THE FAR EASTERN LAW REVIEW

The Annual Publication of the Institute of Law

VOLUME NO. 49 • 2019

INSTITUTE OF LAW'S BEST THESES - 2018 & 2019

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and Its Implications on The Right To Privacy
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LAW REVIEW

The Far Eastern Law Review is the official law journal of the Far Eastern University Institute of Law. It is published annually by the FEU Law Review Editorial Board composed of law students from the Institute.

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MESSAGE

The FEU Law Journal has been publishing articles that have been either informative, insightful or provocative. This issue is not an exception.

I am sure that the articles in this volume will continue to contribute to the enrichment of our knowledge of various laws and, again, will certainly find curious and open-minded law students, lawyers, and magistrates searching for new perspectives and nuances in the laws' application.

I encourage all to read the articles. I am sure you will find them scholarly and at the same time interesting.

MELENCIO STA.MARIA

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THE FAR EASTERN
LAW REVIEW
An Annual Publication of the Institute of Law

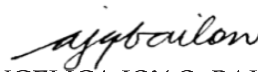
In 2014, the Far Eastern University – Institute of Law welcomed its doors to the Juris Doctor program. An integral part of the Juris Doctor degree is the completion of a legal thesis. In 2018, the FEU – Institute of Law's first batch of JD students submitted and defended their legal thesis; thereby composing the first set of Juris Doctor graduates of the University.

The Far Eastern Law Review is proud to recognize the maiden batches of the Institute's Thesis Program by featuring in this issue the Three (3) respective Best Thesis Awardees of Academic Years 2017-2018 and 2018-2019.

With this feature, the Far Eastern Law Review presents to the legal academic world the emergence of the FEU – Institute of Law as a nest of quality discourse on academic and legal issues and questions of the present times.

We, the editors of the Far Eastern Law Review, hope that this issue will help the present and future students of the Institute of Law to aspire to do more and be more in exploring and resolving legal issues and questions in their own theses when their time comes.

The reader must take note that the theses presented in this issue are abridged versions of the original thesis papers submitted by the respective authors to the Institute. The original, unabridged versions of the articles in this issue are available at the FEU Makati Law Library. Any abridgment, omission, or change in the Law Review version of the papers were undertaken by the Far Eastern Law Review by virtue of the authority given by thesis proponents of the Institute of Law to the University to publish their papers in any form or part for any purpose.



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Cosmetic Surgery Tax and its Implications on the Right to Privacy of Patients and the Physician-Patient Confidentiality Rule

Norhaisah A. Calbe

Best Thesis, 2019

Introduction

Cliché as it may sound, but tax is the lifeblood of the government. The taxes are vital for the government in order to perform its functions and for a nation to be sustained. Without them, the government will not have enough funds which are necessary to finance its programs and projects, buildings, infrastructures, and other administrative costs in carrying out its services. This is the reason that the government, through the Bureau of Internal Revenue (BIR), does its best to maximize the full potential of generating revenues through the taxes from various goods, services, and people's income.

Taxes come in different forms. One of them is the excise tax. A unique characteristic of the excise tax is that it can be designed to control externalities and to impose tax burdens on those who benefit from government spending. Rather more controversially, excise tax also can be used to discourage consumption of potentially harmful substances (such as tobacco and alcohol) that individuals may abuse in the absence of taxation.

Cosmetic surgery tax is one of the newly imposed indirect taxes under the recently signed Republic Act (RA) No. 10963, otherwise known as the Tax Reform for Acceleration and Inclusion (TRAIN) last December 2017. It is an excise tax of 5% on the gross receipts on invasive cosmetic procedures, surgeries, and body enhancements for aesthetic purposes.[1]

Before the ultimate inclusion of the 5% cosmetic surgery tax among the taxes on non-essential services, there had already been a motion to drop it from the Senate Bill No. 1408 in recognition of the *right of certain persons to improve their appearance.*[2] In the end, the collection

[1] An Act Amending Sections 5, 6, 24, 25, 27, 31, 32, 33, 34, 51, 52, 56, 57, 58, 74, 79, 84, 86, 90, 91, 97, 99, 100, 101, 106, 107, 108, 109, 110, 112, 114, 116, 127, 128, 129, 145, 148, 149, 151, 155, 171, 174, 175, 177, 178, 179, 180, 181, 182, 183, 186, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 232, 236, 237, 249, 254, 264, 269, AND 288; CREATING NEW SECTIONS 51-A, 148-A, 150-A, 150-B, 237-A, 264-A, 264-B, AND 265-A; AND REPEALING SECTIONS 35, 62, AND 89; all under Republic Act No. 8424, otherwise known as the National Internal Revenue Code of 1997, as amended, and for other purposes [Tax Reform for Acceleration and Inclusion (TRAIN)], Republic Act No. 10963, § 150-A (2017).

[2] Maila Ager, *Senate drops cosmetic surgery tax from tax reform bill*, INQUIRET.NET, Nov. 22, 2017, *available at* http://newsinfo.inquirer.net/946918/senate-cosmetic-surgery-tax-reform-bill (last accessed Oct. 17, 2018).

of taxes was more compelling to the legislators, thereby it was included. The interest of the government in the imposition of such was more inclined on the generation of revenue. However, given the nature of excise taxes, which was to reduce consumption of certain goods and services, cosmetic surgery tax means to discourage these procedures.

Also, in a research conducted by the National Tax Research Center (NTRC) prior to its imposition, the cosmetic surgery tax was deemed as a good revenue source for the government because the cosmetic industry is considered a booming industry in the Philippines.[3] It also emphasized that if the proposed tax should push through, the BIR should have proper coordination with cosmetic surgery providers to ensure that the proposed tax would serve its purpose of providing additional revenue to the government. There should be an effective tax enforcement plan to ensure that the optimal revenue is collected.[4]

While the proceeds from taxing this industry may help increase government revenue and finance health related programs and projects, the interest of the individual patients may be compromised. Hereby, the adoption of the *strict scrutiny standard* and the *balancing of interest test* may be valid. In a Supreme Court opinion, the *balancing test*, a concept analogous to the form of *strict scrutiny* employed by courts of the United States, was deemed applicable in the face of conflict between the individual interest of a petitioner (i.e. who asserts right to privacy) and the legitimate concern of his government agency employer to perform official functions.[5]The *balancing of interest test* has been explained by Professor Kauper, viz:

> The theory of balance of interests represents a wholly pragmatic approach to the problem of First Amendment freedom, indeed, to the whole problem of constitutional interpretation. It rests on the theory that is the Courts function in the case before it when it finds public interests served by legislation on the one hand and First Amendment freedoms, by it on the other, to balance that one against the other and to arrive at a judgment where the greater weight shall be placed. If on balance it appears that the public interest served by restrictive legislation is of such a character that it outweighs the abridgment of freedom, then the Court will find the legislation valid. In short, the balance-of-interests theory rests on the basis that constitutional freedoms are not absolute, not even

[3] Eva Marie T. Nejar, *Feasibility of Imposing Excise Tax on Cosmetic Medical Procedures,* NTRC TAX RESEARCH JOURNAL, Volume XXVI.4, July-August 2014 *available at* http://www.ntrc.gov.ph/images/journal/j20140708a.pdf (last accessed Sept. 20, 2018).
[4] *Id.*
[5] Helen L. Gilbert, *Minors Constitutional Right to Informational Privacy,* 74 THE UNIV. OF CHICAGO LAW JOURNAL 1375, (2007).

> those stated in the First Amendment, and that they may be abridged to some extent to serve appropriate and important interest.[6]

In this paper, the author aims to examine the balancing of interest between the imposition and enforcement of excise tax on cosmetic surgeries in the Philippines in relation to the consumer's right to privacy, and to evaluate the legality aspects of the said tax on the patients' most valued right. By doing so, it hoped to help the Bureau of Internal Revenue (BIR) in the creation of its revenue regulations regarding cosmetic surgery tax and to enlighten the lawmakers on the importance of the protection of the right to privacy. It also seeks to resolve the legal issue on *whether the cosmetic surgery tax indeed violates the right to privacy of the patients and the physician-patient confidentiality rule.*

Defining Cosmetic Surgery

Cosmetic Surgery, Plastic Surgery, and Reconstructive Surgery

Plastic, reconstructive, and *cosmetic* surgery are highly specialized types of surgery, which refer to a variety of operations performed in order to repair or restore body parts to look normal, or to change a body part to look better.[7]

Plastic surgery, as defined by the American Society of Plastic Surgeons, deals with the repair, reconstruction, or replacement of physical defects of form or function involving the skin, musculoskeletal system, craniomaxillofacial structures, hand, extremities, breast and trunk, or external genitalia.[8] It is a surgical specialty dedicated to reconstruction of facial and body defects due to birth disorders, trauma, burns, and disease.[9] Plastic surgery is categorized into *cosmetic surgery* and *reconstructive surgery*.

The American Academy of Cosmetic Surgery (AACS) defined *cosmetic surgery* as a unique discipline of medicine focused on enhancing appearance through surgical and medical

---

[6] Pollo v. Constantino-David, 659 SCRA 189, J. Bersamin Concurring and Dissenting Opinion, cited in Gonzales v. COMELEC, 27 SCRA 835, 899 (1969).

[7] Encyclopedia of Surgery, Plastic, reconstructive and cosmetic surgery*, available at* https://www.surgeryencyclopedia.com/Pa-St/Plastic-Reconstructive-and-Cosmetic-Surgery.html#ixzz5V1KpB811 (last accessed Oct. 17, 2018).

[8] *Id.*

[9] *Id.*

techniques.[10] The procedures, techniques, and principles of cosmetic surgery are entirely focused on enhancing a patient's appearance.[11]

Cosmetic surgery is further classified into *invasive* and *non-invasive cosmetic procedures*. *Invasive cosmetic procedure* refers to a surgery that is carried out by entering the body through the skin or through a body cavity or anatomical opening, but with the smallest damage possible to these structures.[12] On the other hand, *non-invasive cosmetic procedure* refers to a conservative treatment that does not require incision into the body or the removal of tissue, or when no break in the skin is created and there is no contact with mucosa, or skin break, or internal body cavity beyond a natural or artificial body orifice.[13]

Reconstructive surgery refers to another type of plastic surgery which aims to improve function and give a normal appearance to a part of a person's body that has been damaged, ameliorate a deformity arising from, or directly related to, a congenital or developmental defect or abnormality, a personal injury resulting from accident or trauma, or disfiguring disease, tumor, virus or infection. It is focused totally on reconstructing the form of the body after trauma or defect. It is often performed on burn and accident victims.[14]

It is important to differentiate cosmetic surgery and reconstructive surgery because the cosmetic surgery tax only covers the former and not the reconstructive surgery.

Cosmetic Surgery Tax: Legislative History

The Tax Reform for Acceleration and Inclusion (TRAIN) Act, the first package of the Comprehensive Tax Reform Program (CTRP), was first submitted by the Department of Finance (DOF) to the Congress on 26 September and was filed as House Bill (HB) 4774 in January 2017 by Quirino Rep. Dakila Carlo Cua, the chairman of the House Ways and Means Committee that is in charge of writing tax laws.[15]

[10] American Acamedy of Cosmetic Surgery. About Cosmetic Surgery: Frequently Asked Questions About Cosmetic Surgery, *available at https://www.cosmeticsurgery.org/page/CosmeticSurgery* (last accessed Oct. 17 2018).
[11]American Board of Cosmetic Society, Cosmetic Surgery vs. Plastic Surgery, *available at* https://www.americanboardcosmeticsurgery.org/patient-resources/cosmetic-surgery-vs-plastic-surgery/, (last accessed Oct. 17 2018).
[12] Nejar, *supra* note 3, at 2.
[13] Nejar, *supra* note 3, at 2.
[14] Encyclopedia, *supra* note 7.
[15] *PRRD certifies tax reform bill as urgent,* May 29, 2017, *available at* http://www.dof.gov.ph/taxreform/index.php/2017/05/29/prrd-certifies-tax-reform-bill-as-urgent/ (last accessed Oct. 17, 2018).

A Senate version of the measure was also filed as Senate Bill No. 1408 by Senate President Aquilino Pimintel on March 2017.[16] The Senate proposed a 20-percent tax on "non-essential" services, including cosmetic procedures and surgeries. During the plenary deliberations on the tax bill, the Senators reached a compromise, reducing the 20% tax to 10% that would be imposed on aesthetic procedures or operations. [17] On 28 November 2017, the Senate approved the TRAIN bill, 17 voting for and 1 against.[18]

Since the cosmetic surgery tax was not included in the version of the House of Representatives on tax reform bill, this was met with strong resistance from the House during the bicameral discussions. After deliberations, the Bicameral conference committee, reconciling the tax reform legislation, has agreed to impose a 5% tax on cosmetic surgery procedures.[19] On 11 December 2017, the committee approved the bill which favored the Senate version and prepared a report after ratification of both chambers of the Congress and signing of the President.[20]

Finally, on 19 December 2017, President Rodrigo Duterte signed into law Republic Act No. 10963, otherwise known as the Tax Reform for Acceleration and Inclusion (TRAIN) Act, as the first package of the Comprehensive Tax Reform Program (CTRP).[21]

Cosmetic Surgery Tax Rate and Base

Imposed under Section 150-A of the TRAIN Law, the cosmetic surgery tax is an *excise tax* levied, assessed, and collected equivalent to *five percent (5%)* based on the *gross receipts* derived from the performance of services, *net of excise tax and value added tax* on *invasive cosmetic procedures, surgeries*, and *body enhancements* directed solely towards improving, altering, or enhancing the patient's appearance and do not meaningfully promote the proper function of the body or prevent or treat illness or disease.[22]

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[16] *Id.*

[17] Camille Elemia, *After heated debate, senator approve 10% tax on cosmetic surgeries*, RAPPLER, Nov. 27, 2017, https://www.rappler.com/nation/189676-senators-debate-cosmetic-surgery-tax-vicki-belo (last accessed Oct. 17, 2018).

[18] *Id.*

[19] Arjay L. Balinbin, *Tax Bicam sets 5% excise for cosmetic procedures*, BUSINESSWORLD, December 9, 2017, *available* at https://www.bworldonline.com/tax-bicam-sets-5-excise-cosmetic-procedures-drilon/ (last accessed Oct. 17, 2018).

[20] Jovee Marie de la Cruz, et. al., *TRAIN passes with Senate having its way in bicam*, BUSINESSMIRROR, Dec. 11, 2017 *available at* https://businessmirror.com.ph/train-passes-with-senate-having-its-way-in-bicam/ (last accessed Oct. 17, 2018).

[21] The Department of Finance, *The Tax Reform for Acceleration and Inclusion (TRAIN) Act*, Dec. 27, 2017, *available at* https://www.dof.gov.ph/index.php/ra-10963-train-law-and-veto-message-of-the-president/ (last accessed Oct. 17, 2018).

[22] Section 46. A new section designated as Section 150-A under Chapter, Title VI of the NIRC is hereby inserted to read as follows:

Draft Revenue Regulation: "Prescribing the Implementing Rules and Guidelines on the imposition of Excise Tax Treatment on Invasive Cosmetic Procedures Pursuant to Section 46 of Republic Act No. 10963, otherwise known as the "Tax Reform for Acceleration and Inclusion (TRAIN) Law"[23]

The BIR issued the proposed draft Revenue Regulations (RR) and presented the same to the public for consultations last January 11-12, 2018 before implementing the foregoing on January 5, 2018. However, as of this writing, the Bureau of Internal Revenue has yet to provide any updates on the draft Revenue Regulation that will properly guide taxpayers in paying the required tax under the amended provision of the new law.[24]

According to the draft RR, the cosmetic surgery tax shall cover any person, whether individual or juridical entity, performing invasive medical/cosmetic procedures, surgeries, body enhancements directed solely on improving, altering, or enhancing the patient's appearance and do not meaningfully promote the proper functions of the body or prevent or treat illness.

In the draft RR, *invasive cosmetic procedure* was referred to as a surgery that is carried out by entering the body through the skin or through a body cavity or anatomical opening, but with the smallest damage possible to these structures. [25]

On the other hand, *non-invasive cosmetic procedure* was referred as a conservative treatment that does not require incision into the body or the removal of tissue, or when no break in the skin is created and there is no contact with mucosa, or skin break, or internal body cavity beyond a natural or artificial body orifice. [26]

"Sec. 150-A. *Non-essential Services* – There shall be levied, assessed, and collected a tax equivalent to five percent (5)% based on the gross receipts derived from the performance of services, net of excise tax and value added tax on invasive cosmetic procedures, surgeries, and body enhancements directed solely towards improving, altering, or enhancing the patient's appearance and do not meaningfully promote the proper function of the body or prevent or treat illness or disease: *Provided,* That this tax shall not apply to procedures necessary to ameliorate a deformity arising from, or directly related to, a congenital or developmental defect or abnormality, a personal injury resulting from an accident or trauma, or disfiguring disease, tumor, virus or infection: *Provided, further,* That cases or treatments covered by the National Health Insurance Program shall not be subject to this tax."

[23] Bureau of Internal Revenue, Draft Revenue Regulations for Public Consultation, *available at* https://www.bir.gov.ph/images/bir_files/internal_communications_1/TRAIN%20matters/RR%20CP%20TAX%20FOR%20PUBLIC%20CONSULTATION.pdf (last accessed Sep. 20, 2018).

[24] Cassandra Andreia Gabion, *Taxing vanity*, MANILA TIMES, Feb. 5, 2018, *available at* https://www.manilatimes.net/taxing-vanity/378274/ (last accessed Oct. 17, 2018).

[25] Bureau of Internal Revenue, Draft Revenue Regulation (RR): "Prescribing the Implementing Rules and Guidelines on the imposition of Excise Tax Treatment on Invasive Cosmetic Procedures Pursuant to Section 46 of Republic Act No. 10963, otherwise known as the "Tax Reform for Acceleration and Inclusion (TRAIN) Law", *available at* https://www.bir.gov.ph/images/bir_files/internal_communications_1/TRAIN%20matters/RR%20CP%20TAX%20FOR%20PUBLIC%20CONSULTATION.pdf, § 2.4.

[26] Draft RR, § 2.5.

The invoicing requirements, which every person subject to excise tax, shall issue are stated as follows:

> 6.3.1 Invoicing Requirements. – Every person subject to excise tax herein imposed shall issue:
>
> 1. An Official Receipt for services performed whether invasive/non-invasive.
>
> 2. The following information shall be indicated in the Official Receipt:
>
> a. The total amount which the patient/client pays or is obligated to pay to the service provider including the excise tax and value added tax: Provided, that:
>
> 1. The amount of excise tax shall be shown as a separate item in the OR;
>
> 2. Discounts given shall be indicated in the OR, otherwise the same shall not be allowed as deduction from gross receipts;
>
> 3. If the procedure performed is non-invasive and considered exempt from excise tax, the term Exempt from Excise Tax shall be shown on the OR;
>
> 4. If the services performed involved both invasive (excisable) and noninvasive (exempt from excise tax) procedures, the receipt shall clearly indicate the breakdown of the amount received between its taxable and exempt components and the calculation of excise tax on each portion of the procedure performed shall be shown on the receipt: Provided, that the service provider may issue separate ORs for the excisable and exempt components of the services rendered.[27]

The BIR further requires the affected taxpayers, in addition to regular accounting records required, maintain a *subsidiary ledger* on which every service rendered/performed on any given day is recorded.[28] The subsidiary ledger shall contain the following information:

1. Name of Patient;
2. Taxpayers Identification Number;
3. Invasive Cosmetic Procedures Performed;
4. Non-Invasive Cosmetic Procedures Performed;

[27] Draft RR, § 6.3.1.
[28] *Id.,* §.6.3.2.

5. Official Receipts Number;
6. Gross Receipts (net of VAT and 5% excise tax)
7. 5%Excise Tax to be Withheld and Remitted
8. 12% VAT Due
9. Total Amount to be Collected from Customer (sum of 6, 7 and 8)
10. Remarks (description of cosmetic procedure performed) [29]

Right to Privacy: Decisional and Informational

Privacy is the ability and/or right to protect your personal secrets; it extends to the ability and/or right to prevent invasions of your personal space.[30] Black's Law Dictionary says that 'right to privacy' is a generic term encompassing various rights recognized to be inherent in concept of ordered liberty, and such rights prevent government interference in intimate personal relationship's or activities, freedoms of individual to make fundamental choices involving himself, his family, and his relationship with others.[31]

The concept of right to privacy was introduced by two young Boston lawyers, Samuel Warren and Louis Brandeis, in their famous article entitled 'The Right to Privacy', which was published in 1890 in the Harvard Law Review.[32] Warren and Brandeis originally described the right to privacy as an already existing common law right which embodied protections for each individual's 'inviolate personality'.[33] "The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others . . . fixing the limits of the publicity which shall be given them."[34]

[29] *Id.*
[30] Annicka Gunnarsson Siri Ekberg, Invasion of Privacy: Spam – one result of bad privacy protection, at 3 (May 26, 2003) (published master thesis, Blekinge Institute of Technology) *available at* https://www.divaportal.org/smash/get/diva2:832773/FULLTEXT01.pdf (last accessed Sept. 20, 2018).
[31] Tripathi, Shivnath, Right to Privacy as a Fundamental Right: Extent and Limitations (June 17, 2017), *available at* SSRN: https://ssrn.com/abstract=2273074 or http://dx.doi.org/10.2139/ssrn.2273074 (last accessed September 20, 2018).
[32] Dorothy J. Glancy, *The Invention of the Right to Privacy,* Arizona Law Review, (1979).
[33] *Id.,* at 2.
[34] *Id.*

To its inventors, the right to privacy meant that each individual had the *right to choose to share or not to share with others information about his or her "private life, habits, acts, and relations."*[35]

Justice Louis Brandeis, in his dissenting opinion in the case of *Olmstead v. United States*,[36] described the right to be alone as "the most comprehensive of rights and the right most valued by civilized men."[37] He explained that:

> The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, *the right to be let alone—the most comprehensive of rights and the right most valued by civilized men*. To protect that right, *every unjustifiable intrusion by the Government upon the privacy of the individual*, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth. [38]

This right encompasses a wide range of rights—including protection from intrusions into family and home life, control of sexual and reproductive rights, and communications secrecy.[39] The right to privacy is central to the protection of human dignity and forms the basis of any democratic society.[40] It also supports and reinforces other rights, such as freedom of expression, information and association.

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[35] Glancy, *supra* note 63, at 2.
[36] 277 U.S. 438, (1928).
[37] Olmstead v. United States, 277 U.S. 438, 478 (1928).
[38] *Id.*
[39] David Banisar, The Right to Information and Privacy: Balancing Rights and Managing Conflicts (2011), *available at* https://www.iprs.si/fileadmin/user_upload/Pdf/Publikacije_ostalih_pooblascencev/Right_to_Information_and_Privacy__banisar.pdf (last accessed Sept. 20, 2018).
[40] Institute for Policy Research and Advocacy (ELSAM) and Privacy International, The Right to Privacy in the Indonesia - Stakeholder Report Universal Periodic Review 27th Session – Indonesia, Sept. 2016 *available at* https://www.iprs.si/fileadmin/user_upload/Pdf/Publikacije_ostalih_pooblascencev/Right_to_Information_and_Privacy__banisar.pdf (last accessed Sept. 20, 2018).

In the case *Disini vs. Secretary of Justice,*[41] citing *Whalen v. Roe,*[42] the United States Supreme Court classified privacy into two categories: **decisional privacy** and **informational privacy**.[43]

> **Decisional privacy** involves the right to independence in making certain important decisions, while **informational privacy** refers to the interest in avoiding disclosure of personal matters. It is the latter right—the right to informational privacy—that **those who oppose government collection or recording of traffic data in real-time seek to protect.”**
>
> xxx **Informational privacy** has two aspects**: the right not to have private information disclosed,** and **the right to live freely without surveillance and intrusion**. In determining whether or not a matter is entitled to the right to privacy, this Court has laid down a two-fold test. The first is a **subjective test**, where one claiming the right must have an actual or legitimate expectation of privacy over a certain matter. The second is an **objective test**, where his or her expectation of privacy must be one society is prepared to accept as objectively reasonable.[44]

These two are often summarized into one as the **“right to be left alone”.**

Decisional Privacy

As defined in the case of *Whalen v. Roe,*[45] decisional privacy involves the right to independence in making certain important decisions.[46] This kind of privacy evolved from decisions touching on matters concerning speech, religion, personal relations, education and sexual preferences.[47]

In *Griswold v. Connecticut,*[48] the US Supreme Court struck down a statute that prohibited the use of contraceptives by married couples.[49] Justice William O. Douglas, writing for the majority of the court, recognized the right to privacy, even though not enumerated in the Bill of

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[41] G.R. No. 203335, Feb. 11, 2014.
[42] 429 U.S. 589 (1977).
[43] *Disini,* G.R. No. 203335, Feb. 11, 2014.
[44] *Id.*
[45] 429 U.S. 589 (1977).
[46] *Pollo,* 659 SCRA 189.
[47] *Pollo,* 659 SCRA 189.
[48] 381 U.S. 479 (1965).
[49] *Pollo*, 659 SCRA 189.

Rights, is found in the "penumbras" and "emanations" of other constitutional protections, such as the self-incrimination clause of the Fifth Amendment, or the freedom of association clause of the First Amendment.[50] Further, this right to privacy is "fundamental" when it concerns the actions of married couples, because it "is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of our civil and political institutions."[51] Because a married couple's use of contraception constitutes a "fundamental" right, Connecticut must prove to the Court that its law is *"compelling"* and "*absolutely necessary"* to overcome that right (i.e., the "strict scrutiny test").[52] The right to privacy is seen as a right to *"protection from governmental intrusion."*[53] In other words, the right of privacy is the right of the individual, married or single, to be free from unwarranted government intrusion.

