15, 2019).
[18] EXPANDED ANTI-TRAFFICKING IN PERSONS ACT OF 2012, § 3.
[19] *Id.*

In the same vein, RA 10364 also provides the definition of a child, being a person "below eighteen years of age or one who is over eighteen but is unable to fully take care of or protect himself/herself from abuse, neglect, cruelty, exploitation, or discrimination because of a physical or mental disability or condition."[20]

Under RA 10364, there are three categories of acts of trafficking in persons: actual acts of trafficking in persons;[21] acts that promote trafficking in persons, which may include attempted trafficking in persons, in cases where the victim is a child who travels alone to a foreign country or territory without valid reason and absent any of the required clearances or permit from the child's parent or guardian, or simulated births or solicitations for a child;[22] and, qualified trafficking in persons, which refers to acts committed against a child below child eighteen years old or where the adoption of the child made under Republic Act No. 8043, otherwise known as the "Inter-Country Adoption Act of 1995" is for the purpose of prostitution, pornography, sexual exploitation, forced labor, slavery, involuntary servitude or debt bondage.[23]

In relation to that, child trafficking may also include the more common forms of exploitation, such as sexual exploitation or child labor.[24] Sex trafficking, in general, refers to the "recruitment, harboring, transportation, provision, or obtaining of a minor for the purpose of commercial sex induced by force, fraud or coercion."[25] Meanwhile, child labor trafficking refers to the "recruitment, harboring, provision, or obtaining of a minor for labor or services, through the use of force, fraud, or coercion, or for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery."[26]

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[20] *Id.*
[21] Id, § 5.
[22] Id., § 4-a.
[23] Id., § 6.
[24] Id., § 4.
[25] *Office on Trafficking in Persons, Fact Sheet: Human Trafficking*, available at https://www.act-labs.gov/atip/resource/fshumantrafficking (last accessed 01 June 2019).
[26] Id.

U.N. CONVENTION ON THE RIGHTS OF THE CHILD

The main source of international law that governs the rights of children can be traced with the adoption of the United Nations Convention on the Rights of the Child (UNCRC). The UNCRC, which came into force on September 2, 1990,[27] is considered to be the most widely ratified human rights treaty in the world.[28] The UNCRC contains about 54 articles that provide civil, political, economic, social, and cultural rights that all children in all countries in the world are entitled to.[29] The UNCRC refers to a child as someone who is below 18 years of age unless the state or country adopts an earlier age of majority.[30] The UNCRC also provides the mechanisms on how the governments of member-states must work together to make sure that all children in all states may be fully protected and enjoy their rights.[31] The main goal of the convention is to secure the protection of the rights of children, considering their best interests at heart as the primary consideration in adopting the specific articles provided under the convention.[32]

Article 35 of the UNCRC states its mandate, which provides that state parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic of children for any purpose or in any form.[33] Article 36, on the other hand, calls for the state parties to protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.[34]

There are also optional protocols adopted that particularly discuss the other rights and obligations of states. These include the following: The Optional Protocol on the Involvement of Children in Armed Conflict; The Optional Protocol on a Communications Procedure; and, the Optional Protocol to the Convention on the Sale of Children, Child Prostitution and Child pornography which is also known as the "Sex Trafficking Protocol." This Protocol provides a

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[27] United Nations Treaty Collection, Status: Convention on the Rights of the Child, available at https://treaties.un.org/pages/viewdetails.aspx?src_mtdsg_no_lv_118chapter_48lang_en (last accessed 28 Nov. 2018).
[28] United Nations Children's Emergency Fund, *What is the Convention on the Rights of the Child?*, available at https://www.unicef.org/child-rights-convention/what-is-the-convention (last accessed 23 July 2019).
[29] Convention on the Rights of the Child, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter, UNCRC]
[30] *Id.*, Art. 1.
[31] *Id.*, Art. 2.
[32] *Id.*, Preamble.
[33] *Id.*, Art. 35.
[34] *Id.*, Art. 36.

detailed requirement for governments to end the sexual exploitation and abuse of children.[35] It also provides for the protection of children from being sold for non-sexual purposes, such as other forms of forced labor, illegal adoption, and black market organ donation by providing in its Article 11 that each State Party shall ensure that, as a minimum, such acts and activities are fully covered under its criminal or penal law, whether such offenses are committed domestically or transnationally, or on an individual or organized basis.[36] These activities include the following: (a) in the context of sale of children; (b) in offering, obtaining, procuring or providing a child for child prostitution; and, (c) producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes as child pornography.[37]

Thus, under the Convention, the Philippine Government, as a party, has committed to undertake all appropriate measures to ensure that every Filipino child is protected against all forms of discrimination or inhumane punishment on the basis of the child's status, activities, freedom of expression, or the beliefs of the child's parents, legal guardians, or family members. The Philippines is also mandated to undertake all appropriate legislative, administrative, judicial and other measures it can observe for the full implementation and realization of the rights of the child as provided under the adopted convention. In relation to its duty under international law, the Philippines shall undertake such measures that promote the protection of children's rights within the framework of international cooperation and amity with all nations.

THE ANTI-TRAFFICKING IN PERSONS ACT

The Republic Act 9208, as amended by RA 10364, is the governing law in the Philippines that institutes policies to eliminate trafficking in persons especially with women and children. The law is in accordance with the mandate of Articles 35 and 36 of the UNCRC, the mandates of which were discussed previously. The law's thrust is encapsulated in its Section 2,[38] which provides:

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[35] A Protocol to Prevent, Suppress, and Punish Trafficking in persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organization Crime, opened for signature Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter, SEX TRAFFICKING PROTOCOL].
[36] SEX TRAFFICKING PROTOCOL, Art. 11.
[37] SEX TRAFFICKING PROTOCOL, Art. 3.
[38] EXPANDED ANTI-TRAFFICKING IN PERSONS ACT OF 2012, § 2.

"It is hereby declared that the State values the dignity of every human person and guarantees the respect of individual rights. In pursuit of this policy, the State shall give highest priority to the enactment of measures and development of programs that will promote human dignity, protect the people from any threat of violence and exploitation, eliminate trafficking in persons, and mitigate pressures for involuntary migration and servitude of persons, not only to support trafficked persons but more importantly, to ensure their recovery, rehabilitation and reintegration into the mainstream of society. It shall be a State policy to recognize the equal rights and inherent human dignity of women and men as enshrined in the United Nations Universal Declaration on Human Rights, United Nations Convention on the Elimination of All Forms of Discrimination Against Women, United Nations Convention on the Rights of the Child, United Nations Convention on the Protection of Migrant Workers and their Families, United Nations Convention Against Transnational Organized Crime Including its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and all other relevant and universally accepted human rights instruments and other international conventions to which the Philippines is a signatory."[39]

The amendments introduced in RA 10364 significantly changed the mechanisms on prosecuting trafficking in persons by including provisions for penalties for attempts,[40] as well as for accomplices[41] and accessories[42] to the crime. The law has further included as Trafficking in Persons the engagement of a child below eighteen (18) years of age or one who is over eighteen (18) but is unable to fully take care of or protect himself/ herself from abuse, neglect, cruelty, exploitation, or discrimination because of a physical or mental disability or condition.[43]

[39] *Id.*
[40] *Id.*, § 4-A.
[41] *Id.*, §4-B.
[42] *Id.*, §4-C
[43] *Id.*, § 4 (k).

This law caters to both the protection of men and women in society. It covers cases such as mail-order brides,[44] child slavery,[45] prostitution,[46] and even child abuse cases, as long as the intent of any act committed against a man, woman or child is for the purpose of or with the intent of exploitation.[47] Thus, it is quite easier now to prosecute cases in trafficking in persons because of the legal implications brought about by the amendments in the expanded version in 2012. Among other changes added in the expanded version, in contrast to the provisions of R.A 9208, is the gravamen of the offense of mere intent to exploit. Mere intent to exploit is sufficient to consummate the crime of TIP. Originally, the challenge with RA. 9208 is the stringent definition of the element of "exploitation" as provided under the law which makes the prosecution of cases tedious. In the original version of the law, proving intent was a problem. Thus, the passage of RA 10364, amending RA 9208, brought changes to the law giving it teeth and providing for more comprehensive victim protection and more efficient prosecution of the acts of trafficking in persons committed by perpetrators. The matter has been extensively discussed by Atty. Ryan Jeremiah Quan in a paper entitled *"Revisiting the Element of Exploitation in the Definition of Trafficking in Persons in Republic Act 9208*."[48] According to Atty. Quan, proving the element of intent in the earlier version of the law was hard enough that it affected the prosecution of cases. Before, TIP did not have an attempted stage in its commission, thus, the difficulty in prosecution of cases.

As discussed above, the UNODC provides the definition of TIP.[49] The Republic Act 10364 also provides the elements of trafficking in accordance with its provisions which are more or less the same, as discussed previously.

The United Nations Office on Drugs and Crime (UNODC) Optional Protocol provided the definition of Trafficking in Persons. The three (3) elements of acts that pertain to human trafficking, include the following: first, the act which may include recruiting, transporting and offering; second, the means using force and violence; and, third, the purpose or intent which is exploitation. The Anti Trafficking in Persons Act of 2012 also provides the elements of

[44] *Id*., § 4 (b).
[45] *supra* note 43.
[46] *Id.*, § 4 (a).
[47] *supra* note 43.
[48] Ryan Jeremiah Quan, *Revisiting the Element of Exploitation in the Definition of Trafficking in Persons in Republic Act 9208*, 57 ALJ 401 (2012).
[49] *Id*.,at 416.

trafficking in accordance with its provisions which are more or less the same, these are: *acts* which 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; *means* of commission of the crime by use of threat, or 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, the purpose which is exploitation or the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery, involuntary servitude or the removal or sale of organs.[50] The Philippine version of the 2012 Expanded Anti-Trafficking in Persons Act as amended has also included within its provisions the definition of a child being a person below eighteen (18) years of age or one who is over eighteen (18) but is unable to fully take care of or protect himself/ herself from abuse, neglect, cruelty, exploitation, or discrimination because of a physical or mental disability or condition. [51] Ultimately, RA 10364 has provided the definition of TIP:

> "It 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 recruitment, transportation, transfer, harboring, adoption or receipt of a child for the purpose of exploitation or when the adoption is induced by any form of consideration for exploitative purposes shall

[50] Commission on Filipinos Overseas, Primer on R.A. 9208 as amended by R.A. 10364 3rd Edition *available at* https://www.dilg.gov.ph/PDF_File/reports_resources/dilg-reports-resources-2017323_e21a5b9c4f.pdf (last accessed Jan 27, 2019).
[51] SEX TRAFFICKING PROTOCOL, Art. 3.

also be considered as 'trafficking in persons' even if it does not involve any of the means set forth in the preceding paragraph."[52]

In the prosecution of offenses, Section 8[53] of the law requires law enforcement agencies to immediately initiate investigation and counter-trafficking-intelligence gathering upon receipt of statements or affidavit from victims of trafficking, migrant workers, or their families who are in possession of knowledge or information about trafficking in persons cases or in that case those involving child trafficking.[54] Also, any person who has personal knowledge of the commission of any offense including the trafficked person, the parents, spouse, siblings, children or legal guardian may file the complaint in court.[55] The filing of an affidavit of desistance is also being frowned upon for the dismissal of complaints.[56] The Republic Act 10364 also provides for legal protection of the victims of human trafficking.[57] "Trafficked persons or children for that matter are recognized as victims of trafficking and shall not be penalized for any crimes directly related to the acts of trafficking or in obedience to the order made by the trafficker."[58] The law also provides that the consent of the victim to the intended exploitation is irrelevant, thus, the victim cannot be held liable for any crime in relation to or as a resort of the trafficking upon his person.[59]

In 2015, the Trafficking in Persons Report (TIP Report) submitted by the Philippines showed that the government has convicted 246 offenders from 223 human trafficking cases.[60] Also, the report stated that more than one 1,100 trafficking cases filed in court in 2016 or in previous years remained pending in the Philippine courts due to different factors, including inefficiency (e.g. non-continuous trials, large caseloads of the Philippine Courts, limited resources, and in some cases, rampant corruption).[61]

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[52] EXPANDED ANTI-TRAFFICKING IN PERSONS ACT OF 2012, § 3 (a).
[53] *Id.*
[54] *Id.*, § 8a.
[55] *Id.*, 8b.
[56] *Id.*, § 8c.
[57] *Id.*, § 17.
[58] *Id.*
[59] *Id.*
[60] U.S. Department of State, 2017 Trafficking in Persons Report, available at https://www.state.gov/j/tip/rls/tiprpt/countries/2017/271264.htm (last accessed Nov. 15, 2018).
[61] *Id.*

The report also stated that the government has maintained its protection efforts in compliance with its obligation under international law.[62.] The DSWD reported that there are around 1,713 possible trafficking victims as of the year 2017, wherein 1,434 were female, compared to the data from 2015 with 1,465 victims,[63] some of which include minors. There is a notable increase in the number of trafficking in persons cases in 2017compared to the 2015 data. The Department has also reported assisting 530 victims of illegal recruitment, 465 victims of sex trafficking, and 232 victims of labor trafficking.[64] The Philippines, as a member-state, that has ratified the UNCRC still continues to comply with its obligations under the Convention by implementing measures for the prevention and prosecution of child trafficking in the Philippines. The challenge lies in the strengthening of our law enforcement activities and judicial system by fully hearing cases speedily and for the law enforcement officers to continuously monitor trafficking activities in the country.

THE RANK OF THE PHILIPPINES IN COMPLIANCE TO TRAFFICKING IN PERSONS INCLUDING CHILD TRAFFICKING MEASURES

In 2015, the Philippines was classified as a Tier 2 country by the US Department of State in terms of its efforts to combat human trafficking activities within its borders.[65] A Tier 2 ranking means that the country did not meet the minimum requirements in prosecuting and preventing TIP cases, as well as child trafficking. According to the report most of the victims experienced physical and sexual abuse, threats, inhumane living conditions, nonpayment of salaries and withholding of travel and identity documents.[65]

In 2017, our ranking has moved up from Tier 2 to Tier 1 which means that as of that year up to the present the Philippine Government has fully met the minimum standards for the elimination of trafficking in persons. However, it was observed in the report that the government did not vigorously investigate and prosecute officials allegedly involved in trafficking crimes or

[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*

expand its pilot program to address the backlog of trafficking cases in the courts.[66] From its ranking from the previous decade to the present, the Philippines has come a long way in global compliance with the minimum requirements provided by the Sex Trafficking Protocol.

CONCLUSION

As the proliferation of unscrupulous and unlawful acts of trafficking in persons becomes rampant in the country, the Government should continue its efforts to enforce and protect victims of human trafficking, especially children who are vulnerable to such acts, considering that the Philippines is both a source and destination country of trafficked persons. It should aim to maintain its Tier 1 status which is in full compliance of its obligations under international law and in accordance with the Philippine Constitution which provides that "[n]o person shall be denied of his life, liberty or property without due process of law nor shall any person be deprived the equal protection of the laws."[67]

The Government, for this matter, should focus its resources on the protection and upliftment of the rights of the children instead of pushing legislation that is contrary to the best interests of a child. Children, due to their tenderness, are vulnerable members of society and the Government as well as its officials must always endeavor to pass legislation that would further protect their interests from trafficking activities. Their involvement to such activities is contrary to their will given that they lack the necessary understanding of their illegality, and given their economic background. It must not look at the capacity of the child to commit a crime. Instead, it must re-evaluate its own goals and thrust to check if they are really in line with what the constitution seeks to protect, the sanctity of life and the dignity of the human person.[68]

[66] *Id.*
[67] PHIL CONST. Art. III, §1.
[68] PHIL CONST. Art. II, § 12.

UPHOLDING MARRIAGE: SHIFTING PERSPECTIVES FROM LEGALIZING DIVORCE THROUGH AN OVERVIEW OF ITS EFFECTS

Carla June O. Garcia[1]

Introduction

In Greek mythology, Zeus, the King of the Gods, fell head over heels with Hera, the goddess of women, marriage, family and childbirth. Similar with the other celebrations of most marriages in the Philippines, the marriage of Zeus and Hera was celebrated with sacrifices coupled with singing hymns and praises.[2] It may seem romantic, but discussions have been done in which others have put their two cents' worth that marriages born out of romance is not an enough motive for upholding the sanctity of matrimony and that committing to their partners should be carefully done.

Is it the decline on valuing marriages or perhaps, a need for changed perspective about the nature of marriage?

Section 1, Article XV of the 1987 Constitution provides that, *"the State recognizes the Filipino family as the foundation of the nation. Accordingly, it shall strengthen its solidarity and actively promote its total development."*[3] Despite this state recognition, studies indicate that the common marital issues like money problems, poor communication, and emotional infidelity still persist.[4] Thus, the issue of whether a divorce bill should be passed or not persists as well. However, instead of focusing on passing a divorce bill, the author would like to propose an alternative perspective. The author suggests that lawmakers

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[2] Greek Boston.com, The Rocky Relationship of Zeus and Hera, *available at* https://www.greekboston.com/culture/mythology/zeus-hera/ (last accessed Nov. 12, 2018).
[3] PHIL. CONST., ART. XV, § 1.
[4] Dani-Elle Dubé, *The most common relationship problems and how to fix them before it's too late*, GLOBAL NEWS, January 17, 2017, *available at* https://globalnews.ca/news/3186071/the-most-common-relationship-problems-and-how-to-fix-them-before-its-too-late/ (last accessed Nov. 12, 2018).

should consider reviewing the societal effects of marriages terminated through a divorce as most studies show that legalizing it has many negative consequences to the state in general. The most common necessary consequences of divorce are the following:

1. It would disrupt the state's recognition of the sanctity of family life as divorce runs counter to what has been expressly provided in Section 1, Article XV of the Constitution;
2. It would affect not only the immediate parties involved, *i.e.*, the family but also the society as a whole, as the family is considered the society's basic unit; and
3. Even assuming for the sake of argument that the consequences mentioned above are acceptable in the discretion of the legislators, divorce does not guarantee a solution as opposed to a better enforcement of the existing Philippine laws on marriage.

Regulation of Marriage in the Philippines

Research shows that the Philippines and the Vatican are the only states that remain opposed to the enactment of divorce decrees.[5] While there has already been an ongoing discourse on passing a divorce bill, the author would first like to show the development of the Philippine legal system as regards its family law.

During the pre-Spanish colonial period, customs on marriages were truly valued.[6] These customs were later on reflected under Article 11 of the New Civil Code of the Philippines which states that *"customs which are contrary to law, public order or public policy shall not be countenanced."*[7] Throughout this era, the legal arrangement of marriage was done by the parents or even the grandparents of the prospective spouses which was sometimes effected even before birth. A condition before a marriage was formed was through a legal retribution of a dowry which was demanded of the groom and his family."[8] Furthermore, acquiring divorce then was relatively accessible because what the woman must do was to merely obtain the dowry given

[5] Delon Porcalla, *Only Philippines, Vatican ban divorce — Speaker Alvarez,* March 13, 2018, *available at* https://www.philstar.com/headlines/2018/03/13/1796145/only-philippines-vatican-ban-divorce-speaker-alvarez (last accessed Nov. 12, 2018).
[6] SAMUEL R. WILEY, S.J. THE HISTORY OF MARRIAGE LEGISLATION IN THE PHILIPPINES 24 (1976).
[7] AN ACT TO ORDAIN AND INSTITUTE THE CIVIL CODE OF THE PHILIPPINES [CIVIL CODE], ACT NO. 386, ART. 11 (1950).
[8] SAMUEL R. WILEY, S.J. THE HISTORY OF MARRIAGE LEGISLATION IN THE PHILIPPINES 24 (1976).

prior to marriage and thereafter return it to the man and his parents plus an additional amount equal to the dowry.[9]

Moving forward to the Spanish Rule, an absolute divorce was prohibited, and only relative divorce was allowed. Relative divorce is analogous to the legal separation written in today's Family Code.[10] This is a mere separation in bed and board and does not totally sever the marriage ties of the involved parties.[11] Then, advancing to the American colonial rule, the Church interfered to address the adversity in the marriage laws. Act No. 2710, otherwise known as *"An Act to Establish Divorce"* was then enacted by the Philippine Legislature which allowed for absolute divorce on the ground of criminal conviction for adultery on the part of the wife or concubinage on the part of the husband.[12] However, the limited grounds and the requirement of criminal conviction of the said Act made it difficult to obtain a divorce. Thus, several attempts were made to further liberalize the process of divorce in the Philippines.[13]

Concurrently, the Japanese occupation from 1941 to 1946 which happened after the American occupation from 1898 to 1941, paved the way for the commander-in-chief of the Japanese Imperial Forces in the Philippines to grant authority to the Chairman of the Philippine Executive Commission to issue Executive Order No. 141, otherwise known as the "New Divorce Law" which expressly repealed Act No. 2710.[14]

When World War II ended, the Philippines was granted complete liberation and independence. The divorce decree of E.O. 141 under the Japanese era was abrogated while those of the American laws were revived. The said E.O. was the controlling rule until the enactment of the New Civil Code of the Philippines in 1950. It repealed the legislation on absolute divorce in the Philippines and restored the catholic values in the realm of marriage and family. The practice

[9] *Id.*
[10] Frederick M. De Borja, Divorce in the Philippines: A Legal History, *available at* https://www.hg.org/legal-articles/divorce-in-the-philippines-a-legal-history-45701 (last accessed Nov 12, 2018).
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*

of divorce among the Muslim population in the Philippines also began to be recognized under the New Civil Code, which is still in force today.[15]

With these advancements, then President Marcos issued Presidential Decree 1083, otherwise known as *"A Decree To Ordain And Promulgate A Code Recognizing The System Of Filipino Muslim Laws, Codifying Muslim Personal Laws, And Providing For Its Administration And For Other Purposes"* which paved the way for the creation of Shariah courts in the Philippines that allowed divorce among Muslims. The said decree was then the only effective divorce law in the Philippines and remains in full force and effect.[16]

Fourteen (14) years after martial law, Executive Order No. 109, otherwise known as *"The Family Code of the Philippines"* was promulgated by Corazon Aquino who was then the elected president under the revolutionary government. One of its provisions, Article 36, allowed for the filing of a petition for declaration of nullity on the ground of psychological incapacity. The Family Code also provides remedies as to the declaration of nullity which would render the marriage *void ab initio* or void from the very beginning but produces legal effects as to status of children and treatment of property of the spouses."[17]

Divorce in Foreign Countries

The divorce law was first rooted in Italy in 1970,[18] followed, among others, by Argentina in 1987[19] and Chile in 2004.[20]

While grounds for divorce may vary from every country, their similarities are still evident such as the grounds for filing for fault-based and no-fault based.[21] The option a spouse may have

[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] Marriage and Divorce in Italy, *available at* https://www.justlanded.com/english/Italy/Articles/Visas-Permits/Marriage-Divorce-in-Italy (last accessed Mar. 1, 2019).
[19] Randall Hackley, *Divorce Is Now Legal in Argentina but, So Far, Few Couples Have Taken the Break*, LOS ANGELES TIME, July 12, 1987, *available at* http://articles.latimes.com/1987-07-12/news/mn-3473_1_divorce-law (last accessed Mar. 1, 2019).
[20] *Chile introduces rights to divorce*, BBC NEWS, Nov. 18, 2004, *available at* http://news.bbc.co.uk/2/hi/americas/4021427.stm (last accessed Mar. 1, 2019).

depends on the state laws where he or she lives and the particular circumstances of the case.[22] The state laws allow the court to evaluate the grounds given by a spouse who filed for a divorce. On the other hand, the particular circumstances of the case permits a spouse to prove his or her filing based on irreconcilable differences in accordance with the state law. Among those common fault-based grounds for divorce are adultery, insanity, and incarceration.[23]

In Italy, any married couple can apply if their marriage took place there or if one in the couple is Italian or a resident of the country.[24] In Argentina, any married couple for more than three (3) years can obtain a divorce through a civil court after a one-year separation or a no-fault divorce after a separation of three (3) years. Remarriage is permitted immediately after a divorce has been approved.[25] In Chile, a couple may divorce a year after separating if both partners agree to split up. If one partner disagrees, a divorce is allowed after three years.[26] Foreign divorces in Chile, however, are not recognized under Chilean law.[27] Divorce applications must first be in accordance with the Chilean requirements for divorce.[28] For such applications to prosper, involved parties must show proof of legal separation from one to five years.[29]

Attempts to Legalize Divorce in the Philippines

In 2005, the Gabriela Part-List Representative Liza Maza attempted to file a divorce bill which was docketed as House Bill 1799, otherwise known as *"An Act Introducing Divorce in the*

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[21] HG.org Legal Resources, What is the Difference Between Fault and No-Fault Divorce? *available at* https://www.hg.org/legal-articles/what-is-the-difference-between-fault-and-no-fault-divorce-37388 (last accessed Feb. 8, 2019).
[22] *Id.*
[23] *Id.*
[24]Marriage and Divorce in Italy, *available at* https://www.justlanded.com/english/Italy/Articles/Visas-Permits/Marriage-Divorce-in-Italy (last accessed Mar. 1, 2019).
[25] Randall Hackley, *Divorce Is Now Legal in Argentina but, So Far, Few Couples Have Taken the Break*, LOS ANGELES TIME, July 12, 1987, *available at* http://articles.latimes.com/1987-07-12/news/mn-3473_1_divorce-law (last accessed Mar. 1, 2019).
[26]*Chile introduces rights to divorce, BBC NEWS, Nov. 18, 2004, available at http://news.bbc.co.uk/2/hi/americas/4021427.stm (last accessed Mar. 1, 2019).*
[27] Spencer Global Chile, Divorce in Chile, *available at* https://www.spencerglobal.com/family-law/23-divorce-in-chile.html?fbclid=IwAR3TuiAGrZkXaEUsyzBcnrZuOcJXvS_DOxboU1uX5SWzWzr1MVoM92QsEKY (last accessed Feb. 25, 2019).
[28] *Id.*
[29] *Id.*

Philippines."[30] It was then re-filed in August 2010 by Liza Maza herself and Luzviminda Ilagan, also of Gabriela Women's party-list, due to unexplained circumstances that happened upon its first filing which later on paved the way for the committee to deliberate on June 1, 2011 whether to legalize the divorce or not. However, the bill did not prosper due to lack of support from the legislators.

Nevertheless, the discourse about legalizing divorce was later initiated by the former House Speaker Pantaleon Alvarez as House Bill No. 7303, otherwise known as *"An Act Instituting Absolute Divorce and Dissolution of Marriage in the Philippines".*[31] It was a proposed preventive means to save the children from the pain, stress, and agony consequent to their parents' constant marital clashes and grant the divorced spouses the right to marry again for another chance to achieve marital bliss.[32] The bill stated that divorce may give opportunity to failed marriages of spouses in availing of a remedy that will judicially terminate a continuing dysfunction of a long broken marriage. Majority of the lawmakers have disagreed on the proposed measure as they saw that there is a more appropriate way to find a solution to unstable marriages.[33]

Other Remedies Apart from Absolute Divorce

Absolute divorce is not legally recognized in the Philippines.[34] Therefore, Filipino couples who have validly obtained marriage in the Philippines are still recognized as husband and wife regardless of irreconcilable differences that might occur between them. Divorce initiated by a Filipino is considered against public policy.[35] However, it is worth to note that the

[30] An Act Introducing Divorce in the Philippines, H.B. No. 1799, 15th Cong., 1st Reg. Sess. (2005).
[31] An Act Instituting Absolute Divorce and Dissolution of Marriage in the Philippines, H.B. No. 7303, 17th Cong., 2nd Reg. Sess. (2018).
[32] *Id.*
[33] tech2.org, Filipino Senators Swear to Kill Divorce Bill, available at https://tech2.org/philippines/filipino-senators-swear-to-kill-divorce-bill/ (last accessed Nov. 12, 2018).
[34] MELENCIO S. STA MARIA, PERSONS AND FAMILY RELATIONS 179 (2015).
[35] *Id.*

Supreme Court has taken a different view in the recent case of *Republic v. Manalo*[36] which will be further discussed later.