The Court in the case of *Roe v. Wade*[54] held that where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a *"compelling state interest,"* [55] and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.[56] Justice Blackmun, the *ponente* of the case, applied a *strict scrutiny analysis* to abortion regulations.[57] The Court articulated two important state interests - the preservation of maternal health and the protection of fetal life-noting that each interest becomes "compelling" at different points of the pregnancy.'[58] Thus, the Court ruled 7–2 that a right to privacy under the Due Process Clause of the 14th Amendment extended to a woman's decision to have an abortion, but that *this right must be balanced against the state's interests* in regulating abortions: protecting women's health and protecting the potentiality of human life.[59]

Kathryn Holmes Snedaker, in her article,[60] which was published in New Mexico Law Review, summarized the Roe framework as follows:

[50] Griswold v. Connecticut*,* 381 U.S. 479 (1965).
[51] *Griswold v. Connecticut,* Thirteen Media with Impact, *available at* https://www.thirteen.org/wnet/supremecourt/rights/landmark_griswold.html (last accessed Sept. 13, 2018).
[52] *Id.*
[53] *Grisworld*, 381 U.S. 479.
[54] 410 U.S. 113 (1973).
[55] *Id.* citing Kramer v. Union Free School District, 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969), Sherbert v. Verner, 374 U.S. 398, 406 (1963).
[56] Roe v. Wade*,* Citing Griswold v. Connecticut, 381 U.S., at 485; Aptheker v. Secretary of State, 378 U.S. 500,508 (1964); Cantwell v. Connecticut, 310 U.S. 296, 307 -308 (1940); see [410 U.S. 113, 156] Eisenstadt v. Baird, 405 U.S., at 460 , 463-464.
[57] *Roe*, 410 U.S. 113.
[58] Kathryn H. Snedaker, Reconsidering Roe v. Wade: Equal Protection Analysis as an Alternative Approach, 17 N.M. L. Rev. 115 (1987), *available at* http://digitalrepository.unm.edu/nmlr/vol17/iss1/5 (last accessed Sept. 14, 2018).
[59] *Roe v. Wade,* American History U.S.A., *available at* https://www.americanhistoryusa.com/topic/roe-v-wade/ (last accessed Sept. 14, 2018).
[60] Snedaker, *supra* note 58.

> The Roe Framework is based, therefore, first on **whether the statute substantially infringes on a fundamental right.** Once that infringement is established, a **strict scrutiny standard** is employed, and a statute will be struck down if the state does not have a compelling interest or if, even though there is a compelling state interest, there is a less restrictive alternative means to achieve the statute's purpose. If, on the other hand, no infringement of a fundamental right can be established, then a strict scrutiny test is not appropriate, and the statute must be merely rationally related to the end it is meant to achieve. Under this relaxed standard, a statute will likely be upheld as constitutional.[61]

In the Philippines, the Supreme Court have upheld decisional privacy claims.[62] The constitutional right to privacy was first explicitly recognized in the Philippines by *Morfe vs. Mutuc.*[63] In this case, Chief Justice Fernando stated that the right to privacy was accorded recognition independently of its identification with liberty and in itself, is fully deserving of constitutional protection.[64] Although this case was decided nine years before *Whalen,* the same framework was used by Chief Justice Fernando in which he termed decisional privacy as part of "liberty" and informational privacy as merely "privacy."

Informational Privacy

The informational privacy was defined as "freedom from epistemic interference" that is achieved when there is a restriction on "facts" about someone that are "unknown."[65] In the case *Whalen vs. Roe,* informational privacy was ruled to have two aspects: the *right not to have private information disclosed,* and the *right to live freely without surveillance and intrusion.* This case recognized that an "interest in privacy" was implicated by potential disclosure of the collected information, and that "statutory or regulatory duties to avoid unwarranted disclosures. . . arguably [have their] roots in the Constitution."[66]

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[61] *Id.*
[62] Pollo, 659 SCRA 189.
[63] 22 SCRA 424, G.R. No. L-20387, January 31, 1968.
[64] *Id.*
[65] Kenneth Einar Himma, et.al., The Handbook of Information and Computer Ethics (2008), *available at* http://www.cems.uwe.ac.uk/~pchatter/2011/pepi/The_Handbook_of_Information_and_Computer_Ethics.pdf (last accessed Oct. 10, 2018).
[66] Timothy Azarchs, Informational Privacy: Lessons from Across the Atlantic, 806 Journal of Const. Law, Vol. 16:3 (Feb. 2014), *available at* https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1520&context=jcl (last accessed Oct. 10, 2018).

Which kinds of personal information are affected in this privacy category? According to the Handbook of Information and Computer Ethics written by Himma and Tavani, such information can include data about "one's daily activities, personal lifestyle, finances, medical history, and academic achievement."[67] Thus, information privacy relates to different data types, including:

- *Internet privacy (online privacy):* All personal data shared over the Internet is subject to privacy issues. Most websites publish a privacy policy that details the website's intended use of collected online and/or offline collected data.
- *Financial privacy*: Financial information is particularly sensitive, as it may easily used to commit online and/or offline fraud.
- *Medical privacy:* All medical records are subject to stringent laws that address user access privileges. By law, security and authentication systems are often required for individuals that process and store medical records.[68]

Associate Justice Consuelo Ynares-Santiago recognized that the basic attribute of an effective right to informational privacy is the individual's ability to control the flow of information concerning or describing him, which however must be overbalanced by legitimate public concerns.[69] To deprive an individual of his power to control or determine whom to share information of his personal details would deny him of his right to his own personhood.[70] For the essence of the constitutional right to informational privacy goes to the very heart of a person's individuality, a sphere as exclusive and as personal to an individual which the state has no right to intrude without any legitimate public concern.[71]

Nonetheless, all US Circuit Courts recognizing it have held that this right is not absolute and, therefore, they have balanced individuals' informational privacy interests against the States interest in acquiring or disclosing the information.[72] The majority of the US Circuit Courts have adopted some form of scrutiny that has required the Government to show a substantial interest for invading individuals' right to confidentiality in their personal information, and then to balance the

[67] *Himma,* supra note 65.
[68] Information Privacy, Techopedia, *available at* https://www.techopedia.com/definition/10380/information-privacy *(last accessed Oct. 10, 2018).*
[69] Kilusang Mayo Uno v. The Director General, NEDA, Associate Justice Ynares-Santiago Dissenting Opinion, G.R. No. 167798, April 19, 2006.
[70] *Id.*
[71] Kilusang Mayo Uno, G.R. No. 167798, April 19, 2006.
[72] Helen L. Gilber, Minors Constitutional Right to Informational Privacy, The University of Chicago Law Journal (2007), 1385, 1386.

States substantial interest in the disclosure as against the individuals interest in confidentiality.[73] This balancing test was developed in *United States v. Westinghouse*[74] by using the following factors, to wit: (a) the type of record requested; (b) the information it did or might contain; (c) the potential for harm in any subsequent non-consensual disclosure; (d) the injury from disclosure to the relationship in which the record was generated; (e) the adequacy of safeguards to prevent unauthorized disclosure; (f) the degree of need for access; and (g) the presence of an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.[75]

Associate Justice Lucas P. Bersamin, in his concurring and dissenting opinion in the case of *Pollo v. Constantino,*[76] said that on the constitutional right to privacy of communication and correspondence vis-a-vis an office memorandum that apparently removed an employee's expectation of privacy in the workplace, he stated that although the right to privacy is referred to as a right to be enjoyed by the people, the State cannot just sit back and stand aside when, in the exercise of his right to privacy, the individual perilously tilts the scales to the detriment of the national interest.[77]

> In upholding the validity of OM No. 10, I also suppose that it is not the intention of the Majority to render the Bill of Rights inferior to an administrative rule. Rather, adoption of the balancing of interests test, a concept analogous to the form of scrutiny employed by courts of the United States, has turned out to be applicable especially in the face of the conflict between the individual interest of the petitioner (who asserts his right to privacy) and the Commission's legitimate concern as an arm of the Government tasked to perform official functions.[78]
>
> The *balancing of interest test* has been explained by Professor Kauper, *viz:*
>
> The theory of balance of interests represents a wholly pragmatic approach to the problem of First Amendment freedom, indeed, to the whole problem of constitutional interpretation. It rests on the theory that is the Courts function in the case before it when it finds public interests served by legislation on the one hand and First Amendment freedoms, by it on the other, to balance that one against the other and to arrive at a judgment where the greater weight shall be placed. If on balance it appears that the public interest served by restrictive

[73] Id., p. 1386.
[74] 638 F2d 570 (3d Cir 1980).
[75] Pollo, 659 SCRA 189.
[76] *Id.*
[77] Pollo, 659 SCRA 189.
[78] *Id.*

> legislation is of such a character that it outweighs the abridgment of freedom, then the Court will find the legislation valid. In short, the balance-of-interests theory rests on the basis that constitutional freedoms are not absolute, not even those stated in the First Amendment, and that they may be abridged to some extent to serve appropriate and important interest.[79]

Medical Privacy And Confidentiality: Ethical and Legal Framework

The concepts of privacy are closely intertwined with those of confidentiality and security and although, these are used interchangeably, they have distinct meanings. The Institute of Medicine (US) Committee on Health Research and the Privacy of Health Information in its paper entitled *"Beyond the HIPAA Privacy Rule: Enhancing Privacy, Improving Health Through Research",* differentiated privacy, confidentiality and security, as follows:

> *Privacy* addresses the question of who has access to personal information and under what conditions. Privacy is concerned with the collection, storage, and use of personal information, and examines whether data can be collected in the first place, as well as the justifications, if any, under which data collected for one purpose can be used for another (secondary) purpose. An important issue in privacy analysis is whether the individual has authorized particular uses of his or her personal information (Westin, 1967).
>
> *Confidentiality* safeguards information that is gathered in the context of an intimate relationship. It addresses the issue of how to keep information exchanged in that relationship from being disclosed to third parties (Westin, 1976). Confidentiality, for example, prevents physicians from disclosing information shared with them by a patient in the course of a physician–patient relationship. Unauthorized or inadvertent disclosures of data gained as part of an intimate relationship are breaches of confidentiality (Gostin and Hodge, 2002; NBAC, 2001).
>
> *Security* can be defined as "the procedural and technical measures required (a) to prevent unauthorized access, modification, use, and dissemination of data stored or processed in a computer system, (b) to prevent any deliberate denial of service, and (c) to protect the system in its entirety from physical harm" (Turn and Ware, 1976). Security helps keep health records safe from unauthorized use.

[79] *Pollo*, 659 SCRA 189.

> When someone hacks into a computer system, there is a breach of security (and also potentially, a breach of confidentiality). No security measure, however, can prevent invasion of privacy by those who have authority to access the record (Gostin, 1995).[80]

Privacy has been a part of medical practice since the 4th century B.C. It has become an important issue since the time when the *Hippocratic Oath*, which has been enforcing medical ethics for centuries.[81] This classical version of the Hippocratic oath for physicians states, "What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself, holding such things shameful to be spoken about."[82]

On the other hand, confidentiality is one of the core duties of medical practice. It requires health care providers to keep a patient's personal health information private unless consent to release the information is provided by the patient.[83] The duty of confidentiality for health providers and the rights of patients to privacy are uncontested and universally recognized.[84] The same principles have been adopted by the Philippine Medical Association and similar associations in other countries.[85] The American Association of Family Physicians (AAFP) also believes that patient confidentiality must be protected and that the privileged nature of communications between physician and patient has been a safeguard for the patient's personal privacy and constitutional rights.[86] Medical information may have legitimate purposes outside of the physician/patient relationship, such as, billing, quality improvement, quality assurance, population-based care, patient safety, etc. However, patients and physicians must authorize release of any personally identifiable information to other parties such as third party payer and self-insured employer who should explicitly describe in the policies and contracts the patient information that may be released,

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[80] Institute of Medicine (US) Committee on Health Research and the Privacy of Health Information: The HIPAA Privacy Rule;. Beyond the HIPAA Privacy Rule: Enhancing Privacy, Improving Health Through Research. Washington (DC): National Academies Press (US); (Nass SJ, et.al. eds., 2009) 2. The Value and Importance of Health Information Privacy, *available at* https://www.ncbi.nlm.nih.gov/books/NBK9579/ (last accessed Oct. 5, 2018).

[81] Natalia Serenko and Lida Fan, Patients' perceptions of privacy and their outcomes in healthcare, Int. J. Behavioural and Healthcare Research, Vol. 4, No. 2, 2013, *available at* https://www.researchgate.net/publication/264812856_Patients'_perceptions_of_privacy_and_their_outcomes_in_healthcare (last accessed Oct. 5, 2018).

[82] *Id.*

[83] Jessica De Bord, et.al., Ethics in Medicine: Confidentiality, University of Washington School of medicine (2013), *available at* https://depts.washington.edu/bioethx/topics/confiden.html (last accessed Oct. 5, 2018)

[84] Carl A. T. Antonio, et.al., FPCS Health Information Privacy in the Philippines: Trends and Challenges in Policy and Practice (Privacy in the Developing World—Philippines Monograph Series) (April 2013), *available at* https://www.researchgate.net/publication/*254256631* (last accessed Oct. 5, 2018).

[85] *Id.*

[86] Confidentiality, Patient/Physician, American Academy of Philippine Physicians, *available at* https://www.aafp.org/about/policies/all/patient-confidentiality.html (last accessed Oct. 5, 2018).

the purpose of the information release, the party who will receive the information, and the time period limit for release.[87] Policies and contracts should further prohibit secondary information release without specific patient and physician authorization.[88]

Right to Privacy in Medical Ethics

Confidentiality is one of the core duties of medical practice. It requires health care providers to keep a patient's personal health information private unless consent to release the information is provided by the patient.[89] The following are some ethical principles emphasizing the duty of medical practitioners in the protection of the right of privacy of their patients:

Hippocratic Oath

The Hippocratic Oath is an oath traditionally taken by physicians pertaining to the ethical practice of medicine.[90] It is widely believed that the oath was written by Hippocrates, the father of medicine, in the 4th century BC, or by one of his students.[91] "All that may come to my knowledge in the exercise of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal."[92]

World Medical Assembly (WMA) Declaration of Lisbon on the Rights of the Patient[93]

> Right to confidentiality
>
> a. All identifiable information about a patient's health status, medical condition, diagnosis, prognosis and treatment and all other information of a personal kind must be kept confidential, even after death. Exceptionally,

[87] *Id.*
[88] *Id.*
[89] Bord, *supra* note 83.
[90] Hippocratic Oath, *available at* https://www.wikidoc.org/index.php/Hippocratic_Oath (last accessed Oct. 5, 2018).
[91] *Id.*
[92] *Id.*
[93] Adopted by the 34th World Medical Assembly, Lisbon, Portugal, September/October 1981 and amended by the 47th WMA General Assembly, Bali Indonesia, September 1985 and editorially revised by the 171st WMA Council Session, Santiago, Chile, October 2005 and reaffirmed by the 200th WMA Council Session, Oslo, Norway, April 2015.

descendants may have a right of access to information that would inform them of their health risks.

b. Confidential information can only be disclosed if the patient gives explicit consent or if expressly provided for in the law. Information can be disclosed to other health care providers only on a strictly "need to know" basis unless the patient has given explicit consent.

c. All identifiable patient data must be protected. The protection of the data must be appropriate to the manner of its storage. Human substances from which identifiable data can be derived must be likewise protected.[94]

World Medical Association International Code of Medical Ethics

A physician shall respect a patient's right to confidentiality. It is ethical to disclose confidential information when the patient consents to it or when there is a real and imminent threat of harm to the patient or to others and this threat can be only removed by a breach of confidentiality.[95]

Philippine Board of Medicine Code of Ethics

Section 6, Article II: The medical practitioner should guard as a sacred trust anything that is confidential or private in nature that he may discover or that may be communicated to him in his professional relation with his patients, even after their death. He should never divulge this confidential information, or anything that may reflect upon the moral character of the person involved, except when it is required in the interest of justice, public health, or public safety.

Section 2, Article VII: Violation of anyone of the provisions of this Code of Ethics shall constitute unethical and unprofessional conduct and therefore a sufficient ground for the reprimand, suspensions, or revocation of the certificate of registration of the offending physician in accordance with the provisions of Section 24, paragraph (12) of the Medical Act of 1959, Republic Act 2382.[96]

[94] *Id,* § 8.
[95] *supra* note 90.
[96] Proffesional Regulation Commission, *available at* https://www.prc.gov.ph/uploaded/documents/Board%20of%20Medicine-CE.pdf (last accessed Oct. 5, 2018).

Code of Ethics, Philippine Medical Association

> Section 6, Article II: The physician should hold as sacred and highly confidential whatever may be discovered or learned pertinent to the patient even after death, except when required in the promotion of justice, safety and public health.[97]

Philippine Medical Association (PMA) Declaration on the Rights and Obligations of the Patient and Magna Carta of Patient's Rights and Obligations of 2008

> i. Right To Privacy and Confidentiality - The patient has the right to privacy and protection from unwarranted publicity. The right to privacy shall include the patient's right not to be subjected to exposure, private or public, either by photography, publications, video-taping, discussion, medical teaching or by any other means that would otherwise tend to reveal his person and identity and the circumstances under which he was, he is, or he will be, under medical or surgical care or treatment.
>
> The Patient and his/her legal representative has the right to be informed by the physician or his/her legal representative of the patient's continuing Health Care requirements following discharge, including instructions about home medications, diet, physical activity and other pertinent information.
>
> All identifiable information about a patient's health status, medical condition, diagnosis, prognosis and treatment, and all other information of a personal kind, must be kept confidential even after death, Provided, That descendants may have a right of access to information that will inform them of their health risks.
>
> All identifiable patient data must be protected. The protection of the data must be appropriate as to the manner of its storage. Human substance from which identifiable data can be derived must be likewise protected.
>
> Confidential information can be disclosed in the following cases:

[97] Code of Ethics of the Philippine Medical Association, *available at* https://www.philippinemedicalassociation.org/wp-content/uploads/2017/10/FINAL-PMA-CODEOFETHICS2008.pdf (last access October 15, 2018).

- when his mental or physical condition is in controversy in a court litigation and the court in its discretion orders him to submit to physical or mental examination by a physician;
- when the public health and safety so demand;
- when the patient or, in his incapacity, his legal representative expressly gives the consent;
- when his medical or surgical condition, without revealing his identity, is discussed in a medical or scientific forum for expert discussion for his benefit or for the advancement of science and medicine.
- when it is otherwise required by law.[98]

Physician-Patient Confidentiality Rule

Case Law

Krohn vs. Court of Appeals[99]

This case discussed the privileged nature of the communication between physician and patient. The Supreme Court held that:

> Indeed, statutes making communications between physician and patient privileged are intended to inspire confidence in the patient and encourage him to make a full disclosure to his physician of his symptoms and condition. Consequently, this prevents the physician from making public information that will result in humiliation, embarrassment, or disgrace to the patient. For the patient should rest assured with the knowledge that the law recognizes the communication as confidential, and guards against the possibility of his feelings being shocked or his reputation tarnished by their subsequent disclosure.
>
> *The physician-patient privilege creates a zone of privacy, intended to preclude the humiliation of the patient that may follow the disclosure of his ailments.*

[98] Magna Carta of Patient's Rights and Obligations of 2008, S.B. No. 2371, 14th Cong., 1st Reg. Sess. (2008).
[99] 233 SCRA 146, G.R. No. 108854, June 14, 1994.

> Indeed, certain types of information communicated in the context of the physician-patient relationship fall within the constitutionally protected zone of privacy, including a patient's interest in keeping his mental health records confidential. Thus, it has been observed that the psychotherapist-patient privilege is founded upon the notion that certain forms of antisocial behavior may be prevented by encouraging those in need of treatment for emotional problems to secure the services of a psychotherapist.
>
> In this case, the person against whom the privilege is claimed is not one duly authorized to practice medicine, surgery or obstetrics. He is simply the patient's husband who wishes to testify on a document executed by medical practitioners. Plainly and clearly, this does not fall within the claimed prohibition. Neither can his testimony be considered a circumvention of the prohibition because his testimony cannot have the force and effect of the testimony of the physician who examined the patient and executed the report. [100]

Lim vs. Court of Appeals[101]

This case is about the motion of the private respondent to present as a witness, Dr. Lydia Acampado who had examined the petitioner in a professional capacity and had diagnosed her to be suffering from schizophrenia.[102] The petitioner argued that the doctor was barred under the rule on the confidentiality of a physician-patient relationship.[103] The Supreme Court has held that:

> This rule on the physician-patient privilege is intended to facilitate and make safe full and confidential disclosure by the patient to the physician of all facts, circumstances and symptoms, untrammeled by apprehension of their subsequent and enforced disclosure and publication on the witness stand, to the end that the physician may form a correct opinion, and be enabled safely and efficaciously to treat his patient. It rests in public policy and is for the general interest of the community.[104]
>
> In order that the privilege may be successfully claimed, the following requisites must concur:

[100] *Khron,* 233 SCRA 146.
[101] 214 SCRA 273, G.R. No. 91114, September 25, 1992
[102] *Lim*, 214 SCRA 273
[103] *Id.*
[104] *Id.*

1. the privilege is claimed in a civil case;

2. the person against whom the privilege is claimed is one duly authorized to practice medicine, surgery or obstetrics;

3. such person acquired the information while he was attending to the patient in his professional capacity;

4. the information was necessary to enable him to act in that capacity; and

5. the information was confidential, and, if disclosed, would blacken the reputation (formerly character) of the patient."

The physician may be considered to be acting in his professional capacity when he attends to the patient for curative, preventive, or palliative treatment. Thus, only disclosures which would have been made to the physician to enable him "safely and efficaciously to treat his patient" are covered by the privilege. It is to be emphasized that "it is the tenor only of the communication that is privileged. The mere fact of making a communication, as well as the date of a consultation and the number of consultations, are therefore not privileged from disclosure, so long as the subject communicated is not stated."[105]

Physician-Patient Confidentiality under Rules of Court and Administrative Rules

Section 24(c), Rule 130

Section 24. Disqualification by reason of privileged communication. —

The following persons cannot testify as to matters learned in confidence in the following cases:

(c) A person authorized to practice medicine, surgery or obstetrics cannot in a civil case, without the consent of the patient, be examined as to any advice or treatment given by him or any information which he may have acquired in attending such patient in a professional capacity, which information was necessary to enable him to act in capacity, and which would blacken the reputation of the patient.[106]

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[105] *Lim*, 214 SCRA 273.
[106] 1997 Revised Rules on Evidence, Rule 130, § 24 (c).

Department of Health Guidelines in the Planning and Design of a Hospital and other Health Facilities (2004)

> Auditory and Visual Privacy: A hospital and other health facilities shall observe acceptable sound level and adequate visual seclusion to achieve the acoustical and privacy requirements in designated areas allowing the unhampered conduct of activities.[107]

Right to Privacy under Philippine Laws

In Philippine law, the concept of privacy is enshrined in the Constitution and is regarded as the right to be free from unwarranted exploitation of one's person or from intrusion into one's private activities in such a way as to cause humiliation to a person's ordinary sensibilities.[108]

Several laws have been passed by the Congress regarding privacy of individuals, including *Republic Act 10173* or *The Data Privacy Act of 2012.*

The right to privacy is enshrined in several provisions of the 1987 Philippine Constitution, namely:

> Section 2. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.[109]

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[107] Department of Health Guidelines in the Planning and Design of a Hospital and other Health Facilities (2004), ¶ 8, *available at* https://www.doh.gov.ph/sites/default/files/publications/planning_and_design_hospitals_other_facilities.pdf (last accessed Oct. 5, 2018).
[108] Hing v. Choachuy, Sr., 699 SCRA 667, G.R. No. 179736, June 26, 2013, K. Bautista & L. Llanillo, "Zones of Privacy: How Private? Volume 84, No. 3, *available at* https://www.iadclaw.org/publications-news/defensecounseljournal/zones-of-privacy-how-private/ (last accessed Oct. 5, 2008).
[109] PHIL. CONST., art. III, §2.

> Section 3. (1) The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise, as prescribed by law.
>
> (2) Any evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding.[110]

The *Data Privacy Act of 2012 or RA 10173* [111] was signed into law on August 15, 2012 which protects individuals from unauthorized processing of personal information that is (1) private, not publicly available; and (2) identifiable, where the identity of the individual is apparent either through direct attribution or when put together with other available information.[112] The guiding policy is stated as follows:

> It is the policy of the State to protect the fundamental human right of privacy, of communication while ensuring free flow of information to promote innovation and growth. The State recognizes the vital role of information and communications technology in nation-building and its inherent obligation to ensure that personal information in information and communications systems in the government and in the private sector are secured and protected.[113]

This Act applies to the processing of personal data by any natural and juridical person in the government or private sector.[114] The processing referred hereto is any operation or any set of operations performed upon personal information including, but not limited to, the collection, recording, organization, storage, updating or modification, retrieval, consultation, use, consolidation, blocking, erasure or destruction of data.[115] As can be gleaned from its title, the purpose of the Act is for the protection of "individual personal information," referring to personal data of a natural person.[116] Personal data refers to all types of personal information[117] while

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[110] PHIL. CONST., art. III, §3.
[111] An Act Protecting Individual Personal Information in Information and Communications Sysyemts in the Government and the Private Sector, Creating for this Purpose a National Privacy Commission, and for other Purposes [Data Privacy Act of 2012], Republic Act No. 10173 (2012).
[112] The Beginner's Guide to RA 10173 (Data Privacy Act of 2012), Jul. 10, 2017, *available at https://amihan.net/2017/07/10/beginners_guide_to_ra_10173/* (last accessed Sept. 5, 2018).
[113] Data Privacy Act of 2012, § 2.
[114] Implementing Rules and Regulations of Republic Act No. 10173, known as the "Data Privacy Act of 2012" [IRR] (Aug. 24, 2016), § 4.
[115] Data Privacy Act of 2012, § 3(j).
[116] Ivy D. Patdu & Rasiele Rebekah DL. Rellosa, "Data Privacy Act", *availabl*e at http://www.sanbeda-alabang.edu.ph/bede/images/researchpublication/BedanReview/10.%20data%20privacy%20act%20-%20bedan%20review%20vol.%20v.pdf (last accessed Oct. 5, 2018).
[117] IRR, Data Privacy Act of 2012, § 3(j).

personal information[118] refers to any information whether recorded in a material form or not, from which the identity of an individual is apparent or can be reasonably and directly ascertained by the entity holding the information, or when put together with other information would directly and certainly identify an individual. In other words, personal information is any information, which can be linked to your identity, thus making you readily identifiable.

Cosmetic Surgery Tax on Right to Improve One's Appearance

The right to privacy, as mentioned, is classified into decisional privacy and informational privacy. Decisional privacy involves the right to independence in making certain important decisions while informational privacy refers to the interest in avoiding disclosures of personal matters and the right to live freely without surveillance and intrusion.[119] As early as 1968, Philippine jurisprudence recognized the right of privacy as included in the constitutional right to liberty. Quoting US Supreme Court Justice Louis Brandeis, the Court explained that the right to be let alone is "the most comprehensive of rights and the right most valued by civilized men."[120] This right encompasses a wide range of rights—including protection from intrusions into family and home life, control of sexual and reproductive rights, and communications secrecy.[121] It is also said that the right to privacy forms the basis of any democratic society.[122]

The right to decisional privacy provides that there are certain areas of life so fundamentally important and private that the government may not, absent satisfying a heightened level of scrutiny, infringe or burden an individual's autonomy or freedom to make those decisions.[123]

The question now is *whether the right to improve one's appearance falls within the right to decisional privacy of the people.* As mentioned above, the decisional right to privacy involves the right to decide freely or right to be independent in making important decisions**.** In deciding whether to improve oneself through cosmetic procedures or not is a choice that is given to the person as a matter of right. In the exercise of this right, the law also recognizes that people have the right to be alone – that is, the right to live freely without surveillance and intrusion**.** This includes the right of a person to choose whether to share or not to share with others information about his or her private life, habits, acts, and relations.