The prohibition on the absolute divorce is also anchored in Article 15 and in the last paragraph of Article 17 of the New Civil Code.[37] The Article 15 provides that laws relating to family rights and duties or to the status, condition, and legal capacity of persons are binding upon citizens of the Philippines, even though living abroad. Meanwhile, Article 17 provides that prohibitive laws concerning persons, their acts or property, and those which have for their object public order, public policy and good customs shall not be rendered ineffective by laws or judgments promulgated, or by determinations or conventions agreed upon in a foreign country. However, an action raised by either party may provide them remedies such as filing of a declaration of their marriage as void or voidable, filing for a recognition of a foreign divorce, and initiating a legal separation proceeding.

The New Civil Code expressly provides remedies that may be availed of to terminate marriages without having to resort to divorce. Void marriages or those marriages that are considered as never to have taken place can be declared invalid on the grounds mentioned in Art. 35 which refers to the following marriages:

- those marriages contracted by parties who are under eighteen years of age;
- those that were solemnized by a person without authority;
- those contracted without a valid marriage license;
- those bigamous and polygamous marriages;
- those that were contracted through mistake of identity;
- those subsequent marriages without complying to the requirements needed for the judicial declaration of absolute nullity;
- in Art. 36 which refers to marriages contracted with either of the party with psychological incapacity;

[36] Republic of the Philippines vs. Marelyn Tanedo Manalo, G.R. No. 221029, April 24, 2018, *available at* http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2018/april2018/221029.pdf (last accessed Feb. 16, 2019).
[37] *Id.*

- in Art. 37 which refers to incestuous marriages
- in Art. 38 which refers to those marriage contracted against public policy; and
- in Art. 44 which refers to marriages contacted with bad faith in a subsequent bigamous marriage of the Family Code.[38]

Apart from voidable marriages, the Philippines also recognize that there are voidable or annullable marriages. These are marriages that are valid until otherwise declared void by the court. The grounds for this are under Article 45 of the same code which includes the following marriages:

- those marriages that were contracted by the parties of eighteen years or over but below twenty-one without the consent of their parents;

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[38] THE FAMILY CODE OF THE PHILIPPINES [FAMILY CODE], ACT NO. 8533, ART. 35-38, 44 (1988).
The following marriages shall be void from the beginning:
(1) Those contracted by any party below eighteen years of age even with the consent of parents or guardians;
(2) Those solemnized by any person not legally authorized to perform marriages unless such marriages were contracted with either or both parties believing in good faith that the solemnizing officer had the legal authority to do so;
(3) Those solemnized without license, except those covered the preceding Chapter;
(4) Those bigamous or polygamous marriages not failing under Article 41;
(5) Those contracted through mistake of one contracting party as to the identity of the other; and
(6) Those subsequent marriages that are void under Article 53.
Art. 36. A marriage contracted by any party who, at the time of the celebration, was psychologically incapacitated to comply with the essential marital obligations of marriage, shall likewise be void even if such incapacity becomes manifest only after its solemnization. (As amended by Executive Order 227)
Art. 37. Marriages between the following are incestuous and void from the beginning, whether relationship between the parties be legitimate or illegitimate:
(1) Between ascendants and descendants of any degree; and
(2) Between brothers and sisters, whether of the full or half blood.
Art. 38. The following marriages shall be void from the beginning for reasons of public policy:
(1) Between collateral blood relatives whether legitimate or illegitimate, up to the fourth civil degree;
(2) Between step-parents and step-children;
(3) Between parents-in-law and children-in-law;
(4) Between the adopting parent and the adopted child;
(5) Between the surviving spouse of the adopting parent and the adopted child;
(6) Between the surviving spouse of the adopted child and the adopter;
(7) Between an adopted child and a legitimate child of the adopter;
(8) Between adopted children of the same adopter; and
(9) Between parties where one, with the intention to marry the other, killed that other person's spouse, or his or her own spouse.
Art. 44. If both spouses of the subsequent marriage acted in bad faith, said marriage shall be void ab initio and all donations by reason of marriage and testamentary dispositions made by one in favor of the other are revoked by operation of law.

- those that either party was of unsound mind;
- those whose consent was obtained through fraud;
- those that were vitiated with force, intimidation, or undue influence;
- those that are physically incapable to consummate marriage; and
- those that either of the party was afflicted with sexually transmissible disease.[39]

Accordingly, either party may file an action declaring the marriage as void or voidable, as the case may be. In addition to terminating marriages which are void or voidable, the Philippines also acknowledges legal separation. As opposed to the declaration of nullity and annulment, legal separation does not affect the marital status or dissolve the marriage.[40] It merely involves a bed-and-board separation. It has exclusive grounds on which it can be granted.

Under Art. 55 of the Family Code, a spouse can file for legal separation in court if the other spouse is sentenced to jail for more than five (5) years; physically abuses her or a child in the household or attempts to marry another person. It is also allowed if one spouse has a drug or alcohol problem or is a homosexual. Adultery or aggressive attempts by one spouse to get the other spouse to change religions; adopt political views or prostitute herself or a child in the home, are also grounds for legal separation. If one spouse leaves the other spouse without having a reason held as valid by the court, the abandoned spouse can file for separation after a year has passed. The spouse must file within five years of the qualifying event, and the court can deny the

[39] THE FAMILY CODE OF THE PHILIPPINES [FAMILY CODE], ACT NO. 8533, ART. 45 (1988).
A marriage may be annulled for any of the following causes, existing at the time of the marriage:
(1) That the party in whose behalf it is sought to have the marriage annulled was eighteen years of age or over but below twenty-one, and the marriage was solemnized without the consent of the parents, guardian or person having substitute parental authority over the party, in that order, unless after attaining the age of twenty-one, such party freely cohabited with the other and both lived together as husband and wife;
(2) That either party was of unsound mind, unless such party after coming to reason, freely cohabited with the other as husband and wife;
(3) That the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband and wife;
(4) That the consent of either party was obtained by force, intimidation or undue influence, unless the same having disappeared or ceased, such party thereafter freely cohabited with the other as husband and wife;
(5) That either party was physically incapable of consummating the marriage with the other, and such incapacity continues and appears to be incurable; or
(6) That either party was afflicted with a sexually-transmissible disease found to be serious and appears to be incurable.

[40] MELENCIO S. STA MARIA, PERSONS AND FAMILY RELATIONS 370 (2015).

petition for various reasons, including evidence that the filing spouse consented to the qualifying event.[41] An exceptional option on filing a legal separation instead of annulment is that the former cannot be tried before six (6) months shall have elapsed since the filing of the petition to give the parties enough time to further contemplate and to have possible reconciliation whereas the latter can be tried then once an action has been filed. [42]

Additionally, even Filipinos who are married to foreigners or those who subsequently obtained foreign citizenship are allowed to remarry when a valid divorce is obtained in a foreign country allowing remarriage to the the alien spouse.[43] In *Van Dorn v. Romillo*,[44] the court explained the rationale of the said paragraph that:

> To maintain, x x x that, under our laws, petitioner has to be considered still married to private respondent and still subject to a wife's obligations x x x cannot be just. [The Filipino spouse] should not be obliged to live together with, observe respect and fidelity, and render support to [the alien spouse]. The latter should not continue to be one of her heirs with possible rights to conjugal property. She should not be discriminated against in her own country if the ends of justice are to be served.[45]

As previously stated, a recent decision of the Supreme Court in *Republic vs. Manalo*[46] held that the Philippine courts now recognize divorce obtained by the Filipino from foreign spouse. The court elaborated that:

> Based on a clear and plain reading of the provision, it only requires that there be a divorce validly obtained abroad. The letter of the law does not demand that the

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[41] Anna Assad, Philippine Laws on Divorce, Separation and Annulment, *available at* https://info.legalzoom.com/philippine-laws-divorce-separation-annulment-20694.html (last accessed Nov. 30, 2018).
[42] AN ACT TO ORDAIN AND INSTITUTE THE CIVIL CODE OF THE PHILIPPINES [CIVIL CODE], ACT NO. 386, ART. 58 (1950).
An action for legal separation shall in no case be tried before six months shall have elapsed since the filing of the petition.
[43] The Family Code of the Philippines [FAMILY CODE], Act No. 8533, art. 26 (1988).
All marriages solemnized outside the Philippines, in accordance with the laws in force in the country where they were solemnized, and valid there as such, shall also be valid in this country, except those prohibited under Articles 35 (1), (4), (5) and (6), 3637 and 38. (17a)
Where a marriage between a Filipino citizen and a foreigner is validly celebrated and a divorce is thereafter validly obtained abroad by the alien spouse capacitating him or her to remarry, the Filipino spouse shall have capacity to remarry under Philippine law. (As amended by Executive Order 227)
[44] 139 SCRA 139
[45] *Id.*
[46] Republic of the Philippines vs. Marelyn Tanedo Manalo, G.R. No. 221029, April 24, 2018.

> alien spouse should be the one who initiated the proceeding wherein the divorce decree was granted. It does not distinguish whether the Filipino spouse is the petitioner or the respondent in the foreign divorce proceeding. The Court is bound by the words of the statute; neither can we put words in the mouths of the lawmakers.[47]

Furthermore, the court reiterated that, "the provision is a corrective measure to address an anomaly where the Filipino spouse is tied to the marriage while the foreign spouse is free to marry under the laws of his or her country. Whether the Filipino spouse initiated the foreign divorce proceeding or not, a favorable decree dissolving the marriage bond and capacitating his or her alien spouse to remarry will have the same result to the Filipino spouse will effectively be without a husband or wife."[48]

Thus, divorce may merely serve as an avenue for one of the parties who agreed to such marriage to severe it under the guise of the ground of irreconcilable differences. Through these remedies, legalizing divorce could not be said to be necessary.

Possible Effects of Divorce

Marriage is a special contract of permanent union between a man and a woman whose nature, consequences, and incidents are governed by law and not subject to stipulation.[49] Therefore, marriage is a not mere contract between the parties but also with the state as it is imbued with public interest. It is for this reason that the author realizes that passing the divorce bill would merely disrupt the state's recognition on the sanctity of family life.

The myth being perpetuated that divorce is a far acceptable alternative for children, rather than have them seeing their parents fight all the time is not true.[50] Research says that while

[47] *Id.*
[48] *Id.*
[49] THE FAMILY CODE OF THE PHILIPPINES [FAMILY CODE], ACT NO. 8533, ART. 1 (1988).

[50] Jemy Gatdula, Divorce and its Damaging Effect on Children, Business World, Aug. 11, 2017, *available at* https://www.bworldonline.com/divorce-damaging-effect-children-society/ (last accessed Nov. 30, 2018)

children in quite high conflict homes may benefit by being removed from those situations, the situation of children in lower-conflict marriages can go much worse following a divorce.[51]

Furthermore, children experience lasting tension even after their parents' divorce, particularly as a result of the increasing differences in their parents' values and ideas. Therefore, children who are affected of divorced marriages are worse emotionally than children who merely grew up in an unhappy but "low-conflict" marriage.[52]

What makes divorces even more devastatingly ironic is that studies have conclusively shown that "children benefit if parents can stay together and work out their problems rather than get a divorce."[53]

As to the effects of divorce on women, research shows that divorced women reported significantly higher levels of psychological distress than married women and no differences in physical illness. In 2001, divorced women reported significantly higher levels of illness, even after controlling for age, remarriage, education, income, and prior health. Compared to their married counterparts, divorced women reported higher levels of stressful life events between 1994 and 2000, which led to higher levels of depressive symptoms in 2001.[54]

Furthermore, research states that divorce breeds poverty, particularly for women and children. In the first eighteen (18) months following divorce, between 77% and 83% percent of mothers and their children live in poverty. With limited economic resources, most children of divorced marriages experience disruptions – changes in child care, living arrangements and schools – that create turmoil in their lives.[55]

Moreover, research also shows that divorce not only affects the involved parties but also adversely affects the society by dissolving families and weakening belief in the family as an essential social unit.[56] According to sociologists, the family does more than unite people by

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[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] Lorenz, F.O., Et. Al., The Short-Term and Decade-Long Effects of Divorce on Women's Midlife Health, *available at* https://www.ncbi.nlm.nih.gov/pubmed/16821506 (last accessed Nov. 30, 2018).
[55] Michele Vrouvas, The Effects of Divorce on Society, *available at* https://info.legalzoom.com/effects-divorce-society-20105.html (last accessed Nov. 30, 2018).
[56] Jemy Gatdula, Divorce and its Damaging Effect on Children, Business World, Aug. 11, 2017, available at https://www.bworldonline.com/divorce-damaging-effect-children-society/ (last accessed Nov. 30, 2018)

marriage and blood or adoption; it provides the educational, financial, and emotional support its members need to thrive socially. Without such support, divorced adults and their children are mentally and physically weakened, becoming less productive social participants.[57] More broadly, divorce leads people to question whether having a family is worthwhile.[58] Even worse, says researcher Patrick Fagan, children of divorced households often do not marry and start families of their own, a phenomenon that can disturb social harmony.[59]

According to researchers Amato and Sobolewski,[60] divorce damages the society, as it consumes social and human capital. It substantially increases cost to the taxpayer, while diminishing the taxpaying portion of society. It diminishes children's future competence in all five of society's major tasks or institutions: family, school, religion, marketplace, and government. Divorce also permanently weakens the family and the relationship between children and parents. It frequently leads to destructive conflict management methods, diminished social competence, and for children, the early loss of virginity, as well as diminished sense of masculinity or femininity for young adults. It also results in more trouble with dating, more cohabitation, greater likelihood of divorce, higher expectations of divorce later in life, and a decreased desire to have children.[61]

The legalization of divorce does not also guarantee a better solution as opposed to a better enforcement of the existing Philippine laws on marriage. While cohabitation of the couples before marriage is a possible remedy, studies have shown that it also tends to increase likelihood for divorce as the excitement of living together eventually decreases.[62]

There are other forms of solution in the form of present laws and even more are being formed in the Philippines to cater the problem of the grounds for separation of the legal ties in a marriage. These are evident in the enactment of special laws such as the R.A. 9262, otherwise known as "Anti-Violence Against Women and Their Children Act of 2014" which is

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[57] Michele Vrouvas, The Effects of Divorce on Society, *available at* https://info.legalzoom.com/effects-divorce-society-20105.html (last accessed Nov. 30, 2018).
[58] *Id.*
[59] Churchill, A. & Fagan, P., The Effects of Divorce on Children, *available at* https://www.frc.org/EF/EF12A22.pdf (last accessed Nov. 30, 2018).
[60] Paul Amato, The Consequences of Divorce for Adults and Children. Journal of Marriage and Family, *available at* https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1741-3737.2000.01269.x (last accessed Nov. 30, 2018).
[61] *Id.*
[62] Paul Goodman, The Pros and Cons of Living Together Before Marriage, *available at* https://pairedlife.com/relationships/The-Pros-and-Cons-of-Living-Together-Before-Marriage (last accessed Nov. 30, 2018).

implemented to rehabilitate the spouses that are violent towards the other spouse or their children which could be the cause for a ground of separation or annulment of marriage.[63]

While some would acknowledge the advantages of divorce, there is a tendency to abuse it. Studies show that one of the struggles in filing divorce is the lack of consent of the other spouse. Oftentimes, the consent of both couples is not mutual, and therefore divorce cannot take place. One of the parties may be unwilling to end the relation, whether the reason be one of social convenience, economic stability, or even "nobler" motives. For this reason, the commentaries believe that filing for a divorce would only be possible if the innocent spouse can resort to divorce even without the consent of the other spouse at fault.[64]

As to the effects on third-party relationships, filing for divorce would be easy for the wealthy to obtain, since they will be able to afford it in spite of the financial obligations which it may entail. Poor couples, on the other hand, may decide to avoid the idea completely in the belief that it will be cheaper and less bothersome to maintain a third-party than to support two or more wives. Thus, a study concludes that divorce would not afford an absolute and complete cure for the ills spawned by the *querida* system.[65]

Given the above reasons, the author considers that legalizing divorce is a necessity not for the aggrieved but for those who are the cause of the grief in which the legislative should give into consideration according to its long term effects by the legislative rather than venturing into a band-aid solution.

Conclusion

Laws help inform and shape public conscience, and changes to social policy can influence what the public believes to be right and good about marriage.[66] It is through this reason that enactment of laws should be dealt with further research on psychology. Law and psychology are two separate disciplines but have much in common. While psychology's goal is to

[63] An Act Defining Violence Against Women And Their Children, Providing For Protective Measures For Victims, Prescribing Penalties Therefore, And For Other Purposes [Anti-Violence Against Women and Children Act of 2004), Republic Act No. 9262, § 41 (2004).
[64] Jorge M. Juco, Fault, Consent and Breakdown—The Sociology of Divorce Legislation in the Philippines. Philippine Sociological Review, *available at* http://connection.ebscohost.com/c/articles/9989882/fault-consent-breakdown-sociology-divorce-legislation-philippines (last accessed Nov. 30, 2018)
[65] *Id.*
[66] Discussing Marriage Organization, available at https://discussingmarriage.org/ (last accessed Nov. 30, 2018).

understand behavior and law's goal is to regulate it, both fields make assumptions about what causes people to act the way they do.[67]

More than the constitutionality on legalizing divorce, the author suggests that its efforts should be given more weight and scope on its possible implications. The legislators as well as the Filipinos should consider to think whichever would more likely to cause a negative effect on society. Is it the decline on valuing marriages, or perhaps a need for changed perspective about the nature of marriage?

The Family Code of the Philippines provides for three remedies on the dissolution or suspension of marriage bonds: declaration of nullity, annulment, and legal separation. The remedies provided for by the Civil Code are enough to address the problems arising marital concerns. The fact that a divorce law once existed and was totally repealed by the Family Code reveals that it anticipated the evil sought to be prevented by the previous law, which is the protection of the sanctity of marriage.

Given these reasons, marriage and the family should be considered so crucial to the stability and peace of the nation that their nature, consequences, and incidents are governed by law and not subject to the whim of the parties. Legalizing divorce in the Philippines would degrade the value of marriage as a special contract and would destroy Filipino families as it would cause spouses to easily give up on their marriage.

[67] American Psychological Association, available at https://www.apa.org/topics/law/index.aspx (last accessed Nov. 30, 2018).

DIGITAL AGE OF MISINFORMATION: IS THERE A NEED TO REGULATE AND CRIMINALIZE "FAKE NEWS"?

Mara Geraldine Beltran Geminiano[1]

JUST IN: President Duterte, Doing His Best to Improve Philippine Transport System through a High Speed Rail Network from Laoag in the North to Tawi-Tawi Way Down in the South.

The average Filipino reads this kind of news in social media every day. This headline was patterned after a Facebook post shared on September 27, 2018.[2] It is not proper to have high hopes for a better transport system but sharing it as an actual project is a different matter. In a report, the Agence France Prese (AFP) debunked the existence of such rail project, claiming that it was just imaginary."[3] According to Michael Gonzales, the one who made the map, it was a "complete work of fiction but added that he did not share his work to show that it was an actual project. He added that "someone at some point must have taken it and shared it for malicious purposes."[4] For some who do not ascertain the credibility of the sources as well as the accuracy of the news itself, they are misled and misguided victims of "fake news."

The right of the people to information is enshrined in the Bill of Rights of the Constitution. Article II, Section 7 of the 1987 Constitution[5] provides:

> SECTION 7. The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government

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[2] Consuelo Marquez, *LOOK: Fake News Alert on PH High-Speed Rail System*, PHIL DAILY INQ., October 19, 2018, *available at* https://newsinfo.inquirer.net/1044954/look-fake-news-alert-on-ph-high-speed-rail-system (last accessed Nov. 15, 2018).
[3] *Id.*
[4] *Id.*
[5] PHIL. CONST. art. 3. § 7.

research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.[6]

In the case of *Valmonte v. Belmonte,*[7] "[a]n informed citizenry with access to the diverse currents in political, moral and artistic thought and data relative to them, and the free exchange of ideas and discussion of issues thereon, is vital to the democratic government envisioned under our Constitution.[8] The same case provides that "[t]he right to information goes hand-in-hand with the constitutional policies of *full public disclosure and honesty in the public service*.[9] Although the right to information is not absolute as it is subject to limitations provided by law, by no stretch does this limitation include fake news.

While we are not in control of the news that we receive, we are in control of the news that we perceive is true and vital so as to make informed decisions.

We are rational human beings but human as we are, we are vulnerable to the detrimental effects of misinformation, especially now in the age of technology. Hence, our right to information may be trampled upon by the proliferation of fake news. It is vital that we receive real information for us to make informed decisions in our day to day lives.

Collins Dictionary,[10] which named the word "fake news" as the 2017 Word of the Year, defines the same as "false, often sensational, information disseminated under the guise of news reporting."[11] Fake news has also been hailed by the Filipinas Institute of Translation as the second "word of the year" for 2018 next to "tokhang."[12] To date, there are no laws in the Philippines operationally defining "fake news" but its occurrence since time immemorial would imply that it is happening.

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[6] *Id.*
[7] Valmonte v. Belmonte, Jr., 252 Phil. 264-279 (1989).
[8] *Id.*
[9] *Id.*
[10] COLLINS ENGLISH DICTIONARY *available at* HTTPS://WWW.COLLINSDICTIONARY.COM/WORD-LOVERS-BLOG/NEW/COLLINS-2017-WORD-OF-THE-YEAR-SHORTLIST,396,HCB.HTML (last accessed Nov. 15, 2018)
[11] *Id.*
[12] Xave Gregorio, *'Tokhang' named 2018 Word of the Year* , CNN PHILIPPINES, October 26, 2018, *available at* http://cnnphilippines.com/news/2018/10/26/tokhang-named-2018-word-of-the-year.html (last accessed Nov. 15, 2018).

A. FAKE NEWS IS OLD NEWS

Misinformation, disinformation and propaganda have been features of human communication since the Roman times when Antony met Cleopatra. Octavian waged a propaganda campaign against Antony that was designed to smear his reputation. This took the form of "short, sharp slogans written upon coins in the style of archaic Tweets.[13]

The invention of the Gutenberg printing press in 1493 dramatically amplified the dissemination of disinformation and misinformation, and it ultimately delivered the first-large scale news hoax, 'The Great Moon Hoax' of 1835.[14] Moreover, the New York Sun published six articles about the discovery of life on the moon, complete with illustrations of humanoid bat-creatures and bearded blue unicorns. Conflicts, regime change, and catastrophes then became markers for the dissemination of disinformation.[15]

With the advent of radio and television, a plethora of fake news and misinformation has emerged. What more in the age of technology and of the internet? Despite the fact that fake news is not old news, it is undeniable that its risks abruptly increased in the age of the internet and the usage of social media. As the UNESCO Series on Journalism Education would put it, "[t]he 21st century has seen the weaponization of information on an unprecedented scale. Powerful new technology makes the manipulation and fabrication of content simple, and social networks dramatically amplify falsehoods peddled by States, populist politicians, and dishonest corporate entities, as they are shared by uncritical publics."[16]

B. FAKE NEW BATTLES ACROSS THE GLOBE

While fake news is not something new, several countries have only undertaken steps recently to address these issues.

For Germany, its parliament adopted the Network Enforcement Act which seeks to fine social networks if they do not remove hate speeches. In a European study it was mentioned that:

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[13] Kaminska, I, *A module in fake news from the info-wars of ancient Rome. Financial Times, available at* https://www.ft.com/content/aaf2bb08-dca2-11e6-86ac-f253db7791c6 (last accessed Nov. 15, 2018).
[14] Thornton, B., *The Moon Hoax: Debates About Ethics in 1835 New York Newspapers*, Journal of Mass Media Ethics 15(2), 89-100, (2009).
[15] Julie Posetti and Alice Matthews, *A Short Guide To The History Of 'Fake News' And Disinformation*, International Center for Journalists (2018).
[16] Cherilyn Ireton and Julie Posetti, *Journalism, Fake news, and Disinformation*, UN Educational, Scientific and Cultural Organization, at 15, *available at* http://unesdoc.unesco.org/images/0026/002655/265552e.pdf (last accessed Nov. 15, 2018).

> With fake news and hate speech not disappearing from social networks in response to the initiative (although on a much lower level than in the U.S.), the German government decided to resort to a tougher instrument. On 30 June 2017, three months before the federal elections, the German parliament adopted a law that can rightly be considered the most extreme reaction to the threat of disinformation among Western countries. Under the so called Network Enforcement Act, which came into full effect on 1 January 2018, online platforms face fines of up to €50 million, if they do not remove 'obviously illegal' hate speech and other sorts of illegal expression within 24 hours. More ambiguous cases can be assessed within a week.[17]

In July 2018, the French Parliament passed a draft law against Fake News, allowing courts to rule whether reports published during election periods are credible or should be taken down.[18] It aimed to prevent foreign state-owned media companies from influencing French democracy during electoral periods with false information and propaganda.[19] However, its Senate rejected the bills. Senator and Rapporteur for the French Senate Law Commission Christophe-André Frassa justified the Senate's rejection by explaining that the Senate had doubts on the effectiveness of the proposed provisions and the risks of disproportionate constraints on freedom of speech.[20]

The same is true in Malaysia. In April 2018, Malaysia enforced the "Anti-Fake News Act " which made it an offense to create, publish or disseminate any fake news or any publication containing fake news. Those found guilty faced up to six years in prison and fines of up to

[17] Marius Mortsiefer, *The German Battle With Fake News*, 2018 Eastern Europe Studies Centre, at 2, *available at* http://www.eesc.lt/uploads/news/id1059/Readings%202018%201.pdf (last accessed Nov. 15, 2018).
[18] Zachary Young,, French Parliament passes law against 'fake news', Politico.eu, *available at* https://www.politico.eu/article/french-parliament-passes-law-against-fake-news/ (last accessed December 9, 2018).
[19] France: Senate Rejects 'Fake News Ban' Bills, 2018, Library of Local Congress, *available at* http://www.loc.gov/law/foreign-news/article/france-senate-rejects-fake-news-ban-bills/ (last accessed Dec. 9, 2019).
[20] *Id.*

$130,000.[21] Four months thereafter, it was repealed. Teddy Brawner Baguilat Jr., a board member of ASEAN Parliamentarians for Human Rights, called the decision "a huge step forward for human rights in Malaysia."[22] According to Press Freedom advocates, it was a law designed to quell public debate.[23]

From the foregoing, it can be concluded that battles against fake news are concerned with issues on the freedom of speech. What are the boundaries of free speech? Are we to allow free speech to temper our right to information?