[118] IRR, Data Privacy Act of 2012, § 3(l).
[119] *Disini,* G.R. 203335.
[120] Capin-Cadiz vs. Brent Hospital and Colleges, Inc. 785 SCRA 18, J. Jardeleza, Concurring Opinion, February 24, 2016.
[121] Banisar, *supra* note 39.
[122] *Id.*
[123] Scott Skinner-Thompson, Outing Privacy (November 16, 2015), Northwestern University Law Review, Vol. 110, No. 1, 2015; NYU School of Law, Public Law Research Paper No. 15-56, *available* at SSRN: https://ssrn.com/abstract=2691422.

In the Philippines, the Filipinos have grown to the practice of undergoing invasive procedures without the interference of the government. In fact, there is no law that impedes any doctor to offer or perform plastic surgery services regardless of their board certification, training, and skill level.[124] But the impending imposition of excise tax on the cosmetic industry, may adversely affect the decision of the people in going through such procedures. Though the imposition of excise taxes on them is a means for the government to raise additional revenue, it may also be a means to discourage the availment of the said services.

In the position paper of Philippine Dermatological Society (PDS) when it appealed to the Senate to consider the repercussions of imposing an excise tax on cosmetic procedures, it cited four major reasons for opposing the tax. First is health, which, they said, is guaranteed by the Constitution; second is the psychological, emotional, and spiritual impact of cosmetic surgeries on people like workers, students, and those seeking opportunities where competition is stiff; third is the additional financial burden on patients; and fourth, medical tourism, especially now that the country is strengthening ties with its ASEAN neighbors. The PDS President, Dr. Angela Lavadia, in a press briefing at EDSA Shangri-La Hotel, said that the cosmetic surgery tax deprives ordinary people or the middle class of the chance to improve or enhance their looks to boost their self-esteem or their competitiveness in the job market.[125] Lavadia even cited that simple conditions such as acne can often lead to depression and to thoughts of suicides, especially among the young people, adding that studies show that cosmetic procedures have actually improved the quality of life of the people. [126]

While it is expected that there will be a surge on the cost of these services, one of the factors that will also discourage people in undergoing the said procedures is the unnecessary disclosure of their personal information. As mentioned above, informational privacy refers to the interest in avoiding disclosures of personal matters and the right to live freely without surveillance and intrusion.

Thus, the author believes that the right to improve one’s appearance falls within the right of privacy vis-à-vis the right of the people to decide freely in making important decisions in their lives and the right of non-disclosure of personal information.

After establishing that the right to improve one’s appearance falls within the right to privacy of the people, the next question is *whether there is a compelling interest for the State to impose cosmetic surgery tax.*

The determination of whether there is a compelling state interest in the imposition of such excise tax is important because privacy, although a constitutionally guaranteed fundamental right, is not absolute. The Constitution itself states that the right may be "impaired" in consideration of:

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[124] Nejar, *supra* note 3.
[125] Leilani Junio, Dermatologists urge Senate to reconsider cosmetic surgery tax, PHILIPPINE NEWS AGENCY, Nov.12, 2017 (last accessed Oct. 17, 2018).
[126] *Id.*

national security, public safety, or public health.[127] Jurisprudence also dictates that when fundamental rights are involved, the regulations, ordinances and statutes limiting these rights may be justified only by a "compelling state interest." [128]

In applying the *strict scrutiny standard*, [129] the first question that should be resolved is whether the statute substantially infringes on a fundamental right. Once that infringement is established, a strict scrutiny standard is employed, and a statute will be struck down if the state does not have a compelling interest or if, even though there is a compelling state interest, there is a less restrictive alternative means to achieve the statute's purpose.[130]

The burden now falls upon the government to prove that it was impelled by a compelling state interest and that there is actually no other less restrictive mechanism for realizing the interest that it invokes. Applying strict scrutiny, the focus is on the presence of compelling, rather than substantial, governmental interest and on the absence of less restrictive means for achieving that interest, and the burden befalls upon the State to prove the same.[131]

So what constitutes compelling interest? In *Serrano vs. Gallant Maritime Services,*[132] the Court ruled that the compelling interest is measured by the scale of rights and powers arrayed in the Constitution and calibrated by history.[133] It is akin to the paramount interest of the state for which some individual liberties must give way, such as the public interest in safeguarding health or maintaining medical standards, or in maintaining access to information on matters of public concern.[134]

Here, the imposition of cosmetic surgery tax is an exercise of the State's inherent power of taxation. While the power of taxation is inherent to the State, such power is still subject to limitations.[135] If no limitations were imposed on the power, then the State would be dangerous, rampant in wielding such power.[136]

One of the constitutional limitations of the State's power of taxation is *due process* under Article III, Section 1 of the 1987 Constitution which states that "No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." This law requires that tax laws and their enforcement must comply with substantive and procedural due process.[137] Substantive due process requires that it must be

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[127] Samahan ng mga Progresibong Kabataan v. Quezon City, G.R. No. 225442, Justice Leonen, Separate Opinion (2017).
[128] Roe, 410 U.S. 113.
[129] Roe, 410 U.S. 113.
[130] *Id.*
[131] Capin-Cadiz, 785 SCRA 18.
[132] GR No. 167614, March 24, 2009.
[133] 582 SCRA 254, G.R. No. 167614, March 24, 2009.
[134] *Serrano*, 582 SCRA 254.
[135] IGNATIUS MICHAEL D. INGLES, TAX MADE LESS TAXING: A REVIEWER WITH CODALS AND CASES 8 (2018 ed.).
[136] *Id,* at 11.
[137] *Id.*

reasonable and must be for a public purpose, while procedural due process requires that there must be no arbitrariness in the assessment and collection and that the prescribed rules must be followed before assessment and collection**.** As discussed earlier, the constitutional right to liberty includes the right to privacy. Thus, a violation of the right to privacy is a violation of the right to liberty of the person.

In order to determine if there is a compelling interest, it is important to study the purpose and goal of the State in imposing cosmetic surgery tax. The cosmetic surgery tax is a form of excise tax commonly justified as a source of revenue of the State. But the excise tax has always been designed to *regulate the negative externalities* and to *influence the behavior* of the people.

Excise tax on tobacco products was designed to generate more revenue for the government's health care program and at the same time encourage Filipinos to be health conscious as smoking was studied to cause cancer, heart disease, lung disease, etc. The same tax was imposed on liquor products, because consumption of alcohol products was associated with extensive liver damage, motor vehicle accidents caused by drunken behavior, and crime. According to Department of Finance (DOF), the alcohol beverage taxes were proposed to strengthen moves to prevent the poor and young people from taking alcoholic products. Additionally, excise tax was also imposed on sweetened beverages. The DOF along with Department of Health (DOH) support this as part of a comprehensive health measure to curb the consumption of SSBs and address the worsening number of diabetes and obesity cases in the country, while raising revenue for complementary health programs that address these problems.

Studying carefully the nature of the abovementioned excise taxes, it can be said that they are mostly imposed for public purposes because they can cause damage to the consumers and the people around them and such is contrary to the promotion of the health and well-being of the public. In contrast, invasive cosmetic procedures have not been shown to have any detrimental effect on society.

Excise tax is designed to regulate negative and detrimental effects of consumption of the mentioned health hazards. In cosmetic surgery, there is no wrong behavior that needs to be corrected by the State. Filipinos have grown to the practice of undergoing invasive procedures without the interference of the government.

Excise taxes are not charged to the cosmetic surgery providers because they are mere withholding agents. It is the actually the consumers who will be burdened by the additional tax. Thus, until the legislators are able to provide evidence to the detrimental effect of cosmetic surgery on the society, the author submits that the imposition of excise tax is without reasonable basis and compelling state interest.

Cosmetic Surgery Tax on Patient's Right to Confidentiality

Confidentiality is one of the core duties of medical practice. It requires health care providers to keep a patient's personal health information private unless consent to release the information is provided by the patient.[138] The duty of confidentiality for health providers and the rights of patients to privacy are uncontested and universally recognized.[139] The same principles have been adopted by the Philippine Medical Association, Professional Regulation Commission Board of Medicine and similar associations in other countries.[140]

As provided for in the Code of Ethics of the Philippine Medical Association and the World Medical Association, the physician shall respect the patient's right to confidentiality and that it shall hold as sacred and highly confidential whatever may be discovered or learned pertinent to the patient even after death, except when required in promotion of justice, safety, and public health.

In the Philippines, a person's right to privacy is enshrined in no less than fundamental law. Section 3(1), Article III of the Constitution provides that "the privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise, as prescribed by law."[141] This guarantee encompasses all aspects of a person's privacy, including the confidential nature of the relationship between health provider and patient. The privileged nature of communications between physician and patient has been a safeguard for the patient's personal privacy and constitutional rights. Communication between doctor and patient is generally considered privileged and should not be inquired into even by the courts.

In *Lim vs. CA,*[142] the Court held that the rule physician-patient privilege is intended to facilitate and make safe full and confidential disclosure by the patient to the physician of all facts, circumstances and symptoms, untrammeled by apprehension of their subsequent and enforced disclosure and publication on the witness stand, to the end that the physician may form a correct opinion, and be enabled safely and efficaciously to treat his patient.[143] The Court also said that this rule rests on public policy and is for the general interest of the community.[144]

As held in *Khron vs. CA,*[145] the physician-patient privilege creates a zone of privacy, intended to preclude the humiliation of the patient that may follow the disclosure of his ailments.

[138] Bord, *supra* note 83.
[139] Antonio, *supra* note 84.
[140] *Id.*
[141] PHIL. CONST. art. III, § 3 (1).
[142] *Lim,* 214 SCRA 273.
[143] *Id.*
[144] *Id.*
[145] *Khron,* 233 SCRA 146.

Indeed, certain types of information communicated in the context of the physician-patient relationship fall within the constitutionally protected zone of privacy.[146]

In assessing the challenge that the State has impermissibly intruded into these zones of privacy, a court must determine whether a person has exhibited a reasonable expectation of privacy and, if so, whether that expectation has been violated by unreasonable government intrusion.[147]

Internal Revenue Deputy Commissioner Arnel Guballa said that under the BIR's proposed revenue regulations covering the 5-percent excise tax on invasive cosmetic procedures done for aesthetic purposes, they would ask doctors or clinics to collect the levy from their patients, which would be later on remitted by the doctors in what is called reverse withholding. Euvimil Nina Asuncion, revenue lawyer at the BIR, said confidentiality agreements between doctors and patients going under the knife would be respected as the country's biggest revenue agency would never ask clinics to reveal the identities of their clients.[148]

However, going back to draft revenue regulations in Chapter III, performing doctors or surgeons are required to submit a list of the procedures that they have undertaken together with the names of their patients. The draft Revue Regulation (RR) even require the description of the procedures that the patient went through. This, by itself, drops the confidentiality of the patients.

However, the BIR, in its privacy policy,[149] claims that they adhere strictly to the Data Privacy Act of 2012 and assures that they keep the taxpayers' information confidential unless they are lawfully required or allowed to disclose it or that they are given written consent by the taxpayers to such disclosure.

Yet, under the Magna Carta of Patient's Bill of Rights and Obligations, confidential information can be disclosed in the following cases: i. When the patient's medical or physical condition is in controversy in a court litigation and the court, in its discretion, orders the patient to submit to physical or mental examination of a physician; ii. When public health or safety so demands; iii. *When the patient, or in his incapacity, his/her legal representative, expressly gives the consent;* iv. When the patient's medical or surgical condition is discussed in a medical or scientific forum for expert discussion for his/her benefit or for the advancement of science and medicine, Provided however, That the identity of the Patient should not be revealed; and v. *When it is otherwise required by law.*[150]

It can be argued that the disclosure to the BIR of the patients' personal information falls within the fifth exception. The author argues otherwise. It must be noted that there is no provision under the TRAIN Law which requires the patients to disclose their personal information to the

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[146] *Id.*
[147] *Miguel*, 535 Phil 687.
[148] BIR to rely on doctor's honesty drive, INQUIRER.NET, Jan. 8, 2018, *available at* https://business.inquirer.net/243719/bir-rely-doctors-honesty-tax-drive#ixzz5TtT39u9T (last accessed Oct. 8, 2018).
[149] Bureau of Internal Revenue Privacy Policy, *available at* https://www.bir.gov.ph/index.php/privacy-policy.html
[150] S.B. No. 2371, ¶ i.

BIR in case of an audit or investigation. Second, the subject of the tax audit or investigation is not the patient but the cosmetic surgery service provider. Although the excise tax is paid by the patient as an additional cost to the price of the subject procedure, the service provider, as the withholding agent, is the one responsible in remitting or paying such tax to the BIR. The BIR may only access the confidential information regarding the withholding agent's business. The author submits that this does not include the personal information of the patient since, in determining whether the withholding agent remits the correct taxes, such information is not necessary. Third, in relation to the informational privacy of the patient, the disclosure of personal information shall only be allowed if there is a compelling interest for the State to intrude such right to privacy. Here, the author submits that the State has no compelling interest to justify the intrusion in the right to privacy of the patients.

Conclusion

It was known that the right to privacy was classified into two: 1) the decisional privacy and 2) the informational privacy. The former is the right to independence in making personal choices while the latter is the interest in avoiding disclosure of personal matters. The two are then summarized as the right to be left alone.

The strict scrutiny standard and the balancing interest test were applied in evaluating whether cosmetic surgery tax actually compromises the right to privacy. Applying these tests, the State, by imposing cosmetic surgery tax, may cause undue intrusion in the right of privacy of the patient. Therefore, in order to justify the exercise of the government's taxing power, there should be a point of balance between its interest and the people.

In terms of the decisional privacy, there are solid grounds that can be established to prove that the tax on cosmetic surgeries deliberately intrudes the right of the patients to decide in undergoing such. The psychological, emotional, and spiritual impact of cosmetic surgeries on people like workers, students, and those seeking opportunities where competition is, the additional financial burden on the patients and the disclosure of their personal information are the clear effects of the imposition of cosmetic surgery tax on the decisional right to privacy of the patients. Balancing this against the State interest in imposing such tax, the author submits that the right of the people to improve one's appearance outweighed the interest of the State in the imposition of such tax and thus, it does substantially infringe the decisional privacy of the patients involved.

On the other hand, the cosmetic surgery tax adversely affects the informational privacy and the right to confidentiality of the patients on the aspect of its enforcement by the BIR as stated in its draft revenue regulation. There is a substantial infringement on the patients' right to not be identified or for their personal matters not to be disclosed by requiring the performing surgeons or doctors to submit a list of the names of their patients and other pertinent information.

Recommendation

In view thereof, the author submits the amended draft of the Revenue Regulation *"Prescribing the Implementing Rules and Guidelines on the imposition of Excise Tax Treatment on Invasive Cosmetic Procedures Pursuant to Section 46 of Republic Act No. 10963, otherwise known as the "Tax Reform for Acceleration and Inclusion (TRAIN) Law"* which was published for public consultation by the Bureau of Internal Revenue on 5 January 2018. (See Annex) The proposed Revenue Regulation recognizes the importance of the written consent of the patient before any disclosure of personal information *to balance the protection of the right of privacy of the patients, the confidentiality of the personal information and the State's interest in imposing the cosmetic surgery tax.* The draft RR also provides for techniques in protecting the personal information by redaction.

THE HERITAGE LEFT BEHIND: COMPLIANCE OF THE PHILIPPINE GOVERNMENT WITH INTERNATIONAL STANDARDS ON PRESERVATION OF CULTURAL PROPERTY

Mary Clydeen L. Valencia

Best Thesis, 2018

Introduction

Background

Cultural property is an amalgamation of philosophy, politics, and social history. It is the window to human civilization, a reminder of history, a reservoir of identity, and an explanation of how the values and accomplishments it represents shaped human progress. Accordingly, cultural property, which encompasses tangibles "through which the highest achievements of the human spirit are embodied"[1] as well as equally essential intangibles, i.e., stories, poems, plays, recipes, custom, designs, music, songs, and ceremonies, must be treasured.

The idea of preserving cultural property emanated from the west, between the Middle Ages and Renaissance Period.[2] There are many other cultural properties outside of Rome which became the subject of extremely cruel, violent, and uncontrolled practices, especially during wars, i.e., destruction of old Greek libraries in Alexandria which treasured the literature of centuries,[3] the atrocious and intentional burning of palaces, the looting of treasures of antiquities in Constantinople during the Fourth Crusade,[4] the destruction of Samarqand led to the disappearance of the arts and crafts, which flourished in Central Asia for hundreds of years,[5] and the destruction of the beautiful buildings, palaces, temples, exquisite carvings, and sculptures in the splendid city of Vijayanagar.[6] These events paved the way for the enactment of laws and conventions preserving cultural property.

In the Philippines, preserving and conserving the cultural heritage is frequently an overlooked topic because the government's priority has always been the improvement of the quality of life or social welfare of the people – pursuing rapid and sustainable economic growth

[1] LYNDEL V. PROTT & PATRICK J. O'KEEFE, LAW AND THE CULTURAL HERITAGE 8 (1984).
[2] *Id.*
[3] WILLIAM N. WEECH, HISTORY OF THE WORLD, (2nd ed. 1960). The estimated number of volumes was 400,000.
[4] P. Ishwara Bhat, *Protection of Cultural Property under International Humanitarian Law: Some Emerging Trends*, pp 440-1 (2001).
[5] *Id.,* Citing Jawaharlal Nehru, *Glimpses of World History*, pp. 218-19 (1935).
[6] *Id.*, at 259.

and development. Lest forgotten, culture is one of the facets of national development. Yet in the Philippine Development Plan from 2017-2020, while the incumbent administration included a goal focused on culture and creativity – to develop a culture-sensitive development program that advances artistic expression and strengthens Filipino identity and nationalism – no measures illuminating how the State intends to carry it out are specified. While the researcher concedes that it is reasonable to prioritize the country's poor state of development, it is incorrect to consider preserving the past and conserving the old as antitheses of progress. Emphasis is placed on the proposition that even in an era of globalization, there is no need to trade-off, preserving, and conserving cultural heritage to achieve growth and development.

Thus, this study is a tribute dedicated to the heritage, art, and culture. It is intended to discover how the law, as the vanguard of all rights, manifests itself in the preservation of the cultural property – the very things that shape, expand, and color human civilization. First, the researcher will define what cultural property is. Second, the researcher will trace the history and evolution of the concept of cultural property by examining the relevant international conventions to which the Philippines is a signatory, as well as the domestic law to establish the obligation to preserve its cultural property. Correlatively, how such obligation is treated under contemporary public international law and domestic law will be determined. Third, the researcher will inquire into the compliance or non-compliance of the Philippine government and the consistency or inconsistency of national and local policies concerning the international standards on the preservation of cultural property. In turn, such inquiry will yield to determining whether the State complies with its obligation to preserve cultural property. Fourth, the researcher will discuss how national and local government agencies comply with the obligation so established in light of the prevailing international standards and domestic law. Fifth, the researcher will identify the challenges and/or lapses in the application of the law with corresponding actual incidents or occurrences. Finally, the researcher will recommend several measures to put into force or operation the existing international standards and domestic law on the preservation of cultural property.

Statement of the Problem

Continued desecration of Philippine cultural property, as well as that of other countries illegally imported in the Philippines, is rampant.

There are many cases of desecration of cultural property belonging to Filipinos and/or other nationalities committed in Philippines and/or abroad, i.e., brazenly large-scale illicit trade of antiquities; illegal archaeological excavation in terrestrial and underwater sites in the Philippines; alteration of the components of cultural property to make it easier to pass through Customs; forgery and reproduction of cultural property such as submerging it to chemicals, putting it in saltwater to

allow oyster encrustation to make it appear an authentic antique and sell/donate it to unsuspecting buyers/donees; and illegal sale of cultural property in the internet.[7]

A question is thus posed: Does the Philippine government, in light of the prevailing international standards and domestic law, comply with its obligation to preserve and sustainably manage its cultural property?

Objectives of the Study

The following are the objectives of the study:

(1) Define the concept of compliance, implementation, application, and effectiveness of international standards on the preservation of cultural property;

(2) Discuss the different compliance theories which explain why States comply with international standards on the preservation of cultural property;

(3) Examine the international standards as well as Philippine law on preservation of cultural property to establish the obligation to preserve its cultural property;

(4) Inquire into the consistency of the domestic law concerning international standards on the preservation of cultural property;

(5) Determine whether there is compliance through a national agency and/or local government units with the obligation so established under prevailing international standards and domestic law on preservation of cultural property; and

(6) Identify the challenges and lapses in the law as well as practice in selected cultural property, namely:

a) Alberto Mansion, Binan, Laguna;
b) Ancestral houses along M.J.Cuenca Ave., Brgy. Mabolo, Cebu City, Cebu;
c) Undeclared Churches of Tubigon, Bohol;
d) Dampol Bridge, Dupax del Sur, Nueva Vizcaya;
e) Barit Bridge, Brgy. Santiago, Iriga City, Camarines Sur;
f) World's Prospective Largest Pearl from the island of Palawan;
g) Burial Jars and Other Antiquities;
h) Dayawan Torogan in Marawi City and Kawayan Torogan in Lanao del Sur;
i) Church Complex of Santo Rosario in Angeles City, Pampanga; and
j) St. Bartholomew Parish Church, Nagcarlan, Laguna.

[7] *Illicit traffic of cultural property*, MANILA TIMES, 14 May 2010, available at http://www.pressreader.com/philippines/manila-times/20100514/282424165440534.

Scope and Limitation

The study is conducted to determine whether the Philippines, under the 1987 Constitution, complies with its obligation to preserve Philippine cultural property. Thus, as the research is essentially an in-depth investigation, it considered the (1) current relevant international and domestic law on preservation of cultural property, (2) guidelines, policies, and standards issued by national cultural agencies primarily responsible in preserving Philippine cultural property, i.e., National Museum and National Historical Commission of the Philippines, (3) ordinances implemented by local government units to protect the cultural property included in the *UNESCO World Heritage List* located within their respective jurisdiction, i.e., Vigan City and Ifugao Province, and (4) challenges and/or lapses in the law as well as practice supported by actual events or occurrences to explore the implication of such events or circumstances.

The study is limited only to Philippine cultural property. However, concerning Philippine cultural property recognized by UNESCO in the *World Heritage List*, only the historic city of Vigan and the Banaue Rice Terraces in the province of Ifugao are considered. Further, only secondary data relevant to the two specified world heritage sites is included, because of time constraints, inaccessibility of the places where other world heritage sites are located, and/or limited access to needed information.

Significance of the Study

This study, which addresses the problem of continued desecration of Philippine cultural property, will redound to the benefit of the Government, the Filipino citizens, the students of law, and future researchers. It is designed to assess the impact of international standards and domestic law in the preservation of Philippine cultural property, by identifying the challenges and/or lapses in the law and its implementation and by proposing solutions and/or alternatives to preserve existing cultural property and protect those that are at risk.

To the Government

In view of the State's mandate to preserve its cultural property under the 1987 Constitution, this study is a contribution which reinforces the effort of the Philippine government in fulfilling this obligation. For one, it critically analyses an important problem to come up with a defensible plan that solves the problem by identifying and discussing the challenges in the application of the law. For another, it proposes solutions to the problem or useful recommendations, so the Philippine government may devise a better plan of action in complying with its obligations.

To the Filipino Citizens

The fact is many private owners of cultural property is not aware of the law on the preservation of cultural property. Therefore, this study is beneficial to Filipino citizens because it raises awareness of the relevant international conventions to which the Philippines is a signatory, as well as domestic law on the preservation of cultural property.

To the Students of the Law

This study is significant for law students in general because it is a consolidation of all relevant international conventions to which the Philippines is a signatory as well as domestic law on the preservation of cultural property. It is an avenue that may lead the students of law into discovering how the law may better preserve Philippine cultural property – testing the legal and analytical tools they learned and developed over time.

Review of Related Literature

History and Overview of Instruments on Preservation of Cultural Property

Preservation of Cultural Property in International Setting

The Lieber Code

Among the first systematically fashioned provisions relevant to the preservation of cultural property is the Lieber Code of 1863, sponsored by Francis Lieber, a professor of history at Columbia University.[8] The Lieber Code was subsequently improved when the Brussels Conference of 1874, and the First and Second Hague Conventions of 1899 and 1907 - strengthening the ideas set forth therein by making offenses committed against cultural property in time of war a crime that are punishable under national laws, and by imposing an obligation on

[8] John Henry Merryman, *The Free International Movement of Cultural Property*, 31 N.Y.U. J. INT'L L. & POL. 1, 2-3, (1998).

the besieged to put distinctive and visible signs to indicate that a building is a cultural property and to communicate such signs to the enemy.[9]

After World War I, the Treaty on the Protection of Artistic and Scientific Institutions and Monuments of 1935, or the Roerich pact, was agreed upon, declaring that the cultural property to be neutral in time of war.[10] It was superseded by the Draft Declaration of the League of Nations Draft, and the Draft International Convention for the Protection of Monuments and Works of Art in Time of War. But the aftermath of World War II brought to the fore serious consideration about the inadequacies in international law preserving cultural property.[11]

As a result of what has been regarded the most significant looting of cultural property in Modern History, the preservation of cultural property was finally addressed in its very own treaty – the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter referred to as 1954 Hague Convention), and its First and Second Protocols.[12] The 1954 Hague Convention also applies in the event of declared war or of any other armed conflict, arising between two or more States Parties regardless if the state of war is not recognized by one or more of them, [to all cases of partial or total occupation of the territory of a State Party] regardless if the said occupation meets with no armed resistance, and [to all State Parties] regardless if one of the powers in conflict is not a party to it.[13] It recognizes that cultural property suffers grave and irreparable damage during armed conflicts and the developments in the technique of warfare increase the destruction. Corollary, it espouses the international concept of worldwide ownership of cultural property, such that the preservation of the cultural heritage is of great importance for all peoples of the world. Thus, it is essential that this heritage should receive international protection – that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind since each people makes its contribution to the culture of the world.

Cultural property is also entitled to protection in times of peace, and armed conflicts are not the only threat to loss and/or destruction of cultural property. Other threats include traditional theft of objects from public and private collections; looting of archaeological and ethnographic objects from sites and cultural communities; illegal export and import across borders towards the

[9] Sarah Eagen, *Preserving Cultural Property: Our Public Duty: A Look at How and Why We Must Create International Laws that Support International Action*, 13 Pace INT'L L. Rev. 407 (2001). Citing John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L. L. 831, 833 at p. 835 (1986). The Brussels Convention was never made into law; Convention to the Laws and Customs of War on Land, 29 July 1899, art. 56, 32 Stat. 1803; Convention respecting the Laws and Customs of War on Land, 18 October 1907, art. 56, 36 Stat. 2277; Karen Geopfert, The Decapitation of Rameses II, 13 B.U. INT'L. L.J. 503, 517-18 (1995).

[10] Treaty on the Protection of the Artistic and Scientific Institutions and Monuments, 49 Stat, 3267, 167 L.N.T.S. 279.

[11] Catherine Foster, *Stolen Art a War Booty: Hostages of Harbingers of Peace?*, The Christian Science Monitor, 8 February 1995, at The U.S., p. 1.

[12] 1954 Hague Convention; First Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, U.N.T.S. 358, 14 May 1954 amended by the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 38 I.L.M. 769, 26 March 1999.

[13] 1954 Hague Convention, art. 18.

goal of supplying the international art market with stolen or looted objects and/or finding of terrorism and armed conflict;[14] and collectors' fascination with the past and the desire to collect artifacts but do not understand the moral, historical and scientific implications of separating an item from where it was found – separating it from its historical context, story and what it could tell us about how it was used and valued in the past.[15]

In response to these other threats, two major international legal frameworks are currently implemented. First, in 1970, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property was created. It considers cultural property as one of the basic elements of civilization and national culture, the value of which can be appreciated only to the fullest possible information regarding its origin, history, and traditional setting.[16] Second, in 1995, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, a process that will enhance international cultural cooperation and maintain a proper role for legal trading and inter-state agreements for cultural exchanges, was created. Convinced of the fundamental importance of the protection of cultural heritage and cultural exchanges for promoting understanding between peoples and the dissemination of culture for the well-being of humanity and the progress of civilization, the International Institute for the Unification of Private Law was deeply concerned by the illicit trade in cultural objects and the irreparable damage frequently caused by it, both to the objects themselves and the cultural heritage of national, tribal, indigenous or other communities, and also to the heritage of all peoples, and in particular by the pillage of archaeological sites and the resulting loss of irreplaceable archaeological, historical and scientific information.

Another convention that protects the cultural property in time of peace is the Convention Concerning the Protection of the World Cultural and Natural Heritage (hereinafter referred to as the World Heritage Convention) adopted by the General Conference of the United Nations Educational, Scientific, and Cultural Organization. It developed from the need to balance the way people interact with nature and the fundamental need to preserve the property, and it attempts to establish an effective system of collective protection of cultural as well as the natural heritage of outstanding universal value. It noted that the cultural and natural heritage are increasingly threatened with distinction, not only by traditional causes of decay, but also by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction, and it considered that protection of this heritage at the national level often remains incomplete because of the scale of resources it requires and of the insufficient economic, scientific, and technological resources of the country where the property to be protected is situated.[17] By signing the World Heritage Convention, each State Party pledged to conserve the world heritage sites situated in its territory, protect its national heritage, and endeavor by all appropriate means – in particular by educational and information programs – to strengthen

[14] Patty Gerstenblith, *The Legal Framework for the Prosecution of Crimes Involving Archaeological Objects*, United States Attorneys' Bulletin, Volume 64, Number 2 (2016).
[15] Judith Benderson, *Introduction* to *Cultural Property Law*, United States Attorneys' Bulletin, Volume 64, Number 2 (2016).
[16] 1970 UNESCO Convention, preamble.
[17] World Heritage Convention, preamble.

appreciation and respect by their peoples of the cultural and natural heritage.[18] Thus, recognizing that intangible cultural heritage is also an essential factor in maintaining and encouraging respect for cultural diversity in the face of growing globalization, the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage was approved.

Preservation of Cultural Property in the Domestic Setting

A look from the national level point-of-view would reveal that the United States government led the historic preservation movement in the Philippines. The initial step towards the movement began when the United States Philippine Commission enacted Act No. 243, authorizing the Municipal Board of the City of Manila, with the concurrence of the Advisory Board, to grant permission to erect a monument of Jose Rizal – the Philippine patriot, writer, and poet in Luneta, Manila.[19] In 1933, American Governor-General Frank Murphy issued Executive Order No. 451 creating the Philippine Historical Research and Markers Committee (hereinafter referred to as PHRMC) the functions of which were identification, designation, and proper marking of antiquities – structures and sites throughout the Philippine archipelago where historical events took place involving heroes and other eminent Filipinos – before these are permanently lost.[20]

In 1936, the National Assembly enacted Commonwealth Act No. 169 appropriating a sum of money from the funds in the Philippine Treasury to be expended under the direction of the President of the Philippines through the Philippine Historical Committee (hereinafter referred to as PHC) which superseded PHRMC to defray the necessary expenses in connection with the protection, preservation, and acquisition of privately-owned antiquities, so the present and future generations may be impressed with the significance and value of said antiquities.[21] In 1947, after World War II, the PHC was restored. Among others, it identified more than 400 historic sites, acquired some 600 Rizaliana memento, and rebuilt the Rizal ancestral house in Calamba, Laguna.[22]

In 1953, after gaining independence from the United States, local government units, by virtues of Republic Act No. 841, had control in the national preservation program involving historic sites within their respective localities, albeit with oversight of the PHC. In 1965, Republic Act No. 4368 was enacted to create a commission primarily concerned with historic matters,

[18] *Id.,* art. 27.
[19] An Act Granting the Right to Use Public Land upon the Luneta in the City of Manila upon which to Erect a Statue of Jose Rizal from Fund to be Raised by Public Subscriptions, and Prescribing as a Condition the Method by which such Subscription shall be Collected and Disbursed, Act No. 243 (28 September 1901).
[20] Exec. Order No. 451, Creating the Philippine Historical Research and Marker Committee (October 1933).
[21] An Act Appropriating the Sum of Fifty Thousand Pesos to be Expended under the Direction of the President of the Philippines to identify and Appropriately Mark the Historic Antiquities in the Philippines or Preserving or Acquiring the Same, Commonwealth Act No. 169 (12 November 1936).
[22] National Historical Commission of the Philippines, *About Us*, available at http://nhcp.gov.ph/about-us/.

primarily focused on the management of historic sites – the National Historical Commission, whose objectives, among others, are awakening and fostering a sense of history among Filipinos.[23]

In 1966, declaring as the policy of the State to preserve and protect the important cultural property and national cultural treasures – unique objects found locally possessing outstanding historical, cultural, artistic and/or scientific value which is highly significant and important to the country – and to safeguard their intrinsic value, the Cultural Properties Preservation Act (hereinafter referred to as CPPA) was enacted.[24] A significant feature of law is the provision subjecting an offender to imprisonment or fine or both upon conviction for violation/s of any of the proscribed acts specified in the law.[25]

In 1974, the CPPA was amended, because it was believed that more stringent regulation on movement and a limited form of registration of important cultural property and of designated national cultural treasures are necessary and that any cultural property.

In 1992, the National Commission for Culture and the Arts (hereinafter referred to as NCCA) was created to be the principal government agency for culture. It is the over-all policy-making, coordinating, and grants-giving agency for the preservation, development, and promotion of Philippine historical and cultural heritage. As such, it exercises administrative supervision over the following cultural agencies: the National Archives, the National Historical Commission of the Philippines, the Cultural Center of the Philippines, and the *Komisyon sa Wikang Filipino*. It was tasked to draft a new, comprehensive cultural heritage law that will consolidate all Government-led efforts strengthening the mandates of the Commission and the attached cultural agencies with respect to the preservation and protection of our cultural as well as natural properties.[26]

Finally, in 2009, the National Cultural Heritage Act (hereinafter referred to as NCHA) was enacted. Its salient features include:

> (1) redefinition of the term "cultural property" to encompass intangible cultural property – the people's learned processes along with knowledge, skills, and creativity that inform and are developed by them, the products and other manifestations that they create and the resources, spaces and other aspects of social and natural context necessary for their sustainability;[27]

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[23] An Act to Establish a National Historical Commission, to Define Its Powers and Functions, Authorizing the Appropriation of Funds Therefor, and for Other Purposes, Republic Act No. 4368 (1965).
[24] An Act to Repeal Act Numbered Thirty-Eight Hundred Seventy Four and to Provide for the Protection and Preservation of Philippine Cultural Properties, Republic Act No. 4846, sec. 5 (1966) [hereinafter referred to as Cultural Properties Preservation Act].
[25] *Id.,* sec. 20.
[26] An Act Creating the National Commission for Culture and the Arts, Establishing National Endowment Fund for Culture and the Arts, and for Other Purposes, Republic Act No. 7356 (3 April 1992).
[27] Republic Act No. 10066, sec. 3(o).

(2) for purposes of protecting a cultural property against exportation, modification, or demolition, enumerated works categorized as Important Cultural Property[28] and/or Uncategorized Property[29] which do not fall under the Presumption of Important Cultural Property but has characteristics that will qualify as such are considered important cultural property;

(3) all cultural properties declared as national cultural treasure and national historic landmark, site, or monument are entitled to priority in government funding for protection, conservation and restoration, incentive for private support of conservation and restoration through the Conservation Incentive Program for national cultural treasures of the NCCA, and priority protection by the Government shall be given to all national cultural treasures or national historical landmarks, sites or monuments in time of armed conflict, natural disasters and other exceptional events that endanger the cultural heritage of the country;[30]

(4) Declaration or delisting of cultural property as a national cultural treasure or an important cultural property upon the filing of a petition by the owner, stakeholder, or any interested person with the NCCA;[31]

(5) grant of Right of First Refusal to the appropriate cultural agency in the purchase of national cultural properties so declared, or match any offer made before the finality of the sale to another person;[32]

(6) designation of heritage zones to protect the historical and cultural integrity of a geographical area;[33]

(7) promotion of the principle of shared responsibility among government agencies, local government, and the private sector in the preservation of cultural property by requiring:

> (a) cultural agencies concerned to maintain an inventory, evaluation individually, and documentation of cultural property declared according to their category, submit the same to the NCCA and give due notice to the concerned Registry of deeds for the annotation on the land titles on declared immovable cultural property,[34]
>
> (b) local government units, through their cultural offices, to maintain an inventory of their ownership, location and condition of cultural property and furnish the NCCA a copy of the same,[35]

[28] *Id.,* sec. 5.
[29] Rules and Regulations Implementing Republic Act No. 10066, sec. 7.2
[30] Republic Act No. 10066, sec. 7.
[31] *Id.,* sec. 8.
[32] *Id.,* sec. 9.
[33] *Id.,* sec. 12.
[34] *Id.,* sec. 14(a).
[35] *Id.,* sec. 14(b).

(c) both cultural agencies concerned and local government units to continuously coordinate in making entries and in monitoring the various cultural property in their respective inventories,[36]

(d) private collectors and owners of cultural properties to register such properties within three years from the effectivity of the NCHA;[37]

(e) the NCCA, upon the advice of the concerned cultural agency, enter into Heritage Agreements in the form of contracts with private owners of cultural properties concerning the preservation of the said properties,[38]

(f) a permit secured from the NCCA or the appropriate cultural agency before an immovable national cultural treasure may be relocated, rebuilt, defaced, or otherwise changed in a manner which would destroy the dignity and authenticity of the property except to save such property from destruction due to natural causes,[39] and

(g) the issuance of a Cease and Desist Order by the appropriate cultural agency after due notice and hearing involving the interested parties and stakeholders upon a report submitted by the local government unit which has jurisdiction over the site where the immovable cultural property is located to secure the integrity of such immovable cultural property or the issuance of a Cease and Desist Order *ex parte* when the physical integrity of a national cultural treasure or important cultural property is found to be in danger of destruction or significant alteration from its original state to suspend all activities that will affect the cultural property.[40]

The existing international conventions, recommendations, and resolutions discussed to cultural property altogether demonstrate the importance of preserving this unique and irreplaceable property for all peoples of the world to whatever people it may belong. The Philippine government, in particular, recognizes the fact that the cultural property of the country is necessarily indispensable for the correct understanding of its history and culture. Therefore, it may be concluded that the preservation of cultural property, in general, should be seen by every man as his duty[41] if not moral obligation to do so. It is our common patrimony, and the responsibility to preserve it for posterity is ours.

[36] Republic Act No. 10066, sec. 14(c).
[37] *Id.,* sec. 14(e).
[38] *Id.,* sec. 18.
[39] *Id.,* sec. 19.
[40] *Id.,* sec. 25.
[41] Eagan, *supra* note 20 at. p. 19. Citing Joseph L. Sax, *Heritage Preservation as a public duty: The Abbe Gregoire and The Origins of An Idea*, 88 MICH, L. REV. 1148 (1990) Referring to *A Documentary History of Art*, pp. 269-96 (E. Hold. ed. 1957)); Joseph L. Sax, *is Anyone Minding Stonehenge?*, The Origins of Cultural Property Protection in England, 78 Cal. L. REV. 1543 (1990).

Concept of Compliance, Implementation, Application, and Effectiveness of International Standards

To date, there is no universally authoritative definition of the concept of compliance, but literature provides several definitions of the concept, such as:

1) The adherence to and conformity between the relevant actor's behavior and a specified rule;[42]
2) The result of state interactions and cooperation where processes of justification, discourse, and persuasion are played out;[43]
3) Whether countries adhere to the provisions of the accord and to the implementing measures that have been instituted;[44]
4) A factual matching of state behavior and international norms;[45]
5) A state of conformity or identity between a State's (or actor's) behavior and a specified rule;[46]
6) Conformity between the conduct required of the state by an international obligation and the conduct adopted by the state i.e., between the requirements of international law and the facts of the matter;[47] and
7) Fulfillment by the contracting parties of their obligations under (a) multilateral agreement/s.[48]

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[42] ORAN R. YOUNG, COMPLIANCE, AND PUBLIC AUTHORITY: A THEORY WITH INTERNATIONAL APPLICATIONS (1979).
[43] ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995).
[44] HAROLD K. JACOBSON & EDITH BROWN WEISS, ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS (1998).
[45] DINAH SHELTON, COMMITMENT, AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (2000).
[46] KAL RAUSTIALA & ANNE-MARIE SLAUGHTER, INTERNATIONAL LAW, INTERNATIONAL RELATIONS AND Compliance in WALTER CARLNAES, ET.AL., HANDBOOK OF INTERNATIONAL RELATIONS (2002).
[47] JAMES CRAWFORD, INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES (2002). The definition is an adaptation of the ILC's description of noncompliance: "the breach of an international obligation consists in the disconformity between the conduct required of the state by that obligation and the conduct adopted by the state i.e., between the requirements of international law and the facts of the matter."
[48] UNITED NATIONS ENVIRONMENT PROGRAMME, MANUAL ON COMPLIANCE WITH AND ENFORCEMENT OF MULTILATERAL ENVIRONMENTAL AGREEMENTS (2006). The definition adapts UNEP's definition of compliance with international environmental agreements: "Compliance means the fulfillment by the contracting parties of their obligations under a multilateral environmental agreement."

Implementation refers to putting treaty provisions into practice i.e. domestic legislation, enactment of regulations and policies, creation of institutions and mechanisms, and enforcement of the law, regulations, and policies the contents of which conform to the obligatory or prescriptive language of the international norm.[49]

Effectiveness is whether the norm successfully addresses the problem it was designed to solve or tackle.[50] It is defined as the extent to which a treaty alters a State's behavior to further the goals of the treaty,[51] or as a concept which can be defined in varying ways: as the degree to which a given rule induces changes in behavior that further the goals of the rule; the degree to which a rule improves the state of the underlying problem; or the degree to which a rule achieves its inherent policy objectives.[52] It is often measured in association with levels of compliance despite its indirect relation to compliance.[53]

Compliance Theories

Rational Actor Theories

The theories suggest that compliance with international law is based on calculations of self-interest, thereby implying that international law is not law at all.[54]

Realism

In realism, the power of a State is considered as the key variable in assessing why the State complies with international law,[55] and the State, as a unitary actor, make decisions based on a rational calculation of how to most effectively enhance its power.[56] If compliance brings the actor

[49] KAL RAUSTIALA & ANNE-MARIE SLAUGHTER, *supra* note at 21 at p. 18.
[50] Dinah Shelton, *Introduction* to DINAH SHELTON, COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (2000).
[51] ROBERT O. KEOHANE, INTERNATIONAL INSTITUTIONS AND STATE POWER: ESSAYS IN INTERNATIONAL RELATIONS THEORY (1989).
[52] Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation,* 32 Case Western Reserve Journal of International Law, 387 at 393 (2000).
[53] Andrew T. Guzman, *A Compliance–Based Theory of International Law*, 90 California Law Review 1823 at 1874 (2002).
[54] MORGENTHAU, HANS JOACHIM, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (7th ed. 2005) (Kenneth Thompson & David Clinton eds., 2005).
[55] *Id.*
[56] Shirley V. Scott, *International Law as Ideology: Theorizing the Relationship between International Law and International* Politics, 5 European Journal of International Law 313, 325 (1994).

more benefits than costs, then it is in the actor's interest to comply with its obligation. If, however, the costs of compliance outweigh the benefits, then the actor will likely choose not to comply.

Institutionalism

Institutionalism grew out of regime theory which espoused that international regimes i.e., norms, rules, principles, and decision-making procedures, facilitate state interaction and enhance international cooperation by reducing uncertainty among States that are members or part of an international regime, help counter the anarchy that may otherwise prevail between States by providing a means for exchange of information to lend some transparency to a State's behavior, and promote conditions for orderly negotiations, asserting that when a State's self-interest dictate the need for collective action, it will do so through an international organization because such will increase efficiency.[57] Otherwise stated, a State will commit to agreements reached in international fora to obtain agreement from others and will comply with the agreement reached so long as the cost of compliance is less than the cost of violation i.e., reputational damage, loss of reputation.

Liberalism

In liberalism, a State's commitment to and compliance with international law by reference to domestic rather international influences and processes are explained. It places individuals, rather than States, at the center of international law on the argument that the rights and power of a State are derivative of the rights and interests of individuals who reside within it.[58]

Normative Theories

Managerial Model

Managerialism, relying on a cooperative problem-solving approach, may be applied to explain why a State does or does not comply with international law only if its national interest is reflected in the international agreement.[59] The State will not only ratify it but also comply with it.

[57] Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42(1) Journal of Conflict Resolution 35 (1998); ANDREW T. GUZMAN, *supra* note 28, at p. 19.
[58] IMMANUEL KANT, PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY AND MORALS (1985).
[59] ABRAM CHAYES & CHAYES, ANTONIA H. CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH

Fairness Model

As to compliance with international law, Franck argues that the reason why a State complies with international law is that it perceives the same to be legitimate and fair.[60] Thus, if international law satisfies the four indicators or elements of norm legitimacy, then it is legitimate and fair. Resultantly, compliance may be expected.

Transnational Legal Process Model

Koh defined it as the process whereby an international law is interpreted through the interactions of transnational actors in a variety of law-declaring fora then internalized into a State's domestic legal system.[61] Thus, since the focus is predominantly on the impact and influence of international factors albeit placing little emphasis on the role that domestic factors play in shaping the behavior of a State, he argues that the way to increase a State's acceptance of and compliance with international law is to increase the interaction between members of the international community regarding the norm – not to increase enforcement mechanisms. The increased interaction will lead to increased internalization of the norm through incorporation to a State's value system, which, ultimately, will result in increased compliance.

Domestic Salience Model

They identified three factors as indicative domestic salience:

(1) the norm's appearance in domestic political discourse either by way of a State or non-state actor whereby it is relied upon to justify or support a position;

(2) changes in domestic institutions to sanction violations or monitor compliance; and

(3) changes in policy. Using such measures, they argued that norm salience could be rated as high, moderate, low, or not salient.

INTERNATIONAL REGULATORY AGREEMENTS (1995); Abram Chayes & Antonia H. Chayes, *On Compliance*, 47(2) International Organization, Vol. 47, No. 2, at pp. 175, 178-184.

[60] THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990). THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995).

[61] Harold H. Koh, *Why Do Nations Obey International Law?*, 106 Yale Law Journal 2599 (1997).

Norms that achieve all three measures have a high degree of salience. In contrast, norms which are part of national discourse but produce an only limited change in institutions and policies have moderate salience. Norms that are part of the national discourse, but do not produce changes in institutions or policies, are rated as having a low degree of domestic salience. In contrast, norms that lack domestic advocates are not salient at all.[62]

The proliferation of literature addressing the compliance question proves that scholars remain divided as to why nations obey international law. It remains as one of the most perplexing questions in international relations because there is no single compliance theory that adequately explains why a State complies or fails to comply with its international obligation. At best, elements or components of these compliance theories assist in understanding the factors which greatly influence the behavior of a State.

METHODOLOGY

Research design

The researcher adopted a descriptive research design to address the fundamental research objectives because such a design is intended to describe, explain, and validate the present conditions – what exists. Specifically, the researcher considered a qualitative approach that predominantly has an interpretive orientation[63] to facilitate the understanding of *whys* and *hows* – the reason behind the compliance of the Philippine government with international standards on the preservation of cultural property and how such international standards influence its policy and practice towards preservation of its cultural property.

Sources of data

Documents are the main source of information. There are three groups of documents developed according to the subject approached. The first group includes documents which provide insight to preservation standards i.e., relevant conventions testament to the international obligations of the Philippines concerning the preservation of cultural property as well as reports and news articles published by the media and reputable heritage organizations and the media which provide insight to Philippine law and practice regarding preservation of cultural property. The

[62] Andrew P. Cortell & James W. Davis, Jr., *Understanding the Domestic Impact of International Norms: A Research Agenda*, 2 International Studies Review 65, (2002).
[63] ALAN BRYMAN, SOCIAL RESEARCH METHODS (4th ed. 2012).

second group includes the domestic law as well as guidelines, policies, and standards issued by the National Historical Commission of the Philippines. Finally, the third group includes ordinances implemented by two local government units to protect the world heritage site located in their respective jurisdiction.

The researcher interviewed government officers involved in, or responsible for implementing the relevant laws as well as persons knowledgeable about the preservation of cultural property and which may shed light on the data from documents. The National Center for Culture and Arts and the National Museum were chosen because both are the two government agencies whose overriding purpose of creation is to implement the policy of the State to preserve Philippine cultural property. Several local government units, heritage advocate groups, and other subjects who may have information of interest to this study were likewise contacted to gain an accurate and deep intuitive understanding of how such organizations understand the preservation of cultural property and how they see their role in preserving cultural property.

Methods of data analysis

In this study, the researcher first evaluated the documents based on the criteria and guidelines specified by Alan Bryman – authenticity, credibility, and representativeness.

Second, the two approaches used by UNICEF in assessing compliance of national legislation with international standards were adopted. International agreements were used as a "checklist" – taking each article individually and looking to see if there is an existing legislation that relates to the rights specifically mentioned in an article and if a legislation does exist, determining whether it satisfies the obligations under an article both in its formal expression and how it is enforced and implemented.

Third, the policy analysis technique which is intended to analytically read and explore relevant official texts that bear upon shaping actions [or at least with such intention of the State authorities] and documented actions that serve as evidence of a particular course of action taken by State authorities concerning the preservation of cultural property was used.

Fourth, finally, the case study method was used. According to Robert Yin, it is appropriate when a study asks why or how about a contemporary set of events over which the researcher has little or no control and when the focus is on a contemporary phenomenon within some real-life context.[64]

[64] ROBERT K. YIN, CASE STUDY RESEARCH DESIGN AND METHODS (5th ed. 2014).

PRESENTATION AND ANALYSIS OF DATA

Compliance of the Philippine Government with International Standards on Preservation of Cultural Property

The 1987 Constitution mandates the State to foster the preservation, enrichment, and dynamic evolution of Filipino national culture based on the principle of unity in diversity in a climate of free artistic and intellectual expression[65] to conserve, develop, promote, and popularize the nation's historical and cultural heritage and resources as well as artistic creations;[66] to recognize, respect, and protect the rights of indigenous cultural communities to preserve and develop their culture, traditions, and institutions;[67] and to protect all the country's artistic and historical wealth constituting the cultural treasure of the nation.[68]

Concomitantly, in the pursuit of cultural preservation as a strategy to maintain Filipino identity, the relevant law, as well as its implementing rules and regulations, shall:

(a) protect, preserve, conserve and promote the nation's cultural heritage, its property, and history, and safeguard the ethnicity of local communities;

(b) establish and strengthen cultural institutions, and

(c) protect cultural workers and ensure their professional development and well-being.[69]

The Philippine government has been striving to promote the objectives which international standards on the preservation of cultural property seek to achieve. As regards compliance, an inference may be deduced from the constitutional mandate of the Philippine government that one factor which motivates it to comply with such international standards is self-interest. The Philippine government preserves its cultural property because of its desired political and economic aims – because preserving its cultural property brings more benefits to it than costs; or because commitment to and compliance with the international standards [and domestic law] on preservation of cultural property, founded on the argument that the rights and powers of a State are derivative of the rights and interests of its citizens, is in furtherance of placing its citizens rather than the State itself at the center of paramount consideration – because protecting, preserving, conserving and promoting its cultural heritage, history and property and safeguarding the ethnicity

[65] PHIL. CONST. art. XIV, sec. 14.
[66] PHIL. CONST. art. XIV, sec. 15.
[67] PHIL. CONST. art. XIV, sec. 17.
[68] PHIL. CONST. art. XIV, sec. 16.
[69] Rules and Regulations Implementing the National Cultural Heritage Act of 2009, Republic Act No. 10066, rule II, sec 5 (2012).

of local communities are strategies to maintain Filipino identity. This, however, is compliance without effectiveness, because the improvements, if any, have nothing (directly) to do with the international standards themselves. Conversely, the Philippine government may not have been successful in furthering the objectives of the international standards. Nonetheless, it has been making significant, genuine efforts to bring its domestic law and practice in conformity with the international standards – bridging theory and practice by developing the use of heritage, public interpretation of the past ethics in conservation, and global trade in antiquities. This, in turn, is effective without (full) compliance.

Consistency of Domestic Law in Relation to International Standards on Preservation Cultural Property

International law requires all States to carry out its international obligations. In turn, to ensure that the States Parties to a convention meet with their obligations, it is necessary to assess compliance through national legislation, policy and administrative mechanisms, and the allocation of resources that all together reflect the effort of a State Party to meet such obligations. In the main, the researcher will adopt the two approaches used by UNICEF in assessing compliance through national legislation with international standards.