C. FAKE NEWS IN THE PHILIPPINES

In a news report, it was mentioned that Justice Secretary Vitaliano Aguirre II was criticized for_implicating some senators and opposition figures in the siege of Marawi City, apparently based on an old photograph posted on a propaganda Facebook page.[24] Aguirre used a photograph showing some opposition politicians in a meeting but the picture later turned out to have been taken in Iloilo in 2015 and not during a supposed meeting between opposition lawmakers and influential clans in Marawi City.[25] Defense Secretary Delfin Lorenzana has called on the public to report to authorities suspicious websites and avoid spreading unverified information.[26]

According to the First Quarter 2018 Social Weather Survey[27] fielded on March 23-27, 2018, 42% of Filipino adults are now *using* the Internet. The March 2018 survey found that among the 42% who are Internet users, a plurality of 32% use it *more than 3hours* daily, 21% use it *more than 2 hours daily*, 13% *less than an hour a day*, and 15% *a few days per week*, while the remaining 19% said they *seldom* use the Internet.[28] Among adult Filipino Internet users, 67%

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[21] **Jessie Yeung, *Malaysia Repeals Controversial Fake News Law* ,CNN, August 17, 2018, *available at* https://edition.cnn.com/2018/08/17/asia/malaysia-fake-news-law-repeal-intl/index.html (last accessed December 9, 2019).**
[22] *Id.*
[23] *Id.*
[24] Audrey Moralla, *Bill seeks to impose fine, jail time on creators of fake news*Philstar, June 22, 2017 *available at* https://www.philstar.com/headlines/2017/06/22/1712604/bill-seeks-impose-fine-jail-time-creators-fake-news#qggxkiyvjd1zv2x8.99 (last accessed December 9, 2018).
[25] *Id.*
[26] *Id.*
[27] *4th Quarter 2017 and 1st Quarter 2018 Social Weather Surveys: 67% of Pinoy Internet users say there is a serious problem of fake news in the Internet,* Social Weather Stations, June 11, 2018, *available at* https://www.sws.org.ph/swsmain/artcldisppage/?Artcsyscode=ART-20180611190510 (last accessed December 9, 2018).
[28] *Id.*

said the fake news problem in the Internet is *serious* (40% *very serious* and 26% *somewhat serious*, correctly rounded), 20% were *undecided*, and 13% said it is not serious (9% *somewhat not serious* and 4% *not serious at all).*[29] It is also notable that the proportion of Internet users saying there is a *serious* problem of fake news in the Internet was directly related to the frequency of using it.

Moreover, according to a report by We Are Social, a United Kingdom-based consultancy, the Philippines topped the world in terms of social media usage as the number of internet users in the country hit 67 million people.[30] In its Digital 2018 report, which compiled data from various third-party sources, We Are Social said Filipinos spent an average of 3 hours and 57 minutes a day on social media sites, mainly on Facebook.[31] It cannot be denied that Filipinos who spend a lot of time in using social media is exposed to all sorts of fake news.

The Courts are not blind to the existence of fake news. In the dissenting opinion of Justice Marvic Leonen in the case of *Lagman v Medialdea*,[32] he opined that: "[t]he public will accept this far-fetched narrative as reasonable or the truth, when it could be nothing but 'fake news.'"[33] It is undeniable that it is a present controversial issue that must be addressed.

Currently, there is a pending bill in the Senate which aims to penalize the malicious distribution of false news and other related violations. Senate Bill No. 1492[34] was introduced by Senator Joel Villanueva. Once passed, the bill shall be known as the "Ant-fake News Act." It aims to criminalize the unlawful creation of false news who had knowledge that such information is false or has reasonable grounds to believe that the same is false.[35]

In the explanatory note of the bill, it was mentioned that "[f]ake news creates impression and beliefs based on false premises leading to division, misunderstanding and further

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[29] *Id.*
[30] Miguel Camus, PH is world leader in social media usage, Phil Daily Inquirer, *available at* https://business.inquirer.net/246015/ph-world-leader-social-media usage#ixzz5zfknlucr (last accessed December 9, 2018).
[31] *Id.*
[32] Lagman v Medialdea, 224 SCRA 272 (2017) (J. Leonon, dissenting opinion).
[33] *Id.*
[34] An Act Penalizing the Malicious Distribution of False News and Other Related Violations, S.B. 1492, §2, Par. 1, 17th Congress, 2nd Regular Session (2017).
[35] SECTION 2. Malicious Creation and Distribution of False News. It shall be unlawful for any person to maliciously offer, publish, distribute, circulate and spread false news or information or cause the publication, distribution, circulation or spreading of the same in print, broadcast or online media, provided that, such false news or information cause or tend to cause panic, division, chaos, violence, hate or which exhibit or tend to exhibit a propaganda to blacken or discredit one's reputation and the person knowingly commits such act with full knowledge that such news or information is false, or with reasonable grounds to believe that the same is false.

exacerbating otherwise tenuous relations."[36] The bill seeks to punish those who maliciously create and spread fake news under four elements of liability:

1. Malicious intent
2. Publication or broadcast of the fake news item
3. Publication causes or tends to cause panic, division, chaos, violence, hate or tends to discredit one's reputation
4. Has full knowledge that such information is false or has reasonable ground to believe that the same is false.[37]

Under the measure, those found guilty could be fined from ₱100,000 to ₱5 million and face from one to five years in jail.[38] In cases where a public official is involved, they will be made to pay twice the aforementioned amount and the period of imprisonment. The official will also be perpetually barred from holding any public office.[39]

The aforementioned Senate Bill's currents status is pending with the Committee. Concurrently, there is also a pending house bill relating to fake news. It was introduced by Hon. Luis Raymund Villafuerte, Jr. House Bill No. 6022,[40] compared to Senate Bill 1492 imposes a different penalty and distinguishes between a first offense and a second offense.

[36] S.B. 1492, *supra* note 34.
[37] *Id.*
[38] *Id.* §2, Par. 2.
Any person who shall be found guilty of committing any of the foregoing acts shall be punished by a fine ranging from One Hundred Thousand Pesos (PI00,000) to Five Million Pesos (P5,000,000) and imprisonment ranging from one (1) to five (5) years.
[39] *Id.* §2, Par. 4.
If the offender is a public official, he shall be liable for twice the amount of the fine imposed above, and be imprisoned for two times longer than the period provided herein. In addition, he shall also suffer the accessory penalty of absolute perpetual disqualification from holding any public office.
[40] An Act Penalizing the Creation and Distribution of False News H.B. 6022, §5, ¶ c,17th Congress, 2nd Regular Session (2017).
Any social media user found guilty of creating fake news shall be punished with imprisonment of arresto menor or a fine of One Hundred Thousand Pesos (PHP100, 000) or both for his first offense.

Any Social mdia user found guilty of creating fake news shall be punished with imprisonment of arresto mayor or a fine of Three Hundred Thousand Peses (PHP 300, 000), or both for his second offense

D. WOULD THE ANTI-FAKE NEWS ACT IMPAIR THE RIGHT TO FREE SPEECH?

The liberty of the press is indeed essential. Whoever would overthrow the liberty of a nation must begin by subduing the freeness of speech. - Benjamin Franklin[41]

Those who oppose the bill contend that Freedom of Speech may be violated. According to Media Scholars, punishing those who make and spread fake news could violate the constitutional right to free speech.[42] In a forum, professors from the University of the Philippines (U.P.) College of Mass Communication said the provisions of Senate Bill No. 1492 or the "Anti-Fake News Act of 2017" could be used to silence certain groups.[43]

Section 4, article 3 of the 1987 Constitution[44] provides that "[n]o law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances."[45]

Moreover, Article 19 of the Universal Declaration of Human Rights[46] provides that "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[47]

Being a Democratic State, the safeguards of the freedom of speech, of expression, or the press must be upheld. In fact, the free flow of truthful and non-misleading commercial speech should be encouraged in cyberspace for the enlightenment of the consuming public, considering that it is cost-free to the public and almost cost-free to merchants.[48]

The vital question here is that "Does the State have the right to regulate Freedom of Speech?"

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[41] *Guingguing v. Court of Appeals, 508 PHIL 193-223 (2005).*
[42] VJ Bacungan, *U.P. profs: Law vs. Fake news could violate right to free speech*, CNN Philippines, *available at* http://cnnphilippines.com/news/2017/10/31/up-fake-news-senate-bill-1492-free-speech.html (last accessed December 9, 2018).
[43] *Id.*
[44] PHIL. CONST. art. III, § 4.
[45] *Id.*
[46] Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 (1948).
[47] *Id*. art. 18.
[48] Disini, Jr. v. Secretary of Justice,727 PHIL 28-430 (2014).

The State is justified in imposing a penalty against fake news in the exercise of police power. Police power has been defined as "the state authority to enact legislation that may interfere with personal liberty or property in order to promote general welfare."[49]

In order to validly exercise this power, the State must assure the concurrence of a lawful subject and a lawful method.[50] It can be said subject of fake news is within the ambit of police power because it affects the interests of the public in general, requiring the interference of the State. The means employed, i.e. the imposition of penalty, is also reasonably necessary to lessen, if not eradicate, the proliferation of fake news.

The United States Supreme Court, through Chief Justice Warren, held in *United States v. O'Brien*:[51]

> [A] government regulation is sufficiently justified if (1) if it is within the constitutional power of the Government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms [of speech, expression and press] is no greater than is essential to the furtherance of that interest.[52]

This is so far the most influential test for distinguishing content-based from content-neutral regulations and is said to have "become canonical in the review of such laws."[53]

Moreover, in *Gonzales v COMELEC*,[54] the court held that "[w]hen particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of the two conflicting interests demands the greater protection under the particular circumstances presented."[55]

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[49] Philippine Association of Service Exporters Incorporated v. Drilon, G.R. No. L-81958 (1988).
[50] Department of Education, Culture and Sports v. San Diego, 180 SCRA 533 (1989).
[51] Social Weather Stations, Inc. v. COMELEC, 755 SCRA 124 (2001) citing US v O'Brien 391 US 367 (1968).
[52] *Id.*
[53] *Id.*
[54] Gonzales v. COMELEC, 27 SCRA 835 (1969).
[55] *Id.*

In the case of *Roque, Jr. v. Armed Forces of the Philippines Chief of Staff*,[56] the court mentioned that:

> If the words uttered create a dangerous tendency which the state has a right to prevent, then such words are punishable. It is not necessary that some definite or immediate acts of force, violence, or unlawfulness be advocated. It is sufficient that such acts be advocated in general terms. Nor is it necessary that the language used be reasonably calculated to incite persons to acts of force, violence, or unlawfulness. It is sufficient if the natural tendency and probable effect of the utterance be to bring about the substantive evil which the legislative body seeks to prevent.[57]

E. IS THERE REALLY A NEED TO ENACT A NEW LAW PENALIZING FAKE NEWS?

At present, the closest our legislations have come close to address the problem of fake news is Article 154 of the Revised Penal Code on unlawful use of means of publication and unlawful utterances.[58] However, the penal provision does not distinguish upon any felon based on intent or malice. As long as he has published or has caused the publication of any false news, he will be held liable. The fine provided for in Article 154 of the Revised Penal Code is also

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[56] Roque, Jr. v. Armed Forces of the Philippines Chief of Staff, G.R. No. 214986 (2017). *citing* Gitlow vs. New York, 268 U.S. 652 (1925).

[57] *Id.*

[58] An Act Revising the Revised Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815, Art. 154. (1932) (as amended).

> Art. 154. *Unlawful use of means of publication and unlawful utterances.*— The penalty of arresto mayor and a fine ranging from Forty Thousand pesos (P40, 000) to Two hundred Thousand pesos (P200,000) shall be imposed upon:
> 1. Any person who by means of printing, lithography, or any other means of publication shall publish or cause to be published as news any false news which may endanger the public order, or cause damage to the interest or credit of the State;
> 2. Any person who by the same means, or by words, utterances or speeches shall encourage disobedience to the law or to the constituted authorities or praise, justify, or extol any act punished by law;
> 3. Any person who shall maliciously publish or cause to be published any official resolution or document without proper authority, or before they have been published officially; or
> 4. Any person who shall print, publish, or distribute or cause to be printed, published, or distributed books, pamphlets, periodicals, or leaflets which do not bear the real printer's name, or which are classified as anonymous.

lesser as compared to the proposed penalties in House Bill 6022 and Senate Bill 1492. Does this mean that if the Anti-Fake News Act is passed it will repeal Art. 154 of the Revised Penal Code?

Article 154 was amended by Republic Act No. 10951.[59] In the case of *People v Mejares,*[60] the court explained that the said act seeks to help indigent prisoners and individuals accused of committing petty crimes by making the penalties meted commensurate with the offenses committed.[61] In the same case, the court mentioned that "[i]mperative to maintaining an effective and progressive penal system is the consideration of exigencies borne by the passage of time. This includes the basic economic fact that property values are not constant."[62]

Republic Act No. 10951[63] was signed into law in the year 2017. The Congress has already taken up measures to combat the proliferation of false news. To what extent does false news have to be regulated? It has to be reiterated that Article 154 does not distinguish the malicious distribution and creation of false news.

Because Filipinos spend too much time in the cyberworld, another crime that may be related to Fake news is the Cybercrime law. The cybercrime law provides that if the penal laws are committed through the use of information and communications technology, it shall be covered by the same law.[64] The penalty for a juridical person is also provided for in the Cybercrime law which may be commensurate to a mass media outlet.[65]

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[59] An Act Adjusting the Amount or the Value of Property and Damage on Which a Penalty is Based and the Fines Imposed Under the Revised Penal Code, Amending for the Purpose Act No. 3815, Otherwise Known as "The Revised Penal Code", as Amended, Republic Act No. 10951 (2017).

[60] **People v Mejares, G.R. No. 225735 (2018).**

[61] *Id.*

[62] *Id.*

[63] Republic Act No. 10951, *supra* note 59.

[64] An Act Defining Cybercrime, Providing For The Prevention, Investigation, Suppression And The Imposition Of Penalties Therefor And For Other Purposes [Cybercrime Prevention Act Of 2012), Republic Act 10175, §6 (2012).

> SEC. 6. All crimes defined and penalized by the Revised Penal Code, as amended, and special laws, if committed by, through and with the use of information and communications technologies shall be covered by the relevant provisions of this Act: *Provided,* That the penalty to be imposed shall be one (1) degree higher than that provided for by the Revised Penal Code, as amended, and special laws, as the case may be

[65] *Id at* §9.

> *SEC.* 9. *Corporate Liability.* — When any of the punishable acts herein defined are knowingly committed on behalf of or for the benefit of a juridical person, by a natural person acting either individually or as part of an organ of the juridical person, who has a leading position within, based on: (a) a power of representation of the juridical person provided the act committed falls within the scope of such authority; (b) an authority to take decisions on behalf of the juridical person: *Provided,* That the act committed falls within the scope of such authority; or (c) an authority to exercise control within the juridical person, the juridical person shall be held liable for a fine equivalent to at least double the fines imposable in Section 7 up to a maximum of Ten million pesos (PhP10,000,000.00).

Several ASEAN member states already have initiatives in place to combat false news. A civic group in Indonesia called The Anti-Fake News Society of Indonesia (Masyarakat Anti Fitnah Indonesia) has set up a Facebook page where people can report and discuss suspected false information.[66] If ASEAN is indeed serious about balancing freedom of the press and stopping fake news in its tracks then perhaps fact-checking initiatives like these are the way forward and not legislation.[67]

CONCLUSION

With our current laws, i.e. false news in Art. 154 and the Cybercrime Law, it can be said that the State has already undertaken steps to deal and penalize fake news. Although Fake News is not considered as protected speech, there are dangers in penalizing the same because of the fear of the people to voice out their concerns and participate in discourse.

As a general principle, speech on matters of public interest should not be restricted. The Supreme Court recognizes the fundamental right to information, which is essential to allow the citizenry to form intelligent opinions and hold people accountable for their actions.[68]

Instead of a law against fake news, why not take steps to promote news literacy? Why not push for programs that will educate people on how to check the sources of the news they read? Fake News has been in existence since time immemorial. While we are not in control of the news that we receive, we are in control of the news that we perceive is true and vital so as to make informed decisions.

If the commission of any of the punishable acts herein defined was made possible due to the lack of supervision or control by a natural person referred to and described in the preceding paragraph, for the benefit of that juridical person by a natural person acting under its authority, the juridical person shall be held liable for a fine equivalent to at least double the fines imposable in Section 7 up to a maximum of Five million pesos (PhP5,000,000.00).

[66] Sheith Khidhir, *Combating fake news: A balancing act , available at* https://theaseanpost.com/index.php/article/combating-fake-news-balancing-act (last accessed December 9, 2018).

[67] *Id.*

[68] Roque, Jr. v. Armed Forces of the Philippines Chief of Staff, G.R. No. 214986, (2017).

MONOPSONY: THE NEGLECTED FACE OF UNFAIR COMPETITION

J'ven Marc A. Makilan[1]

INTRODUCTION

If we picture a marketplace, we would imagine a bustling plaza filled with people shouting, bartering, and negotiating. There would be people rifling through goods laid out by merchants, and everyone is there to get the best deal they can find. It is an organized chaos and yet despite all the commotion, there is only ever two kinds of people in there: buyers, and sellers. In this ideal free market, buyers can choose which products they like depending on who sells the best product at the best price. Sellers compete with each other and find creative ways to lure buyers, and they can refuse to sell to a buyer who would not pay a fair purchase price.

Although monopsonies and monopolies are similar distortions of competition, it is not necessary that they behave similarly to warrant a similar treatment.

Unsurprisingly, the real market is vastly dissimilar. Buyers can be forced to buy the only product from the only seller, and sellers can be forced to sell to the only buyer. These two scenarios depict the twin instances of monopoly and monopsony. They both create unfair competition in the market, however that is where their similarity ends.[2] Fundamentally, they behave differently, and require different environments to thrive, and is commonly regulated around the world. Philippines codified its regulation in the 1987 Constitution. Article XII Section 19 of the Constitution[3] provides:

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[2] Stucke, M. (2013), *Looking at Monopsony in the Mirror*. 62 Emory L.J. 1509
[3] PHIL. CONST. art. XII, § 19.

> SECTION 19. The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.[4]

Monopolies are clearly indicated, but monopsonies are vaguely touched upon. One could stretch their imagination to think that the second sentence includes monopsonies, since monopsonies also create unfair competition. However, the framers did not intend it as such, and deliberations on the provision point to different means of achieving monopolies such as mergers, oligopolies, and other acts that makes it unfair for *buyers*.[5] Reading the Constitution in its entirety, it does not appear that the framers considered monopsonistic entities in preventing unfair competition,[6] but even so, the Philippine Congress in exercising its plenary legislative power enacted R.A. 10667[7] or the Philippine Competition Act (PCA) that included protection against monopsonies, found in Sec. 15 (g) and (h). The provision is written well, but is flawed for two reasons: first, it gives the same legal treatment to monopsonies as it does with monopolies, and second, it assumes that monopsonistic acts can only be done through commodities.

This paper will first discuss why the law as it is written applies the same legal treatment to both monopolies and monopsonies and why it is fatal to prosecuting monopsonistic acts. Next, it will discuss that monopsonistic acts can also apply to the labor market. Lastly, this paper will suggest amendments or further studies that will address these flaws.

[4] PHIL. CONST. art. XII, § 19.
[5] III Records 520.
[6] The only other provision that protects the market in the Constitution is in Art XII Sec.1 ¶2, which protects Filipino enterprises against foreign competition
[7] An Act Providing for a National Competition Policy prohibiting Anti-Competitive Agreements, Abuse of Dominant Position and Anti-Competitive Mergers and Acquisitions, Establishing the Philippine Competition Commission and Appropriating Funds Therefor [Philippine Competition Act], Republic Act No. 10667 (2014).

MONOPSONIES MUST BE GIVEN A DIFFERENT LEGAL TREATMENT

Monopolies and monopsonies are symmetrical distortions of competition where one creates unfair competition on the buyer side, and the other creates it on the seller side.[8] This is where its similarity ends. Even though monopsony is almost similar to monopolies, and both affect the competitiveness of the market, the fundamental approach to each must be different.[9] The two risks in assuming that monopsonies are the mirror image of monopolies are: (1) monopsony entity can have a low market share**,** and that may not necessarily affect the end consumers and (2) monopsonies may or may not necessarily harm consumers downstream.[10]

An entity's market share is commonly used as a basis to determine if the entity can exercise monopolistic acts which is commonly pegged at 50%.[11] If monopsonies were to be given the same legal treatment, the same market share threshold can be made to apply in determining monopsony power. However, this threshold has proven to be inapplicable and ineffective when dealing with monopsonies, as can be seen in the U.S. case of *Toys "R" Us v. FTC*.[12] In that case, even with a 20% market share, the defendant was able to coerce toy manufacturers to reduce supplies to the defendant's competitors, thereby increasing the cost of products being sold in defendant's competitors. The market share threshold was also made to apply in another monopsony case of *In Re: S. Milk Antitrust litigation*[13] where the claim was dismissed because the entity did not meet the criteria of being a monopsony power for only having 40% market share.

The same threshold can be seen under the PCA. The subparagraphs (g) and (h) of Section 15[14] contain the acts that prohibit against monopsony, but Section 15 itself has qualified that it is an entity with a *dominant position* who commits the acts enumerated under the section. Section 15 says that "It shall be prohibited for one or more entities *to abuse their dominant position* by

[8] Jonathan Jacobson, Monopsony 2013: Still not truly symmetric, *available at* https://www.wsgr.com/attorneys/BIOS/PDFs/jacobson-0413.pdf (last accessed June 29, 2019).
[9] Roger D. Blair and Jeffrey Harrison, (1991). *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297 (1991).
[10] Strucke, *supra* note 2.
[11] Philippine Competition Act, art. 27, Smith Wholesale Co. v. Philip Morris 219 F. 6th Cir. 2007, Fineman v. Armstrong World, F.2d 6th Cir. 1990.
[12] Toys "R" Us v. FTC, 221 F.3d 928, 937 (7th Cir. 2000).
[13] In Re: Se. Milk Antitrust Litigation 801 F.Supp. 2d at 727.
[14] Philippine Competition Act, art. 15.

engaging in conduct x x x"[15] (emphasis mine). Section 27[16] gives the guidelines for the competition commission to determine whether an entity has a dominant position:

> SEC. 27. Market Dominant Position. – In determining whether an entity has market dominant position for purposes of this Act, the Commission shall consider the following:
>
> (a) The *share of the entity in the relevant market* and whether it is able to fix prices unilaterally or to restrict supply in the relevant market;
>
> (b) The existence of barriers to entry and the elements which could foreseeably alter both said barriers and the supply from competitors;
>
> (d) The possibility of access by its competitors or other entities to its sources of inputs;
>
> There shall be a rebuttable presumption of market dominant position if the market share of an entity in the relevant market is *at least fifty percent (50%),* unless a new market share threshold is determined by the Commission for that particular sector (emphasis ours).[17]

The deliberations for R.A. 10667 characterize that an entity may be considered to be in a 'dominant position' if they have the ability to control the market or to edge out the competition.[18] This control is reflected by the legislators in directing the Competition Commission to consider market share to determine if the entity can exercise such control. However, as illustrated in the U.S. cases mentioned, an entity may not have a dominant position in the market in order to exercise monopsonistic acts.

As for the second risk in assuming that monopsomies are the mirror image of monopolies, U.S. cases, courts, and agencies, in deciding monopoly cases, would require proof that the monopolist's conduct harmed the consumers, but the same requirement would not make

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[15] *Id.*
[16] Philippine Competition Act, art. 27.
[17] *Id.*
[18] FRANCISCO ED. LIM AND ERIC R. RECALDE, THE PHILIPPINE COMPETITION ACT: SALIENT POINTS AND EMERGING ISSUES (2016).

sense for monopsony claims since the harm caused by monopsonies affect upstream to its sellers.[19] The requirement of proving consumer harm originated from the belief that the Sherman Act was a consumer welfare prescription, therefore proof of damage to consumers was deemed a necessity.[20] The same objective can be found under Section 2 of PCA, which outlines three main policy objectives: Enhance economic efficiency, discipline anti-competitive practices, and *protecting consumer welfare*. These three objectives, though couched in separate paragraphs under Section 2, are viewed as supplementary objectives to each other.[21] Consumer welfare is highly relevant with monopoly claims, but in a monopsony, the buyer uses its market power to damage competition among its *suppliers* instead of its consumers.[22] Consumers may in fact benefit from monopsony pricing if the monopsonist reflects the lowered purchase price to its selling price,[23] but the resulting anticompetitive environment for the suppliers would negate such benefits.

The provisions of the PCA show that it gives the same legal treatment to both monopolies and monopsonies. It employs the same tests in determining the existence of monopoly as it would with a monopsony when it defined monopsony in Section 4(g)[24] in the same breath as a monopoly as "an entity having a dominant position of economic strength which makes it capable of controlling the relevant market independently from any or a combination of the following: competitors, customers, suppliers, or consumers"[25] (underscoring mine). Further, in order to be held liable under Section 15 (g) and (h), the entity must have "1) a dominant position in the relevant market; 2) it must directly or indirectly impose unfair purchase or selling price on its competitors, customers, suppliers, or consumers; 3) the price is not a result of or due to a superior product or process, business acumen, or legal rights or laws (for subparagraph (h)) or

[19] John Shively, When does buyer power become monopsony pricing?, *available at* https://www.faegrebd.com/webfiles/Fall12-ShivelyC.pdf (last accessed June 29, 2019).
[20] Strucke, *supra* note 2 at 13.
[21] Senate Interpellations, Sept. 2, 2014.
[22] White Mule v. ATC Leasing 540 F. Supp. 2d (N.D. Ohio 2008).
[23] Balmoral Cinema v. Allied Artists Pictures, 885 F.2d (6th Cir. 1985). The U.S. Court in this case said that "a monopsony power might result in lower [...] prices to the (consumers) and thereby serve rather than undermine consumer welfare". Blair and Harrison (*supra* note 10 at 3) disagrees, saying that the fact is that the monopsonist does not pass the lower purchase price to the consumers as lower selling prices.
[24] Philippine Competition Act, art. 4(g).
[25] *Id.*

that the counterparty must be considered a marginalized supplier (for subparagraph (g)), and 4) the price has a foreclosure effect in a separate relevant market."[26]

This shows us that while the Philippine Competition Act protects against monopsonistic acts, it uses the wrong legal framework to do so. Giving monopsony the same legal treatment as a monopoly is precisely the risk mentioned by Stucke, which can result in a failure of prosecution against monopsonistic acts.[27] The fact that monopsonies are given the same legal treatment with monopolies has led to U.S. courts having no reported case finding any firm guilty of unilateral monopsonization.[28]

A common illustration of a monopsonistic entity that has neither a large market share nor an adverse effect on the consumer can be found in the agricultural sector.[29] Farmers and small landowners who have limited resources would also have a limited choice to whom they may sell their products,[30] leading to a scenario where they are essentially forced to sell to the only buyers that their resources can reach. The buyers, knowing that the farmers selling agricultural products have limited market options, can impose unfairly low purchase prices. Since agricultural products are most likely common, the monopsonistic buyers can either match prevailing market price, or sell lower to consumers. The buyer in this scenario need not have a high market share and does not harm the consumers.

MONOPSONY IN THE LABOR MARKET

Monopsonistic acts as shown in Sec.15 (g) and (h) of PCA[31] shows that it applies on goods and commodities only, but there can also be monopsony in the labor market.[32] A simple illustration of monopsony in the labor market is when there is a single employer in a given area

[26] Strucke, *supra* note 2 at 114.
[27] *Id.*
[28] Jacobson, *supra* note 9.
[29] An Act Promoting the Welfare of Farm Workers, Farmers, and Small Landowners in Contract Growing and for Other Purposes, H.B. No. 5189, 16th Cong., 1st Reg. Sess. (2014).
[30] *Id.*
[31] Philippine Competition Act, art. 15.
[32] Friedrich L. Sell and Ernst K. Ruf, *Monopsony in the labor market, minimum wages, and the time horizon: Some unresolved issues*, International Atlantic Economic Society. DOI: 10.1007/s11293-016-9484-8 (2016).

or labor skill, and there are more laborers than what is needed by this single employer.[33] Just like a monopsonist in the commodities market, the monopsonist in the labor market can impose unfairly low wages, and a monopsonist employer need not hold a large market share nor have detrimental effects to consumer welfare.

The common safeguard against a monopsonist employer is imposing minimum wages and other minimum working conditions.[34] Against a monopsonist employer, there are no other laws in the Philippines outside of labor standard laws that protects against its unfair acts. However, as will be shown by this section, even if the State imposes minimum wages and minimum working conditions, the monopsonist employer only needs to change its labor capitalization by lowering or increasing the number of employees to balance out its desired profitability.[35] This technique is called high/low labor capital intensity, and is best illustrated by the graph:[36]

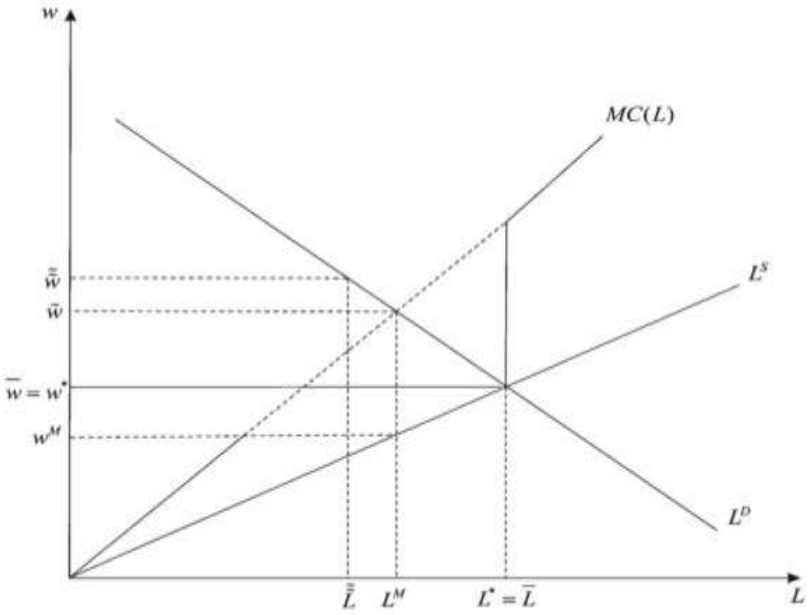

Figure 1: How minimum wage affects labor market monopsony (Sell & Ruf, 2016)

[33] Douglas O. Staiger, Joanne S. Petz and Ciaran S. Phibbs, *Is there Monopsony in the Labor Market? Evidence from a Natural Experiment*, 28 J. LABOR ECON 2 (2010).
[34] Art. 124 of the Labor Code provides that some of the criteria for the Regional Board in determining minimum wage includes cost of living, needs of the worker and his/her family, and equitable distribution of income and wealth.
[35] Bertram Schefold, *Reswitching as a cause of instability of intertemporal equilibrium*, 56 Metroeconomica 438, 443 (2005).
[36] Sell and Ruf, *supra* note 33.

Assuming that there is a single non-discriminatory employer, the wage rate is represented by the Y axis, while the Labor supply is represented by the X axis. The marginal cost of labor is represented by MC(L) and pertains to that maximum cost that an employer can pay for labor that can produce a profit.[37] Assuming all else being equal, we see the standard economic model of supply and demand where an increasing supply relates to a decrease in demand.[38] L^S represents the number of available laborers for a particular wage level, also referred to as the competitive employment level, while L^D represents the monopsonist employer's demand for such laborer at a given wage level. Suppose there is no minimum wage imposed by the State, and the prevailing competitive wage for a particular labor is w^*, the monopsonist can impose an unfairly low wage at w^M where the equilibrium between labor supply L^S and its demand for such labor L^D, which is at point L^M. If the State imposes a minimum wage $\overline{w}$ equal to the competitive wage w^*, the monopsonist employer will also choose labor at the level of competitive employment, represented by $L^*=\overline{L}$. However, this may not always be the scenario, and the monopsonist employer can choose to increase labor capital to maximize MC(L) and decrease employment, choosing a wage rate of $\widetilde{w}$ while maintaining an employment level at L^M. Essentially, it can choose to hire less more-skilled workers at a higher wage rate, instead of increasing its employment. This is a commonly-cited source of unemployment especially in labor skills with excess supply.[39]

Simply increasing wages by imposing minimum wage may create increased income for those who can be employed, but it can create problems such as unemployment.[40] Referring to Figure 1, even if wages are increased to $\widetilde{w}$, employment may not necessarily increase, resulting in an inelastic labor supply curve. The scenario is a zero-sum game between the State and the monopsonist employer if the only protection against monopsony in the labor market are labor standards. The inelasticity of labor supply vis-a-vis increases in wage is an evidence of monopsony in the labor market, and the PCA does not envision monopsony as applied to labor.

[37] Staiger, *supra* note 34.
[38] GREGORY N. MANKIW. PRINCIPLES OF ECONOMICS 77 (6th ed.).
[39] *Id.* at 385.
[40] Tavis Barr and Udayan Roy, *The effect of labor market monopsony on economic growth*, 30 JOURNAL OF MACROECONOMICS 1446 (2008).

The common example of labor market monopsony in the Philippines is the current state of the nursing profession. Nursing's popularity reached its peak in 2006 through 2011 when the graduates numbered at a minimum of 100,000 per year,[41] but local demand did not equally rise as 200,000 registered nurses remained unemployed in 2012.[42] The oversupply of nurses can explain why some registered nurses report poor working conditions, and why some employers can require some applicants to undergo unpaid 'volunteer' work before being given security of tenure.[43] The practice is not recorded as an industry standard, yet employers were able to impose such conditions due to the oversupply of nurses. This happens in spite of having minimum salaries and working conditions.

The 1987 Constitution, Labor Code, and relevant laws views labor as a right that must be protected through social justice, such as Art. II Secs.16 and 18, Art. III Sec. 8, and Art XII Sec. 1 of the Constitution to name a few. Supreme Court decisions look at labor as a *property right*, the deprivation of which is protected by due process.[44] However, businesses treat labor as a *resource* that it can utilize to create a profit.[45] Businesses operate on a basic principle: turning one thing into another and selling it to the target market, and this is applicable regardless of whether the business sells goods or services.[46]

The solution presented by Sell & Ruf[47] requires a multifaceted approach, taking into consideration the business capitalization, prevailing interest rates, labor supply and input, and depending on such variables, the binding minimum wage can be set to a level where the monopsonist employer would be motivated to increase their labor and production capitalization.

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[41] Commission on Higher Education, Higher Education Graduates by Discipline Group: AY 2005-2006 to AY 2015-2016, *available at* http://ched.gov.ph/wp-content/uploads/2017/09/Higher-Education-Graduates-by-Discipline-Group.pdf (last accessed May 31, 2018).
[42] Kate McGeown, *Nursing dream turns sour in the Philippines*. BBC NEWS, July 5, 2012, *available at* https://www.bbc.com/news/world-asia-18575810 (last accessed May 31, 2018).
[43] *Id.* Also see Don Kevin Hapal, *Why Our Nurses are Leaving*. Rappler, September 2, 2017, *available at* https://www.rappler.com/move-ph/180918-why-nurses-leave-philippines (last accessed March 31, 2018).
[44] Serrano v. Gallant Maritime Services, Inc., G.R. No. 167614, March 24, 2009. and JMM Promotions v. CA, G.R. No. 120095, August 5, 1996.
[45] CLAUDIA GOLDIN, HUMAN CAPITAL. HANDBOOK OF CLIOMETRICS, HARVARD UNIVERSITY DEPT. OF ECONOMICS AND NATIONAL BUREAU OF ECONOMIC RESEARCH (2016).
[46] *Id.*
[47] Sell and Ruf, *supra* note 37 at 80.

A different solution may be arrived at in the context of the Philippine labor market, and even on a per-industry context, but it is clear that merely setting a minimum wage and working condition would not deter monopsonistic acts.

CONCLUSION

The effectiveness of laws and regulations in achieving its desired outcome rests in its ability to understand the nature of the subject being regulated. Although monopsonies and monopolies are similar distortions of competition, it is not necessary that they behave similarly to warrant a similar treatment. A monopsonist entity can thrive in an environment and market conditions where a monopolist could not, and if they are given the same legal treatment, the law would be ineffective in regulating either. The example given by the paper is that a monopsonist entity could have a market share lower than 50% and still be able to exercise monopsonistic acts. If the 50% threshold is applied in prosecuting monopsonistic entities for example, U.S. cases reveal that it would not be effective.

The mirroring of monopsonies with monopolies also resulted to monopsonies being appreciated only in the goods market. There are a number of studies showing how monopsonies can exist in the labor market, and how minimum wage and minimum working conditions could not prevent labor market monopsonies. The example given in the Philippine nursing industry shows that even with the imposition of labor code provisions for minimum wage and working conditions, nurses can still be subjected to unfair working conditions. Arriving at a solution for preventing monopsonistic acts in the labor market, however, may require a multidisciplinary research that takes into consideration a multitude of factors.

Research and works on monopsonies authored in the Philippines are also scarce, with the author of this paper frequently referring to foreign materials to gather knowledge. This may be an evidence on how monopsony is neglected as an issue in the country, and further research may shed light on how other labor market problems proliferate such as end-of-contract or “endo” practices, unpaid forced volunteer work, and the labor diaspora.

RESOLVING REFUGEE CRISIS THROUGH BLOCKCHAIN

Maria Francesca R. Montes[1]

"More people are being displaced by war and persecution and that's worrying in itself, but the factors that endanger refugees are multiplying too. At sea, a frightening number of refugees and migrants are dying each year; on land, people fleeing war are finding their way blocked by closed borders. Closing borders does not solve the problem."

Filippo Grandi – United Nations High Commissioner for Refugees

Globally, one in every 113 people out of 7.4 billion[2] is an asylum-seeker – someone whose request for sanctuary has yet to be processed, internally displaced – those who have not crossed a border to find safety, or a refugee – those who are on the run at home state.[3] The increase in worldwide civil and power unrest has caused large scale human displacement, which affects surrounding countries that host refugees.[4] The political and economic turmoil in Venezuela caused refugee crisis in the Latin America region as roughly three (3) million Venezuelans have poured into neighboring countries such as Brazil, Chile, Colombia, and Peru.[5] For Venezuelans, the hyperinflation has become unbearable, forcing them to flee and seek for a better life to live elsewhere. Based on recent United Nations High Commissioner for Refugees

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[2] Adrian Edwards, Global Forced Displacements Hits Record High, United Nations High Commissioner for Refugees: The United Nations Refugee Agency (01 October 2017, 10:15 PM), http://www.unhcr.org/news/latest/2016/6/5763b65a4/global-forced-displacement-hits-record-high.html

[3] Article 1, United Nations Convention and Protocol Relating to the Status of Refugees (December 2010), states that, the term "refugee" shall apply to any person who… xxx owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a natural, and a person shall not be deemed to be lacking the protection of the country of his nationality if without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

[4] For purposes of this article, asylum-seekers, externally and internally displaced persons shall be collectively referred to as "refugees."

[5] Number of refugees and migrants from Venezuela reaches 3 million, United Nations High Commissioner for Refugees: The United Nations Refugee Agency, November 8, 2018 (16 February 2019, 11:52 PM), https://www.unhcr.org/news/press/2018/11/5be4192b4/number-refugees-migrants-venezuela-reaches-3-million.html

(UNHCR) report,[6] there are 40.8 million internally displaced persons primarily from Colombia, Syria, and Iraq; and 21.3 million refugees primarily from Syria, Afghanistan and Somalia. In a published study[7] in 2017 by Environmental Justice Foundation, scientists found empirical basis to conclude that there will be an expanded global refugee crisis from Europe to Africa due to climate change in twenty (20) years.[8] The study, furthermore, calls for a new legal framework to protect climate refugees as it finds climate change and its potential to trigger both violent conflict and mass migration.[9]

Due to various political and social consequences resulting in civil catastrophe and other forms of tragic violence, refugees leave their country and seek for a better life in another – armed with nothing but hope for survival. No one would really leave the comforts of one's home, unless otherwise the conditions at home have become intolerable. Domestic and international conflicts, as well as drastic changes in climate environment have caused tremendous amount of distress among peoples resulting into diaspora. It can also be argued that most nation states in the world are founded and developed by refugees; and the principles by which they do were largely based on how they were accepted and protected by their host country. In retrospect, biblical foundation and historical records provide that the global refugee crisis has been in existence since time immemorial.[10] The crisis has two-pronged dilemma – one, the large number of affected individuals forced to leave homes; and two, resistance and hostility towards the refugees by host countries. Some host countries react negatively in accepting the influx of refugees in their desire to uphold national security and preserve national homogeneity.

Whether the world realizes it or not, technology defines regulation and policy, and arguably, blockchain can adjust to policies and provide regulatory platform for the welfare of global economic order.

[6] Edwards, *supra* note 2.
[7] Matthew Taylor, *Climate Change 'Will Create World's Biggest Refugee Crisis'*, THE GUARDIAN, November 2, 2017, *available at* https://www.theguardian.com/environment/2017/nov/02/climate-change-will-create-worlds-biggest-refugee-crisis (last accessed November 2, 2017).
[8] *Id.*
[9] *Id.*
[10] International Association For Refugees, Refugees in the Bible, *available at* http://iafr.org/youversion/downloads/day2-refugees-in-the-bible.pdf (last accessed February 18 2019).

Notwithstanding humanitarian and national sovereignty matters, UNHCR and most countries still continue to provide access and assistance to refugees.

The Author aims to strike a balance between pushing the humanitarian agenda for refugees and securing nationalist policies of host countries. For purposes of this article, the situation involving the refugees, asylum seekers, returning refugees, resettled refugees, and stateless and internally displaced persons who are of concern to the High Commissioner (collectively referred to as "refugees") is classified as "crisis" due to its global socio-economic and political implications not just to the said persons involved but also to the nation-states that raised concerns on the matter by creating protectionist policies that advance nationalist ideals. Another issue that is consequential to this crisis is the right to privacy of the refugees who will be subjected to the registration system of the UNHCR and contracting countries that host them.

The overwhelming challenges that come with the refugee crisis such as funding, extremist infiltration, and supply chain, among others, can be addressed by incorporating the foundation of blockchain technology into the platform of information management of the refugee registration system. The unified approach to registration is based on key policy decisions such as by the UNHCR Executive Committee in its Conclusion No. 91 dated October 2001.[11] There are three (3) cornerstones of this approach: 1) operational standards for registration, documentation, and population data management activities; 2) standard data set to be gathered and verified about individuals of concern as part of registration and data management activities; and 3) standard generic process for undertaking registration and population data management activities.[12]

For purposes of registration, meeting minimum standards will be undertaken in the same way for asylum seekers and refugees everywhere, including internally displaced persons and stateless persons. Refugees need to be registered within three (3) months after their arrival in the territory of the host country or asylum.[13] It usually takes twelve (12) months to verify and update registration records, while changes in population data are updated once a month. It is conducted through an individual interview and information is always solicited directly from the individual

[11] United Nations High Commissioner for Refugees, Handbook for Registration: Procedures and Standards for Registration, Population Data Management and Documentation (Provisional Release September 2003), *available at* https://cms.emergency.unhcr.org/documents/11982/52542/UNHCR%2C+Handbook+for+Registration%2C+2003+%28provisional+release%29/d8584c37-e8a2-40a1-bc42-2842d1df3ba7 (last accessed June 21, 2019).
[12] *Id.*
[13] *Id.*

concerned to the extent possible.[14] Blockchain technology can concretize the culture of agility in providing basic survival needs from refugee registration to food rationing, digital identification, and banking. Now is the time for digital revolution of humanity.

The Humanitarian Protocol

The principle behind resolving refugee crisis is the protection for humanity as embraced under Article 14 of the Universal Declaration of Human Rights,[15] which recognizes the right of persons to seek asylum from persecution in other countries.[16] Most of these refugees leave behind pertinent documents attesting to their respective identities and information on their nationality and civil status in the form of passports, identification documents, bank accounts, and other similar personal identification. Host countries that are Contracting States[17] to the United Nations Convention and Protocol Relating to the Status of Refugees[18] are mandated to issue identity papers to any refugee in their territory who does not possess a valid travel document.[19] The same Convention provides for several rights and responsibilities of refugees, among others are: 1) refugees shall be accorded the same treatment as nationals where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply;[20] 2) the Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accord to their nationals;[21] 3) when the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in which territory he is residing shall arrange that such assistance be afforded to him by its own

[14] *Id.*
[15] Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 (1948).
[16] *Id.* art. 14.
[17] See State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, *available at* http://www.unhcr.org/3b73b0d63.pdf
[18] United Nations Convention relating to the Status of Refugees, *adopted on* July 28, 2951, 189 U.N.T.S. 137. [hereinafter 1951 Refugee Convention]
[19] Article 27, United Nations Convention and Protocol Relating to the Status of Refugees (December 2010). This article is conjunction with Article 26 (Freedom of Movement) which states that, each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances. Also, under Article 28 (Travel Documents), the Convention provides that the Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require.
[20] 1951 Refugee Convention, art. 20.
[21] *Id.* art. 23.

authorities or by an international authority[22] and that the authority thereto shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities;[23] and 4) documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities, and shall be given credence in the absence of proof to the contrary.[24]

With all these rights and responsibilities of the refugees, it is vital in the process of upholding humanity that we secure the key protection tool – registration. Registration does not only provide basic life needs such as food and drinks, but it also protects them from refoulement, which is the expulsion of persons who have the right to be recognized as refugees, arbitrary arrest, detention, and forcible recruitment. Registration is the primary source of information about the refugees. This data collection phase in data life cycle is, however, considered as the most vulnerable one because of the potential risk for identity fraud, unverified data inputs, and unauthenticated personal information. Refugee data generation is necessary for the following: 1) emergencies and mass movements, which is crucial when dealing with disease outbreak, mass movements from disasters and other sudden unforeseen events; 2) urban areas – where refugee status determination may be the norm; 3) camps for new populations and stable camp situations; and 4) when implementing durable solutions, including voluntary repatriation, local integration and resettlement. Proper and unified approach, standards, procedures, and systems should be in place to ensure integrity of data inputs in registration for efficient management of operations.[25] The unified approach for registration is based on three (3) principles to ensure minimum standards are complied with.[26] The first principle states that, "*teams engaged in all aspects of refugee protection and assistance will work with a common set of core registration data, gathered through a common process and adhering to common standards*."[27] The second states that, "*a sustainable registration process will focus on the continuous updating, validation, and*

[22] *Id.* art. 25(1).
[23] *Id.* art. 25(2).
[24] 1951 Refugee Convention, art. 25(3).
[25] United Nations High Commissioner for Refugees, *supra* note 11.
[26] *Id.*
[27] *Id.*

use of existing information about individuals of concern."[28] Lastly, the third one states that, "*procedures used are flexible enough to adapt to different situations and to evolve over time."*[29]

The Convention allows UNHCR and the Contracting Parties to cooperate in the administration, enforcement, and to ensure the welfare and rights of the refugees are protected in a humane manner. The Contracting States undertake to provide the Office of the UNHCR the appropriate form with information and statistical data requested concerning: (a) the condition of refugees; (b) the implementation of the Convention; and (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.[30] Information management on personal identification of the refugees is one of the core and crucial responsibilities of the UNHCR as such activity captures, handles, stores, analyzes and discloses data on the key operations, functions, and other activities to uphold and protect rights of the refugees. Refugee data, which includes demographic and statistical information, is rich as it is an important ingredient for UNHCR and the Contracting States to determine sector-specific concerns and needs for health, nutrition, water, sanitation, shelter, community-based response, gender-based issues, and other responses to several forms of violence which refugees need protection from.

These refugees have seen atrocities of war and violence in their home country which compelled them to flee and seek refuge in another. The host country or Contracting State would best ease their pain and inconvenience by providing them seamless service and provisions of basic necessity needed for survival. It should be highlighted that refugee crisis have historical context. However, how host countries would aid in resolving this international humanitarian dilemma is dictated by socio-political and economic factors. There have been countries that have tightened their refugee policies due to alleged high risk of terrorism and nationalist policies of the receiving states which portray the influx of refugees as a danger to existing sociological structures and policies that embody nationalist ideals.[31] Nonetheless, European states issued statements and policies against imposing general suspicion on Muslims as well as closing routes

[28] *Id.*
[29] *Id.*
[30] 1951 Refugee Convention, art. 35 (2).
[31] Rebecca Mendelsohn, The European Refugee Crisis: Nationalist Backlashes within the European Union, 7 MJUR 150, *available at* http://research.monm.edu/mjur/files/2017/05/MJUR-2017-Part-13-Mendelsohn.pdf (last accessed March 20, 2018).

and borders because they make people, especially women and children who seek refuge more vulnerable to danger and violence.[32]

Challenges in Refugee Registration System

Refugee registration is defined as the recording, verifying, and updating of information on persons of concern to UNHCR with the aim of protecting and documenting them and of implementing durable solutions.[33] Basic refugee registration system consists of the collection and processing of an individual's personal information, consisting of a prescribed minimum amount of core bio-data from the refugee's arrival to solution. The UNHCR Handbook for Registration[34] particularly highlights that registration should be conducted with full respect for the confidential nature of the relationship between the protecting agent, which is the host country or UNHCR, and the refugee or person concerned.[35] Confidentiality is a good principle but pragmatically, influx of refugees is a nightmare for a protectionist government that prefers to close its doors due to heightened threats to national security and terrorist activities. Host governments would, out of their sovereign power to protect its citizens from terrorist threats, conduct monitoring and surveillance on the arriving refugees to determine whether certain individuals have penetrated the group to advance violent political agenda. Doing so would consequentially violate the principle of confidentiality on refugees which the UNHCR is advocating. UNHCR may be mandated to disclose personal information of the refugees for legitimate purposes subject to the principle of proportionality, which is the processing of personal information limited based on the legitimate reason to do so.

There may be minor variations in other registration procedures depending on the conditional context and focus population. Personal data of every refugee is the source of data lifecycle management for Contracting States and UNHCR. There is a global trend to invest in digital transformation campaigns in order to capture as much data as possible. The same can also be utilized for humanitarian purposes to determine demographic metrics and statistical data needed to address supply and funding allocations. Refugee registration is crucial for

[32] Judith Vonberg, *How some European countries are tightening their refugee policies*, CNN, February 22, 2017, *available at* https://edition.cnn.com/2017/02/22/europe/europe-refugee-policy/index.html (last accessed March 30, 2018).
[33] United Nations High Commissioner for Refugees, *supra* note 11.
[34] *Id.*
[35] *Id.*

determination of persons who are more susceptible to risks, and those who have special needs, such as persons-with-disabilities, children, and elderly. It should be a continuing process that records essential information such as time of initial displacement and changes in the refugee population such as births, deaths, new arrivals and departures.

One of the most sensitive challenges in the refugee registration system is the handling of children or individuals under the age of eighteen (18) whether they are separated (those who were separated from both parents or from their legal guardian) or unaccompanied (those who have been separated from parents and/or relatives, and who are not being cared for by an adult who, by law or custom, is responsible for doing so). In the system, children are tier 1 – or very important individuals who must be immediately registered, identified and documented no matter who is conducting the registration. This is for the system to avoid attracting false cases or those in which parents or legal guardians intentionally separate themselves from children in order for the children to gain access to basic needs under the refugee programs. With respect to children, sharing information within and between countries is essential for tracing families of the unaccompanied and/or separated children.

In this day and age, a person's data is his or her identity. Everything one touches and consumes whether physically, virtually, or digitally, becomes a part of him or her and form a profile of his or her being. When Internet was invented and emerged into a human commodity, more so, a human right, the concept of property has shifted from physical to virtual and a version of a human person has been translated into data. Electronic data through devices and chip cards are always linked to the human user. One's data is the digital version of one's self. Moving from one point to another is just in your fingertips. Now, companies that provide web-based services and applications do not capitalize on immovable property anymore, but on data. AirBedandBreakfast.com (*Airbnb*), which is an application portal to link home owners who are willing to have their private spaces rented and temporary tenants like travelers who prefer cheaper housing lodging than hotel accommodation.[36] *Airbnb* provides a convenient way of connecting private space owners and tenants without even owning any real property. Grab Holdings Inc. (*Grab),* which is a transport network company that enables linking car owner to car passengers, does not own any vehicle as it is a mere platform for parties to go from one place to another. *Grab* collects information about its users when they use the mobile applications,

[36] Airbnb, Terms of Service, *available at* https://www.airbnb.com/terms (last accessed March 30, 2018).

websites and other online products and services through the users' interactions. A user's location information, contacts information, transaction information, usage and preference information, device information, call and SMS data, and log information are being disclosed by the users to *Grab* to consummate the processing of the service.[37]

Gcash and *PayMaya*[38] are forms of electronic money which allow users to easily and conveniently send and receive cash. It also allows users to make payments electronically, which can also serve as an e-wallets that store Philippine Peso (PhP) value which are being processed in their respective financial management system.[39] Subscription to cloud-based services such as *Google, Apple, Dropbox,* or *Microsoft* would inevitably result in data being transported outside the territory or location where the subject data is located from the data generation. It removes territorial limits and creates a legal framework that would ideally govern collection, storage, access, use, retrieval, disposal, and so on. This kind of technological advancement through cloud computing services is cost-efficient as capital expenditures for infrastructure would be converted into operational expenses.[40] Data extractions from electronic data use are main drivers for technology companies to pivot into application development and data analytics which necessitate international data transfers. In retrospect, we now live in a borderless world. Imagine if this data processing can be used to ease the plight of people seeking to survive, the borderless world will be a better place. This is not some other business venture where one expects to gain profits, this is a call to use technology as a moral imperative to help others who are in need, who, unfortunately, are mostly refugees.

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[37] Grab, Terms of Service, *available at* https://www.grab.com/ph/terms/ (last accessed March 30, 2018).
[38] Paymaya, PayMaya Terms and Conditions, *available at* https://paymaya.com/terms-and-condition/ (last accessed March 30, 2018).
[39] GCash, Terms and conditions, *available at* https://www.gcash.com/terms-and-conditions (last accessed March 30, 2018).
[40] "The best part about a private cloud is that not only do you get all of the great benefits of virtualization and security, but it can be cheaper and less of a hassle then hosting your own servers or buying dedicated servers. If your company has more than 2 servers, it could benefit from virtualization. If your company has more than 10 servers, it could benefit from private cloud computing with a dedicated SAN and multiple physical host servers. The public cloud revolutionized Information Technology forever; the private cloud brings the benefits to the masses." Top 5 Reasons Why Your Company Should Transition to Private Cloud Computing, *available at* http://www.onlinetech.com/resources/references/top-5-reasons-why-your-company-should-transition-to-private-cloud-computing (last accessed March 30, 2018).

Defining Blockchain and Use Cases

Blockchain is Internet 3.0 – it is the new upgrade in the Internet with the promise to return the internet to the hands of the user, and this is where the world is going. It is the technological fabric that can infiltrate business, society, government using four segments: 1) web users; 2) cellular phone users; 3) website owners; 4) anything that gains benefits from being connected, and becoming a "smart thing."[41] Blockchain is the technology that upgrades technology itself with its intrinsic capability to continuously grow and develop records of transactions and data called "blocks" and create links among them in a secure manner using cryptography, producing a public ledger in chains. It is "an open, distributed ledger that can record transactions between two parties efficiently and in a verifiable and permanent way."[42]

Blockchain can be in public and in private. In public blockchain, transactions are visible and transparent to the public such that anyone can trace value of transaction from origin to destination. In private blockchain, it is possible to keep transactions confidential by encryption and anonymization. Recent innovations using blockchain would involve executing smart contracts, modernizing land registries, resolving global refugee crisis, identity management, election voting, asset management, and so on.