First, the Hague Convention, its Protocols and Additional Protocols to it, the 1970 UNESCO Convention, and the World Heritage Convention will be used as a "checklist" – taking each article individually and looking to see if there is existing legislation that relates to the rights specifically mentioned in an article and if a legislation does exist, determining whether it satisfies the obligations under an article both in its formal expression and how it is implemented and applied. Second, the same international agreements will be used as the minimum standards set to recognize, protect and promote the preservation of cultural property against which all existing legislation, programmes, policies, and institutions are measured – assessing their appropriateness as a whole to identify any divergences between the two sets of law.[70]

The 1954 Hague Convention

The 1954 Hague Convention places upon the States Parties to adopt in peacetime appropriate measures for the safeguarding of cultural property within their respective territory against foreseeable effects of an armed conflict as well as to disseminate its provisions including the regulations for its execution as widely as possible in their respective countries particularly the study thereof in their military program and civilian training so that its principles are made known

[70] Christine Lundy, *Assessing Compliance of national Legislation with International Human Rights Norms and* Standards, Part II, UNICEF, November 2008.

to the whole population.[71] The Second Protocol provides for the adoption of concrete preparatory peacetime measures i.e., identification of cultural properties, preparation of inventories, planning of emergency measures for protection against fire or structural collapse, providing for adequate *in situ* protection of movable cultural property, and designating competent national authorities responsible for its safeguarding.[72]

In contrast, the NCHA mandates the pertinent cultural agency,

> (1) to identify and place an official heritage marker indicating that an immovable cultural property has been identified as a national cultural treasure and/or national historic landmark, site, or monument, or an important cultural property;[73]
>
> (2) the establishment of a Philippine Registry of Cultural Property wherein all cultural property of the country deemed important to cultural heritage shall be registered[74] as well as the establishment of the National Inventory of Intangible Cultural Heritage;[75]
>
> (3) the NCCA or the pertinent cultural agency to issue a Compulsory Repair Order when a privately-owned heritage site cannot be maintained by the owner or has fallen into disrepair through neglect to such an extent that it will lose its potential for conservation or undertake the necessary repairs if the owner fails to comply with the said order within thirty to forty-five days from service;[76]

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[71] 1954 Hague Convention, art. 3.
[72] Second Protocol, art. 5.
[73] Republic Act No. 10066, art. Sec. 7(c).
[74] *Id.* sec. 14.
Other relevant text follows:
The guidelines in the registration of cultural property are as follows:
(a)All cultural agencies concerned shall individually maintain an inventory, evaluation, and documentation of all cultural properties declared according to their category and shall submit the same to the NCCA. For cultural property declared as immovable cultural property, the appropriate cultural agency shall, after registration, give due notice to the concerned Registry of Deeds for annotation on the land titles pertaining to the same;
(b)Local government units, through their cultural offices, shall likewise maintain an inventory of cultural property under its jurisdiction and shall furnish the NCCA a copy of the same;
(c)Both cultural agencies concerned and local government units shall continuously coordinate in making entries and in monitoring the various cultural properties in their respective inventory;
(d)All government agencies and instrumentalities, government-owned and/or -controlled corporations and their subsidiaries, including public and private educational institutions, shall report their ownership and/or possession of such items to the pertinent cultural agency and shall register such properties within three (3) years from the effectivity of this Act;
(e)Private collectors and owners of cultural property shall register such properties within three (3) years from the effectivity of this Act. The private collectors and owners of cultural property shall not be divested of their possession and ownership thereof even after registration of said property as herein required. Information on registered cultural properties owned by private individuals shall remain confidential and may be given only upon prior consent of the private owner. The NCCA shall operate the Registry in the NCCA portal cultural databank.
[75] *Id.,* sec. 19.
[76] *Id.,* sec. 26.

(4) the cultural agencies to inspect national cultural treasures, national historic landmarks, sites or monuments, and important cultural property and public and private collections or objects that may be categorized as cultural property at any time [provided that, in case of privately-owned monuments and sites, the pertinent cultural agency shall arrange with the owners the schedules of visits and regular inspection; in case of private collections or objects, prior written consent of the owner shall be obtained] to ensure the protection and integrity of such properties;[77]

(5) the cultural agencies shall, in conformity with their respective charters, define and delineate their respective area of responsibility to cultural property and assessment of national cultural treasures and national historical landmarks, sites or monuments;[78]

(6) the cultural agencies and other national government agencies to consult, coordinate and work closely with the NCCA in the implementation of their respective programs or projects within the context of the law and with other agencies and institutions as it may deem appropriate as a way of dealing with conservation holistically;[79]

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[77] *Id.* sec. 27; sec. 40.
[78] *Id.* sec. 31.
The relevant text follows:
For purposes of the Act, the following shall be the responsibilities of cultural agencies in the categorization of cultural property:
(a)The Cultural Center of the Philippines shall be responsible for significant cultural property on the performing arts;
(b)The National Archives of the Philippines shall be responsible for significant archival materials;
(c)The National Library shall be responsible for rare and significant contemporary Philippine books, manuscripts such as, but not limited to, presidential papers, periodicals, newspapers, singly or in the collection, and libraries and electronic records;
(d)The National Historical Institute shall be responsible for significant movable and immovable cultural property that pertains to Philippine history, heroes and the conservation of historical artifacts;
(e)The National Museum shall be responsible for significant movable and immovable cultural and natural property pertaining to collections of fine arts, archaeology, anthropology, botany, geology, zoology and astronomy, including its conservation aspect; and
(f)The Komisyon sa Wikang Filipino shall be responsible for the dissemination development, and the promotion of the Filipino national language and the conservation of ethnic languages.
[79] Republic Act No. 10066, sec. 32.
Another relevant text follows:
xxx xxx xxx
(a)The Department of Tourism and its attached agencies which shall be responsible for cultural education among tourism services, and protection of cultural properties supplemental to the jurisdiction of the cultural agencies, as defined in this Act. The implementation and creation of a tourism master plan shall be consistent with this Act;
(b)The Intramuros Administration which shall be responsible for the restoration and administration of the development in Intramuros;
(c)The National Parks Development Committee as an attached agency of the Department of Tourism which shall be responsible for supervising the development (beautification, preservation, and maintenance) of the Quezon Memorial, Fort Santiago, Luneta, Paco Park, Pook ni Maria Makiling and other national parks and satellite projects;
(d)The Department of Education which shall be responsible for instituting the governance of basic education act, and the conservation and restoration of its built heritage such as the significant Gabaldon school buildings as determined by the National Historical Institute;

(7) the NCCA as well as the relevant cultural agency:

(a) to deputize the Philippine National Police, the National Bureau of Investigation, the Armed Forces of the Philippines, the Philippine Coast Guard and other local or national law enforcement agencies, including the Bureau of Fisheries' agents, the Department of Environment and Natural Resources' rangers, the Bureau of Customs and the Bureau of Immigration agents, members of the Office of the Special Envoy on Transnational Crimes and other such agencies and their successors-in-interest, to enforce the provisions of the law and its implementing rules and regulations, and

(b) to order said agencies to immediately detail their respective personnel to protect the cultural items under the National Registry;[80]

(8) the Department of Education, in coordination with the NCCA, to formulate the cultural heritage education programs both for local and overseas Filipinos to be incorporated into the formal, alternative and informal education, with emphasis on the protection, conservation, and preservation of cultural heritage within one year from the effectivity of the law;[81] and

(e)The Department of Public Works and Highways which shall be responsible for undertaking major infrastructure projects specifically in the planning, design, construction, and maintenance of national roads and bridges as they impact on heritage structures or aspects of heritage conservation;
(f)The National Commission on Indigenous Peoples, on behalf of the country's indigenous cultural communities, which shall coordinate with the national agencies on matters about cultural properties under its jurisdiction;
(g)The Department of Environment and Natural Resources which shall be responsible for the establishment and management of the National Integrated Protected Areas System and the conservation of wildlife resources, including cave and cave resources and which shall coordinate with the National Commission on Indigenous Peoples, the conservation of natural resources that are cultural sanctuaries of indigenous peoples;
(h)The Department of the Interior and Local Government which shall coordinate with the national cultural agencies on matters about cultural properties under its jurisdiction, and ensure that the provisions of the local government unit properly executes this Act;
(i)The Office on Muslim Affairs which shall coordinate with the national cultural agencies on matters about cultural properties under its jurisdiction;
(j)The UNESCO National Commission of the Philippines which shall be responsible for providing the liaison between the cultural agencies of the Philippines and the UNESCO as well as assist the national cultural agencies in implementing the agreements and conventions adopted by the UNESCO of which the Philippines has ratified or is in the process of ratification;
(k)The Housing and Land Use Regulatory Board which shall coordinate with the local government units and the NCCA on matters about the establishment and maintenance of heritage zones;
(l)The Autonomous Region in Muslim Mindanao and the Cordillera Administrative Region which shall coordinate with the national cultural agencies on matters on cultural properties under their respective jurisdictions; and
(m)The Office of the Special Envoy on Transnational Crimes which shall have the oversight and operational capacity to go after illicitly trafficked and stolen cultural treasures.

[80] *Id.,* sec. 28.

[81] *Id.,* sec. 38.

(9) the Department of Education, the Commission on Higher Education and the Technical Education and Skills Development Authority, in consultation with the NCCA, to outline in its teaching programs nationwide cultural heritage education programs with emphasis at the provincial, city and municipal levels, i.e. (a) protection, conservation and preservation of cultural heritage; (b) instructional materials in print, film and broadcast media on the cultural and historical significance of cultural property; and (c) visitation, public accessibility and information dissemination on designated local cultural property.[82] In the event of armed conflict, the NCHA mandates the government to give priority protection to the cultural heritage of the country, all national cultural treasures and national historical landmarks, sites, or monuments in times of armed conflict, natural disasters and other exceptional events that endanger such property.[83]

The 1970 UNESCO Convention

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property recognizes that the illicit import, export, and transfer of ownership of cultural property is one of the leading causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international cooperation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting from there. To this end, the States Parties undertake:

(1) to oppose such practices with the means at their disposal and to put a stop to current practices, particularly by removing their causes and by helping to make reparation;[84] to set up within their territories one or more national services, where such services do not exist, for the protection of the cultural heritage, with a qualified staff sufficient in number for the effective carrying out of its functions;[85]

[82] *Id.,* sec. 39.
[83] *Id.,* sec 7(d).
[84] 1970 UNESCO Convention, art. 2.
[85] 1970 UNESCO Convention, art. 5.
Another relevant text follows:
The functions referred to include:
(a) contributing to the formation of draft laws and regulations designed to secure the protection of the cultural heritage and particularly prevention of the illicit import, export, and transfer of ownership of important cultural property;
(b) establishing and keeping up to date, based on a national inventory of protected property, a list of important public and private cultural property whose export would constitute an appreciable the impoverishment of the national cultural heritage
(c) promoting the development or the establishment of scientific and technical institutions (museums, libraries, archives, laboratories, workshops . . .) required to ensure the preservation and presentation of

(2) to introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorized, to prohibit the exportation of cultural property from their territory unless accompanied by the export mentioned above certificate, and to publicize this prohibition by appropriate means, particularly among persons likely to export or import cultural property;[86]

(3) to take the necessary measures consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported in the State concerned after entry into force of the Convention, to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to the Convention after the entry into force of this Convention for the States concerned [provided that such property is documented as appertaining to the inventory of that institution], and to take appropriate steps at the request of the State Party of origin to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned [provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property];[87]

(4) to restrict the movement of cultural property illegally removed from any State Party to the Convention by education, information, and vigilance, and to endeavor by educational means the creation and development in the public mind a realization of the value of cultural property and the threat to the cultural heritage created by theft, clandestine excavations, and illicit exports;[88]

(5) to prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property, to ensure that their competent services cooperate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner, to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners, and to recognize the indefeasible right of each State Party to classify and declare specific cultural property as inalienable which should, therefore, *ipso facto* not be exported and to facilitate recovery of such property by the State concerned in cases where it has been exported;

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cultural property;
(d) organizing the supervision of archaeological excavations, ensuring the preservation in situ of certain cultural property, and protecting certain areas reserved for future archaeological research;
(e) establishing, for the benefit of those concerned (curators, collectors, antique dealers, etc.) rules in conformity with the ethical principles outlined in this Convention and taking steps to ensure the observance of those rules;
(f) taking educational measures to stimulate and develop respect for the cultural heritage of all States and spreading knowledge of the provisions of this Convention;
(g) seeing that appropriate publicity is given to the disappearance of any items of cultural property.

[86] 1970 UNESCO Convention, art. 6.
[87] 1970 UNESCO Convention, art. 7.
[88] 1970 UNESCO Convention, art. 10.

(6) to provide the national services responsible for the protection of its cultural heritage and prevention of illicit export and to set up a fund for this purpose if necessary;[89] and

(7) to submit reports the General Conference of the United Nations Educational, Scientific and Cultural Organization on dates and in a manner to be determined by it, give information on the legislative and administrative provisions which they have adopted and other action which they have taken for the application of this Convention, together with details of the experience acquired in the field.[90]

In contrast, the NCHA mandates:

(1) that no cultural property shall be sold, resold, or taken out of the country without first securing a clearance from the cultural agency concerned;[91]

(2) whoever desires to export cultural property registered in the Philippine Registry of Cultural Property to adhere to the requirements specified therein i.e., authorization from the NCCA through the appropriate cultural agencies and application for an export permit submitted thirty days before the intended export from the Philippines;[92]

(3) the Department of Foreign Affairs, upon the recommendation of the appropriate cultural agency to claim the right of repatriation vis-à-vis all other contracting States, should the cultural property registered in the Philippine Registry of Cultural Property be illicitly exported from the country;[93]

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[89] 1970 UNESCO Convention, art. 14.
[90] 1970 UNESCO Convention, art. 16.
[91] Republic Act No. 10066, sec. 11.
[92] *Id.* sec. 23.
Other relevant text follows:
xxx xxx xxx
(c) Application for an export permit must include the following: (1) the purpose of the temporary export; (2) the export date of the cultural property; (3) the repatriation date of the cultural property; (4) a description of the cultural property; and (5) the inventory of the cultural property in the Philippine Registry of Cultural Property.
The grant of the export permit shall be based on the following conditions: (i) the cultural property is exported on a temporary basis, and (ii) export of cultural property is necessary for scientific scrutiny or exhibit.
[93] *Id.* sec. 24.
Other relevant text follows:
For the protection of cultural and foreign affairs interests and to secure cultural heritage, the Philippines may conclude international treaties with contracting States on the import and repatriation of cultural property subject to the following conditions:
(a)The scope of the agreement must be the cultural property of significant importance to the cultural heritage of the contracting States;
(b)The cultural property must be subject to the existing export policies to protect culturally heritage; and
(c)The contracting States shall grant reciprocal rights.

(4) the NCCA to recover or retrieve cultural property which is under the custody of foreign nationals or entities and to bring these properties back to Philippine custody;[94] and

(5) (a) the National Museum to cultural/archaeological/anthropological matters and the National Historical Institute to historical, anthropological matters to regulate and control all archaeological excavation and/or exploration and anthropological research conducted by foreigners and to deputize other agencies to protect archaeological and anthropological sites, (b) to immediately suspend all activities that will affect the site until the systematic recovery of the archaeological materials has been made and to notify the local government unit having jurisdiction of the place where the discovery was made so that measures to protect and safeguard the integrity of the discovered cultural property be promptly adopted, (c) the NCCA, upon the recommendation of the cultural agency concerned, to provide incentives for persons who discover and report heretofore unknown archaeological sites, and (d) to include anthropological, archaeological, and historical and heritage site conservation concerns in conducting Environmental Impact Assessment System in any government or non-government infrastructure project or architectural site development.[95]

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[94] NCHA, sec. 29.
[95] *Id.* sec. 30.
Other relevant text follows:
It shall be guided by the following rules:
(1) All cultural properties found in terrestrial and/or underwater archaeological sites belong to the State;
(2) No terrestrial and/or underwater archaeological explorations and excavations for obtaining materials and data of cultural value shall be undertaken without written authority and direct site supervision by archaeologists and/or representatives of the National Museum;
(3) All anthropological researches, to obtain materials and data of cultural value and where the principal proponent is a foreign national, shall be undertaken only with authority and under the supervision of the National Museum or the National Historical Institute. Anthropological research by Philippine nationals, especially members of the indigenous communities, shall be encouraged;
(4) Archaeological or anthropological materials presumed as crucial cultural property shall be allowed to leave the country only upon proper evaluation and written permission of the National Museum or the National Historical Institute;
(5) All explorations and excavations undertook, wherein the caves, rock shelters and their vicinities may have been used in the prehistoric past by man either for habitation, religious and/or sacred and burial purposes all over the country, shall be under the direct jurisdiction and supervision of archaeologists and/or other experts of the National Museum;
(6) All mining activities inside caves, rock shelters, and any such other areas shall require a written permit and clearance from the National Museum. An appropriate prior inspection by representatives of the National Museum, funded by the company applying for a mining right, shall be required to ensure that no archaeological materials are present and destroyed;
(7) This Act prohibits excavations in caves, rock shelters, and other areas by laypeople. All earthmoving activities in these areas must have the proper permit and clearance from the National Museum and monitored by their representatives;
(8) All treasure hunting permits and licenses shall be issued by the National Museum, which shall formulate the rules and regulations to adequately control, regulate and monitor all applicants for such undertakings; and
(9) The provisions of this Act on explorations and excavations of terrestrial and underwater archaeological

The World Heritage Convention

The World Heritage Convention requires each State Party to recognize that it is primarily responsible for ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage situated in its territory, and it will do all it can to this end, to the utmost of its resources and where appropriate, with any international assistance and cooperation i.e., financial, artistic, scientific and technical which it may be able to obtain.[96]

Thus, each State Party undertakes to give its help in the identification, protection, conservation, and presentation of the cultural and natural heritage if the State on whose territory it is situated so request, and not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage situated on the territory of other States Parties.[97]

Further, each State Party shall endeavor, in so far as possible, and as appropriate for each country:

(a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programs;

(b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with appropriate staff and possessing the means to discharge their functions;

(c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;

(d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and

(e) to foster the establishment or development of national or regional centers for training in the protection, conservation, and presentation of the cultural and natural heritage, and to encourage scientific research in this field to ensure that adequate and active measures are taken for the protection, conservation, and presentation of the cultural and natural heritage situated on its territory.[98]

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sites shall supersede all local, municipal, regional, and autonomous regional governments' resolutions and ordinances.

[96] World Heritage Convention, art. 4.

[97] *Id.,* art. 6-7.

[98] *Id.,* art. 5.

Furthermore, each State Party shall in so far as possible, submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage situated in its territory suitable for inclusion in the World Heritage List – a list of properties considered as having outstanding universal value.[99]

In contrast, the NCHA mandates:

> (1) the local government units to document traditional and contemporary arts and crafts, including their processes and makers, to sustain the sources of their raw materials, and to encourage traditional arts and crafts making them active sources of income for the community and viable for current and future market to encourage and promote the unique heritage and identities of said communities;[100]
>
> (2) the local government units to incorporate programs and budgets for the conservation and preservation of cultural property in their environmental, educational, and cultural activities;[101]
>
> (3) the creation of *Sentro Rizal* to promote Philippine arts, culture, and language throughout the world by offering Filipino language courses, exhibits, small concerts, poetry reading, and Philippine cuisine lessons, and the establishment of its branches or offices in developed countries where there are large Filipino communities and/or in countries where there are children of overseas Filipino workers who need to be educated about their roots;[102]
>
> (4) priority government funding for protection, conservation, and restoration of all cultural property declared as a national cultural treasure and/or national historic landmark, site, or monument;[103]
>
> (5) the National Museum to collect, maintain and develop the national reference collections of Philippine flora and fauna, rocks and minerals through research and field collection of specimens including important cultural property within the territorial jurisdiction of the Philippines, to inform the Department of Environment and Natural Resources and the Department of Agriculture of such collection, and to take custody of all types of specimen collected in the Philippine territory;[104]

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[99] *Id.,* art. 11.
[100] Republic Act No. 10066, sec. 16.
[101] *Id.,* sec. 33.
[102] *Id.,* art. XII.
[103] *Id.,* sec 7(a).
[104] *Id.,* sec. 17.

(6) the NCCA, in coordination with the appropriate cultural agencies, to provide general training programs on conservation to the local government units, which have established cultural heritage programs and projects in their localities;[105]

(7) the national cultural agencies, in coordination with the Commission on Higher Education, to initiate scholarships, educational training programs and other measures to protect the well-being of curators, conservators, authenticators, cultural researchers or educators, historians, librarians, archivists and valuators/appraisers of cultural property through grants, incentives and scholarships upon endorsement by the head of the appropriate cultural agency;[106]

(8) the NCCA to provide financial assistance in the form of a grant to historical, archaeological, architectural, artistic organizations for conservation or research on the cultural property when appropriate;[107] and

(9) the NCCA to establish an annual conservation recognition program under which monetary prizes, awards, and citations will be given by the President of the Philippines, upon the recommendation of the NCCA, for special achievements and important contributions and services in the area of heritage preservation and conservation efforts.[108]

<u>Compliance through a national cultural agency as well as local government units with the obligation so established under prevailing international standards as well as domestic law to preserve Philippine cultural property.</u>

The NHSP as a National Cultural Agency

The National Historical Commission of the Philippines (hereinafter referred to as the Commission) is the cultural agency mandated by the NCHA to undertake and prescribe the manner of conservation, restoration, and protection of the movable and immovable objects of the country. In keeping with its mandate, the Commission issued several guidelines, policies, and standards to promote the preservation of significant historical, cultural and social sites and environment consisting of tangible and intangible historical and cultural property, and to enhance and provide order, continuity, and identity to the growth and progress of our historic towns for the benefit and enjoyment of succeeding generations of Filipinos. The Basic Conservation Principles was issued adopting the articles contained in the 1981 Edition of the Venice Charter of the International

[105] *Id.,* sec. 34.
[106] *Id.,* sec. 41.
[107] *Id.,* sec. 36.
[108] *Id.,* sec. 37.

Charter for the Conservation and Restoration of Monuments and Sites to serve as guidelines in any conservation study.

The Process of Architectural Restoration was issued discussing the outline of the process which goes as follows: inventory, when it is necessary, declaration as monument, planning stage, approval of the scheme agreed upon to be the most feasible, actual intervention work, documentation and publication, and the new use and the maintenance of the restored edifice. The Techniques Involved in the Restoration of Historic Structures, further, explains the two types of restoration and enumerates examples for each type.

The Guidelines, Policies, and Standards for the Conservation and Development of Historic Centers / Heritage Zones enumerates the components of a historic center or heritage zone, the offenses against historic or heritage sites and structures, the general policies to govern the exercise of government planning, development, conservation and regulatory function in historic centers or heritage zone.

First, it provides that planning and development efforts of the national government, the municipal government, and the private sector shall be synchronized with the objectives of restoration, conservation, and preservation of Historic Centers or Heritage Zones and shall conform to the approved development plan for these centers or zones in keeping with the rules and regulations.

Second, all efforts at planning and restoration shall be directed toward ensuring that the general original appearance and architectural and environmental qualities of buildings, structure and their setting within the designated portion of the historic center or heritage zone conform to and/or be compatible or harmonious with the progressive historic character and ambiance of the town, upon consultation and in coordination with the Commission or the National Museum.

Third, development of historic centers or heritage zones shall be anchored on the conservation and historical continuity of the distinct character and identity of the town as expressed through its diverse culture.

Fourth, the Commission and the National Museum shall encourage and support the preservation and development of private properties by extending technical and other forms of assistance. In contrast, local government units are encouraged to give tax and other incentives to property owners and developers who shall participate in the restorations and adaptive reuse of historical or heritage sites and structures.

Fifth, the local government unit within whose jurisdiction a historic center or heritage zone is located shall undertake the following measures to ensure the preservation and sustainability of the site once declared as such:

> (1) conduct studies for the revitalization of historic center or heritage zone including measures to improve business investments, provide leisure and entertainment, upgrade public services, government infrastructure works, and develop heritage tourism;

(2) harness local or traditional products and small business or home industries for sustainable historic preservation program;

(3) integrate other programs, projects, and activities that highlight local history and culture;

(4) provide professional skills training program for conservation managers and staff;

(5) periodically review and improve, if necessary local ordinances and their implementation;

(6) create a local Development and Conservation Council (hereinafter referred to as Council) or its equivalent to implementing the policies and standards and propose others that require the passage of local ordinances;

(7) adopt a risk preparedness program for the protection of the historic center or heritage zone against natural calamities and disasters; and

(8) maintain and protect the surrounding natural environment.

Sixth, all buildings to be constructed in the area, including lots owned by private persons and entities, shall be designed for residences, light commercial establishments, and institutions. It specifies the preferred building uses and limitations within the designated historic center or heritage zone.

Seventh, any application for non-conforming use within the heritage site shall be subject to a public hearing where the presence of the Commission and the National Museum shall be mandatory.

Eight, the following general policies shall be enforced in the construction, reconstruction, and alteration of buildings and structures in the historic [except those covered by the NCHA prohibiting the unauthorized modification, alteration, repair and destruction of original features of all national shrines, monuments, landmarks, and other important historic edifices]:

(1) historic precedents shall, whenever available, be respected and adopted as the primary consideration in allowing or disallowing specific architectural structures or designs;

(2) the urban scale of the historic center or heritage zone shall be observed;

(3) in all rehabilitation, reconstruction or renovation of buildings and structures, the materials and techniques to be used shall be in harmony with the historical period architecture and construction; and

(4) after consultation with the Commission, all new building and structures or additions shall be allowed to adopt current period styles, layout, and designs, provided that these new buildings, structures, or additions are in harmony with the distinct town character in terms of scale, proportion, texture, color, shape, height, and other external vital features.

Ninth, all buildings and structures shall conform to the following architectural and town/city plans standards and requirements:

(1) the restoration or rehabilitation scheme shall ensure the preservation of the building and the extension of its lifespan and/or guarantee zero or minimal alteration of its historical or cultural value;

(2) good judgment, professional consultation, and careful study shall be employed in deciding whether to restore, reconstruct, rehabilitate, or retain building ruins; and

(3) new buildings, building additions, and in-fills shall either adopt the old historical style or carry the current style that is contextual or compatible with the existing building and the prevailing town character.

It also provided the standards, requirements, and limitations concerning building height, roofscape, streetscape, sidewalk, building cluster, integration, exterior walls, building exterior, town plazas, and pocket gardens or their equivalent, parking facilities, facilities for persons with disabilities, buffer zones, firewalls, visual corridors and vista points, outdoor or monumental lighting, buildings and places with official markers installed by the Commission, National Museum, ICOMOS-World Heritage Committee, tourism development, community development, environmental protection, non-conforming buildings, and permit, clearance and other requirements for alteration.

Tenth, in case of non-compliance, the Council shall take steps and subject to penalties the followings activities: any deviation from or modification of the approved architectural plans without the official clearance, any unauthorized change in the use of the building or structure, illegal construction undertaken without prior approval of the Council and the local building official, violation of the terms and conditions imposed in the clearance or construction permit issued, and violation or consistent or repeated violation of the relevant rules and/or regulations.