Blockchain launched a new global economic order from its inception by Satoshi Nakamoto[43] in 2008[44] to solving global refugee crisis[45] especially in Syria.[46] In Finland,

[41] WILLIAM MOUGAYAR, THE BUSINESS BLOCKCHAIN (2016).
[42] Marco Iansiti and Karim R. Lakhani, *The Truth About Blockchain*, HARVARD BUSINESS REVIEW, January – February 2017, *available at* https://hbr.org/2017/01/the-truth-about-blockchain (last accessed March 30, 2018).
[43] Note that the real identity of the name Satoshi Nakamoto had never been revealed since his or her name came into existence in 2008 with the invention of the concept of bitcoin and blockchain.
[44] On October 31, 2008, Satoshi Nakamoto published his/her paper entitled: "Bitcoin: A Peer-to-Peer Electronic Cash System" on a web site through a mailing list composed of cryptography experts and enthusiasts.
[45] In Finland, Helsinki-based startup MONI developed prepaid Mastercard developed in the platform of blockchain technology to provide asylum seekers applying in Finnish Immigration Service legal identification and necessary fund disbursement for their basic necessities. Mike Orcutt, How Blockchain Is Kickstarting The Financial Lives of Refugees, MIT Technology Review, September 5, 2017, *available at* https://www.technologyreview.com/s/608764/how-blockchain-is-kickstarting-the-financial-lives-of-refugees/ (last accessed March 18, 2018).
[46] United Nations and host countries or Contracting States can efficiently provide cashless vouchers or funds to the refugees on the digital identification platform through blockchain technology, which enables refugees to redeem the funds or vouchers in selected markets for food, clothing, and other basic necessity crucial for survival. With enhanced identification system, host countries would be able to mitigate any threats imminent to the interest of the public and national security. United Nations recently opens up its doors to blockchain technology to resolve refugee crisis in Syria. Umberto Bacchi, U.N. Glimpses Into Blockchain Future With Eye Scan Payments For Refugees,

Helsinki-based start-up MONI developed prepaid Mastercard developed in the platform of blockchain technology to provide asylum seekers applying in Finnish Immigration Service legal identification and necessary fund disbursement for their basic necessities.[47] Technological breakthroughs and innovations have been changing every minute that they can arguably be intrinsically in constant change and regulations just follow. Business models also drastically change overnight to adapt to new technology, capture the market, and take the advantageous spot. Regulations and policy makers exist for public welfare and maintenance of public order. However, regulations are having a hard time catching up with new technology – especially when the new technology completely renders regulations and policies obsolete, reactive, or inept.

Regulators and humanitarian advocates should take note of the difference between two (2) types of blockchain: (1) *private* or *permissioned blockchains*, which are essentially a controlled system of distributed ledger or database with cryptography to secure them; and (2) *public* or *permissionless blockchains*, which are the public ledgers that record transactions of digital assets in the form of bitcoin or other cryptocurrency, and tracks their respective real-time movements.[48] Most regulatory positions on blockchain focus on the *public* or *permissionless* type as this involves cryptocurrency transactions impressed with public interest. In Israel, financial sector has started building blockchain-powered platform, as well as taxing cryptocurrencies by the capital gains as properties.[49] South Korea, however, sends mixed positions on whether it will pursue banning cryptocurrency or regulating it instead, as its own Finance Minister advocated against the ban and stated that blockchain technology can revolutionize and change the world.[50] Russia's financial sector also catches up as a large bank

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Reuters, June 21, 2017, *available at* https://www.reuters.com/article/us-un-refugees-blockchain/u-n-glimpses-into-blockchain-future-with-eye-scan-payments-for-refugees-idUSKBN19C0BB (last accessed March 18, 2018).

[47] Mike Orcutt, How Blockchain is Kickstarting the financial lives of Refugees, *available at* https://www.technologyreview.com/s/608764/how-blockchain-is-kickstarting-the-financial-lives-of-refugees/ (last accessed March 18, 2018).

[48] DON TOPSCOTT & ALEX TOPSCOTT, BLOCKCHAIN REVOLUTION: HOW THE TECHNOLOGY BEHIND BITCOIN IS CHANGING MONEY (2016).

[49] Nikolai Kuznetsov, Israel: Steps Toward Cryptocurrency Support?, *available at* https://cointelegraph.com/news/israel-steps-toward-cryptocurrency-support (last accessed March 18, 2018).

[50] Samburaj Das, *'Blockchain Tech Can 'Change the World', Says South Korea's Finance Minister,* CCN, February 5, 2018, *available at* https://www.ccn.com/blockchain-tech-can-change-world-says-south-koreas-finance-minister/ (last accessed March 18, 2018).

incubates a blockchain lab,[51] pilots a new blockchain-based payment system,[52] and secured the 2018 presidential elections.[53]

Recently, Swiss Financial Market Supervisory Authority (FINMA) released new guidelines for initial coin offering (ICO) in anticipation of the increase in number of business ventures on this as well as recognizing the economic function and purpose of the tokens, which are blockchain-based units.[54] In the Philippines, its *Bangko Sentral ng Pilipinas* recently issued its Circular No. 994 Series of 2017,[55] which officially recognized virtual currencies or cryptocurrencies such as bitcoin, and covered virtual currency[56] exchanges in the Philippines offering services or engaging in activities that provide facility for the conversation or exchange of fiat currency[57] to virtual currency or vice versa. The United States of America also adapts to the regulatory requirements that blockchain would inevitably touch upon such as in various government agencies and instrumentalities like Securities and Exchange Commission, Commodity Futures Trading Commission, Internal Revenue Service, Department of Treasury, and State laws recognizing smart contracts, blockchain as evidence.[58]

The European Union however, sends mixed signals differentiating blockchain as a technology and as cryptocurrency. In 2017, European Banking Authority issued warnings to the public on risks with virtual currencies yet shaped policy direction towards anti-money laundering and anti-terrorist financial.[59] Notwithstanding, several EU members have adopted blockchain in

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[51] Sujha Sundararajan, Russia's Sberbank Has Launched a Blockchain Lab, *available at* https://www.coindesk.com/russias-sberbank-has-launched-a-blockchain-lab/ (last accessed March 18, 2018).
[52] Annaliese Milano, Regional Government in Russia to Test Blockchain Payments, *available at* https://www.coindesk.com/regional-government-russia-test-blockchain-payments/ (last accessed March 18, 2018).
[53] William Suberg, Russia: Blockchain Will Be Used To Protect 2018 Presidential Exit Poll Data, *available at* https://cointelegraph.com/news/russia-blockchain-will-be-used-to-protect-2018-presidential-exit-poll-data (last accessed March 18, 2018).
[54] FINMA, FINMA publishes ICO guidelines, *available at* https://www.finma.ch/en/news/2018/02/20180216-mm-ico-wegleitung/ (last accessed March 18, 2018).
[55] Bangko Sentral ng Pilipinas, Guidelines for Virtual Currency (VC) Exchanges, Circular No. 944 series of 2017 (February 6, 2017).
[56] Virtual Currency refers to any type of digital unit that is used as a medium of exchange or a form of digitally stored value created by agreement wihtin the community of virtual currency users. (Subsec. 4512N.2.a, BSP Circular No. 994).
[57] Fiat Currency refers to government issued currency that is designated as legal tender in its country of issuance through government decree, regulation, or law. (Subsec. 4512N.2.c, BSP Circular No. 994).
[58] Francine McKenna, Here's how the U.S. And the world regulate bitcoin and other cryptoccurencies, *availavle at* https://www.marketwatch.com/story/heres-how-the-us-and-the-world-are-regulating-bitcoin-and-cryptocurrency-2017-12-18 (last accessed March 18, 2018).
[59] *Id.*

their integral government functions and legitimized cryptocurrency transactions.[60] Hence, the overall approach in Europe for blockchain technology has always been positive and encouraging as the EU also considers exploring "Distributed Ledger Technology" (DLT) for government projects.[61] The EU, after all, is well-known for creating policies that are progressive and applicable in current changes in technological development.

Blockchain for the Refugee Registration System

It is generally acceptable to build physical border walls for nation states to establish their sovereignty and territorial bounds. It is equally important for refugees to subject themselves to the domestic laws of their host countries. Registration should be easily accessible and should take place in a safe and secure location where it can be conducted in a non-threatening and impartial manner, with respect for the dignity, privacy, and security of the refugees. To find the middle-ground and reconcile the nationalist-approach of the host countries and the humanitarian necessity to address the needs of the refugees, it is sensible to use a cutting-edge technology that can build virtual border wall for the former and sustain the basic needs of the latter.

Per UNHCR Executive Committee Conclusion No. 91,[62] the following personal information are recorded and ideally verified for each person: 1) name; 2) unique identifying registration number; 3) date and place of birth; 4) sex; 5) existing identity documents; 6) marital status; 7) special protection and assistance needs; 8) level of education; 9) occupational skills; 10) ethnic origins; 11) religion; 12) language; 13) household and family composition, including parents' names; 14) date of arrival; 15) current location and address; 16) place of origin; 17) photograph.[63] For the family and/or household, the following are asked: 1) family/household number; 2) family/household size; 3) family/household composition, including relationships and roles; 4) family/household members' names, sex, and age cohorts (age groupings); and 5) family/household location (present address). Registration records are constantly updated based on changes in the family or household composition and individual information.[64]

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[60] *Id.*
[61] Divja Joshi, *How the law and regulation affecting blockchain technology can impact its adoption*, BUSINESS INSIDER, October 20, 2017, *available at* http://www.businessinsider.com/blockchain-cryptocurrency-regulations-us-global-2017-10 (last accessed March 18, 2018).
[62] United Nations High Commissioner for Refugees Executive Committee, Conclusion on Registration of Refugees and Asylum-seekers No. 91 (LII) – 2001 (October 5, 2001).
[63] United Nations High Commissioner for Refugees, *supra* note 11.
[64] *Id.*

In the physical world, we use our wallet and tangible identification cards to prove our identity. We use them to fulfill day-to-day transactions such as renting a book from the library, going inside a private property or building, boarding an airplane, reserving a hotel room, and so on. We open our wallets containing our identification cards in order to prove our identity. In these times, it is also possible to prove our identity through technology. We can present or show a digital equivalent of our personal identification such as passport, driver's license, national identification card, birth certificate, and more importantly, in the case at bar, refugee identification card containing the family or individual number of the refugee. It would be more practical for host countries and UNHCR to provide ID cards that are enable them to withdraw cash or transact cashless.

Registration and documentation are different with respect to refugee registration because they are supposed to be different documents. However, once the registration system runs on blockchain, the chain can also be used to generate documentation and certification duly verified by the chain through the UNHCR and host countries that are assigned to authenticate the information provided by the refugees. There would be dramatic decrease in turn-around time for which the refugees would be verified by the current system. For instance, all adults within the family or household should sign statements or declaration regarding protection and durable solutions on behalf of the household could be done through the chain where all members of the household would also have their own unique identification number for the chain to verify and authenticate. The documents testifying to their status as persons of concern to UNHCR can also be available through the chain that can be portable and accessible anywhere in the world. Also, the names of the adult members of the family or household who receive or collect the entitlements on behalf of the family or the household shall be duly named and verified in the chain.

The traditional registration would not be complete without the verification and identification where the UNHCR or the host country or government partner would accept the registration record. There is also a report on the quality of information gathered, how the dependency relations of the family or household are established and verified. The refugees, upon arriving, receive fixing tokens or wristbands or the populations is fixed by other means. Personal identifiers used are also considered sufficient to uniquely identify each individual, however, biometric capabilities are also used in some areas whenever photograph is not sufficient.

The first thing to do in creating refugee registration system running on blockchain is the standardization of the format. UNHCR has established guidelines on the matter with highly specialized procedures for children and women who are more susceptible to abuse and discrimination. Standardization of the verification methods to authenticate integrity of digital credentials is important ingredient in blockchain.[65] Digital signatures require two keys: the first one is the private key or signing key, which is used to sign the document and is kept secret by the issuer; the second one is the public key or verification key, which is used to verify the signature and ensure the document has not been tampered with, and it does not need to be kept secret.[66] To universally adopt this mechanism of digital credentials verification, there must be a standard way to verify public key of the issuer, which would then prove the authenticity of the credential. In the World Wide Web, there have been movements to standardize digital credentials as well such as standardized network packets enabled the Internet, standardized hypertext pages enabled the Web. The worldwide ecosystem has also standardized the digital credentials for issuers, owners, and verifiers, which the financial industry and the rest of the e-commerce community have benefited from.[67] Verifying the digital signatures of credential issuers is also a challenge, but it is usually resolved by having Public Key Infrastructure ("PKI"). PKI runs on the premise of public key cryptography which is defined as verification of digital signature from anyone else as long as one has access to the public key. In simple terms, PKI enables the padlock icon in the web browser and unlocks access to secure websites where the owners thereof would provide public key to a certificate authority ("CA") which signs the browser address with their own private key and henceforth issues a public key certificate. Being subscribed in CA is like having a middleman to conduct the verification; therefore, it is costly, cumbersome, and highly centralized. Blockchain for public consumption such as providing access to refugee registration system anywhere in the world with minimal amount of money involved, would be ideal for humanitarian activities as verifiable credentials in network will be decentralized using consensus algorithm in contrast with CAs or governments to be a cryptographic root of trust.

The registration system on blockchain would represent the typical cryptographic triple play: 1) each transaction in the blockchain is digitally signed by the originator, who is the

[65] CONSENSYS ACADEMY, BLOCKCHAIN BASICS: A GUIDE TO UNDERSTANDING BLOCKCHAIN AND ETHEREUM FOR NON-DEVELOPER AUDIENCE (2018).
[66] MOUGAYAR, *supra* note 41.
[67] CONSENSYS ACDEMY, *supra* note 65.

refugee or subject concerned; 2) each transaction – singly or in blocks – is chained to the prior via a digital hash – this is where the UNHCR and host government could provide verification of their identification, vouchers for basic needs, and other forms of humanitarian activities; and 3) validated transactions are replicated across all machines using a consensus algorithm.[68] This would result in cryptographic ledger of immutable data inputs and records that are reliable not just for refugees but also for UNHCR and host countries. The chains would have address that is called a "decentralized identifier" (or otherwise known as "DID")[69] to create permanent, unique, cryptographically verifiable identifiers entirely under the identity owner's control. The DID is the key component of the blockchain that enables self-sovereign identity or lifetime portable digital identity for any person. The same DID will enable other forms of products and services benefiting the refugees, where their identities can be verified. For instance, DID would all in one become an issuer would sign claim, owner who will countersign claim and presenter of claim that verifies the digital signature.

Once the refugee registration system runs on blockchain, United Nations and host countries or Contracting States could efficiently provide cashless vouchers or funds to the refugees on the digital identification platform, which enables refugees to redeem the funds or vouchers in selected markets for food, clothing, and other basic necessity crucial for survival. With enhanced identification system, host countries would be able to mitigate any imminent threats to the interest of the public and national security. United Nations recently opened up its doors to the same technology to resolve refugee crisis in Syria.[70] The same technology can also be used for de-registration or the removal from the list of refugees due to reintegration, resettlement, and naturalization. When refugees are de-registered, documentation attesting thereto should be recalled and invalidated and the data collected, examined should be cancelled from the records, or in the case of blockchain system, a record of removal in the chain.

Privacy Issues for Refugees

[68] This solutions design running on blockchain is fully explained in ConsenSys Academy published e-book entitled Blockchain Basics, as above cited.
[69] Credentials Community Group under W3C Community Contributor License Agreement (CLA), A Primer for Decentralized Identifiers, *available a*t https://w3c-ccg.github.io/did-primer/ (last accessed February 18, 2019).
[70] Umberto Bacchi, *U.N. Glimpses Into Blockchain Future With Eye Scan Payments For Refugees*, REUTERS, June 21, 2017, *available at* https://www.reuters.com/article/us-un-refugees-blockchain/u-n-glimpses-into-blockchain-future-with-eye-scan-payments-for-refugees-idUSKBN19C0BB (last accessed October 1, 2017).

International Humanitarian Law guarantees an individual's right to privacy whereby data subjects need to consent before processing or sharing of personal data with other parties.[71] The UNHCR Handbook provides for effective measures to ensure security of personal information of refugees when shared with legitimate recipients and prevent unauthorized disclosure to third parties that might use the information for purposes incompatible with human rights law and principles.[72] Registration system on blockchain must meet the highest privacy standards. The system shall enable the UNHCR, host countries, and refugees to verify and safely share highly sensitive personal information such as banking, tax, health records. It is important to protect these information as they are a matter of life and death.

Blockchain can implement Privacy-By-Design where privacy is the default setting: 1) pseudonymity by default – pairwise-unique DIDs and public keys; 2) private agents by default – to prevent correlation, no private data is stored on the ledger, even in encrypted form; 3) selective disclosure by default – verifiable claims use cryptographic zero-knowledge proofs so they can automatically support data minimization. Given that the new General Data Protection Regulation (EU) 2016/69[73] of the European Parliament and of the Council ("GDPR") enacted on April 27, 2016 has been enforceable since May 25, 2018, it is prudent to use and subscribe to the definition, security measures, and procedures therein to protect the natural persons with regard to the processing of personal data and on the free movement of such data. The GDPR intends to enhance data protection rights of individuals and to improve business opportunities by facilitating the free flow of personal data in the digital single market.[74] It will automatically be effective without enabling legislation, moreover, it will still be applicable and enforceable outside the European Union, as long as the data controller collects and processes data of European Union member states' nationals. This new data protection regulation implements important reforms in the following areas: 1) limits on data processing; 2) the right to erasure; 3) consent; 4) limits on processing of sensitive data and automated decision-making; 5) centralization of regulatory power; 6) cross-border data transfers; and 7) sanctions.

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[71] United Nations High Commissioner for Refugees, *supra* note 11.
[72] *Id.*
[73] European Parliament and of the Council, European Union General Data Protection Regulation, Regulation No. 2016/678, 2016 O.J. (L.119). [hereinafter GDPR]
[74] President to Council, Council of the European Union, *available at* http://data.consilium.europa.eu/doc/document/ST-9565-2015-INIT/en/pdf (last accessed March 18, 2018).

Article 4 (4) of the GDPR[75] defines *profiling* as any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyze or predict aspects concerning that natural person's performance at work, economic situation, health, personal preference, interests, reliability, behavior, location or movements.[76] The bits and pieces of data therefore can be gathered in a coherent manner to form characteristics of a human person. In technological aspect, data referring to personal information of a human being can be used to develop rules in a programming language and thereby create a model to digitally profile a person and process the same data in an automated decision-making system.

With respect to limits on data processing, Article 5 of the GDPR requires personal data to be *"adequate, relevant, and limited to the minimum necessary in relation to the purposes for which they are processed (data minimization)."*[77] The conditions for procuring consent from data subjects have also been strengthened such that the text must be clear and distinguishable from other matters in the documents that the data subjects need to sign.[78] This new regulation qualifies the extent by which private and public data controllers are allowed to engage in data processing in relation to purposes that inherently require the use of personal data.

GDPR is perceived to be a reaction to the development in cloud infrastructure, platform, and software services where limits of liabilities are mandated to be defined as to which party controls the data. In cloud technology, the personal data controller outsources the infrastructure, platform, and software to the cloud providers which determines the location of the servers where data will be hosted. In this kind of situation, conflict of laws is created such that in case of breach and liabilities, there would be ambiguities as to which party would be responsible. The GDPR resolves such kind of conflict of laws in definitive terms and provides respective strict penalties, thus companies that hold and process data would have no choice but to comply. However, there are policy critics who believe that in the advent of blockchain, GDPR may no longer be applicable before it even starts.[79] The disparity between blockchain and GDPR basically stems

[75] European Parliament and of the Council, *supra* note 73.
[76] *Id.* art. 4(4).
[77] *Id.* art. 5(c).
[78] EU GDPR.ORG, GDPR Key Changes, *available at* http://www.eugdpr.org/key-changes.html (last accessed March 18, 2018).
[79] David Meyer, Blockchain technology is on a collision course with EU privacy law, International *available at* https://iapp.org/news/a/blockchain-technology-is-on-a-collision-course-with-eu-privacy-law/ (last accessed March 18, 2018).

from *public* or *permissionless* type due to its security features, which may have negative impact on privacy.[80] Even though this idea of a risk in privacy in blockchain may find a sound basis, blockchain in itself can resolve such by introducing a new fork of a chain to resolve uncertainties in data security. It is intrinsically impractical for an attacker or fraudster to change, that no one can control but every user can view, and that can connect individuals without a third party or central authority.

Conclusion

We have now come in the era of digital age grounded on blockchain which creates a ledger that will record everything of value to humankind. Blockchain is public and running on open source code, which means everyone can download it for free, run and use it to develop new tools for managing online transactions in the form of bitcoins which refers to private currency operated through digital network.[81] The convergence of computing and communications technology disrupts industries and changes business models in the private manner as how the world addresses geopolitical conflicts. This would expound in detail how the world can use innovations in technology to resolve global problems, specifically the refugee crisis. Self-sovereign identity of the refugee registration system on blockchain is envisioned to operate as a global public utility in the same manner as how the Internet or the Domain Name System (DNS) operates. It is designed architecturally to address the requirements of the refugee registration system for governance – how the network can be trusted by all stakeholders, performance – scalability or how the network can provide self-sovereign identity at internet scale, accessibility – how the network can ensure that identity is available to all, and privacy – how the network can meet the privacy standards set forth by the GDPR.

While there are unclear regulations that need to be clarified, it is innate to technology development not to be constrained. Whether the world realizes it or not, technology defines regulation and policy, and arguably, blockchain can adjust to policies and provide regulatory platform for the welfare of global economic order. Blockchain actually replaces trust in human beings with trust in mathematics. Human beings are susceptible to act based on animal instincts,

[80] *Id.*
[81] Max I. Raslin, *Realm of the Coin: Bitcoin and Civil Procedure*, 20 FJCFL 969, (2015).

political agenda, and other emotional outbursts and prejudice. In these times when nation-states create walls, we have blockchain technology to tear them and open doors for humanity.

"When a foreigner resides among you in your land, do not mistreat them. The foreigner residing among you must be treated as your native-born. Love them as yourself, for you were foreigners in Egypt."

Leviticus 19:33-34

THE GOVERNMENT, ITS POLICIES, AND THE IMPORTANCE OF AMNESTY

Gilbert Allan M. Rueras[1]

For the welfare of all and the advancement of a civilized society, there is a need for a government. The government upholds the rights and affords protection to its citizens.[2] In turn, the citizens support the government and the administration in many different ways.

But what about the dissenters, especially those who strongly disagree? Some will try to wrest power from the incumbent. As a result, administrations have fallen, governments destroyed, and leaders overthrown. But what if they failed? Will they be crushed by the same power they sought to defeat or will they be spared?

The privilege of amnesty should not only be respected but protected as well, not because Trillanes, or any of the mutineers for that matter, deserves it, but because the citizens deserve it.

Punishing dissenters most likely mean the continuance of a government, but what if the one in power chooses compassion over retribution? Will forgiving prevent these dissenters from uprising once again? If not, how will it be resolved? Should such forgiveness be withdrawn?

The past year has been a challenge for the Philippine legal community as new doctrines have risen. Settled principles and jurisprudence have been disturbed that it cannot be left without any serious debate. While the question whether a Chief Justice can be removed by means other than impeachment has been decided by the Supreme Court, it has yet to decide on the matter of the revocation of amnesty. Both events have never happened and are firsts under the Philippine

[1] **Allan Rueras** is a licensed Civil Engineer who earned his degree from then Mapua Institute of Technology. He would not hesitate to go on camping trips if time permits. Being deeply concerned on society's disregard of the present state of pollution and its failure to pursue sustainable development, he believes that there should be reform in government to reflect a "green" policy, and if possible, incorporated in new pieces of legislations. On the article, while he wants to give the government the benefit of the doubt, it, however, provides a discourse on the importance of having amnesty and how it is beneficial. It is his view that given its nature, it is one of the few things provided by our laws that should not be toyed with, especially by the individuals possessing the power to grant it.

[2] Thomas Jefferson, The Necessity of Government, *available at* http://www.importanceofphilosophy.com/Politics_NecessityOfGovernment.html (last accessed Feb 28, 2019).

legal system. But one thing is common among them – the people involved are strong dissenters and critics of the present administration.

Political Crimes

Defining political corruption and state crime can be as thorny, as identifying their perpetrators and their victims.[3] Nevertheless, political crimes refer to those acts or omissions that injure or are perceived as injuring the state, the state's government, or the political system.[4] States will label any behavior a political crime that is perceived as a threat to a state's authority and/or continued survival, regardless of whether the threat is real or imaginary.[5]

Political crime does not have to actually and directly threaten the security and integrity of a regime to be labeled "political." A vehement advocation of change in the ruling order may be considered a political crime, or the demand for change in long-established policy, or a simple act that signifies disloyalty such as burning the national flag. Violence or prejudiced discrimination against minority groups, trade unions strikes, or picketers can also be perceived as a political crime when those in power regard it as undermining the political integrity of the country.[6]

Committing Political Crimes

Throughout history, there have always been events involving political crimes. When the people are not satisfied with the kind of services and protection the government is providing, some of them resort to political crimes. For them, resorting to political crimes is a form of promoting the common good or putting the interests of everyone over the benefits of a select group or a few people.[7] Rarely do people resort to political crimes to wrest power. This is especially true in today's modern age. As part of developing a civilized society, citizens have

[3] Clayton Peoples and James E. Sutton, Political Corruption and State Crime, *available at* http://oxfordre.com/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-274 (last accessed Feb 28, 2019.
[4] Upcounsel, Political Crime – Criminal Classification, *available at* https://www.upcounsel.com/lectl-political-crime-criminal-classification (last accessed January 19, 2019).
[5] *Id.*
[6] *Id.*
[7] Adam J. Bulava, Original Intent: The General Welfare, *available at* https://ajbulava.wordpress.com/2011/08/13/original-meaning-of-the-general-welfare/ (last accessed Jan 28, 2019).

learned to bring up their grievances with less violence and through the proper channels. There are the few, however, who would not hesitate to use power and violence to air their grievances, even to the point of wresting power, especially if the means is within their reach. In such instance, they risk everything. If they succeed, they may gain everything. If they do not succeed, they are deemed to have buried one foot on the ground and are at risk of being persecuted.

Forms of Political Crimes

Political crimes may come in many forms. It may range from something light like picketing or public rally, to something very serious as rebellion and *coup d'état*.[8]

These forms are important in the Government's point of view. Subject to the rights under the Constitution, the government can define which of these political crimes should be penalized, and to what extent.

In most instances, the government will forego punishment for these acts, especially when such activities will not provide threat to national security, public order and public peace. However, when such acts threatened the national security and disrupted public order and peace, the perpetrators are punished and even persecuted. Most of the time, this happens when there are people who strongly disagree or oppose a given set of policies or are deeply disappointed by the outcome of such policies. It may sometimes be seen that going against a policy is going against the Government, hence, is going against the public welfare.

Present Day Philippines

A lot has happened in the history of Philippine politics. Different events have unfolded and has molded into what we call present day Philippines. For the longest time, Filipinos have grown weary. Many has considered the end of the Marcos era as a relief; however, the playing field is still the same. There might have been changes in the rules of the game, but only to favor the few. It only bred a new form of corruption. To be more proper, it decentralized corruption.

[8] Cirrelia Thaxton, What is Amnesty? – Definition & History, *available at* https://study.com/academy/lesson/what-is-amnesty-definition-history.html (last accessed Feb 28, 2019)

Corruption in the Philippines is like EDSA, the iconic highway of frustration. Just standing on its sidewalk will give anyone the feeling of helplessness it brings. For years, it has been unchanged, never upgraded nor are there any concrete plans to. The situation only worsens. While people see the problem, they do not get the big picture and tend to ignore whatever causes it, just like Philippine corruption. Fortunately, there are, those who are willing to stand up, whether they are in the right position to do so or not. Take for example then Marine Lt. Antonio Trillanes and his *Magdalo* group of soldiers and policemen who went against the Arroyo administration but was later granted amnesty by President Benigno Aquino III during his first months in office.

Eight years later, revocation of this grant was sought and a proclamation to that effect was issued by no other than the Chief Executive himself – President Rodrigo Roa Duterte.

Amnesty

The word "amnesty" is derived from the Greek word *"amnestiva"* meaning "forgetfulness, passing over" and has even evolved into the English word "amnesia".[9] Basically, Amnesty is grant to those who have committed political crimes, and makes them free from any liability that would arise therefrom.

While different jurisdictions treat the grant of amnesty in different ways,[10] the Philippines uses it as grant of an official pardon to the classes of persons who have committed political crimes – rebellion, coup d'état, and insurrection to name a few. It does not require a conviction before it can be granted. It is granted even while the case is pending in court. Once granted, it brings to oblivion all criminal liability. It looks back and erases all traces of the crime committed as if it has not happened. In other words, it retroacts to the time right before the commission of the crime.

Government, Policies, and Uprising

[9] Atty. Lorna Patajo-Kapunan, Pardon and Amnesty, *available at* https://businessmirror.com.ph/pardon-and-amnesty/ (last accessed Feb 28,2019).
[10] Cirrelia Thaxton, What is Amnesty? – Definition & History, *available at* https://study.com/academy/lesson/what-is-amnesty-definition-history.html (last accessed Feb 28, 2019).

A government is the representation of the people. It is the embodiment of the power of the people that is granted to a few. A power delegated by the people who are, as a whole, the ultimate sovereign. Its purpose is to serve and protect the general welfare or the public good. The Government is thereby given wide latitude in governing its people, and usually only subject to limitations by the Constitution that gives it life. It is through the system of government that policies are pursued, laws are enacted, and inter-country relations are maintained.

Each government will have their own sets of policies they want to pursue depending on many factors, these usually include national interest, ethnic diversity, limited resources, international relations, history, and culture to name a few. While it is through government that the welfare of the people is enforced and protected, it is through the person of certain individuals that decisions are made. In other words, the incumbent administration sets the policies for a given period.

These individuals are a big factor for the entirety of the population. To prevent corruption and centralization of power, their terms of office are being limited. The time limitation is critical in decision making because the continuance of an administration's policy is always uncertain every election period by the probability that a different set of people having a different agenda will be the incumbent's successor.

Let us now focus on the most powerful person in the country – the President. Just like any other person, the President has his or her own traits. His or her policies will depend on his personality, family, personal relations, education, personal preferences, likes and dislikes, and affiliations. Factoring in such traits with the reality of having such great power at his or her disposal as well as the frailty of human nature, it is not impossible that there would be biases towards what suits such person. These will affect not only the present conditions of the country but of its future as well.

In *Marcos v. Manglapus*,[11] where the issue was on the decision of then President Corazon Aquino forbidding the return of the Marcoses to the Philippines following their exile in the U.S. Justice Cortes cited therein a portion form *The Imperial Presidency* by Schlesinger:

[11] 177 SCRA 668

> For the American Presidency was a peculiarly personal institution. It remained, of course, an agency of government subject to unvarying demands and duties no matter who was President. But, more than most agencies of government, it changed shape, intensity and ethos according to the man in charge. Each President's distinctive temperament and character, his values, standards, style, his habits, expectations, idiosyncrasies, compulsions, phobias recast the White House and pervaded the entire government. The executive branch, said Clark Clifford, was a chameleon, taking its color from the character and personality of the President. The thrust of the office, its impact on the constitutional order, therefore altered from President to President. Above all, the way each President understood it as his personal obligation to inform and involve the Congress, to earn and hold the confidence of the electorate and to render an accounting to the nation and posterity determined whether he strengthened or weakened the constitutional order.[12]

The Government's success or the people's uprising depends on the personal circumstances of the people comprising the government, especially the President. Those who are very critical when it comes to scrutinizing the government will not hesitate to let the people in power know that their mistakes will not be left unnoticed. Those in power, on the other hand, sometimes see such scrutiny as a threat to the existence of the government, and maybe to some point, their personal agendas. The conflict between the people and their representatives starts here. Interests versus interests, the public versus its representatives. As a deterrent, the Government will persecute these dissenters while the critical dissenters would cause an uprising.

The people governed will usually go with whatever policy the government would want to pursue. But there will always be times when policy-making is coated with personal interests. However, when people start to air their grievances it is because of two main reasons, either from the Government's neglect or from the corruption plaguing it. It is when these two events concur in a particular matter that makes it critical and consequently, dangerous. People who are affected will risk everything, some even consider that they have nothing to lose. The 1986 People Power Revolution is one example. Its failure is a risk that its leaders took, they could have easily been a target of persecution were it not for the changing of sides, especially by key military leaders. If it were coupled with taking up arms, it would be rebellion under our criminal laws. The more reason for the government to persecute such offenders in case it failed.

[12] *Id.*

These kinds of events happen because the Government no longer serves its purpose. In principle, it should not be tolerated because it negates the idea of having a government who serves and protect the welfare of the general public. But given certain conditions, those who are very critical would not hesitate to take the chance, fight for their rights and be called the enemies of the state.

By creating such disturbances anyone would agree that the Government would readily act on it, but at what cost? The peace, national economy, lives of both combatants and non-combatants? Results may vary, it is even uncertain that the one who succeeds in wresting power would do any better. It is also probably true that they expect, even by a small chance, that the government will rather feel compassion for them since they only sought to make the government aware of their plight. After all, the government is established for the people, and it is the dissenters – as part of the people who only want the Government to address the issues presented – that are being prosecuted.

The Government was been given a wide latitude in governing its people and responding to its critics. Nonetheless, the Government also shows compassion. It can choose to prosecute offenders, or they may forgive such violations. The primary consideration being the general welfare of the people.

Political crimes always divide a nation. Some can tolerate the Government's mistakes, while others do not. There are those who will always stand up no matter what odds, and there are still others who will just sit back and do nothing. Nevertheless, political crimes always divide the nation.

Thus, in the spirit of national reconciliation, the Government is given the power to grant amnesty, especially in times of national turmoil. In principle, offenders should be punished but for the welfare of the country and its citizens, national reconciliation shall always be sought in times of conflict.

American History

Throughout history, the Americans have been engaged in war, whether internally during the earlier years of the formation of the United States or externally such as the Vietnam War. Because of this**,** they had to maintain an army of adequate size either during peacetime or when there was war – as can be seen with the presence of many US military bases throughout the World. Thus, it became their policy to conscript young men and women for compulsory military service. who were the required to go on tours. However, there were objectors of such policy. Either a citizen evaded being drafted into service or there were war deserters. These were seen as crimes against the State as it would weaken their military strength as well as their state policy.[13] Ideally, these evaders and deserters should be punished, however throughout their history, it is seen that US Presidents, as early as the time of Abraham Lincoln and George Washington, have granted amnesty to these evaders and deserters. These were done for the purpose of healing social wounds as well as to further maintain a sizeable army.[14]

History

Philippine laws are often times derived from the American laws, thus, are given weight in construing and interpreting our laws. To have a better understanding of the nature and implication of Amnesty, considerations are given to how the United States Courts interpret the concept.

In the case of *United States v. Bundal,*[15] Marcos Buncag, who was then municipal president of the pueblo of Cagayancillo, was murdered by Ignacio Bundal and his companions. Buncag held the position of municpal captain and *gobernadorcillo* of the town of Cagayancillo during the Spanish regime for around twenty years. During Buncag's reign, Bundal and his companions were alleged to be victims of outrages, abuses, and illegal exactions. It was found out that hatred and vengeance were their motives for killing Buncag. After having killed Buncag, Bundal's group brought his body to the municipal building to ask people's opinion. A fraudulent report was also made by Vice President Francisco Magbanua to the provincial authorities saying that it was unknown bandits who attacked Buncag's house and killed him. The accused then

[13] LT. COL. WILFRED L. EBEL, U.S.S., THE AMNESTY ISSUE: A HISTORICAL PERSPECTIVE (1974).
[14] *Id.*
[15] United States v. Bundal, G.R. No. 1312, December 21, 1903.

asked that they be included in the amnesty proclamation of July 4, 1902. However, the Court held that the accused cannot be included under the amnesty because the killing of Buncag, while was of a political character in a general sense, did not have the particular political character contemplated by the said amnesty. It was not a political crime as the murder was not related to the revolution against the Government of Spain or the resistance against the sovereignty of the United States.[16]

In the case of *United States v. Cajayon*,[17] the accused were members of insurrectionary forces who were part of the rebellion that caused the expulsion of Spanish officials from the Island of Lubang. Emilio Cajayon, who had the rank of a captain, along with other soldiers, caused the assault and robbery of the house Doña Ana Muriel. After stealing cash and jewelry, they fled the scene but brought with them Tranquillo Torres, who was living in the said house. They later killed him and buried him. They were convicted of murder based on witnesses' testimony and circumstantial evidence. They also sought their inclusion under the July 4, 1902 amnesty. The court also refused to allow them the benefit of amnesty saying that being members of the insurrectionary forces does not make every act a political crime.[18] The murder of Torres was not of a political character. It was neither committed for political motives but for their personal gain. Clearly, the accused may not avail the remedy of amnesty for such acts.

The Philippine Constitution

Substantially reproduced from the 1935 and 1973 Constitutions, the grant of amnesty under the 1987 Constitution now requires the grant by the President and the concurrence of the majority of all the Members of Congress.[19] These are the only two requirements, no more, no less.

It has been settled that while the grant requires the concurrence of the Congress, it is the President who has the ultimate say on whom to grant such executive clemency. The President's power is plenary and the discretion is his or hers alone. There can be no question on the wisdom as to whom to it is granted. The only limitation the grantee faces is when his or her case will not

[16] *Id.*
[17] United States v. Cajayon, G.R. No. 981, October 8, 1903.
[18] *Id.*
[19] PHIL. CONST. art. VII, § 19.

fall under those which the Constitution prohibits amnesty to be granted.[20] Once the President grants amnesty, all the grantee needs to do is wait for the concurrence of the majority of all the Members of Congress. The Constitution is even silent on how it is to be granted. No form is required, and the provision itself is self-executing.

Irrevocable

Article VII, Section 19, paragraph 2 of the 1987 Constitution[21] reads:

> xxxx
>
> "He shall also have the power to grant amnesty with the concurrence of a majority of all Members of Congress"[22]

Nowhere in the said provision, nor in any part of the Constitution, states that amnesty is revocable, more so when it is unilaterally done by either the President or Congress. It may be argued that what is not prohibited by law should be allowed. However, this principle has no application in the case of amnesty. The reason is simple: it is irrevocable. Considering its meaning, nature, and history, it is clear that it cannot and should not be revoked except and only when expressly provided by the Constitution.

Jurisprudence has given life to the meaning of *amnestiva*, or amnesty. According to the Supreme Court, granting amnesty means to forget the wrongdoings done as if it had never happened.[23] The law on amnesty is retroactive and made to look back to the time right before criminal liability has been incurred. It is not simply to pardon or forgive. Granting amnesty is turning a blind eye to the offenses committed. That is why the Constitution provides separate requirements for granting amnesty as compared to pardon.

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[20] PHIL. CONST. art. VII, § 19.
[21] PHIL. CONST. art. VII, § 19, ¶ 2.
[22] PHIL. CONST. art. VII, § 19, ¶ 2.
[23] Biraogo vs. The Philippine Truth Commission of 2010, G.R. No. 192935, December 7, 2010.

It must be noted however, that it is not the government alone that benefits from this act. The people itself, as the grantor of the power to the government, is also benefited by extending amnesty to the offenders. Amnesty is in pursuit of national reconciliation, a deeper meaning of the general welfare. Even tax amnesty is of this nature – forgetting the wrongdoings of not paying taxes in exchange from freedom of liability and to start a new slate by paying an amount under the conditions determined by law.

Allowing the revocation of amnesty when clearly it is not allowed will have many serious implications. Such revocation may cause more damage than the political crime it has extinguished. While it is true, that whatever political crime committed has already caused damage, it is through amnesty that healing of whatever social injury incurred can be realized. Thus, allowing its revocation is adding insult to injury. Unless allowed by the Constitution, revocation of amnesty is seen as a form of persecution.

At present, once amnesty is granted it can no longer be unilaterally revoked because the grant requires two important steps. When it is done unilaterally, such action is an affront to a co-equal branch. By concurring with the grant, two great branches agree to remit any criminal liability of the grantee. In this sense, it is a contract between the State and the grantee for the benefit of all. Hence, it may be argued that an agreement to revoke the grant may be allowed but it would set a dangerous precedent for the future. Conflicts and misunderstandings will never end.

Therefore, a grant of amnesty should be respected, even by a subsequent administration. Having to prosecute an offender is a liability of a given administration to the people during its term and any unresolved liability is passed on to the next administration. It is important that these liabilities be lessened by the current administration. Hence, when a predecessor had remitted an offense, it is for the benefit of its successor. The successor should not then purposely incur any liability already remitted at the cost of the people's welfare. Besides, the Constitution provides that "[n]o person shall be twice put in jeopardy of punishment for the same offense."[24] Hence, the grantee should not be allowed to face any charges or criminal liability for the same acts for the second time around, or else there will be no end to litigation. The benefit of our criminal laws to rehabilitate offenders and re-introduce them to society will be negated. It will do

[24] PHIL. CONST. art. III, § 21.

good for the country especially in times of disunity that a grant of amnesty be respected and upheld.

The Oakwood Mutiny and the Manila Peninsula Siege

Then Lieutenant Senior Grade Antonio Trillanes and the other *Magdalo* members were charged for *coup d'etat* and rebellion for the 2003 Oakwood mutiny and the 2007 Manila Peninsula siege, respectively. The Oakwood Mutiny was a protest to show the group's dissatisfaction with the Arroyo's administration, as well as their protest against the alleged corruption within military officials. Among their grievances were the lack of housing and incentives for soldiers, low pay, and the supposed micromanagement of then Defense Secretary Angelo Reyes.[25] The Manila Peninsula siege, on the other hand, was brought about by the walk out of the soldiers involved in the Oakwood Mutiny during one of their hearings in the Makati Regional Trial Court (RTC). From the Makati court, the *Magdalo* group proceeded to the Manila Peninsula and held a press conference calling for the resignation of then President Gloria Macapagal-Arroyo. They then proceeded to occupy the building but later surrendered after a 6-hour siege when Government troops stormed the building in an attempt to arrest the soldiers. After the incident, they were charged with the crime of rebellion in the Makati RTC.[26] However, on October 11, 2010, then President Benigno Aquino III signed Proclamation No. 50 granting amnesty to the members of the military involved in the mutiny. Trillanes at that time had already won a seat in the Senate. This was superseded more than a month later, or on November 4, 2010, by Proclamation No. 75, which included the members of the Philippine National Police who were also involved in the mutiny.[27] In December 2011, Congress concurred with Proclamation No. 75[28] through Concurrent Resolution No. 4.[29]

The Magdalo and Amnesty

[25] Michael Bueza and Alex Evangelista, TIMELINE: Trillanes, from mutiny to amnesty, RAPPLER, Sept 15, 2018, *available at* https://www.rappler.com/newsbreak/iq/211894-timeline-antonio-trillanes-iv-mutiny-to-amnesty (last accessed Feb 28, 2019).
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] Concurrent Resolution No. 4, 15th Cong., 1st Reg. Sess. (2010).

Clearly, the actions of the soldiers and policemen involved are of political character. They sought government reform because of the rampant corruption within then Arroyo administration as well as the military. However, they never intended to wrest power from the government. Their only plight was that the soldiers and police, who serve the country and risk their lives and limbs in protecting the sovereignty of the country, be given the right benefits and privileges according to the nature of their jobs.

This is not to say that what they did should be rewarded. It is simply a matter of recognizing their situation. As soldiers and policemen, they are first in line to defend the people from both external and internal threats. Conflicts or disturbances should not be initiated by these men. Their job is to protect the people and prevent conflicts. Unlike the People Power revolution in EDSA, it was the people themselves who rose against the government. At that time, the military sided with the people and stood against the administration. They recognized that it was the duty of the military to first protect the people, even against the government itself. After all, it is the same people that the power of the government emanates from.

Some people say that Trillanes does not deserve the grant of amnesty because of his arrogance and lack of respect. Take for example his backdoor dealings with the China. Whether authorized by the President or not, he was not the proper person to settle international disputes. Such right and duty are vested with the President or any of his alter egos, not a Member of Congress like Trillanes. However, the grant is not for anyone to judge. Then President Aquino has deemed it wise to grant amnesty to the members of the *Magdalo*, the wisdom of his choices is his alone. It must be respected in light of the authority given by the Constitution – as the mandate of the people. It was met by the concurrence of Congress

The issue on the mutiny was a complicated and serious matter that had to be dealt with objectively and carefully. It was met with compassion rather than prosecution. Nevertheless, it was aimed for national reconciliation. This is manifested when a few days after the amnesty took effect, Trillanes vowed his support for the Aquino administration.[30] At that point in time, both government and the dissenters set aside their differences and united for the country.

[30] Michael Bueza and Alex Evangelista, *supra* note 25.

The Duterte Revocation

However, on August 31, 2018, President Rodrigo Duterte signed and issued Proclamation No. 572 declaring void *ab initio* the amnesty granted by former President Aquino to Senator Antonio Trillanes IV. According to the current administration, the application for amnesty was void from the beginning because in the first place, Trillanes did not apply for amnesty. Whether this is true or not, should not affect the grant. Ever since President Duterte ran for the presidency, Trillanes has been a vocal critic of the President. But their differences should not also be settled at the cost of public order and the general welfare.

It must be noted that the Constitution's provision on amnesty is self-executing. No form was required, hence, it is upon the discretion of the Chief Executive on how he would communicate his intention to grant the amnesty. Whether internal rules are violated should not be an issue. The Constitution grants a substantial right upon the concurrence of the two requirements – the most important is that it is the President who initiates the grant and he has the discretion on whom to grant the privilege. Even the Supreme Court cannot revoke what was validly granted by both the Executive and Legislative Departments. The incidental question of whether the Supreme Court can revoke it can only be answered in the affirmative if there is the presence of grave abuse of discretion from either of the two branches. In that case, there is no real revocation, only a declaration of invalidity – such as when the majority Members of Congress was not met.

Clearly, the privilege of amnesty should not only be respected but protected as well, not because Trillanes, or any of the mutineers for that matter, deserves it, but because the citizens deserve it. It is part of the service and protection the government can give to its citizens. It is only through respect that the true essence of national reconciliation will be achieved.

"It is not only the power of the President but also his *duty to do anything* not forbidden by the Constitution or the laws that *the needs of the Nation demand*."

– U.S. Pres. Theodore Roosevelt

THROUGH THE LENS OF MASLOW: EXPLAINING THE IMPACT OF BASIC NEEDS SATISFACTION ON THE CRIMINAL LIABILITY OF FILIPINO CHILDREN

Jannah Joy S. Santos[1]

More often than not**,** we see in the news and social media stories featuring the vulnerability of street children who struggle to juggle work in the streets selling snacks or rugs while studying for tomorrow's lesson in school. This type of news captures the attention of many resulting to varying interpretations from feelings of motivation and contentment to disappointment and disbelief. Indeed, one cannot argue the determination shown by these children in ensuring that they try their best to improve their stance in society. However, such instance also strikes a nerve to some who question the State's responsibility in ensuring that the basic needs of these children are provided.

With the current initiative of the government to lower the age of criminal liability, children are placed in a difficult situation of balancing their need to survive by satisfying their physiological needs and evading criminal conviction.

How the law defines a 'Child'

Children are generally viewed as vulnerable beings that are dependent on both the State and their guardian; may it be their parents, immediate family or a person appointed by the law, for physical, psychological and mental sustenance. The Constitution and existing domestic laws afford specific rights and limitations that are only applicable to Filipino children to ensure that they are afforded proper protection and development in order to eventually become positive contributors of the State. It is therefore imperative to identify what constitutes the term "child" in order to determine whether one falls under the said category.

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Article 1 of the United Nations Convention on the Rights of the Child (CRC) defines a "child" as *a person below the age of eighteen (18) years, unless the laws of a particular country set the legal age for adulthood younger*.[2] Similarly, domestic laws also define child as "those under the age of majority, which according to Article 234 of the Family Code, commences at the age of eighteen (18) years".[3] Furthermore, the Juvenile Justice and Welfare Act of 2006[4] exempts children, aged 15 years or under who committed an offense, from any criminal liability.

Although there are slight variations in how international conventions and domestic laws defined the term "child", all are in unison that for one to be considered under this category, he or she must be under the age of eighteen (18) years.[5] People who belong under this category are still viewed by the law as vulnerable and are still dependent to their guardian for support and fulfilment of their basic rights. This is so because they are not yet able to exercise some of their rights to the full extent without supervision or approval from their guardian. The right to work is an example of a right which a child cannot exercise to the full extent due to certain limitations set forth by the law. The Labor Code of the Philippines[6] limits the work hours and the type of work industry which a child can engage in for his own benefit. Moreover, the Department of Labor and Employment has created additional safeguards for employers to comply with when employing children for their business and any violation to such will result to legal sanctions. Another example is the provision in our Civil Code which prohibits children to enter into contracts as the law considers them to be unable to give lawful consent[6]. Indeed, laws are in place to ensure that each child receives their basic needs to fully grow, realize their potentials and become positive contributors of the State.

[2] United Nations Convention on the Rights of the Child, art. 1, *adopted* Nov. 20, 1989, 1577 U.N.T.S.
[3] An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 234 (1950) (as amended).
[4] An Act Establishing A Comprehensive Juvenile Justice and Welfare System, Creating the Juvenile Justice and Welfare Council Under the Department of Justice, Appropriating Funds Therefor and for other Purposes [Juvenile Justice Act], Republic Act No. 9344 (2006)
[5] A Decree Instituting a Labor Code, thereby revising and consolidating Labor and Social Laws to Afford Protection to Labor, to Promote Employment and Human Resources Development and Insure Industrial Peace on Social Justice [LABOR CODE], Presidential Decree No. 442, art. 139 (1974).
[6] CIVIL CODE, art 234.

Basic Rights and Basic Needs

Identifying the basic rights of a child is important not only to ensure their proper development, but also to effectively determine whether their guardian or the State has successfully performed the required responsibilities in the child's upbringing. Both international and local laws have provided various enumerations of the basic rights of a child. Food, health care, shelter, education, and protection from harm are the basic rights of children enumerated in the CRC to which the Philippines is a signatory of.[7] The Philippines also affirms these rights in Section 3 (2) of Article XV of the 1987 Constitution[8] which states that:

The State shall defend (2) the right of children to assistance, including proper care and nutrition, and special protection from all forms of neglect, abuse, cruelty, exploitation and other conditions prejudicial to their development.[9]

The common denominator provided by these laws is that children have a right to satisfy their basic physiological and psychological needs. These rights are aimed at protecting the basic needs of children which are required for survival. The right to proper nutrition, for example, is a basic need not only of children but of every human being.[10] Our body will not be able to function properly without proper nourishment. Empirical results of a study has shown that the nutrients people get from food interact with the molecular systems or cellular processes of the human brain and lack of proper nutrition actually hampers the cognitive process.[11]

Another basic right of children is the right to security against external factors such as the environmental disasters, pollution and violence. Researchers have confirmed that exposure to community violence negatively affects not only the child's physiological development, but their behaviour as well. Children exposed to such harsh environment eventually become violent, aggressive or delinquent themselves.[12]

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[7] Convention on the Rights of the Child, *supra* note 2.
[8] PHIL CONS. art XV, 3(2).
[9] PHIL CONS. art XV, 3(2).
[10] Universal Declaration of Human Rights, G.A> Res. 217 A (III), art. 25 (December 10, 1948).
[11] Fernando Gomez Pinilla, Brain foods: the effects of nutrients on brain function, *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2805706/ (last accessed Jan 20, 2019).
[12] Nancy G Guerra & Carly Dierkhising, *The Effects of Community Violence on Child Development*, Encyclopaedia on Early Childhood Development, *available at* https://cpb-

Given this, it is important that the basic rights of children, which are embodied in our existing laws, are properly enforced in order for these minors to develop into a fully functioning citizen of the State. It is imperative that steps are taken by the State to ensure proper implementation of existing laws which are designed to protect the well-being of Filipino children. Our Constitution has burdened the State with the responsibility of effective implementation of these laws to ensure proper development of every child. As the Doctrine of *Parens Patriae* provides, the State stands as a parent of any child who require protection.

Abraham Maslow's Hierarchy of Needs

The importance of satisfying basic physiological needs of a human being is not only emphasized in the field of law. Different fields of studies have dipped into the concept of basic needs with an aim to understand its impact to various facets. For example, a research under the field of Human Resources focused on the effects of poor nutrition on the work performance of physicians. Experimental results show that poor nutrition affects the well-being and work performance of physicians which in turn has a negative influence in the quality of health care they provide to their patients.[13] A medical research, on the other hand, focused on the relationship between poverty and insufficiency of food to one's health and well-being. The researchers posits that people who lack adequate access to nutritional foods are more prone to develop serious illnesses such as cardio vascular disease, Type 2 diabetes, or even cancer.[14] In the field of psychology, the basic needs, or otherwise known as human needs, are a favoured research topic. Different psychological studies have been conducted to determine the relationship between human needs satisfaction or lack thereof with productivity, cognitive learning, and child development.

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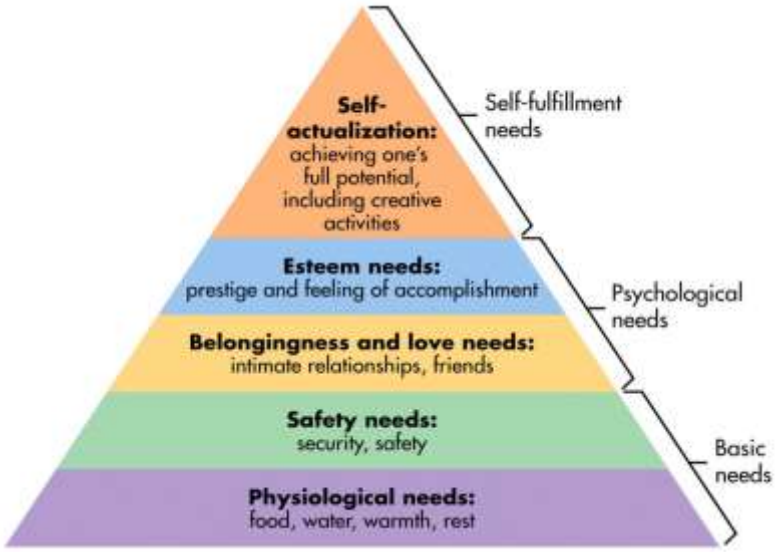
usw2.wpmucdn.com/sites.udel.edu/dist/0/659/files/2013/05/Guerra-Dierkhising-2011-Effects-of-community-violence.pdf. (last accessed June 20, 2019).