The Guidelines on the Identification, Classification, and Recognition of Historic Sites and Structures in the Philippines was issued to recognize, support, protect and conserve sites and structures of demonstrated historical significance considered for inclusion in or delisting from the National Registry of Historic Sites and Structures in the Philippines. First, the Commission shall comply with international principles and standards of conservation as outlined in the International Charter for the Conservation and Restoration of Monuments and Sites, Charter on the Conservation of Historic Towns and Urban Areas, Nara Document on Authenticity, Code of Ethics of the American Institute for Conservation of Historic and Artistic Works, and other universally accepted standards of conservation. Second, given the potentially large number of significant sites and structures, the cost of maintenance, conservation, and restoration – budgetary constraints, the principle of shared responsibility between the Commission and concerned government units or

private parties shall be vigorously encouraged. Third, in identifying historic sites and structures, the criteria shall be as follows:

(a) properties strongly associated with important historical events, heroes and illustrious Filipinos whose distinctive historic contribution endures;

(b) properties that bear strong foreign historical or period influences such as Chinese, Arabic, Spanish, Mexican, American or Japanese and those that provide strong evidence of historical relations with other countries;

(c) sites of first establishments in the Philippines i.e., site of the first printing press, commercial house, theatre, school, transport system, distillery, etcetera;

(d) groups or clusters of buildings or structures, or a whole precinct, district, or town center including plazas, gardens, landscapes, historic ruins, streets, pathways, stairs, bridges, fences, visual corridors, vista points and other open spaces, town plan patterns, and immediate environs whose historic importance is seen in the entirety of the setting, unit or space rather than in its elements or characteristics.

Fourth, in classifying historic sites and structures, the Commission shall determine historical significance in terms of the following:

(1) whether the person, event, site or structure led to or resulted in profound changes in the lives of the community, the country, or a considerable segment of our population;

(2) if the changes are durable or lasting as distinct from short-lived;

(3) whether and how much the event, person, site or structure reveals something meaningful or important about our past; and

(4) whether the event, person, site, or structure resonates and concerns us at present, provided that the site or structure being proposed for recognition must be at least fifty years old and seventy percent authentic. In declaring and marking historic sites and structures, the process may be initiated by the Commission, government unit of the agency, private owner, or concerned citizen, historical or heritage society or association, or private establishment upon submission of the required documents.

Fifth, government units and private owners whose property or structure has received recognition from the Commission shall:

(1) maintain and protect the marker and site it signifies;

(2) in case of local government units, document and inventory their local historical heritage sites and structures and provide protective and fiscal measures; and

(3) for local historical or heritage societies and concerned citizens and groups, monitor the condition of historic sites in their vicinity, report any damage or deterioration to the local government unit and the Commission, help raise funds to maintain the site, and encourage public awareness of the value of the site. Sixth, the Commission shall charge the person(s) responsible for the damage of a site or structure resulting from a violation of P.D. 1505 (Amending Presidential Decree No. 260, as amended, by Prohibiting the Unauthorized Modification, Alteration, Repair and Destruction of Original Features of All National Shrines, Monuments, Landmarks, and Other Important Historic Edifices).

The Standards and Guidelines in Maintaining Historic Sites and Structures were issued to provide owners and technical persons the general idea of what preserving historic sites and structures is all about and what should and should not be done. It lists down:

(1) what maintenance works are and their recommended schedule i.e., inspection and documentation, cleaning and housekeeping jobs, repair and replacement, removal and vegetal and woody growths, repointing, replastering, repainting or refinishing works, preservative treatment, pest control treatment, weather-proofing and ventilating, corrective measures, and building code requirements;

(2) what is not considered as maintenance works i.e., emergency repair or rescue restoration works, major structural retrofitting or restructuring works, major restoration or rehabilitation works, renovation works, reconstruction works, additional structures or dismantling works and use conversion;

(3) the standards or basic activities that should be undertaken to ensure upkeep and preservation of our historic properties; and

(4) the guideline or recommended measures, actions, and activities based on best practices to appropriately undertake the maintenance of historic properties.

The Guidelines on the Declaration of Heritage Houses was issued to lay down the criteria for heritage houses:

(a) the house must be at least fifty years old to qualify – esteemed for its age and for having well withstood the ravages of time;

(b) the site or setting may be urban, suburban, upland, lowland or rural, and may be of environmental, historical, cultural and/or artistic importance;

(c) the house must represent a particular architectural style, form or milestone development, revolutionary technology relating to a significant historico-cultural experience of the Filipino people and taking into account initial and full development/s in architectural styles; and

(d) the house must not have undergone any major renovation or modification that has altered its form, character, and style such that at least 75% of the original structure and materials are still intact. Also laid down were the privileges for being a heritage house; responsibilities of the owner of the heritage house as to preservation, ownership, change of ownership, non-agreement among legal owners, and access to visitors; and the notice that any violation committed by the homeowner will result in the withdrawal of the status of his house as a Heritage House and the privileges that go with it.

The Guidelines on Monuments Honoring National Heroes, Illustrious Filipinos, and Other Personages was issued to provide the measures by which dominance could be achieved, site or setting, orientation, artistic style, design and materials, structures, landscaping and amenities, renovation, proper use, maintenance, relocation, and protection and development of monument sites.

Challenges in the Application of the National Cultural Heritage Act of 2009

Lack of initiative on the part of local government units to cause the documentation and subsequent registration of all cultural property located within their respective jurisdiction in the Philippine Registry of Cultural Property.

The Alberto Mansion

The said mansion was a classic two-story bahay-na-bato with a floor area of about six hundred square meters built in the 1800s by the family of Don Jose Alberto – Dr. Jose Rizal's maternal grandfather. It was said to be the last of the grand houses of Binan, Laguna that has historical significance.

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For more than two hundred years, the Alberto Mansion stood the test of time, but the super typhoon *Ondoy,* which ravaged Luzon in 2009, has caused tremendous damage to it.[109] It was left at such a poor state for quite some time because the last descendant who inherited it – Gerardo Alberto – did not have the financial ability to have the mansion repaired. He sought help from the local government of Binan, Laguna, several times. That same year, before the enactment of the NCHA, the sale of the Alberto Mansion was consummated between Gerardo Alberto and Gerry Acuzar – an architect-developer and project proponent of the Las Casas Filipinas de Acuzar (a heritage resort in Bagac, Bataan). The problem, however, was the house was dismantled and rebuilt in Bagac, Bataan – which thereby undoubtedly destroyed the integrity of the whole structure. In 2011, albeit belatedly, the Alberto Mansion was declared a *Cultural Heritage of Binan* through a city ordinance, and the city government appropriated a sum of money for the expropriation and restoration of whatever remains in the property.[110] Today, a replica of the Alberto Mansion in Binan, Laguna is standing at the Las Casas Filipinas de Acuzar in Bagac, Bataan – some materials of which were the exact materials of the original. ---

Ancestral Houses along M.J. Cuenca Ave., Brgy. Mabolo, Cebu City

Such ancestral houses were on the verge of destruction, because of a road-widening project to give way for the creation of a two-lane fly-over.[111] The Cultural and Historical Affairs Commission of Cebu City itself recognized the historical significance of the said houses because of its intricate Chinese-influenced wood carvings, intricately carved stone comices which bears the telltale marks of the 1800s, displayed coral stones and timber, and for having been used as medical facility during the Japanese occupation and an extension of the Mabolo Elementary School after liberation. The thing, however, is the local government did so until it was almost too late in the day to stop the demolition.[112]

It would not have been put under such threat if only the local government allotted importance in preserving properties that could potentially be declared as a national cultural treasure and/or important cultural property.

[109] Arnaldo Arnaiz, *The Fight for the Alberto House of Binan*, 08 June 2010, available at https://withonespast.wordpress.com/2010/06/08/alberto_house_binan.

[110] Pia Ranada, *The Tragedy of Bahay Alberto*, 05 November 2012, available at http://www.rappler.com/life-and-style/15398-the-tragedy-of-bahay-alberto.

[111] Jessica Ann Pareja, *Ancestral house owners, seek help against demolition*, PHIL. STAR, 30 June 2012, available at http://www.philstar.com:8080/cebu-news/2012/06/30/822906/ancestral-house-owners-seek-help-against-demolition.

[112] May B. Miasco, *City tells DPWH: Spare heritage Mabolo houses*, PHIL. STAR, 02 September 2015, available at http://beta.philstar.com/freeman/cebu-news/2015/09/02/14954444/city-tells-dpwh-spare-heritage-maolo- houses.

Undeclared Churches of Tubigon, Bohol

These churches were constructed during the 1800s and have always been an important aspect in the everyday lives of the communities they cater from then on. Yet, until now, the local government, which has jurisdiction over said churches, never took the initiative to have them recognized as a national cultural treasure and/or important cultural property so that they could be protected under the NCHA.

On 15 October 2013, a 7.2 magnitude earthquake shook the island of Bohol and struck down the priceless heritage churches in various towns and/or cities, including those located in Tubigon, Bohol. Had these churches been recognized by the appropriate national cultural agency prior to the disaster, they would have received the privileges that go along with its status i.e., national cultural treasure or crucial cultural property such as priority in government funding for their reconstruction or restoration.

Dampol Bridge, Dupax del Sur, Nueva

The said bridge is a 200-year-old single-arched brick bridge that divides Dupax del Sur and Dupax del Norte and spans the Abanatan creek. The early Isinay with other indigenous groups living in the old Ituy area handcrafted the red-colored bricks from an old adobe workshop. For the longest time, it connected Dupax to nearby towns and facilitated the transport of people and products.

In 2014, the Department of Public Works and Highways – Nueva Vizcaya 2nd District Engineering Office (hereinafter referred to as DPWH-NV) threatened the existence of the historical bridge by road construction and widening project. It argued that the bridge poses a danger to travelers and the properties of people living within the area, because of its narrowness – four meters wide. Despite objections from heritage advocates and concerned citizens of the province, the project went forward.[113]

In March 2015, the NCCA advised the DPWH-NV to stop the project, but at that time, demolition was on-going – a part of the bridge has already been destroyed, exposing the inner filling to decomposition.[114]

In December 2015, the National Museum has finally declared the Dampol Bridge as a National Cultural Treasure for being an integral part of the national cultural treasure church complex of San Vicente Ferrer which henceforth are known collectively as the San Vicente Ferrer

[113] Lester Babiera, *Nueva Vizcaya, protests DPWH's plan to destroy an ancient bridge*, PHIL. DAILY INQ., 25 August 2014, *available at* http://lifestyle.inquirer,net/169599/nueva-vizcaya-protests-dpwh-plan-to-destroy-ancient-bridge#ixzz4llrsQRKU.

[114] Edgar Allan M. Sembrano, *Spanish-era Dampol Bridge in Nueva Vizcaya saved, restored*, PHIL. DAILY INQ., 27 July 2015, *available at* http://lifestyle.inquirer.net/201424/spanish-era-dampol-bridge-in-nueva-vizcaya-saved/3ixzz4lls9GTPF.

Church Complex and Dampol Bridge of Dupax del Sur (Nueva Vizcaya) National Cultural Treasure.[115]

Poor coordination between the national cultural agencies and other national government agencies and institutions linked to it.

Barit Bridge, Brgy. Santiago, Iriga City, Camarines Sur

The bridge was built-in 1913 by the American Insular Government from what was originally a wooden truss built-in 1898 as shown in the 1898 map, is one of the oldest big and sturdy infrastructure projects which evolved from the Spanish-to-American engineering and architecture. It is an integral component of the setting of the city, as it possesses exceptional engineering, architectural, cultural, and artistic significance reflective of the town's history and culture. First, it aided the operation of ALATCO – the first bus transportation company in the province. Second, it is the only way to transport Manila hemp on a large scale from Buhi – the municipality (in Albay province) where the finest Manila hemp is grown to be brought in the country's capital and then distributed abroad. Third, it is a subject of numerous unique intangible cultural property (local beliefs and traditions about volcanic powers of Mt. Iriga). Fourth, it is an integral component of the setting of Barangay Santiago, as it witnessed several significant historical events documented by notable personages i.e., *Agta dwellings* by Harper's Magazine in 1900; Feodor Jagor's sketch in *Travels in the Philippines* of a large amphitheater formed after the eruption of Mt. Iriga; a sketch of *Novelda*, a reduction based on the present-day Santiago Elementary School by Jose Tavel de Andrade; and the filming of *Og*, the first Philippine Tarzan-inspired movie in the 1950s.

The Regional Development Council of Bicol, in its 2010 Redevelopment Program, approved the inclusion of reconstruction of Barit Bridge, so the Department of Public Works and Highways (hereinafter referred to as DPWH), in its Annual Investment Program, allotted budget for it. In March 2015, Iriga City Mayor Ronald Alfelor filed a petition before the NCCA to lift the *Presumption of Important Cultural Property* enjoyed by the subject bridge. In August 2015, the hearing officer recommended the denial of the petition to lift the presumption of the importance of Barit Bridge and the issuance of clearance for its demolition and advised the DPWH–Region V to coordinate with the NCCA for the proper conservation of the Barit Bridge.

In October 2016, the DPWH–Region V wrote a letter addressed to the NCCA informing the latter that the former cannot introduce retrofitting works on the bridge because of the unavailability of the requested historical data particularly its year of construction, built-plan and the type of materials used for its construction. Instead, a one-lane bridge will be constructed on

[115] National Museum, *Declaration by the National Museum in 2015 of Cultural Properties as Important Cultural Properties and National Cultural Treasures* (23 December 2015).

top of the Barit Bridge. Reports about the purported plan of DPWH–Region V to rehabilitate if not demolish the Barit Bridge was thereafter received by the National Museum from concerned citizens, so the latter proceeded to the site for validation of information and inspection.

World's Prospective Largest Pearl

The pearl found by one Gloria Heutter in the Philippines in 2016. It is an enormous, irregularly-shaped 81.5- pound pearl that has been valued more than USD130 million.

If found to be authentic, the National Museum will declare it as a national cultural treasure to acknowledge the significance of the property as an intrinsic part of the Philippine patrimony that we must take care of and pass on to the next generations.

In an interview conducted by the researcher with an officer of the National Museum, the latter disclosed that the property was brought to the National Museum for valuation. However, the person who brought the property left with it after having been informed that the cultural agency does not appraise the value of any cultural property for purposes of sale and that the property has to be registered.

In February 2017, the property was transported from the Philippines to the United States of America without the necessary permit from the National Museum.[116] According to a news report by a Pennsylvania-based television station WNEP and which news report is available on *Youtube*, Gloria Heutter was able to do so with the help of her friend Charlton Hollenbach without permission or certification from the National Museum. What is surprising, though, is the latter's statement that "It's almost impossible to pull off what we did. First of all, [it is a] national [cultural] treasure. You should go to the National Museum of the Philippines to get [it] certified. xxx xxx xxx To get it to the United States, I think we are probably the first ones, for that size, to pull off what we did."[117]

Burial Jars and Other Antiquities

The said antiques were believed to be thousands of years old were illegally exported from the Philippines to Canada by means of falsified documents, an officer of the National Museum shared during an interview conducted by the researcher that in 2016. These cultural properties,

[116] Edgar Allan M. Sembrano, *National Museum fumes over smuggled P6B clam pearl*, PHIL. DAILY INQ., 13 February 2017, *available at* http://lifestyle.inquirer.net/254393/national-museum-fumes-smuggled-p6b-clam-pearl/#ixzz4mVBVJmm6.
[117] WNEP The News Station, World's Largest Pearl, *available at* https://www.youtube.com/watch?v=jB1eO7XbLOc.

according to archaeologists, is a key piece of evidence to discover an unknown Philippine tribe who lived in one of the earliest human habitations in the Philippines.

At present, officials of the National Museum and the Canadian government is in the process of negotiating for the eventual repatriation of the Philippine cultural property.

Dayawan Torogan in Marawi City; Kawayan Torogan in Lanao del Sur

The said structure is known for its impressive, intricate ethnic architectural structure. It is a living architectural heritage which depicts traditional Maranao culture.[118] Torogan refers to the dwelling place of the Maranao royalty – the *Datu* of a sultanate and his wives and children – built by indigenous communities. Signifying prestige, rank, and wealth.

The Dayawan Torogan in Marawi City was declared by the NHCP as a National Historical Landmark, and the Kawayan Torogan was declared by the National Museum as a National Cultural Treasure.[119] Both structures are regarded as regional museums of living traditions as well as proof of the rich historical past of the Maranao culture.

The Dayawan Torogan was built in the 1730s.[120] Back in 1935, it was the venue where several Moro *Datus* from around Lake Lanao signed the Dansalan Declaration opposing the inclusion of Mindanao, Sulu, and Palawan as part of the Philippine islands should the American government cede power over it.[121]

The Kawayan Torogan – an archetype of torogans – was built in the early 1800s by *Sultan sa Kawayan Makaantal*. At the time of its recognition, it is the last Philippine vestige of traditional [Maranao] vernacular architecture, and unfortunately, it is in jeopardy as parts of it have collapsed.

Considering the armed conflict in Marawi city for more than three months already at the time of this writing and bearing in mind the obligation of the State to afford protection to properties that are culturally important to Filipinos during such armed conflict, the researcher went to the National Museum to ask about the current state of the national cultural treasures at the scene. Unfortunately, no government officer endeavored to check on the structures which the State itself recognized as objects that are so unique, possessing outstanding historical, cultural, artistic, and scientific value, which is significant and important to the country and nation.

[118] N.A., *Dayawan Torogan: The Endangered Heritage of Marawi*, 03 June 2017, available at https://habagatcentral.blogspot.com/2017/06/dayawan-torogan-endangered-heritage-of.html.
[119] National Museum. *Museum Declaration No. 4-2008* (n.d.).
[120] ABDULLAH T. MADALE, THE MARANAW TOROGAN (Chap. VIII: Pres. Fidel V. Ramos Visits Dayawan Torogan Museum) at p.144 (1996).
[121] Letter from Mindanao State University - Marawi City to Dr. Jesus Peralta of the National Museum. Justification for Declaring the Dayawan Torogan, a National Cultural Treasure (12 January 1995).

Lack of guidelines and/or little authority on the part of cultural agencies to implement their mandate as provided for by law

Church Complex of Santo Rosario in Angeles, Pampanga

The said complex was completed in October 1909 by the founding families of Angeles City led by Don Mariano V. Henson. It was laid out by the city planners of the Spanish colonial government by *Polo y Servicio* labor system. The backyard became the execution ground of Filipino rebels from 1896 – 1998, and the structure was used as a military hospital by the American forces from 1899 - 1900.

In 2016, the authorities managing the church, without permission from any national cultural agency, made the necessary arrangements with developers to renovate the whole complex in such a manner that its integrity or the very reasons which made it qualify as an Important Cultural Property will be lost. If it were not for the heritage group who opposed and reported such a plan of renovation to the tourism office of the province, the Philippines would have lost another priceless cultural property that is supposedly protected by law.

St. Bartholomew Parish Church in Nagcarlan, Laguna

In December 2016, was decorated with ornaments in preparation for the Christmas season. In carrying out the decoration, the people who worked on it used nails – something which cannot and should not be spiked on structures made of adobe. Later, debris showered from all sides of the church complex. The damage done came to the knowledge of the National Museum, because the church authorities sought its intervention in repairing the church complex. As it is mandated by law, the National Museum took the lead in repairing the church complex.

Analysis

By utilizing the two approaches devised by the UNICEF, the policy analysis technique and the case study method in assessing whether the domestic law satisfies the international standards on the preservation of cultural property, it may be concluded that the Philippine government, in formal expression, complies with its international obligation to preserve its cultural property. Moreover, as this study is also aimed to determine (1) whether the Philippine government makes genuine efforts in putting its domestic law framed in conformity with the international standards into practice – implementation, (2) whether the Philippine government internally complies through its activities and how such activities are applied in practice – application, and (3) whether

international standards successfully address the problem it was designed to solve or tackle – effectiveness, case studies/illustrations which point out the challenges in the law were helpful.

There must be legal and policy reforms. All cultural institutions of the government have their respective laws and mandates. Still, a cursory look at those laws manifests an overlap and/or incongruence on the tasks of conservation and protection of cultural resources despite the delineation on the areas or subjects of preservation and conservation. Further, there is a lack of policies and guidelines on protection, preservation, conservation, export, sale, and acquisition of Philippine cultural property. In almost all cases, parish priests are not informed of conservation policies before undertaking the rehabilitation of churches or convents, and local community stakeholders are not knowledgeable that there exists a law protecting their cultural property.[122]

Also, there is a lack of (1) clauses penalizing the neglect and consequent destruction of Philippine cultural property and (2) incentives to private owners to encourage them to preserve the cultural property they own. Furthermore, the NCHA is limited in application. It does not relate or refer to other laws i.e., the Philippine Mining Act of 1995, the Indigenous Peoples' Rights Act of 1997, and the Philippine Disaster Risk Reduction and Management Act of 2010. Hence, there is a need to revisit all existing laws on culture as well as charters of the cultural agencies and to create a single comprehensive law on cultural heritage.

There must be institutional restructuring. There is a lack of human resources in implementing the domestic law and programs preserving Philippine cultural property. For instance, in the Cultural Properties Division of the National Museum, only three officers are assigned to manage, on behalf of the government, Philippine cultural property (one in Luzon, one in the Visayas, and one in Mindanao).[123] Considering such a fact, there is no longer a need to explain why enormous Philippine cultural property is either mismanaged or lost one by one. Ideally, there should be regional coordinators to whom provincial cultural officers shall submit written reports regarding matters about the cultural property and/or property, which has in its favor the *presumption of important cultural property* situated within their respective jurisdiction. Further, there is a lack of professional cultural workers for the protection, preservation, and conservation of the cultural property. The on-going process of rehabilitating the damaged churches and civic structures after the Bohol-Cebu earthquake and super typhoon Yolanda reveal many realities in the praxis of cultural conservation. Our local communities, engineers, and architects are not fully and adequately equipped with the knowledge of skills, techniques, and materials in the conservation methods and processes.[124] Consequently, foreign experts had to be flown in to study the nature and extent of the damage caused and to propose solutions. Worse, in almost all cases, there is no comprehensive documentation or record of the structures which could have been helpful during the rehabilitation process.

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[122] Interview *with* an Officer in Cultural Properties Division of the National Museum, in Ermita, Manila (05 May 2017).
[123] *Id.*
[124] Interview *with* an Officer in Cultural Properties Division of the National Museum, in Ermita, Manila (19 May 2017).

There must be a compulsory cultural mapping within the respective jurisdiction of local governments. There have been many instances wherein properties which would have qualified as National Cultural Treasure and/or Important Cultural Property but which were either lost or destroyed by commercially-minded people because such property is not covered by the protective mantle of the law. Thus, it is wisest to order local government units to initiate the conduct of cultural mapping – a method for cataloguing the cultural assets of a community or the process of identifying and documenting in an inventory all the cultural assets within a specific geographic area – located in their respective jurisdiction in order to stall the continued enormous loss or desecration of Philippine cultural property.

To sum up, the Philippine government, for a fact, implements the international standards on the preservation of cultural property. However, it may be deduced from the case studies/illustrations that the problem lies in the application. The Philippine government falls short in applying both international standards and domestic law on the preservation of cultural property, thereby significantly frustrating its objectives as well as its intended effect/s. There may have been domestic legislation, enactment of regulations and policies, and creation of institutions and mechanisms the enforcement of which conforms to the obligatory or prescriptive language of the international standards. Still, the same is not faithfully put or applied in practice. Corollary, the degree to which the international standards alters or induces change in the behavior of the Philippine government to further the goals of such standards, the degree to which the international standards improves the state of the underlying problem/s, or the degree to which the international standards achieves its inherent policy objectives is at best minimal and at worst ineffective. Otherwise stated, while countless policies and programs on the preservation of cultural property have been made at the national and local levels, the gap between this discourse and actual practice remains very wide.

SUMMARY OF FINDINGS

1. Compliance, implementation, application, and effectiveness are concepts different from one another, albeit inter-related. Insofar as this study is concerned, the Philippine government, through a national cultural agency and local government units, understand these concepts and apply them in their effort to preserve Philippine cultural property.
2. There is no single compliance theory that adequately explains why the Philippine government complies with international standards on the preservation of cultural property. At best, elements of the various compliance theories assist in understanding the factors which greatly influence the behavior of the Philippine government in preserving its cultural property.
3. An examination of the international standards on the preservation of cultural property disclosed the sufficiency of these standards. However, the domestic application of these standards, as expressed in the policies and programs adopted to carry them out are beset with challenges. The cases treated in this study reveal the failure of the Philippine government to preserve its cultural property.

4. The domestic law is consistent with the international standards on the preservation of cultural property, as indicated by the adoption of relevant national and local policies and programs to preserve Philippine cultural property.
5. The Philippine government has formal compliance with the international standards on the preservation of cultural property.
6. The challenges in the application of the National Cultural Heritage Act of 2009 are as follows:
    a. lack of initiative on the part of local government units to cause the documentation and subsequent registration in the *Philippine Registry of Cultural Property* of all cultural property located within their respective jurisdiction;
    b. poor coordination between the national cultural agencies and other national government agencies and/or institutions linked to it; and
    c. lack of guidelines and/or little authority on the part of cultural agencies to implement their mandate as provided for by law.

Conclusion

The Philippine government's formal compliance with the international standards on the preservation of cultural property does not result in full preservation of the cultural property. As revealed by the cases treated in this study, functional compliance with the obligation to preserve Philippine cultural property in terms of pro-active implementation and application of actions and programs is low.

Recommendation

Aware of what the policies are, what they tend to accomplish, what they do accomplish, and that particular concepts should either be the foundation of or be reflected in policy. In a bid to reinforce the obligation of the Philippine government to preserve the heritage left behind, the following are hereby recommended to solve the identified challenges:

1. Strengthen the domestic law on preservation of cultural property by (a) enacting laws regulating the acquisition and disposition of Philippine cultural property, (b) penalizing its neglect and consequent destruction, and (c) offering incentives to private initiatives which promote its preservation.
2. Restructure and strengthen the national cultural agencies mandated to preserve Philippine cultural property by augmenting their human and financial resources.

3. Raise the awareness and appreciation of the people on the importance of preserving Philippine cultural property by adopting relevant courses in various curricula and by carrying out a comprehensive campaign to preserve it.
4. Conduct a comprehensive cultural mapping to identify all the cultural property which are currently not included in the preservation programs of the national cultural agencies and local government units.

THE CRIMINAL ASPECT OF CATFISHING

Inah Marie Z. Morales

2nd Best Thesis, 2019

Introduction

Long time ago, people communicate across the different borders through letters, mails, or telegrams. People had to create their messages through the use of pen and paper to be delivered by a messenger before such message will be received by the other person within a week or even a month. The mode of communication back then was not convenient as it takes a week or even a month for a single message to be received or delivered.