[13] Jane B Lemaire et al., Food for thought: An exploratory study of how Physicians experience poor workplace nutrition, *available at* https://nutritionj.biomedcentral.com/articles/10.1186/1475-2891-10-18 (last accessed June 20, 2019).

[14] Food Research and Action Center, The Impact of Poverty, Food Insecurity, and Poor Nutrition on Health and Well-Being, *available at* http://frac.org/wp-content/uploads/hunger-health-impact-poverty-food-insecurity-health-well-being.pdf (last accessed June 20, 2019).

One notable psychologist, Abraham Maslow, devoted his time to understand and study what human needs are and its effects on the society. Maslow is a well-known American psychologist who popularized self-actualization psychology and is the proponent of the famous Hierarchy of Needs theory. He posits that human beings are motivated by a hierarchy of needs. Each level of the hierarchy must be satisfied in order for the person to move to the next level of the hierarchy. Once all levels of the hierarchy are satisfied, the person reaches a state of self-actualization. According to Maslow, self-actualization is the fulfilment of one's greatest potential.[15]

Maslow's hierarchy of needs consists of five levels arranged from the most basic needs to self-fulfillment needs. The levels from lowest to highest in the hierarchy are as follows: physiological needs (such as water, food, shelter, sleep, and clothing), safety needs (such as personal security, employment, resources, health, and property), love and belonging (such as friendship, intimacy, family,and sense of connection), esteem (such as respect, self-esteem, status, recognition, strength, and freedom) and self-actualization (desire to become the most that one can be). The hierarchy is shown in the following figure:[16]



[15] Erin Sullivan, Self-Actualization, Encyclopaedia Britannica, *available at* https://www.britannica.com/science/self-actualization (last accessed June 20, 2019).
[16] Saul McLeod, Maslow's Hierarchy of Needs, *available at* https://www.simplypsychology.org/maslow.html (last accessed June 20, 2019).

According to Maslow's theory, the lowest needs in the hierarchy, namely the psychological needs or the basic needs, must be satisfied first before one can progress to the next level of the hierarchy. One cannot argue that it is understandable for a person to prioritize the satisfaction of his physiological hunger before he can be concerned with his security or forming friendships with other people.

Maslow's theory has been applied in different situations, such as in the context of the nation as a whole, work settings, non-work settings, and even to academic institutions.[17] For instance, when the theory was applied in the workplace, it was found that there exists a relationship between the employee's need for esteem and his work performance. It was said that the failure of an organization to recognize the good performance of its employees has a negative impact on the future work performance of the latter.[18] Another study proposed that children who lack basic needs, such as food and shelter, tend to perform poorly in their academics.[19] Applying Maslow's theory to the issue at hand, it is relevant to point out that the basic physiological needs of a child, such as food, clothing and shelter, are met to ensure that they are afforded equal opportunity to be effective and efficient future contributors of society.

Basic Human Rights and State Responsibility

Basic rights, by the concept of humanity, are bestowed to all human beings. They are universal, inherent, inalienable and indivisible.[20] Human rights are afforded to anyone regardless of race, gender, ethnicity, religion or age. As previously discussed, the concept of basic needs is embodied in laws which are designed to protect the basic human rights of a person. It is therefore, the responsibility of any State to ensure that it has taken positive steps, such as the enactment of local laws or active participation in international treaties which are aimed at protecting these basic rights, to ensure that the basic needs of its citizens are preserved.

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[17] Aishwarya Shahrawat & Renu Shahrawat, Application of Maslow's Hierarchy of Needs in a Historical Context: Case Studies of Four Prominent Figures, *available at* https://www.scirp.org/journal/PaperInformation.aspx?paperID=76172 (last accessed June 20, 2019).
[18] *Id.*
[19] Barbara L Minton, *Maslow's Hierarchy of needs explains why some children fail*, NATURAL NEWS, September 15, 2008, *available at* https://www.naturalnews.com/024190_child_children_WHO.html. (last accessed June 20, 2019).
[20] United Nations Human Rights Office of the High Commissioner, What are Human Rights?, *available at* http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx. (last accessed June 20, 2019).

In consideration of this, the Philippines has taken action by becoming a signatory to several international treaties such as the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), which are all aimed at upholding the human rights of all people.

Locally, our Constitution acknowledges the importance of the preservation of human rights. Particularly, section 1 of Article XIII[21] states that:

> the Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequalities by equitably diffusing wealth and political power for the common good.[22]

This shows that the Philippine government is mandated to follow through with its responsibility of upholding human rights of Filipinos. The creation of the Commission on Human Rights (CHR) was also mandated by the same Constitution with the primary objective of investigating the complaints filed by Filipinos in relation to human rights violation.[23]

Furthermore, specific importance has been highlighted in the Constitution for Filipino children. Section 3(2) of Article XV of the Constitution[24] states that the state must protect:

> (2) The right of children to assistance, including proper care and nutrition, and special protection from all forms of neglect, abuse, cruelty, exploitation and other conditions prejudicial to their development.[25]

[21] PHIL. CONST. art. XIII, § 1.
[22] PHIL. CONST. art. XIII, § 1.
[23] PHIL CONST. art XV § 3(2).
[24] PHIL CONST. art XV § 3(2).
[25] PHIL CONST. art XV § 3(2).

The recognition of the need to protect the children is not only embedded in the Constitution. In fact, Presidential Decree No. 603[26] or otherwise known as The Child and Welfare Code, was created specifically for children's rights. The opening statement of the law confirms the importance of children in nation building which states that:

> The Child is one of the most important assets of the nation. Every effort should be exerted to promote his welfare and enhance his opportunities for a useful and happy life.[27]

Presidential Decree No. 603[28] also enumerates the rights of children in great detail and the application of this law not discriminate based on the child's legitimacy, sex, social status, religion, political antecedents or other factors. In particular, Article 3(4) of this law focuses on the right of children to satisfaction of their basic physiological needs:

> (4) Every child has the right to a balanced diet, adequate clothing, sufficient shelter, proper medical attention, and all the basic physical requirements of a healthy and vigorous life.[29]

Both the State and the parents or legal guardian of the child are held responsible by the law for the fulfilment of the rights enumerated in PD No. 603 as provided in Article 3(10) which states that:

> Sec. 10. Every child has the right to the care, assistance, and protection of the State, particularly when his parents or guardians fail or are unable to provide him with his fundamental needs for growth, development, and improvement.[30]

[26] The Child and Youth Welfare Code, Presidential Decree No. 603 (1974).
[27] *Id.* art. 1.
[28] *Id.*
[29] *Id.* art. 3(4).
[30] *Id.* art. 3(10).

and Article 3(17) which states that:

> Sec. 17. Joint Parental Authority. - The father and mother shall exercise jointly just and reasonable parental authority and responsibility over their legitimate or adopted children. In case of disagreement, the father's decision shall prevail unless there is a judicial order to the contrary.
>
> In case of the absence or death of either parent, the present or surviving parent shall continue to exercise parental authority over such children, unless in case of the surviving parent's remarriage, the court, for justifiable reasons, appoints another person as guardian.[31]

Another law enacted by the legislative body of the State are in place to assist with the government's objective in protecting the basic rights of Filipinos such as Republic Act No. 7610[32] or the Special Protection of Children Against Abuse, Exploitation and Discrimination Act which has defined child abuse as:

> [t]he maltreatment, whether habitual or not, of the child which includes any of the following:
>
> (3) Unreasonable deprivation of his basic needs for survival, such as food and shelter.[33]

Indeed, the Philippines is rich with laws that intend to protect the vulnerability of children. From taking part in international conventions, to the provisions of the Constitution and enactment of domestic laws, the State has covered its legislative responsibility to every child. The only question left to answer is if these laws are effectively implemented to ensure that children are actually receiving the assistance and protection that they are entitled to.

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[31] *Id.* art. 3(17).
[32] An Act Providing for Stronger Deterrence and Special Protection against Child Abuse, Exploitation and Discrimination, and for other purposes [Special protection of Children Against Chidl Abuse, Exploitation and Discrimination Act], Republic Act No. 7610 (1992).
[33] *Id.* § 3.

Statistics and the current state

A law that is effectively implemented yields positive results. If a law is designed to protect the rights of children, the rate of violations regarding the same subject must be low if not zero to confirm that the objective of the law is met. According to The Law Society of Western Australia, an effective law should is characterized as (1) Known to the public, (2) Acceptable to the community (3) Able to be enforced, (4) Stable, (5) Able to be changed, (6) Applied consistently, and (7) Able to resolve disputes.[34] However, author Anthony Allot postulates two main reasons why the implementation of a law fails; (1) the purpose of the law may not be clearly stated or (2) there is little or no emphasis on expressly promulgated law.[35] One cannot be compelled to confirm with the law as it is merely a persuasion:

Law is persuasion; sometimes we submit to it because we believe that we have a duty to do so; sometimes because we feel that there is no alternative; and sometimes because we believe that it is positively to our advantage; but in each case we conform because we are persuaded.[36]

This now begs the question on whether the existing Philippine laws which aim to protect the basic needs of children are effectively implemented.

In the recent study conducted by the United Nations International Children's Emergency Fund (UNICEF) and The Philippine Statistics Authority (PSA) last 2015, it was revealed that 35.5% of Filipino children belong to families who are unable to provide for their basic needs and satisfy the legal minimum food requirements. The regions of Bicol, MIMAROPA and Eastern Visayas had the highest rate of malnourished children aged five (5) years old and below. On the other hand, the same study yields that children who belong to the regions of Zamboanga Peninsula, ARMM and SOCCSKSARGEN are severely deprived of their basic amenities such as

[34] Francis Burt Law Education Programme , Characteristics of an Effective Law: Year 11 Teacher and Student Resource, *available at* https://www.lawsocietywa.asn.au/wp-content/uploads/2015/09/2015-FBLEP-Characteristics-of-an-Effective-Law.pdf (last accessed Jan. 20, 2019).
[35] Anthony Allott, The Effectiveness of Laws, Valpo Scholar, *available at* https://scholar.valpo.edu/cgi/viewcontent.cgi?article=1579&context=vulr (last accessed Jan 20, 2019).
[36] *Id.*

clean and safe water, access to a clean toilet, electricity and shelter. Additionally, UNICEF further reported that there has also been an increase from 48% to 52% of children belonging to families with seven or more family members who live below the poverty line.[37] Families below poverty line are those who are not able to take at least three nutritious meals daily. Further, they struggle to make ends meet. Parents or guardians of children under this class of families are usually engaged in begging on the streets, collecting recyclable materials from garbage for sale in a junk shop, or menial street sellers.

Furthermore, in a survey conducted by Save the Children, the Philippines ranked 96th out of the 172 countries performing poorly in addressing child malnutrition which affects 30% of all children across the Philippines. Malnutrition also increased the mortality rate of children below five years of age.[38] Moreover, children exposed to child labor are estimated to be at 2.1 million. These children are exposed to dangerous work environments ranging from forced domestic labor and sexual exploitation with the hopes of earning a small amount to feed their hungry mouths.[39]

Factoring all this in, one can only see the everyday threats faced by these children. The uncertainty of being able to eat three full meals a day with enough nutrients needed by their growing body, the lack of safe shelter to secure them from the harshness of the open night and their vulnerable to be victimized by lurking perpetrators plainly violates the rights of these children. The present condition of these children proves the failure of the government to deliver their responsibility as guardians of those in need.

However, it is crucial to emphasize that this issue is not only prevalent in the Philippines but commonly existent in other countries. Children from third world countries are left with no choice but to engage in illegal activities to meet their needs. In Pakistan and Kenya for example, children leave their homes due to poverty with a hopes of finding a decent earning job only to be

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[37] UNICEF, Child Poverty in the Philippines, *available at* https://www.unicef.org/philippines/ChildPovertyinthePhilippines_web.pdf. (last accessed January 20, 2019).
[38] Rainier Allan Ronda, *Malnutrition pulls down Philippines' 'End of Childhood' rank to 96th*, PHILSTAR GLOBAL, June 1, 2017, *available at* https://www.philstar.com/headlines/2017/06/01/1705960/malnutrition-pulls-down-philippines-end-childhood-rank-96th (last accessed Jan. 20, 2019).
[39] Patty Pasion, *PHILIPPINES U.S. cites 'significant advancement' in PH anti-child labor drive*, RAPPLER, October 12, 2017, *available at* https://www.rappler.com/nation/185069-united-states-cites-philippines-anti-child-labor-drive (last accessed January 20, 2019).

targeted by syndicates for child prostitution.[40] This threatens the child's security and exposes him or her to potentially being infected by communicable diseases. Despite this, children are forgoing their safety needs, which is the second level in Maslow's hierarchy of needs, just to be able to meet their daily physiological needs.

Hunger and Behavior

As Maslow theorized, the satisfaction of basic physiological needs such as food and shelter are important in order for a person to move to the next level of the hierarchy which is the safety needs. However, the statistics discussed in the earlier part of this article proves that a great number of Filipino children are still unable to satisfy their basic needs. The constant lack of food leaves them with an ongoing feeling of hunger. This, perhaps, is the culprit why children resort to committing crimes in order to satisfy their basic needs. But how does lack of basic needs explain the change in behavior of these children? who resort to commission of crimes?

Empirical results of a psychological study regarding the relationship between hunger and behavior revealed that participants who were subjected to hunger became more impulsive and resorted to a snap-judgment decision making style.[41] This explains why children who are unable to satisfy their hunger become more daring and partake in risky behavior in order to satisfy their physiological needs. Crimes such as theft, robbery or worse prostitution, are committed by children as a survival response in order to satisfy their bodily needs. In other words, these children prioritise the satisfaction of their hunger before being concerned about their safety. As these children engage in petty crimes for survival, they are held accountable under the law to justify their actions. Ironically, the State who is responsible for ensuring that the basic needs of children are protected, but failed to do so, now becomes the prosecutor who decides whether a child who committed theft in order to survive, should be held accountable.

The Brain and Criminal Responsibility

[40] Fanny Busuttil, *Child prostitution: the curse affecting every continent*, HUMANIUM, December 12, 2011, *available at* https://www.humanium.org/en/child-prostitution/ (last accessed Nov 11, 2019).
[41] Daniel Nettle, Does hunger Contribute to Socioeconomic Gradients in Behavior?, *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5344891/ (last accessed Jan. 20, 2019).

The concept of morality comes into play when deciding if a child should be made accountable for a crime he committed at an instance when his youth and vulnerability is at play. During moments of hunger, is a child deemed to possess the proper discernment which enables him to understand right versus wrong as well as the consequences of his actions?

Republic Act No 9344 is currently the prevailing law governing children in conflict with the law. Sections 6 of the said law states that children aged fifteen and below are exempted from criminal liability:

> *Sec. 6. Minimum Age of Criminal Responsibility. - A child fifteen (15) years of age or under at the time of the commission of the offense shall be exempt from criminal liability. However, the child shall be subjected to an intervention program pursuant to Section 20 of this Act.*[42]

The rationale of this age restriction is that children above 15 years but below 18 years of age, although still considered as minors by the law, are deemed to have acquired the discernment needed to consider them culpable. Although children found guilty of a crime are not subject to imprisonment, they are still required to undergo reformation under the care of Bahay Pag-asa, a government run facility. The State has created a different and less harsh reformation approach for children in conflict with the law compared to the adult approach.

However, this law is at the verge of eventually being repealed. Last January 2019, the House of Representative has passed a bill which lowers the criminal liability from fifteen years old to nine years old. This is based on the premise that syndicates are now using minors to commit petty crimes.[43] Similar to the old law, the bill proposes that minors found guilty of a crime will still not face imprisonment but will be subject to reformation at Bahay Pag-asa. This bill is currently facing a number of criticisms from both sides. Part of the population believe that it is about time that criminal liability is lowered in order to address the increasing crimes initiated by children. On the other hand, others strongly disagree with the bill invoking that the state must

[42] Republic Act No. 9344, § 6.
[43] Jose Cielito Reganit, House finalizes bill lowering age of criminal liability, *available at* http://www.pna.gov.ph/articles/1059282 (last accessed June 29, 2019).

first address the reason why these children are engaging in such acts before considering lowering the criminal liability. Nonetheless, this is not the first time that the legislative body of the government has considered lowering the age of criminal liability. In fact, a bill was submitted by the now Senate President Vicente Sotto III, which aimed to lower the criminal liability to thirteen years old.[44] This bill is currently pending before the Senate.

In a situational analysis conducted by UNICEF regarding crimes committed by children in the Philippines, the Philippine National Police(PNP) reported that the highest age group of convicted are those between ages 15 and 17. The graph below shows the statistics of children handled by the PNP for the months of January to June 2017:[45]

Age Group	Number of Children Served by PNP	Percentage
5 years old and below	11	0.18%
6 – 8 years old	65	1.08%
9 -11 years old	360	5.96%
12 – 15 years old	2,290	37.89%
Above 15 but below 18 years old	3,318	54.90%
Total	**6,044**	

PNP reports further reveal that from 2012 and 2015, theft are the most common crime committed by minors followed by physical injury and robbery. This alarming number may clearly justify the purpose of the legislative body in lowering the criminal liability. Nevertheless, it would be ignorant to put aside other factors which lead to children committing crimes. Initially, people would say that it is poverty which pushes children to commit such crimes. The need to satisfy their basic urges such as hunger may clearly motivate them to commit crimes against property. But to conclude that children already have discernment during the commission of the criminal act requires justification.

[44] ABSCBN, Sotto seeks to lower age of criminal liability to 13, ABS-CBN NEWS, Sep 25, 2018, *available at* https://news.abs-cbn.com/news/09/25/18/sotto-seeks-to-lower-age-of-criminal-liability-to-13 (last accessed June 20, 2019).
[45] UNICEF, Situation Analysis of Children in the Philippines, *available at* https://www.unicef.org/philippines/nationalsitan2018.pdf. (last accessed June 20, 2019).

The case of Roper versus Simmons[46] provides a clear example as to why lowering of criminal liability must be carefully thought of. In this case, Christopher Simmons, who was only 17 at that time, was convicted for murdering a woman during a robbery. He was sentenced to death. Simmons contended that his brain was still a developing adolescent brain which proves that he was less culpable for the crime he was convicted for and thus should not be subject to death penalty.[47] This defence was supported by the American Psychological Association which states that the development of an adolescent's brain is different from adults which affects their culpability. The American Medical Association further argued that the "adolescents' behavioural immaturity mirrors the anatomical immaturity of their brain"

Clearly, science has proven that certain behavioural changes happen intrinsically when a person is deprived of basic needs. Jurisprudence further supports the claim that the vulnerable age of minors affects their understanding of the consequences of their action. It now falls under the responsibility of the government to address this gap in order to prevent minors from committing crimes.

Gaps and governmental actions

Although a lot of work is yet to be done to provide the basic needs to Filipino children. The Philippine government has been continuously implementing initiatives through its administrative bodies as well as encouraging inter-agency cooperation to ensure progress in upholding the rights of Filipino children. For example, the Department of Labor and Employment (DOLE) as well as the Department of Social Welfare and Development (DSWD) are working on its 'Makiisa para sa #1MBatangMalaya' program aimed at eliminating child labor in the Philippines by 2025.[48]

Similarly, Executive Order No. 1 or otherwise known as "Re-engineering the Office of the President Toward Greater Responsiveness to the Attainment of Development Goals" was

[46] Roper v. Simmons, 543 U.S. 551, (2005).
[47] *Id.*
[48] Julie M Aurelio, *DOLE, DSWD team up against child labor*, Inquirer.Net, January 14, 2017, *available at* https://newsinfo.inquirer.net/862135/dole-dswd-team-up-against-child-labor (last accessed June 29, 2019).

signed by President Duterte last 2016 placing twelve government agencies such as the National Youth Commission, National Anti-Poverty Commission and the Housing and Urban Development Coordinating Council (HUDCC), to implement means addressing the food security and poverty in the country.[49] Moreover, the National Nutrition Council (NNC) has implemented the Philippine Plan of Action for Nutrition 2017-2022 which aims to achieve food security and improved nutrition and promote sustainable agriculture.[50]

Summary

A significant number of Filipino children are still not fully afforded of their rights as a child. Their basic needs for food and shelter are still left to be satisfied. This exposes children to look for other ways and alternatives in order to make ends meet. Often times, the want for satisfaction of these essential needs results to a commission of a crime. With the current initiative of the government to lower the age of criminal liability, children are placed in a difficult situation of balancing their need to survive by satisfying their physiological needs and evading criminal conviction. Indeed, the Philippine government still has a long way to go in ensuring that their state responsibility of protecting and supporting every Filipino child, is delivered. To perform their mandate, the government has been continuously implementing new means in order to address this issue. As theorized by Abraham Maslow, it is only when the basic needs are met that a person can move to the next level with the hopes of eventually reaching a self-actualized state. If the aim of the national government is to raise children to become efficient and effective contributors on the society, regardless of their gender, ethnicity or religion, all must work hand in hand to ensure that basic rights are extended to every child and that their vulnerability are not taken advantage of. As the saying goes, it takes a village, or in this case a nation, to raise a child.

[49] Marlon Ramos, *12 agencies to lead gov't antipoverty programs*, Inquirer.Net, July 5, 2016, *available at* https://newsinfo.inquirer.net/794271/12-agencies-to-lead-govt-antipoverty-programs (last accessed June 29, 2019).
[50] Scaling up nutrition, A turning point for the next generation of Filipinos with the launch of a new nutrition action plan, *available at* https://www.scallingupnutrition.org/news/a-turningpoint-for-the-nextgeneration-of-filipinos-with-the-launch-of-a-new-nutrition-ation-plan/ (last accessed Jan. 20, 2019).

JURISPRUDENCE

SENATOR LEILA M. DE LIMA v. HON. JUANITA GUERRERO, IN HER CAPACITY AS PRESIDING JUDGE, REGIONAL TRIAL COURT OF MUNTINLUPA

G.R. No. 229781. October 10, 2017.

FACTS: The Senate and the House of Representatives conducted several inquiries on the proliferation of dangerous drugs syndicated at the New Bilibid Prison (NBP), inviting inmates who executed affidavits in support of their testimonies. These legislative inquiries led to the filing of the four consolidated criminal cases against the Petitioner. The DOJ Panel of Prosecutors (DOJ Panel) was directed to conduct the requisite preliminary investigation.

Petitioner alleged evident partiality on the part of the DOJ Panel, the petitioner contended that the DOJ prosecutors should inhibit themselves and refer the complaints to the Office of the Ombudsman. The DOJ Panel proceeded with the conduct of the preliminary investigation and in its Joint Resolution dated February 14, 2017, recommended the filing of Informations against petitioner De Lima.

Petitioner filed a Motion to Quash, mainly raising the following: the RTC lacks jurisdiction over the offense charged against petitioner; the DOJ Panel lacks authority to file the Information; the Information charges more than one offense; the allegations and the recitals of facts do not allege the *corpus delicti* of the charge; the Information is based on testimonies of witnesses who are not qualified to be discharged as state witnesses; and the testimonies of these witnesses are hearsay.

On February 23, 2017, respondent judge issued the presently assailed Order finding probable cause for the issuance of warrants of arrest against De Lima and her co-accused. Thereafter, petitioner repaired to this court via a petition praying for granting a writ of certiorari annulling and setting aside the Order dated 23 February 2017, the Warrant of Arrest dated the same date, and the Order dated 24 February 2017 of the RTC Muntinlupa City.

ISSUES:

Procedural Issues:

1) Whether or not the petition should be dismissed outright for the falsity in the *jurats* committed by Petitioner De Lima.

2) Whether or not the pendency of the Motion to Quash the Information before the trial court renders the instant petition premature.

3) Whether or not petitioner, in filing the present petition, violated the rule against forum shopping given the pendency of the Motion to Quash the Information.

Substantive Issues:

1) Whether or not the Regional Trial Court or the Sandiganbayan has the jurisdiction over the violation of the Republic Act No. 9165.

2) Whether or not the respondent gravely abused her discretion in finding probable cause to issue the Warrant of Arrest against petitioner.

HELD:

Procedural Issues

1) Yes. Petitioner De Lima did not sign the Verification and Certification against Forum Shopping and Affidavit of Merit in front of the notary public. This is contrary to the *jurats* (i.e., the certifications of the notary public at the end of the instruments) signed by Atty. Tresvalles-Cabalo that the documents were "SUBSCRIBED AND SWORN to before me." Notably, petitioner has not proffered any reason to justify her failure to sign the Verification and Certification Against Forum Shopping in the presence of the notary. There is, therefore, no justification to relax the rules and excuse the petitioner's non-compliance therewith. All things considered, the proper course of action was for it to dismiss the petition.

2) Yes. Under the prayer, petitioner asks for a writ of certiorari annulling the Order dated February 23, 2017 finding probable cause, the warrant of arrest and the Order dated February 24, 2017 committing petitioner to the custody of the PNP Custodial Center. Clearly petitioner seeks the recall of said orders to effectuate her release from detention and restore her liberty. She did not ask for the dismissal of the subject criminal case. Nowhere in the prayer did petitioner explicitly ask for the dismissal of Criminal Case No. 17-165. What is clear is she merely asked the respondent judge to rule on her Motion to Quash before issuing the warrant of arrest.

In view of the foregoing, there is no other course of action to take than to dismiss the petition on the ground of prematurity and allow respondent Judge to rule on the Motion to Quash according to the desire of petitioner.

3) Yes. Forum shopping exists when the following elements are present: (a) identity of parties, or at least such parties 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) the 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.

All these requisites are present in this case.

The presence of the first requisite is at once apparent. The petitioner is an accused in the criminal case below, while the respondents in this case, all represented by the Solicitor General, have substantial identity with the complainant in the criminal case still pending before the trial court.

As for the second requisite, the arguments and the reliefs prayed for are essentially the same. In both, petitioner advances the RTC's supposed lack of jurisdiction over the offense, the alleged multiplicity of offenses included in the Information; the purported lack of the *corpus delicti* of the charge, and, basically, the non-existence of probable cause to indict her. And, removed of all non-essentials, she essentially prays for the same thing in both the present petition and the Motion to Quash: the nullification of the Information and her restoration to liberty and freedom.

To restate for emphasis, the RTC has yet to rule on the Motion to Quash. Thus, the present petition and the motion to quash before the RTC are simultaneous actions that do not exempt petitions for certiorari from the rule against forum shopping.

Substantive Procedure:

1) The Regional Trial Court has jurisdiction. The prefatory statements and the accusatory portions of the Information repeatedly provide that the petitioner is charged with "violation of the Comprehensive Dangerous Drugs Act of 2002, Section 5, in relation to Section 3(jj), Section

26(b), and Section 28, Republic Act No. 9165." From the very designation of the crime in the Information itself, it should be plain that the crime with which the petitioner is charged is a violation of R.A. 9165. As this Court clarified in Quimvel vs. People, the designation of the offense in the Information is a critical element required under Section 6, Rule 110 of the Rules of Court in apprising the accused of the offense being charged.

Read as a whole, and not picked apart with each word or phrase construed separately, the Information against De Lima goes beyond an indictment for Direct Bribery under Article 210 of the RPC. As Justice Martires articulately explained, the averments on solicitation of money in the Information, which may be taken as constitutive of bribery, form "part of the description on how illegal drug trading took place at the NBP." The averments on how petitioner asked for and received money from the NBP inmates simply complete the links of conspiracy between her, Ragos, Dayan and the NBP inmates in willfully and unlawfully trading dangerous drugs through the use of mobile phones and other electronic devices. As such, with the designation of the offense, the recital of facts in the Information, there can be no other conclusion than that petitioner is being charged not with Direct Bribery but with violation of RA 9165.