As our society develops and progresses, the mode of communication around the world has been improved through the use of modern technology. The use of modern technology had improved the means of communication by making it convenient, converting the use of pen and paper to electronic mail through the use of internet and computer. As an effect, the mode of communication has been fast and reliable as a single message will only take a minute to be delivered or received. This mode of communication has been efficient in our daily lives, but this has been further improved with the creation of Social Media.

Social media refers to the "means of interactions among people in which they create, share, and/or exchange information and ideas in virtual communities and networks."[1] Social media is about conversations, community, connecting with the audience, and building relationships.[2] It is a platform where people communicate across the borders through other means aside from electronic mail. It is an avenue where people collaborate, communicate, entertain, build relationship, and express their political views and opinions.

Social Media can be divided into different platforms or tools, namely for communication, dating, entertainment, leisure, sports, and etc.[3] For communication, we have Facebook, Messenger, Twitter, Telegram, Yahoo Mail, Gmail, and etc. For dating, we have Tinder, Grindr, FilipinaOnline, and other dating apps. For entertainment, we have Youtube, Instagram, Snapchat,

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[1] Tufts University, Social Media Overview, "What is Social Media?", *available at* http://communications.tufts.edu/marketing-and-branding/social-media-overview/ (last accessed June 8, 2018).
[2] *Id.*
[3] Pranath Fernando, Social Media and its Uses, *available at* https://www.liquidlight.co.uk/blog/article/social-media-and-its-uses/ (last accessed June 8, 2018).

iFlix, Netflix, and other online streaming sites. For leisure, we have TripAdvisory, Booky, Agoda and others. For sports, we have Nike, Topfit, Home Workout, the Score, and others.[4]

The Internet and social media have bridged gaps between people all over the world, allowing them to connect and to communicate in new and easier ways. But, it also has opened the doors to fraud, deception, and cyberbullying.[5]

Social Media has its advantages and disadvantages. Among its advantages are speed and efficiency, which allows communication between people.[6] As for its disadvantages, one of which is the commission of fraud and scams, where individuals use the different platforms to commit fraudulent acts or different scams.[7]

One of the fraudulent acts committed in Social Media is Catfishing. Catfishing is creating a fake identity online and using it to lure people in. In other words, people pretend to be someone they are not online in order to hook people into a romantic relationship.[8] The term "catfishing" comes from the 2010 documentary called "Catfishing." In the documentary, 24-year-old Nev Schulman carried out an online relationship with 19-year-old Megan Faccio from Michigan.[9]

In the Philippines, the term was introduced in 2013, from the news covered by ABS-CBN, where a Filipina was lured into falling in love with an alleged military guy named "Martin" and their relationship basically revolved by sending text messages with the use of SMS and the social networking site Facebook. For two years, the alleged couple was not able to meet in person because of several excuses used by Martin. Throughout their relationship, the Filipina admitted she bought prepaid credits for Martin, who specifically instructed her to buy the prepaid credits to one of his friends "Jackie." The Filipina spent a cumulative amount of P15,000 from October 2011 – the month she started buying prepaid credits for Jackie – until January 2013. This scheme was found out by the Filipina, who then sought the help of the Police. The Philippine National Police – Criminal Investigation and Detection Group considered this case rare since most of the cases they handled involved extortion, using money wire transfer services, which thereby falls within the ambit of the crime, estafa.[10]

Therefore, catfishing is a scheme whereby other people create fake accounts in social media to lure people into engaging in romantic relationships. Once the romantic relationship is

[4] Tufts University *supra* note 1.
[5] Sherri Gordon, Catfishing andHowitRelatestoCyberbullying,available*at* https://www.verywellfam ily.com/what-is-catfishing-460588 (last accessed June 8, 2018).
[6] What are the advantages and disadvantages of Social Media?, *available at* https://www.enotes.com /homework-help/what-advantages-disadvantages-social-m edia-474446 (last accessed June 8, 2018).
[7] BilalAhmad, 10Advantages and Disadvantages of Social Media for Society, *availableat* https://www.techmaish.com/advantages-and-disadvantages-of-social-media-for-society/ (last accessed June 8, 2018).
[8] Gordon, *supra* note 5.
[9] *Id.*
[10] Dharel Placido, ABS-CBN News Exclusive: Love in the time of Facebook, *available at* http://news.abs-cbn.com /focus/02/22/13/exclusive-love-time-facebook (last accessed June 8, 2018).

established, the person starts to make requests, such as the transfer of prepaid credits or cards or other schemes which does not involve direct money transfers.

Catfishing is a developing fraudulent scheme here in our country. The recent survey shows that 56% of our total population is engaged in the form of what we call online dating,[11] where people create accounts online in order to communicate with other people from different countries. With this big chunk of our population engaged in online dating, they can easily be victims of this scheme as people can easily use the identity of others to create fake accounts, pretending to be someone they are not online in order to hook people into romantic relationships.

Unfortunately, this fraudulent scheme has not yet been recognized by local lawmakers, while police officers recognize this kind of scheme as rare; thereby when people report this kind of scheme, they cannot identify what kind of crime it is, and they cannot provide a remedy to the victim.

In the Philippines, the term was introduced in 2013, from the news covered by ABS-CBN, where a Filipina was lured into falling in love with an alleged military guy named "Martin" and their relationship basically revolved by sending text messages with the use of SMS and the social networking site Facebook. For two years, the alleged couple was not able to meet in person because of several excuses used by Martin. Throughout their relationship, the Filipina admitted she bought prepaid credits for Martin, who specifically instructed her to buy the prepaid credits to one of his friends "Jackie." The Filipina spent a cumulative amount of P15,000 from October 2011 – the month she started buying prepaid credits for Jackie – until January 2013. This scheme was found out by the Filipina, who then sought the help of the Police. The Philippine National Police – Criminal Investigation and Detection Group considered this case rare since most of the cases they handled involved extortion, using money wire transfer services, which thereby falls within the ambit of the crime, estafa.[12]

A question is thus posed: Is the existing legal framework sufficient to deal with the nature and legal consequences of Catfishing?

Furthermore, the study aims to answer the following questions: (1) What online social media practices may be considered as "Catfishing?"; (2) How is Catfishing treated under (a) foreign jurisdiction and (b) local jurisdiction?; (3) What are the legal consequences of the online social media practices of Catfishing?; and (4) Are local legal remedies sufficient to deal with the consequences of Catfishing?

[11] YouGov Survey, Use of Online Dating Apps among Filipinos, *available at* http://newsbytes.ph/2017/11/23/use-of-online-dating-apps-am ong-filipinos-up-56-survey/ (last accessed June 8, 2018).
[12] Dharel Placido, ABS-CBN News Exclusive: Love in the time of Facebook, *available at* http://news.abs-cbn.com /focus/02/22/13/exclusive-love-time-facebook (last accessed June 8, 2018).

Review of Related Literature

Origin of the Scheme Catfishing

The term "catfishing" was first introduced in 2010 in a documentary entitled "Catfish." The documentary involves Nev Schulman, a 24-year-old photographer in New York City who discovered and fell in love with a gorgeous woman named "Megan" who was later on found out to be a middle-aged, married mother.[13]

In 2007, he was contacted by an 8-year-old girl named "Abby" on Myspace. Abby was a budding artist from the remote upper peninsula of Michigan, who told Schulman that she had seen one of Schulman's photographs in a newspaper and asked his permission to paint it. Weeks later, Schulman received a watercolor rendition of his photographs. Schulman sent Abby more of his photographs to paint. With her mother Angela's blessing, the two began to correspond online and Schulman developed a friendship with the entire family.

Schulman was blown away to learn from Angela that local art dealers were bidding on Abby's paintings; one had sold for $7,000. Schulman was flooded with packages filled with Abby's drawings and paintings. That's when Schulman's brother Ariel and friend Henry Joost – both filmmakers who shot Schulman and their friends hanging around all the time -- said they sensed a story was building.[14]

Within two months, Schulman became Facebook friends with a small throng of Abby's fans, followers and family, including her 19-year-old half-sister Megan. Like Schulman, she was a photographer and he was intrigued by the striking photos of herself which she posted online. Although they were complete strangers, he quickly fell for her. As part of their virtual courtship, Megan, who was also a talented musician, would write songs for Schulman – often singing them as duets with her brother and mother, Angela -- and post them on Facebook. The two talked on the phone and exchanged steamy text messages about their attraction.[15]

Since then, they have never met in person and the closest they had actually come to being together was in a photo Schulman doctored on the computer. Schulman was ready to go the distance to meet Megan. When she said she was moving from her family's home to a horse farm on the shores of Lake Superior, Schulman wanted to move there to be with her. When Schulman

[13] Ellie Flynn, WHO'S BEHIND THE SCREEN? What does catfishing mean and what's the law on stealing someone's identity online in the UK?, *available at* https://www.thesun.co.uk/fabulous/1754916/catfishing -meaning- identity-steal-online-dating/ (last accessed June 27, 2018).
[14] Thoman Berman and Gail Deutsch, Inside 'Catfish': A Tale of Twisted Cyber-Romance, *available at* https://abcnews.go.com /2020/catfish -movie-tale-twisted-cyber-romance/story?id=11817470 (last accessed June 27, 2018).
[15] *Id.*

got a job shooting a dance performance in Vail, Colo., a destination closer to Michigan than New York City, he leaped at the chance for a rendezvous with Megan, inviting her and her family to meet him. His brother Ariel Schulman and friend Henry Joost were by his side, ready to film what they thought would be the happy ending their friend was waiting for.[16]

But before a real-life meeting could take place, in an online chat, Megan told Schulman she was taking requests for songs. Since Schulman was so excited about Megan's horse farm, the guys tried to think up songs about horses, and came up with "Tennessee Stud," famously sung by Johnny Cash. Within a half-hour, Megan sent them a rendition of the song that they found so impressive; they wanted to try to help her find professional representation as a singer in New York. They looked back at the list of songs on her Facebook page that Megan said she and her mother had written. A simple Google search revealed that the lyrics belonged to another artist. On YouTube, they found a version that sounded almost identical. When Schulman and Joost searched for "Tennessee Stud" on YouTube, way down the list of results they found that the only female rendition of the song was the exact song that Megan had supposedly played and just sent Schulman.[17]

The realization that his seven-month relationship could be a complete sham devastated Schulman, but his friends were eager to get to the bottom of it and confront Megan and her family on camera. The trio set out for upper Michigan from Vail looking for answers. After a 1,300-mile journey, they pulled up to Megan's horse farm just after midnight.[18]

At the end of the documentary Schulman discovers "Megan" was a fake account run by Angela using a family friend's photos.[19]

The documentary was the first milestone in introducing the scheme of Catfishing in other countries. From the documentary, we can deduce that the term Catfishing involves the creation of a fake account in social media using the identity of others with the aim of luring the other person to engage in a romantic relationship. Once the relationship is established, the person who created the fake account will start asking for favors or advances which in the case of Schulman his photographs were turned into paintings by "Abby" who was later on found out to be the same person he fell in love with and the paintings derived from the photographs of Schulman was able to give "Abby/Megan" pecuniary benefit.

[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] Flynn *supra* note 13.

Social Media Practices considered as Catfishing under Local Jurisdiction

In the Philippines, the only case of Catfishing reported was from the news covered by ABS-CBN wherein a Filipina was lured into falling in love with an alleged military guy named "Martin" and their relationship basically revolved by sending text messages with the use of SMS and the social networking site Facebook. For two years, the alleged couple was not able to meet in person because of the several excuses used by Martin. Also, throughout their relationship, the Filipina admitted that she had bought prepaid credits for Martin who specifically instructed her to buy the prepaid credits to one of his friends "Jackie", the Filipina had spent a cumulative amount of P 15,000 from October 2011 - the month she started buying prepaid credits from Jackie - until January 2013.This scheme was later on found out by the Filipina who sought the help of the Police. The Philippine National Police – Criminal Investigation and Detection Group considered this case a rare one since most of the cases they have handled involved extortion using money wire transfer services which thereby falls within the ambit of the crime estafa.[20]

This article published in 2013 by ABS CBN has set the milestone in introducing the scheme of Catfishing here in our country. The scheme of catfishing which appears to be only viral in other countries has been in fact existing in our country but failed to be recognized because these kinds of cases were neither reported to the police officers nor published as a news until this article came out. The article abovementioned is a proof that the scheme of Catfishing employed in social media is a growing case here in our country due to the fact that half of the population of Filipinos are engaged or into the use of social media as a means of engaging and/or finding their romantic relationship.

The case of the Filipina being lured by a fake military guy sets a cornerstone into the growing case of Catfishing by opening the minds of the Filipino citizens that finding love through social media platforms comes with a risk of being tricked by the other person in asking some favours which particularly for financial gains taking advantage of the established romantic relationship between them.

[20] Placido, *supra* note 10.

Treatment of Catfishing

Under Foreign Jurisdiction

Before in foreign jurisdiction [i.e. United States], Catfishing does not have any specific legal action.[21] However, it can still be charged as a crime by examining the intent of the catfishing whether the fake account is used to swindle money then the "catfish" can be criminally charged with fraud or the fake account resulted to an emotional damage then the "catfish" can be civilly liable.[22]

Due to the increasing number of cases reported within their jurisdiction, the lack of specific catfish laws triggered the lawmakers of United States to enact "Catfishing Liability Act of 2016" which took effect on November 1, 2016.[23] The law allows victims to get a restriction against people using their names, pictures or voice to create a fake identity on social media. Oklahoma State Representative John Paul Jordan, who sponsored the bill, said the injunction could allow greater attention for Facebook and Twitter to remove the fake accounts and try harder to figure out who truly made them.[24]

Other states such as California, Pennsylvania and Texas provide for a remedy to the victims of catfishing by awarding them actual damages if they can prove it and an award of 500 USD for emotional damages which is determined in a case to case basis.[25]

Under Local Jurisdiction

In the Philippines, there is still no specific law treating this fraudulent scheme of Catfishing as a crime. Further, there is still no remedy provided by our laws to the victims of this fraudulent scheme.[26]

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[21] Your Guide to Catfishing, The Legal truth about Catfishing in the United States and Canada, *availableat* http://im pactofcatfishing.blogspot.com /2017/02/the-legal-truth-about-catfishing-in.html (last accessed July 24, 2018).

[22] *Id.*

[23] An Act relating to online impersonation; creating the Catfishing Liability Act of 2016; providing short title; defining terms; establishing cause of action for online impersonation for certain purposes; providing exception; authorizing request for certain injunctive relief; authorizing award of certain damages; authorizing award of certain fees and costs; construing provisions; making remedies cumulative; providing for noncodification; providing for codification; and providing an effective date [Catfishing Liability Act of 2016], Enrolled House Bill No. 3024,

[24] Your Guide to Catfishing, *supra* note 21.

[25] *Id.*

[26] Placido, *supra* note 10.

With the number of cases reported to our police authorities, they are having difficulties classifying this kind of crime and in providing legal remedies to the victims. In most cases, our police authorities classify this scheme as a rare one. According to them the fraudulent scheme of catfishing does not fall squarely to the crime of staff because of most of the incident reports does not involve a direct extortion of money.[27]

Until now, these incident reports remained unsolved as there is still no law passed which directly penalizes this fraudulent scheme. Further, as there is no law, it is difficult for them to provide legal remedies to the victims of catfishing.

Legal Consequences of Catfishing

Under foreign jurisdiction, the legal consequences provided for the crime of Catfishing involves criminal and civil liabilities.[28] Catfishing laws under foreign jurisdiction provide an examination of the degree or intent of the "catfish" before determining the liability of the perpetrator.[29] If the degree or intent of the catfish is to swindle money, goods or gifts from the victim this will amount to fraud and the catfish will be liable criminally.[30] While, if the degree or intent of the "catfish" resulted to emotional damage to the victim the "catfish" will be civilly liable.[31]

In the Philippines, there is still no legal consequence provided for the scheme of Catfishing. Unfortunately, there are no provisions under our Revised Penal Code that would qualify this fraudulent scheme as a crime. Moreover, our cybercrime law particularly the Republic Act No. 10175 entitled "Cybercrime Prevention Act" which specifically punishes crimes related to computer-related fraud and computer-related identity theft only and has not yet treated this fraudulent scheme of catfishing as a cybercrime.[32]

[27] *Id.*
[28] Your Guide to Catfishing, *supra* note 21.
[29] *Id.*
[30] HG.Org Legal Resources, Can I Sue for Being Catfished?, *available at* https://www.hg.org/legal-articles/can-i-sue-for-being-catfished-33850 (last accessed July 24, 2018).
[31] *Id.*
[32] Janette Toral, 16 Cybercrimes covered under Cybercrime Prevention Act, *available at* https://digitalfilipino.com/introduction-cybercrime-prevention-act-republic-act-10175/ (last accessed July 24, 2018).

Sufficiency of local remedies to the consequences of Catfishing

In this part, the researcher aims to provide the readers an overview of what crimes are covered by our Revised Penal Code and Special Laws which involves the use of social media or the internet. Further, the researcher aims to establish that the scheme of Catfishing is not yet covered by the laws within our jurisdiction.

In the Philippines, the Revised Penal Code contains the general penal laws of the Philippines.[33] The Revised Penal Code criminalizes a whole class of acts that are generally accepted as criminal, such as the taking of a life whether through murder or homicide, rape, robbery and theft and treason. The Code also penalizes other acts which are considered criminal in the Philippines, such as adultery, concubinage, and abortion. It expressly defines the elements that each crime comprises, and the existence of all these elements have to be proven beyond reasonable doubt in order to secure conviction.[34]

Our Revised Penal Code is comprised of two books covering different titles specifying different crimes. One of its Titles involves the Crimes against Property; particularly Chapter Six of the Title covers the crime of Swindling or Estafa [Articles 315-318].[35] The elements of Estafa or swindling *are* the following:

> (1) there must be a false pretense, fraudulent acts or fraudulent means; (2) such false pretense, fraudulent act or fraudulent means must be made or executed prior to or simultaneously with the commission of the fraud; (3) the offended party must have relied on the false pretense, fraudulent act or fraudulent means and was thus induced to part with his money or property; and (4) as a result thereof, the offended party suffered damage.[36]

It is evident that the crime of Estafa requires that there must be an employment of false pretense or through fraudulent means. Fraud, in its general sense, is deemed to comprise anything calculated to deceive, including all acts, omissions and concealment involving a breach of legal or equitable duty, trust or confidence justly reposed, resulting in damage to another, or by which an undue and unconscientious advantage is taken of another. It is a

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[33] Wikipedia, Revised Penal Code, *available at* https://en.wikipedia.org/wiki/Revised_Penal_Code_of_the_Philippines (last accessed June 29, 2018).
[34] *Id.*
[35] An Act Revising the Penal Code of the Philippines and Other Penal Laws [REVISED PENAL CODE], Act No. 3185, arts. 315-318 (1932).
[36] Franco v. People of the Philippines, G.R. No. 171328 (2011); RCL Feeders PTE., Ltd. v. Hon. Perez, 487 Phil. 211, 220-221 (2004); Montano v. People, 423 Phil. 141, 147 (2001), citing People v. Juego, 358 Phil. 499 (1998); People of the Philippines v. Delos Reyes G.R. No. 198795 (2017).

generic term embracing all multifarious means which human ingenuity can device, and which are resorted to by one individual to secure an advantage over another by false suggestions or by suppression of truth and includes all surprise, trick, cunning, dissembling and any unfair way by which another is cheated and deceit is the false representation of a matter of fact whether by words or conduct, by false or misleading allegations, or by concealment of that which should have been disclosed which deceives or is intended to deceive another so he shall act upon it to his legal injury. The false pretense or fraudulent act must be committed prior to or simultaneously with the commission of the fraud.[37] The fraudulent means must be executed simultaneously, and the victim was made to rely on the said false pretense which induced him to part with his money or property. The crime of Estafa covers only direct extortion of money or property from other people through the use of fraudulent means.

Clearly, the crime of estafa involves a direct extortion of money or property from the victim.[38] The crime of estafa is different from the scheme of Catfishing because the latter requires the use of social media with the purpose of luring other people to enter into romantic relationship online. Once the romantic relationship is established, the perpetrator starts to ask favours from the victim without necessarily extorting money but however uses other forms such as prepaid cards/credits, giving gifts and extending loans [i.e. eCard] which are not capable of pecuniary estimation. In other words, the extortion of money is made indirectly.

On the other hand, Republic Act No. 10175 entitled "An Act defining Cybercrime, Providing for the Prevention, Investigation, Suppression and the Imposition of Penalties therefor and for other purposes." It was promulgated on July 25, 2011.[39] Under its Declaration of Policy, it provides that:

> The State also recognizes the need to protect and safeguard the integrity of computer, computer and communications systems, networks, and databases, and the confidentiality, integrity, and availability of information and data stored therein, from all forms of misuse, abuse, and illegal access by making punishable under the law such conduct or conducts. In this light, the State shall adopt sufficient powers to effectively prevent and combat such offenses by facilitating their detection, investigation, and prosecution at both the domestic and international levels, and by providing arrangements for fast and reliable international cooperation.[40]

[37] Alcantara v. Court of Appeals, 416 SCRA 418 (1998); Garcia v. People, G.R. No. 144785 (1985).
[38] Atty. Rainier Mamangun, Estafa, *available at* http://www.mylawyer.asia/node/25 (last accessed June 29, 2018).
[39] An Act Defining Cybercrime, Providing for the Prevention, Investigation, Suppression and Imposition of Penalties Therefor and for Other Purposes [Cybercrime Prevention Act of 2012], Republic Act No. 10175 (2011).
[40] Cybercrime Prevention Act of 2012, § 2.

Clearly, the special law was enacted to protect and safeguard the communication and information contained in the computers and prevents all forms of misuse, abuse and illegal access of such information or communication contained in the computers.

The Act particularly penalizes the so-called Cybercrime Offenses which primarily covers computer-related offenses and content-related offenses. For computer-related offenses it is classified into two: computer-related fraud and computer-related identity theft. While for content-related offenses, it is limited to the following: cybersex, child pornography, unsolicited commercial communications and libel.

Clearly, nothing in our laws covers or punishes the crime of Catfishing, for our laws particularly the Revised Penal Code and Special Laws focuses on different kinds of crimes which either involves the employment of fraudulent means which led to direct extortion of money or property from another or those crimes committed with the use of computer and information acquired over the computer but the same covers only a particular aspect [i.e. domain name or identity of another] with or without monetary gain. Nothing in our laws covers a kind of crime which involves the use of social media as one of the platform to establish a romantic relationship with other people and luring them to accede to their favours which particularly involves an indirect extortion of money such as the sending of prepaid cards/credits, giving gifts and extending loans [i.e. eCard] which are not capable of pecuniary estimation.

FRAMEWORK

Theoretical Framework

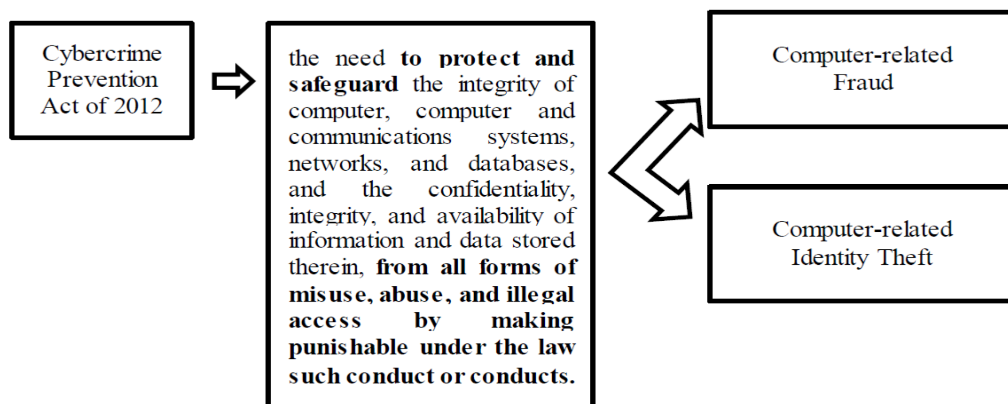

Figure 1. Cybercrime Prevention Act of 2012 Declaration of Policy and Computer-related Offenses

Based on the deliberations of the Cybercrime Prevention Act of 2012, and as stated by Senator Miguel Zubiri:

> [T]he Internet is an indispensable tool, having revolutionized the way we learn, the way we interact, the way we govern and manage businesses, the way we even entertain ourselves. It has liberated communication and different kinds of transactions from constraints of time and geography. Those are examples of the Internet usage. This freedom, however, comes with a cost. Internet usage – as well as abuse – has skyrocketed in the absence of any appropriate legal framework. The ubiquity of the Internet has given rise to the proliferation of cybercrime – which spans hacking, identity theft, spamming, phishing, denial-of-service ("DoS") attacks, malware, and child pornography and cyber prostitution. This can be attributed to the inherent lack of security of the Internet architecture and the relative anonymity of users.[41]

From the statement above by Senator Zubiri, it can be inferred that our lawmakers particularly our senators recognize the possible abuses and threats that can be created or developed through the use of the internet. Moreover, the deliberations on the said law aimed to fill a legislative void which is the punishing of offenses against the confidentiality, integrity and availability of computer data and systems: computer-related offenses such as forgery and fraud; and content-related offenses like cybersex, child pornography and unsolicited commercial communications.[42]

Section 2 of Cybercrime Prevention Act of 2012 provides that the State recognizes the need to protect and safeguard the integrity of computer, computer and communications systems, networks, and databases, and the confidentiality, integrity, and availability of information and data stored therein, from all forms of misuse, abuse, and illegal access by making punishable under the law such conduct or conducts.[43] Further, the State shall adopt sufficient power to effectively prevent and combat such offenses by facilitating their detection, investigation, and prosecution at both the domestic and international levels, and by providing arrangements for fast and reliable international cooperation.[44] From this provision, it can be inferred that the State, by enacting the said law, recognized its duty to protect and safeguard not only the integrity of computer and

[41] Official Gazette, Public Records of Senate Deliberations on the Cybercrime Prevention Bill, *available at* http://www.officialgazette.gov.ph/2012/10/03/for-the-record-public-records-of-senate-deliberations-on-the-cybercrime-prevention-bill/ (last accessed September 8, 2018).
[42] *Id.*
[43] *Id*, § 2.
[44] *Id.*

communication system but also the integrity of the information and data stored in that medium against **all forms** (emphasis supplied) of misuse, abuse and illegal access.

Moreover, the said law only provides for two classifications of offenses under Computer-related Offenses. First, the Computer-related Fraud which is defined as the unauthorized input, alteration, or deletion of computer data or program or interference in the functioning of a computer system, causing damage thereby with fraudulent intent[45] and second, the Computer-related Identity Theft which is defined as intentional acquisition, use, misuse, transfer, possession, alteration or deletion of identifying information belonging to another, whether natural or juridical, without right.[46] These two provisions, although it involves computer-related offenses, do not involve the crime of Catfishing.