In this case, RA 9165 specifies the RTC as the court with the jurisdiction to "exclusively try and hear cases involving violations of R.A. 9165."

2) No. In the present case, the respondent judge had no positive duty to first resolve the Motion to Quash before issuing a warrant of arrest. There is no rule of procedure, statute, or jurisprudence to support the petitioner's claim. Rather, Sec.5(a), Rule 112 of the Rules of Court required the respondent judge to evaluate the prosecutor's resolution and its supporting evidence within a limited period of only ten (10) days.

It must be emphasized that in determining the probable cause to issue the warrant of arrest against the petitioner, respondent judge evaluated the Information and all the evidence presented during the preliminary investigation conducted in this case. It may perhaps even be stated that the respondent judge performed her duty in a manner that far exceed what is required of her by the rules when she reviewed all the evidence, not just the supporting documents. The Court rules that she certainly discharged a judge’s duty in finding probable cause for the issuance of a warrant.

CARLOS CELDRAN Y PAMINTUAN v. PEOPLE OF THE PHILIPPINES

G.R. No. 220127. March 21, 2018.

FACTS: In celebration of the second anniversary of the May They Be One Campaign (MTBC) and the launching of the Hand Written Bible which coincided with the feast of Saint Jerome, a throng of people composed mainly of catholic dignitaries intermixed with those different religions such as members of the military, police, media, non-catholics, students, representatives of various religious organizations gathered around the Manila Cathedral in the afternoon of September 30, 2010.

While Brother Edgar J. Tria was reading a passage from the Bible around 3:00PM, petitioner entered the Manila Cathedral clad in a black suit and a hat. Petitioner went to the center of the aisle, in front of the altar and suddenly brought out a placard emblazoned with the word "DAMASO." Commotion ensued when petitioner started shouting while inside the church saying "Bishops, stop involving yourself in politics," disrupting and showing disrespect to an otherwise solemn celebration.

ISSUE: Whether or not Petitioner is guilty of the crime of Offending Religious Feelings under Art. 133 of the RPC.

HELD: Yes. The Higher Court ruled that in a petition for review on certiorari under Rule 45 of the Rules of Court, only questions of law may be raised. Any resolution as to questions of fact will not be entertained by the Court. The findings of fact made by the trial courts are accorded the highest degree of respect especially when the MeTC, the RTC and the CA have similar findings. Absent any clear showing of abuse, arbitrariness or capriciousness committed by the lower court[s], its findings of facts, especially when affirmed by the CA, are binding and conclusive upon this Court.

The question of whether petitioner offended the religious feelings of those who were present during the celebration of the MTBC is a question of fact which will not be entertained in the present petition.

GENUINO, ET AL. v. DE LIMA, AS SECRETARY OF DOJ

G.R. NO. 197930

MACAPAGAL-ARROYO v. DE LIMA, AS SECRETARY OF DOJ

G.R. NO. 199034

ARROYO v. DE LIMA, AS SECRETARY OF DOJ

G.R. No. 199046. April 17, 2018.

FACTS: These consolidated Petitions for Certiorari and Prohibition with Prayer for the Issuance of Temporary Restraining Orders (TRO) and/or Writs of Preliminary Injunction under Rule 65 of the Rules of Court assail the constitutionality of Department of Justice (DOJ) Circular No. 41, series of 2010, otherwise known as the *Consolidated Rules and Regulations Governing Issuance and Implementation of Hold Departure Orders, Watchlist Orders and Allow Departure Orders*, on the ground that it infringes on the constitutional right to travel.

On May 25, 2010, then Acting DOJ Secretary Alberto C. Agra issued the assailed DOJ Circular No. 41, consolidating DOJ Circular Nos. 17 and 18, which govern the issuance and implementation of HDOs, WLOs, and ADOs.

After the expiration of GMA's term as President of the Republic of the Philippines an her subsequent election as Pampanga representative, criminal complaints were filed against her before the DOJ particularly plunder, malversation and/or illegal use of OWWA funds, illegal use of public funds, graft and corruption, violation of the OEC, violation of the Code of Conduct on Ethical Standards for Public Officials and qualified theft. In view of the foregoing criminal complaints, De Lima issued DOJ WLO No. 2011-422 against GMA pursuant to her authority under DOJ Circular No. 41. She also ordered for the inclusion of GMA's name in the Bureau of Immigration (BI) watchlist.

On October 20, 2011, two criminal complaints for Electoral Sabotage and Violation of the OEC were filed against GMA and her husband, Jose Miguel Arroyo. Following the filing of criminal complaints, De Lima issued DOJ WLO No. 2011-573 against GMA and Miguel Arroyo with a validity period of 60 days, unless sooner terminated or otherwise extended.

Meanwhile, in G.R. No. 197930, HDO No. 2011-64 was issued against Genuinos, among others, after criminal complaints for Malversation and Violation of Sections 3(e), (g), (h) an (i)

of R.A. No. 3019. The petitioners therein seek to annul and set aside the following orders issued by the former Secretary Leila De Lima, pursuant to the said circular.

ISSUES: 1) Whether the DOJ has the authority to issue Circular No. 41; and **2)** whether there is ground to hold the former DOJ Secretary guilty of contempt of Court.

HELD: 1) The issuance of DOJ Circular No. 41 has no legal basis. Sec 6, Art. 3 of the 1987 Constitution provides three considerations that may permit a restriction on the right to travel: **national security, public safety or public health**. As a further requirement, there must be an explicit provision of statutory law or the Rules of Court providing for the impairment.[1]

To begin with, *there is no law particularly providing for the authority of the secretary of justice to curtail the exercise of the right to travel.* To be clear, DOJ Circular No. 41 is not a law. It is not a legislative enactment which underwent the scrutiny and concurrence of lawmakers, and submitted to the President for approval. It is a mere administrative issuance apparently designed to carry out the provisions of an enabling law which the former DOJ Secretary believed to be Executive Order (E.O.) No. 292, otherwise known as the Administrative Code of 1987.

It is, however, important to stress that before there can even be a valid administrative issuance, there must first be a showing that the delegation of legislative power is itself valid. It is valid only if there is a law that (a) is complete in itself, setting forth therein the policy to be executed, carried out, or implemented by the delegate; and (b) fixes a standard the limits of which are sufficiently determinate and determinable to which the delegate must conform in the performance of his functions.

A painstaking examination of the provisions being relied upon by the former DOJ Secretary will disclose that they do not particularly vest the DOJ the authority to issue DOJ Circular No. 41 which effectively restricts the right to travel through the issuance of the WLOs and HDOs. *Sections 1 and 3, Book IV, Title III, Chapter 1 of E.O. No. 292 did not authorize the DOJ to issue WLOs and HDOs to restrict the constitutional right to travel*. There is even no mention of the exigencies stated in the Constitution that will justify the impairment. **The provision simply grants the DOJ the power to investigate the commission of crimes and prosecute offenders, which are basically the functions of the agency**. However, it does not carry with it the power to indiscriminately devise all means it deems proper in performing its

functions without regard to constitutionally-protected rights. The curtailment of fundamental right, which is what DOJ Circular No. 41 does, cannot be read into mentioned provision of the law.

As such, it is compulsory requirement that there be an **existing law, complete and sufficient in itself**, conferring the expressed authority to the concerned agency to promulgate rules. On its own, the DOJ cannot make rules, its authority being confined to execution of laws. The DOJ is confined to filling in the gaps and the necessary details in carrying into effect the law as enacted. Without a clear mandate of an existing law, an administrative issuance is *ultra vires.*

To sum, DOJ Circular No. 41 does not have an enabling law where it could have derived its authority to interfere with the exercise of the right to travel. Thus, the said circular is unconstitutional.

2) In view of the complexity of the facts and corresponding full discussion that it rightfully deserves, the Court finds it more fitting to address the same in a separate proceeding. It is in the interest of fairness that there be a complete and exhaustive discussion on the matter since it entails the imposition of penalty that bears upon the fitness of the respondent as a member of the legal profession. The Court, therefore, finds it proper to deliberate and resolve the charge of contempt against De Lima in a separate proceeding.

REPUBLIC OF THE PHILIPPINES v. MANALO

G.R. No. 221029. April 24, 2018.

FACTS: Respondent Marelyn Tanedo Manalo (Manalo) filed a petition for cancellation of entry of marriage in the Civil Registry of San Juan, Metro Manila, by virtue of a judgment of divorce rendered by the Japanese court. Manalo was allowed to testify. Among [i]the documents that were offered and admitted were: (1) Court Order finding the petition and its attachments to be sufficient in form and in substance; (2) Affidavit of Publication; (3) Certificate of Marriage between Manalo and her former Japanese husband; (4) Divorce Decree of the Japanese court; (5) Authentication/Certificate issued by the Philippine Consulate General in Osaka, Japan of the Notification of Divorce; and (6) Acceptance of Certificate of Divorce.

The Office of the Solicitor's General, as it appeared for the petitioner Republic of the Philippines, did not present any controverting evidence to rebut the allegations of Manalo. The trial court denied the petition for lack of merit. It opined that, based on Article 15 of the New Civil Code, the Philippine law "does not afford Filipinos the right to file for a divorce, whether they are in the country or living abroad, if they are married to Filipinos or to foreigners, or if they celebrated their marriage in the Philippines or in another country.

On appeal, the CA overturned the RTC decision. It held that Article 26 of the Family Code of the Philippines is applicable even if it was Manalo who filed for divorce against her Japanese husband because the decree they obtained makes the latter no longer married to the former capacitating him to remarry.

ISSUE: Whether or not the marriage between a foreigner and a Filipino was dissolved through a divorce filed abroad by the latter?

HELD: Yes. Article 26 of the Family Code reads:

> Art. 26. All marriages solemnized outside the Philippines, in accordance with the laws in force in the country where they were solemnized, and valid there as such, shall also be valid in this country, except those prohibited under Articles 35 (1), (4), (5) and (6), 3637 and 38.

> Where a marriage between a Filipino citizen and a foreigner is validly celebrated and a divorce is thereafter validly obtained abroad by the alien spouse capacitating him or her to remarry, the Filipino spouse shall have capacity to remarry under Philippine law. (As amended by Executive Order 227)

Paragraph 2 of Article 26 confers jurisdiction on the Philippine Courts to **extend the effect of a foreign divorce decree to a Filipino spouse without undergoing trial to determine the validity of the dissolution of the marriage**. It authorizes our courts to adopt the effects of a foreign divorce decree precisely because the Philippines does not allow divorce. Philippine courts cannot try the case on the merits because it is tantamount to trying a divorce case. Under the principles of comity, our jurisdiction recognizes a valid divorce obtained by a spouse of foreign nationality, but the legal effects thereof, e.g., on custody, care, and support of the children or property relations of the spouses, must still be determined by our court.

The Court state the twin elements for the application of Paragraph 2 of Article 26 as follows:

1. There is a valid marriage that has been celebrated between a Filipino citizen and a foreigner; and
2. A valid divorce is obtained abroad by the alien spouse capacitation him or her to remarry.

The reckoning point is not the citizenship of the parties at the time of the celebration of the marriage, but their citizenship *at the time a valid divorce is obtained abroad* by the alien spouse capacitating the latter to remarry.

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

The Court, however, asserts that it cannot yet write *finis* to this controversy by granting Manalo's petition to recognize and enforce the divorce decree rendered by the Japanese Court. Before a foreign divorce decree can be recognized by our courts, the party pleading it must prove the divorce as a fact and demonstrate its conformity to the foreign law allowing it.

The case is **REMANDED** to the court of origin for further proceedings and reception of evidence as to the relevant Japanese law on divorce.

IFURING v. CARPIO-MORALES, ET AL.

G.R. NO. 232131. April 24, 2018.

FACTS: Petitioner filed a Petition for *Certiorari* and Prohibition, in *propria persona*, seeks a declaration from the Court that Section 8(3) in relation to Section 7 of R.A. No. 6770, also known as the Ombudsman Act of 1989, is unconstitutional for being an outright transgression of Section 11, in relation to Secs. 8 and 10 of Article XI of the 1987 Constitution and all individual respondents as *de facto* Ombudsman and Deputies Ombudsman, respectively, and all these positions are vacant.

Petitioner maintains that the constitutional issue raised in this petition is of transcendental importance since this Court's ruling will finally determine the correct term and tenure of the Ombudsman and his deputies and settle the matter as to the constitutionality of Sec. 8(3) of R.A. No. 6770.

Petitioner alleges that assailed provision which gives the newly appointed Ombudsman and his deputies the appointment to a full term of seven (7) years, is constitutionally infirm. Moreover, he alleges that the successor to the positions of the Ombudsman and deputies should serve only the unexpired term of the predecessor.

He claims that Ombudsman Morales should have ceased to hold office on 1 February 2015 considering that the unexpired term of the supposed fourth seven-year term ended on that date; thus, Ombudsman Morales has been holding the position in a *de facto* capacity since February 2, 2015 up to the present. This observation, petitioner claims, holds true with the other respondent deputies.

Respondents, through the Office of the Solicitor's General, claim that the petitioner failed to appreciate the *verba legis* approach to constitutional construction. Respondents allege that the deliberations of the framers of the Constitution reveal their intent to grant the Ombudsman and his deputies the same rank and salary as the Chair and members of the Constitutional Commissions but not by the staggered term.

ISSUE: Whether or not Sec 8(3) of R.A. No. 6770 is constitutional?

HELD: Yes. The pertinent provisions read:

> **Section 7.** ***Term of Office.*** **–** The Ombudsman and his Deputies, including the Special Prosecutor, shall serve for a term of seven (7) years without reappointment.
>
> **Section 8.** ***Removal; Filling of Vacancy.*** **–**
>
> ***xxx***
>
> (3) In case of vacancy in the Office of the Ombudsman due to death, resignation, removal or permanent disability of the incumbent Ombudsman, the Overall Deputy shall serve as Acting Ombudsman in a concurrent capacity **until a new Ombudsman shall have been appointed for a full term**. In case the Overall Deputy cannot assume the role of Acting Ombudsman, the President may designate any of the Deputies, or the Special Prosecutor, as Acting Ombudsman.

On the one hand, Sec. 11, Art. XI of the 1987 Constitution reads:

Sec. 11. The Ombudsman and his Deputies shall serve for a term of seven years without reappointment. They shall not be qualified to run for any office in the election immediately succeeding their cessation from office.

The quoted provisions of the Constitution is clear and explicit: (a) the Ombudsman and the deputies shall serve the term of seven years; (b) that the Ombudsman and the deputies shall not be reappointed; and (c) the Ombudsman and the deputies shall not run for any office in the election immediately succeeding their cessation from office.

Contrary to the position of the petitioner, Sec. 11, Art. XI by itself is clear and can stand on its own. This can only mean that it was the intent of the framers that the appointment to the positions of the Ombudsman and the deputies, ***whether it be for the expired or unexpired term of the predecessor, shall always be for a full term of seven years.*** *Ubi lex non distinguit nec nos distinguere debemus*. Basic is the rule in statutory construction that where the law does not distinguish, the courts should not distinguish.

On the similarity between the Ombudsman and the deputies on one hand, and the chairman and the members of the constitutional commission on the other pursuant to Sec 10, Art. XI, it is only with reference to "salary" and "rank" that the Ombudsman and his deputies should

be similar to the chairman and the members of the constitutional commission. Thus, rules on term are not included contrary to what Petitioner claims.

The Court rules that the petitioner has miserably failed to prove that Sec. 8(3) of R.A. No. 6770 transgresses the provisions of the 1987 Constitution.

REPUBLIC OF THE PHILIPPINES v. SERENO

G.R. No. 237428. May 11, 2018.

FACTS: The Respondent served as a professor at the U.P College of Law until 2006, and thereafter as practitioner in various outfits including as legal counsel for the Republic until 2009. She also submitted her application for the position of Associate Justice of the Supreme Court in July 2010. A month after, or on August 13, 2010, respondent was appointed by then President Benigno C. Aquino III as Associate Justice, and on August 16, 2010, respondent took her oath of office as such.

The position of the Chief Justice was declared vacant in 2012. The JBC announcement was preceded by an *En Banc* meeting held on June 4, 2012 wherein the JBC agreed to require the applicants for the Chief Justice position to submit, instead of the usual submission of the SALNs for the last two years of public service, **all previous SALNs** up to December 31, 2011 for those in government service.

Respondent accepted several nominations for the position of Chief Justice and in support of her nomination, respondent submitted to the ORSN her SALNs for the year 2009, 2010, and 2011. Respondent also executed a waiver of confidentiality of her local and foreign bank accounts.

On the scheduled date of the interview on July 24, 2012, despite respondent's submission of only 3 SALNs, Atty. Pascual prepared a Report – Re: Documentary Requirements and SALN of candidates for the Position of Chief Justice of the Philippines wherein respondent was listed as applicant No. 14 with an opposite annotation that she has "COMPLETE REQUIREMENTS" and a note stating "Letter 7/23/12 – considering that her government records in the academe are more than 15 years old, it is reasonable to consider it infeasible to retrieve all those files."

A month after respondent's acceptance of her nomination, or on August 24, 2012, respondent was appointed by then President Aquino III as Chief Justice of the Supreme Court.
On August 30, 2017, or five years after respondent's appointment as Chief Justice, an impeachment complaint was filed by Atty. Larry Gadon against respondent with the Committee on Justice of the House of Representatives for culpable violation of the Constitution, corruption,

high crimes, and betrayal of public trust. The complaint also alleged that respondent failed to make truthful declarations in her SALNs.

The Republic accordingly seeks the nullification of respondent's appointment, asserting that her failure to file the required disclosures and her failure to submit the same to the Judicial and Bar Council show that she is not possessed of "proven integrity" demanded of every aspirant to the Judiciary. As such, Petitioner file a case for *quo warranto* against the incumbent Chief Justice as ineligible to hold the highest post in the Judiciary for failing to regularly disclose her assets, liabilities and net worth as a member of the career service prior to her appointment as an Associate Justice, and later as Chief Justice, of the Supreme Court, in violation of the Constitution, the Anti-Graft Law, and the Code of Conduct and Ethical Standards for Public Officials and Employees.

ISSUES:

1) Whether the Court can assume jurisdiction and give due recourse to the instant petition for *quo warranto* against respondent who is an impeachable officer and against whom an impeachment complaint has already been filed with the House of Representatives

2) Whether the petition is outrightly dismissible on the ground of prescription

3) Whether respondent failed to comply with the submission of SALNs as required by the JBC; and if so, whether the failure to submit SALNs to the JBC voids the nomination and appointment of respondent as Chief Justice

HELD: 1) The Court has jurisdiction over the instant Petition for Quo Warranto.

Section 5, Article VIII of the Constitution, in part, provides that the Supreme Court shall exercise original jurisdiction over petitions for *certiorari, prohibition, mandamus, quo warranto, and habeas corpus.* Relatedly, **Section 7, Rule 66 of the Rules of Court** provides that the venue of an action for *quo warranto,* when commenced by the Solicitor General, is either the Regional Trial Court in the City of Manila, in the Court of Appeals, or in Supreme Court. In the instant case, direct resort to the Court is justified considering that the action for *quo warranto* questions the qualification of no less than a Member of the Court. The issue of whether a person usurps, intrudes into, or unlawfully holds or exercises a public office is a matter of public concern over which the government takes special interest as it obviously cannot allow an intruder or impostor

to occupy a public position. Further, it is apparent that the instant petition is one of *first impression and of paramount importance to the public* in the sense that the qualification, eligibility and appointment of an incumbent Chief Justice, the highest official of the Judiciary, are being scrutinized through an action for *quo warranto.*

Moreover, *quo warranto* and impeachment can proceed independently and simultaneously. The term "*quo warranto*" is Latin for "by what authority." Therefore, as the name suggests, *quo warranto* is a writ of inquiry. It determines whether an individual has the legal right to hold the public office he or she occupies. As such, judgment is limited to ouster or forfeiture and may not be imposed retroactively upon prior exercise of official or corporate duties. *Quo warranto* and impeachment are, thus, not mutually exclusive remedies and may even proceed simultaneously. *The existence of other remedies against the usurper does not prevent the State from commencing a quo warranto proceeding.*

On another issue, there can be no forum shopping in this case despite the pendency of the impeachment proceedings before the House of Representatives. The cause of action in the two proceedings are unequivocally different. Likewise, the reliefs sough in the two proceedings are different. In short, respondent in a *quo warranto* proceeding shall be adjudged to cease from holding a public office, which he/she is ineligible to hold. On the other hand, in impeachment, a conviction for the charges of impeachable offenses shall result to the removal of the respondent from the public office that he/she is legally holding. In fine, forum shopping and *litis pendentia* are not present and a final decision in one will not strictly constitute as *res judicata* to the other.

2) No. Prescription does not lie against the State. Reference must necessarily be had to Section 3, Rule 66 which makes it compulsory for the Solicitor General to commence a *quo warranto* action:

> Sec. 2. When Solicitor General or public prosecutor must commence action. – The Solicitor General or a public prosecutor, when directed by the President of the Philippines, or when upon complaint or otherwise he has good reason to believe that any case specified in the preceding section can be established by proof must commence such action.

In the case of *People ex rel. Moloney v. Pullman's Palace Car Co.,* the Court emphasize that the State is not bound by statute of limitations nor by laches, acquiescence or unreasonable delay on the part of its officer. Moreover, jurisprudence across the United States likewise richly reflect that **when the Solicitor General files a *quo warranto* petition in behalf of the people and where the interests of the public is involved, the lapse of time presents no effective bar.**

Lastly, prescription does not lie in this case which can be deduced from the very purpose of an action for *quo warranto*. In *People vs. City Whittier,* it explains that the remedy of *quo warranto* is intended to prevent a continuing exercise of an authority unlawfully asserted. Indeed, *quo warranto* serves to end a continuous usurpation. Thus, no statute of limitation applies to the action. Needless to say, no prudent and just court would allow an unqualified person to hold public office, much more the highest position in the Judiciary.

Finally, it bears to stress that this Court finds it more important to rule on the merits of the novel issues imbued with public interest presented before the Court than to dismiss the case outright merely on technicality.

3) Respondents chronically failed to file her SALNs and thus violated the Constitution, the law and the Code of Judicial Conduct. A member of the Judiciary who commits such violations cannot be deemed to be a person of proven integrity. Also, the invalidity of respondent's appointment springs from her lack of qualifications. Her inclusion in the shortlist of candidates for the position of Chief Justice does not negate, nor supply her with the requisite proof of integrity. She should have been disqualified at the outset.

It must be underscored that the JBC En Banc included respondent in the shortlist for the position of Chief Justice without deliberating her **July 23, 2012 Letter**. Without prejudice to this Court's ruling in A.M. No. 17-11-12-SC and A.M. No. 17-11-17-SC, the JBC *En Banc* cannot be deemed to have considered respondent eligible because *it does not appear that respondent's failure to submit her SALNs was squarely addressed by the body*. Her inclusion in the shortlist of nominees and subsequent appointment to the position do not estop the Republic or this Court from looking into her disqualifications.

Verily, no estoppel arises where the representation or conduct of the party sought to be estopped is due to ignorance founded upon an innocent mistake. Again, without prejudice to the

outcome of the pending administrative matter, it appears that respondent's inclusion was made under the erroneous belief that she complied with all the legal requirements concomitant to the position.

Moreover, as the qualification of proven integrity goes into the barest standards set forth under the Constitution to qualify as a Member of the Court, the subsequent nomination and appointment to the position will not qualify and otherwise excluded candidate. In other words, the inclusion of respondent in the shortlist of nominees submitted to the President cannot override the minimum Constitutional qualifications. Neither will the President's act of appointment cause to qualify respondent. To reiterate with emphasis, when the JBC mistakenly or wrongfully accepted and nominated respondent, the President, through his alter egos in the JBC, commits the same mistake and the President's subsequent act to appoint respondent cannot have any curative effect.

The **Petition for *Quo Warranto*** is **GRANTED.** Respondent Maria Lourdes A. Sereno is found **DISQUALIFIED** from and is hereby adjudged **GUILTY of UNLAFULLY HOLDING and EXERCISING THE OFFICE OF THE CHIEF JUSTICE.** Accordingly, Respondent is **OUSTED** and **EXCLUDED** therefrom.

RE: SHOW CAUSE ORDER IN THE DECISION DATED MAY 11, 2018 IN G.R. NO. 237428 (REPUBLIC OF THE PHILIPPINES, REPRESENTED BY SOLICITOR GENERAL JOSE C. CALIDA v. MARIA LOURDES P.A SERENO)

A.M. No. 18-06-01-SC. JULY 17, 2018.

FACTS: The instant administrative matter is an offshoot of Republic of the Philippines v. Maria Lourdes P. A. Sereno, hereinafter referred to as the *quo warranto* case or proceedings against Sereno.

Respondent contends that she should not be judged on the stringent standards set forth in the CPR and NCJC, emphasizing that her participation in the *quo warranto* case is not as counsel or a judge as a party-litigant and that the imputed acts against respondent did not create any serious and imminent threat to the administration of justice to warrant the Court's exercise of its power of contempt in accordance with the "clear and present danger" rule.

ISSUE: May respondent be held administratively liable for her actions and public statements as regards the *quo warranto* case against her during its pendency?

HELD: Yes. The Court found respondent miserably failed to discharge her duty as a member of the Bar to observe and maintain the respect due to the court and its officers. Specifically, respondent violated CANON 11 of the CPR, which states that:

CANON 11- A LAWYER SHALL BE OBSERVE AND MAINTAIN THE RESPECT DUE TO THE COURTS AND TO JUDICIAL OFFICERS AND SHOULD INSIST ON SIMILAR CONDUCT BY OTHERS.

The Court is, thus, reluctant to accept respondent's position that she should be treated as an ordinary litigant in judging her actions. The fact that respondent was not the judge nor the counsel but a litigant in the subject case does not strip her off her membership in the Bar, as well as her being a Member and the head of the highest court of the land at that time. Her being a litigant does not mean that she was free to conduct herself in less honorable manner than that expected of a lawyer or a judge.

Sub Judice Rule

Sub Judice is a Latin term which refers to matters under or before a judge or court; or matters under judicial consideration. In essence, the *sub judice* rule restricts comments and disclosures pertaining to pending judicial proceedings. The restriction applies to litigants and witness, the public in general, and most especially to members of the Bar and the Bench. All told, respondent's reckless behavior of imputing ill motives and malice to the Court's process is plainly evident in the present case. Her public statements covered by different media organizations incontrovertibly brings the Court in a position of disrepute and disrespect, a patent transgression of the very ethics that members of the Bar are sworn to uphold.

Respondent's liability having been established

The Court, in exercising its disciplinary authority in administrative matters, has always kept in mind that lawyers should not be hastily disciplined or penalized. Despite the severity of the offenses committed by respondent, the Court are constrained to suspend the application of the full force of the law and impose a lighter penalty. Mindful of the fact that respondent was removed and disqualified as Chief Justice as a result of *quo warranto* proceedings, suspending her further from the law practice would be too severe to ruin the career and future of respondent. The Court is also not inclined to merely disregard respondent's length of service in the government, specifically, when she was teaching in the University of the Philippines, as well as during her incumbency in this Court. Further, the fact that, per available record, respondent has not been previously found administratively liable is significant in determining the imposable penalty. These factors have always been considered by the Court in the determination of proper sanctions in such administrative cases.

The Court after deep reflection and deliberation, in lieu of suspension, respondent is meted the penalty of REPRIMAND with a STERN WARNING.