Based on Senate Deliberations, Computer-related Fraud is considered as an offense provided there are damage and fraudulent intent regardless of whether or not there is an economic benefit. It is possible that the intention of computer-related fraud is not economic gain but destruction. "Perpetuation of fraudulent activity" connotes a series of action. It should be sufficient that the perpetrator in one act shows fraudulent intent.[47] On the other hand, Computer-related Identity Theft operates when the identity or information of a natural or juridical person is used by another. The deliberations are silent as to whether an economic benefit or pecuniary gain should be considered as an element in determining this kind of offense.[48]

The crime of Catfishing, as defined, is the creating of a **fake identity online and** using it **to lure people in**. In other words, people pretend to be someone they are not online in order to hook people into a romantic relationship. Thus, the crime of Catfishing involves the creation of a fake identity online with the intention of luring people to enter into a romantic relationship and to benefit [either for monetary or other purposes] from the said relationship.

Clearly, the Cybercrime Prevention Act of 2012, particularly the provision on Computer-related Offenses has a limited application as it only provides offenses which are either interference in the functions of a computer system causing damages with fraudulent intent or an intent to acquire, use, misuse, transfer, possess, alter or delete the information belonging to another, whether natural or juridical, without right. The law failed to take into consideration the offenses which may be developed outside the ambit of these two provisions and one of which is the fraudulent scheme employed with the use of computer through social media or known as the crime of Catfishing.

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[45] *Id*, § 4(b)(2).
[46] *Id*, § 4(b)(3).
[47] Senate Deliberations on Cybercrime Prevention Act of 2012 page 7 dated September 12, 2011, *available at* http://senate.gov.ph/lisdata/1218410272!.pdf, (last accessed September 8, 2018).
[48] *Id.*

Conceptual Framework

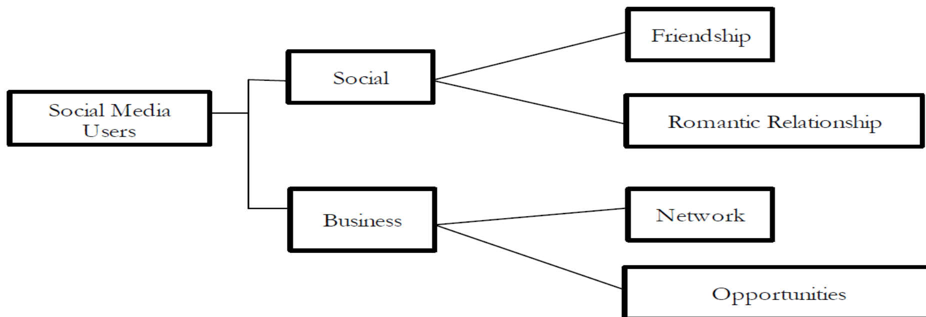

Figure 2. Social Media Users

Based on the recent survey conducted by Global Digital Snapshot, there are 3.028 billion active social media users around the world[49] that means a forty percent (40%) of the world's total population are comprised of social media users.[50] Among the said population, 2.780 billion are active users,[51] meaning they are the ones who constantly checks and updates their social networking sites from time to time. Further, based on the survey twenty percent (20%) of the total number of active users comes from our country, the Philippines.[52] Also, according to the report's data, which came from a wide range of international sources and the social platforms themselves, they'll keep growing. There will be four percent (4%) uptick in total global users (which equates to 121 million people) by the end of 2018.[53]

Social Media is used for different purposes. Its most common uses or purposes are for leisure/entertainment and for business.[54] Social Media is being used for social purposes because this kind of media platform offers a variety of applications and sites where the viewers or its users can access in order to gain satisfaction or pleasure. Also, social media provides not only entertainment to its users but also it gives the users an easy way to communicate to their family, friends and significant others.[55] On the other hand, Social Media is being used for business purposes because it provides the businessmen and entrepreneurs an avenue for them to create and promote their businesses online. It also gives them an opportunity to build connections and

[49] Brett Williams, There are now over 3 billion social media users in the world — about 40 percent of the global population, *available at* https://mashable.com/2017/08/07/3-billion-global-social-media-users/#kDSJBMryPaqN (last accessed September 8, 2018).
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] Kathrina Tiangco, Social Media Users, *available at* https://www.audiencebloom.com/5-types-of-social-media-users-and-how-to-use-them (last accessed September 8, 2018).
[55] *Id.*

networks to other businessmen and entrepreneurs through social media's different features and applications.[56]

As to the kinds of Social Media users, there are two (2) classifications: first, the leisure user and second, the business user. For leisure user, this is the kind of social media user which uses the media platform to build friendships, relationship or to just simply entertain themselves with the different applications provided by different social networking sites.[57] In this kind of user, their main goal is to build relationships with the help of social media application and sites.[58] While the business users primarily use the social media as a platform to promote their products and activities to their prospective buyers online and at the same time build connections and relationships among other businessmen and their clients.[59] In this kind of user, their main purpose of using social media applications and sites is to gain financially.[60]

Although the Social Media has a lot of benefits to our daily lives it is still subject and prone to abuse by its users.[61] Different types of abuses are being employed in social media among of those are extortion, false trickery or simply just causing damage to another person whether financially or emotionally.[62] According to a recent survey, the first group of social media users particularly the leisure users tends to abuse the use of social media by employing different means to lure other people in order to gain financially or to just simply cause damage to another person.[63] With this type of social media users, they primarily use the social media in order to gain financially or to satisfy their personal needs by doing unlawful acts.

Some of the fraudulent acts they employ in social media are the following: (1) they create fake profiles online with the intent of soliciting financial gains from another person;[64] (2) they create fake identities online to lure others to engage in a romantic relationship and ask for some favours whether for pecuniary or non-pecuniary gain;[65] (3) cyberbully other

[56] *Id.*
[57] Top Dog Social Media, 10 Types of Social Media Users, *available at* https://topdogsocialmedia.com/10-types-of-social-media-users (last accessed September 8, 2018).
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] Syed Zulkarmain Syed Idrus and Nor Azizah Hitam, *Social Media Use or Abuse: A Review,* Volume 3 JHDC 41-58 (2014).
[62] *Id.*
[63] Samuel Gibbs, What can be done about abuse on Social Media? *available at* https://www.theguardian.com /media/2017/dec/13/what-can-be-done-about-abuse-on-social-media, (last accessed September 9, 2018).
[64] *Id.*
[65] Gordon, *supra* note 5.

people;[66] (4) create ads for "phishing"[67] and (5) create fake business profiles to scam other people.[68]

To summarize, Social Media has been a platform for us to connect and communicate with other people across and among the different borders of the world. Although, social media has a good effect not only in the development of technology but most importantly it greatly affects our daily lives it has at the same time bad effects which are brought or caused by its users. Some of the users as mentioned tend to abuse the benefits of the social networking sites or applications in order to satisfy their personal needs. With all of the different kinds of abuses that can be employed in social media, we now see the urge to safeguard the rights of its users.

In the Philippines, social media users are often called as "Netizens" which is defined as the citizen of the internet or an active user of the 'net.[69] According to the report released by We Are Social, 67 million of our population is comprised of internet users. 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.[70]

Since a vast majority of our population is comprised of the so-called Netizens, our country, the Philippines, has been one of the top countries with the most social media abuses reports in the past 8 years.[71] Our country had been and continues to be a victim of these abuses employed by social media users such as fake news, online scams, phishing, identity theft and the most recent one the Catfishing.[72]

The Philippines having a vast majority of its population comprised of social media users, there is an urgent need to safeguard and protect its people from being victims of these kinds of abuses.

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[66] Cyberbullying, *available at* https://www.pacerteensagainstbullying.org/experiencing -bullying/ cyber-bullying/, (last accessed September 9, 2018).
[67] Josh Fruhlinger, What is Phishing, *available at* https://www.csoonline.com /article/2117843/phishing/what-is-phishing-how-this-cyber-attack-works-and-how-to-prevent-it.html, (last accessed September 9, 2018).
[68] Top Online Scams, *available at* https://www.lifewire.com /top-online-scam s-153134, (last accessed September 9, 2018).
[69] Urban Dictionary, Netizen, *available at* https://www.urbandictionary.com /define.php?term =netizen (last accessed September 9, 2018).
[70] Miguel R. Camus, *PH is world leader is Social Media Usage*, INQUIRER.NET, February 15, 2018 *available at* http://business.inquirer.net/246015/ph -world-leader-social- media-usage (last accessed September 9, 2018).
[71] Philippines, abuse of social media, *available at* https://www.ucanews.com /news/philippines -probes-fake-news- abuse-of-social-m edia/81386 (last accessed September 10, 2018).
[72] *Id.*

Operational Framework

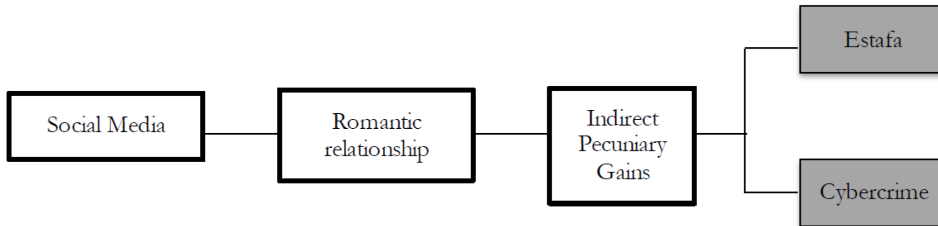

Figure 3. Operational Framework

The enactment of Cybercrime Prevention Act of 2012 was motivated by the arising numbers of fraudulent schemes or unlawful means employed through the use of computers.[73] However, at present time, unlawful means or fraudulent schemes are not only employed through the use of computers but more rampantly in social media networking sites and applications. Despite of the provisions under Section 2 of the said law, the State still fails to safeguard and protect its people and their rights against all kinds of these unlawful means.

Our law, although provides a punishment and remedy to the victims of computer-related fraud or computer-related identity theft, it still not covers some of the fraudulent schemes employed in social media. One of which is the concept of Catfishing, where a person creates a fake identity online to lure another person to enter into a romantic relationship and once the relationship is established, the "catfish" or the person who created the fake online account starts to ask favours to the other person whether it be for pecuniary gain or an indirect pecuniary gain. In this scheme, it neither falls to the concept of estafa because of the fact that there was no abuse of confidence on the part of the party and it was not done to any person who holds position or office or an authority. But rather it was done to a normal person who was lured by the "catfish" to enter into a romantic relationship. Neither this scheme is covered by the provisions of our Cybercrime Prevention Act of 2012 for the scheme does not involve computer-related fraud or computer-related identity theft.

In this regard, this paper aims to fill in the gap as to what kind of crime and punishment should be given to the perpetrator of this scheme as well as to provide an adequate remedy to the victim of this scheme because our present laws are lacking. Taking into consideration of the fact that we already have a law which safeguards and protects the integrity of computers as well as the data incorporated therein and a vast majority of our population is comprised of active social media users or the so called "Netizens", our current Cybercrime Prevention Act of 2012 should be

[73] Senate Deliberations on Cybercrime Prevention Act of 2012 page 7 dated September 12, 2011, *available at* http://senate.gov.ph/lisdata/ 1218410272!.pdf, (last accessed September 8, 2018).

appropriately broadened so as to cover other schemes [i.e. Catfishing] which causes damages and injures the welfare of our people.

DISCUSSION

Catfishing is a developing fraudulent scheme in the Philippines

From the previous discussion on the chapters above, it has been established that in the Philippines, social media users are often called as "Netizens" which is defined as the citizen of the internet or an active user of the 'net.[74] According to the report released by We Are Social, 67 million of our population is comprised of internet users. 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.[75] Since a vast majority of our population is comprised of the so-called Netizens, our country, the Philippines, has been one of the top countries with the most social media abuses reports in the past 8 years.[76] Our country had been and continues to be a victim of these abuses employed by social media users such as fake news, online scams, phishing, identity theft and the most recent one the Catfishing.[77]

The most recent fraudulent scheme that is developing in our country is the one called "Catfishing". Catfishing is defined as creating a fake identity online and using it to lure people in. In other words, people pretend to be someone they are not online in order to hook people into a romantic relationship.[78] Once the romantic relationship is established, the "catfish" or the person who lured the other person online to engage into such relationship will now ask some favours which can be direct pecuniary benefit [i.e. benefits which are in the form of cash] or an indirect pecuniary benefit [i.e. credit card extensions, prepaid load cards, gifts].[79]

Catfishing is a developing fraudulent scheme here in the Philippines; the recent survey shows that 56% of our total population[80] is engaged in the form of what we call online dating where people create an account in an online application in order to communicate with other people

[74] Urban Dictionary, Netizen, *available at* https://www.urbandictionary.com /define.php?term =netizen (last accessed September 9, 2018).
[75] Miguel R. Camus, *PH is world leader is Social Media Usage*, INQUIRER.NET, February 15, 2018 *available at* http://business.inquirer.net/246015/ph -world-leader-social- media-usage (last accessed September 9, 2018).
[76] Philippines, abuse of social media, *available at* https://www.ucanews.com /news/philippines -probes-fake-news- abuse-of-social-m edia/81386, (last accessed September 10, 2018).
[77] *Id.*
[78] Gordon, *supra* note 5.
[79] *Id.*
[80] YouGov Survey*supra* note 11.

among different countries. With this big chunk of our population engaged in online dating, they can easily be a victim of this scheme for people can easily use the identity of others to create fake accounts pretending to be someone they are not online in order to hook people into a romantic relationship.

Despite the fact that this is a developing scheme in the Philippines, our government bodies, particularly Senate of the Philippines and the National Bureau of Investigation, stated based on the interview conducted by the researcher that there are no reports yet submitted before their office but admitted the fact that this scheme has been prevalent online to our country and to other foreign jurisdictions. Further, these government bodies stated that the fact that a big part of our population is comprised of social media users it can be concluded that the Philippines will be an easy target of this scheme in the long run.

Regardless of the fact that there are no reports submitted before the aforementioned government bodies, this scheme has been introduced and established in the Philippines when the ABS-CBN News published a report[81] with regard to this kind of fraudulent scheme. The report has been the milestone of the introduction of this scheme in the Philippines and had raised awareness to our citizens. Accordingly, the first reported case of the crime of Catfishing involves a who Filipina was lured into falling in love with an alleged military guy named “Martin” and their relationship basically revolved by sending text messages with the use of SMS and the social networking site Facebook. For two years, the alleged couple was not able to meet in person because of the several excuses used by Martin. Also, throughout their relationship, the Filipina admitted that she had bought prepaid credits for Martin who specifically instructed her to buy the prepaid credits to one of his friends “Jackie”, the Filipina had spent a cumulative amount of P 15,000 from October 2011 - the month she started buying prepaid credits from Jackie - until January 2013.This scheme was later on found out by the Filipina who sought the help of the Police. The Philippine National Police – Criminal Investigation and Detection Group considered this case a rare one since most of the cases they have handled involved extortion using money wire transfer services which thereby falls within the ambit of the crime estafa.[82]

Although this is the only reported case of the crime of Catfishing in or jurisdiction, there are some cases which remained to be unreported based on the interviews conducted by the researcher and which proves the fact that this crime of Catfishing is a developing fraudulent scheme in the Philippines. The researcher classified its respondents into two (2) groups: first, the victims of Catfishing who suffered indirect pecuniary loss and second, the victims of Catfishing who suffered emotional damages.

As to the first group, the researcher conducted an online interview to these four (4) respondents via social networking site [i.e. Facebook]. Based on the respondents, all of them had a relationship for almost four (4) years online which started on the year 2011, two (2) of them met

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[81] Placido, *supra* note 10.
[82] *Id.*

their "online boyfriend" on Facebook who allegedly told them that they are from the U.S. Military Service and the other two (2) met their "online girlfriend" also in Facebook who claims to be an alleged businesswoman based in California. All of these respondents, throughout their relationships, had given their alleged "significant others" such as gifts [i.e. watches, pieces of jewelry and etc.] and some loan extensions through the use of their credit cards. When the researcher asked them on whether they are aware that they are being catfished during their relationship all of them answered in the negative and stated that their significant others were not showing some "red flags" during their relationship. However, they all come to a realization when they realized the fact that they were already losing a significant amount of money throughout their relationship and the fact that they have not seen their alleged "significant other" even once on their entire relationship. Further, one out of the four (4) respondents stated that the only time he knew about this fraudulent scheme is when he read the article published by the ABS-CBN news in the year of 2013. Moreover, all of them tried to seek the help of the authorities by posting some write ups or blogs on their social media site, but none of the authorities mentioned by these respondents answered.

As to the second group, the researcher conducted an online interview to these four (4) respondents via exchange of electronic mail [i.e. Yahoo Mail and Google Mail]. Based on the respondents who happen to be a majority of females, they stated that they met their alleged "boyfriend" online via an application called Tinder. At first, they were all hesitant to connect with their "significant others" due to the fact that the said application has a reputation of creating fake accounts or personalities. However, due to the persistence of their alleged boyfriends they were lured and later on engaged in a romantic relationship. Majority of the respondents under this group had a relationship for the span of 5 years counting from the year of 2012, some of their alleged boyfriends claimed to be a son of a known politician from various provinces in the Philippines. When asked by the researcher on whether they knew the fact that they are being catfished, three of them answered in the affirmative. Although this set of respondents did not suffer indirect pecuniary losses, they suffered emotional damages [i.e. mental anguish, sleepless nights and moral anxiety] throughout their relationship because they claim that their alleged boyfriends did not evince any suspicious facts about their identities which in effect made them feel that they are really in a genuine relationship.

Further, based on the interview conducted by the researcher on the victims of this fraudulent scheme in Metro Manila, the researcher was able to identify that this scheme has been in existence in our country since 2010 as stated by one of its respondents. They also stated that this kind of scheme is mostly prevalent in social dating sites and applications here in our country. Moreover, the researcher was able to identify the reason why this kind of scheme remained to be unreported. As stated by the respondents, the reason was the victims find it difficult to identify whether this kind of fraudulent scheme is punishable under the laws because of the fact that this is employed in social media and second, they failed to identify which government authorities this scheme should be reported.

Indeed, it can be said that Catfishing is a developing scheme in the Philippines since 2010 and it is a prevalent scheme employed in the social dating sites and applications offered in our country. Further, taking into consideration the fact that majority of our population is composed of social media users or otherwise known as the "*netizens*" our country, the Philippines, is an easy target of this fraudulent scheme because most of our citizens are engaged in the use of social media sites and applications.

Catfishing qualifies as a crime under Philippine law

In the Philippines, crimes are classified into two kinds particularly: (a) *mala in se* which refers to acts which are inherently evil or bad or wrongful in itself[83] and (b) *mala prohibita* which refers an act which is considered wrong because it is prohibited.[84] Thus, no criminal intent is needed in order to find a person liable for crimes punished under Special Penal Laws. As long as the act is committed, then it is punishable as a crime under law.[85]

It must be noted that not all violations of Special Penal Laws are mala prohibita. While intentional felonies are always mala in se, it does not follow that prohibited acts done in violation of special laws are always mala prohibita.[86] There are some important distinctions between crimes punishable under the Revised Penal Code and Special Penal Laws. One of them is that in crimes punished under the Revised Penal Code, the moral trait of the offender is considered. This is why liability would only arise when there is criminal intent or negligence in the commission of the punishable act. In crimes punished under Special Penal Laws, the moral trait of the offender is not considered; it is enough that the prohibited act was voluntarily done.[87]

The crime of Catfishing is considered a crime which falls under the classification of *mala prohibita.* This is because the act of luring another person to engage in a romantic relationship with the use of social media is an act which is considered wrong and prohibited by virtue of a special law enacted by the Philippines particularly the Republic Act No. 10175 or otherwise known as the Cybercrime Prevention Act of 2012. The Section 2 of the said law states that:

> [T]he State recognizes the need to protect and safeguard the integrity of computer, computer and communications systems, networks, and databases, and

[83] Wikipedia, Philippine Criminal Law, *available at* https://en.wikipedia.org/wiki/Philippine_criminal_law, (last accessed at September 21, 2018).
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*

> the confidentiality, integrity, and availability of information and data stored therein, from all forms of misuse, abuse, and illegal access by making punishable under the law such conduct or conducts. In this light, the State shall adopt sufficient powers to effectively prevent and combat such offenses by facilitating their detection, investigation, and prosecution at both the domestic and international levels, and by providing arrangements for fast and reliable international cooperation.[88]

Clearly, a reading of this provision infers that the State recognizes its role in protecting and safeguarding the integrity of computers and communications systems as well as all the data and information stored therein from all forms of abuse with the aim of effectively preventing and combating all offenses at both the domestic and international levels.

The crime of Catfishing is considered as a cybercrime as it involves the use of a computer network or an electronic medium in which online communication takes place.[89] Moreover, the crime of Catfishing does not require that the act of the catfish be inherently evil or bad but rather it only requires that the act must be voluntarily done by the catfish.[90]

In that effect, the fraudulent scheme of catfishing will qualify as a crime under our laws provided that the "catfish" or the perpetrator voluntarily committed the act of luring another person to engage in a romantic relationship with the use of social media. Thus, it qualifies as a *mala prohibita* and thereby governed by a special law relating to cybercrime offenses.

Indeed, the fraudulent scheme of Catfishing qualifies as a crime under the Philippine laws. It is classified as a *mala prohibita* and falls within the safeguards of a special law particularly the Republic Act No. 10175 or otherwise known as Cybercrime Prevention Act of 2012.

Catfishing is employed in social media through different means in the Philippines

From the previous chapters, Catfishing has been defined as a fraudulent scheme of creating a fake identity online and using it to lure people in. In other words, people pretend to be someone they are not online in order to hook people into a romantic relationship.[91]

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[88] Cybercrime Prevention Act of 2012, § 2.
[89] *Id*, § 3(i).
[90] Catfishing: The phenomenon of Internet scammers who fabricate online identities and entire social circles to trick people into romantic relationships, *available at* https://www.dailymail.co.uk/news/article-2264053/Catfishing-The- phenomenon-Internet-scammers-fabricate-online-identities-entire-social-circles-trick-people-romantic-relationships.html, (last accessed September 21, 2018).
[91] Gordon, *supra* note 5.

It has been established that a lot of fraudulent schemes can be employed in the social media due to its vast coverage, features and scope. This aspect of social media makes it more susceptible for the employment of social media crimes or otherwise called as cybercrimes because the perpetrators or the offenders are given a wide scope of how to create and employ their fraudulent schemes in order to cause an injury or damage to another people online. In effect, this social media aspect has paved its way to procure the employment of the crime of Catfishing in social media through different means and with the objective of causing damage or injury to another person.

Based on the interview conducted by the researcher on the victims of this fraudulent scheme, catfishing is employed in social media through different means. Although, this fraudulent scheme is employed generally with the use of social media, the victims have stated that this fraudulent scheme is employed through different means to which are the following but not limited to: first, it is employed in the dating site called Tinder, in this dating site the "catfish" uses a photo of another person to create a fake profile and later on will use the said fake online profile to lure another to engage into a romantic relationship; second, this fraudulent scheme is also employed in the social media site called Facebook wherein the "catfish" will create a fake profile using random pictures of other people in the internet and will pretend to be a sick person to another person thereby he/she will now ask for financial help to the person he/she lured to enter into a romantic relationship or will use their family members/relatives who pretend to be sick in order to solicit some financial help; third, other "catfish" will pretend that they are an established businessman/businesswoman online and they will ask their online partner to venture in their business either in the form of credit or loan extension or some in the form of cash extension; fourth, some "catfish" will pretend that they live overseas and would ask some prepaid card extensions to their online partner and fifth, some "catfish" uses the social media sites with the sole intent of causing emotional damage to other persons online.

Moreover, based on the respondents, this kind of scheme can either cause financial or emotional damage on the part of the victims. Based on the interview conducted by the researcher, as to the financial damages, some of the victims throughout their fake online relationships were able to give their fake significant other some watches, pieces of jewelry, loan extensions, credit card extensions and cash amounting to P50,000.00 or some would just ask for prepaid card or load card extensions pretending that they live across the country. Some of the catfish would also pretend that they are terminally ill or sick which will trigger their online significant other to extend some financial help. As to the emotional damages, this kind of injury is prevalent to the victims who are ages 18 years old up to 21 years old. In this kind of injury, no financial amount is involved, or any indirect pecuniary losses is involved but rather it involves an emotional damage or injury to the person by causing some anxiety, sleepless nights, depression, moral shock and etc. which is mainly caused by the fake romantic relationship established by the "catfish".

Indeed, catfishing in the Philippines is a fraudulent scheme which is employed through different means in social media for two (2) purposes: first, for direct or indirect pecuniary benefit and second, to cause emotional damage to another person online.

Catfishing is a crime that does not fall under the ambit of crimes under the Revised Penal Code and the Cybercrime Prevention Act of 2012

In the Philippines, our penal laws are primarily governed by the Revised Penal Code and other special laws. Our Revised Penal Code was enacted in the year of 1930 and remains to be in effect until the present time. Despite of several amendments thereto, our Penal Code does not comprise a comprehensive compendium of all Philippine penal laws.[92] In that effect, not all crimes in the Philippines are penalized under the Code; certain crimes, such as the illegal possession of firearms, are penalized under special legislation contained in Republic Acts. The most notable crimes now excluded from the Revised Penal Code are those concerning illegal drug use or trafficking, which are penalized instead under the *Dangerous Drugs Act of 1972* and later the *Comprehensive Dangerous Drugs Act of 2002*.[93]

In that effect, the only crimes that can be associated with the crime of Catfishing are the crime of Estafa or *Swindling* under the Revised Penal Code and the Republic Act No. 10175 Cybercrime Prevention Act of 2012.

As to the crime of Estafa, our Revised Penal Code is comprised of two books covering different titles specifying different crimes. One of its Titles involves the Crimes against Property; particularly Chapter Six of the Title covers the crime of Swindling or Estafa [Articles 315-318].[94] The elements of Estafa or *Swindling* are the following: (1) there must be a false pretense, fraudulent acts or fraudulent means; (2) such false pretense, fraudulent act or fraudulent means must be made or executed prior to or simultaneously with the commission of the fraud; (3) the offended party must have relied on the false pretense, fraudulent act or fraudulent means and was thus induced to part with his money or property; and (4) as a result thereof, the offended party suffered damage.[95]

It is evident that the crime of Estafa requires that there must be an employment of false pretense or through fraudulent means. Fraud, as defined in its general sense, is deemed to

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[92] Wikipedia, Revised Penal Code of the Philippines, *available at* https://en.wikipedia.org/wiki/Revised_Penal_Code_of_the_Philippines (last accessed September 18, 2018).
[93] *Id.*
[94] REVISED PENAL CODE, articles 315-318.
[95] Franco v. People of the Philippines, G.R. No. 171328 (2011); RCL Feeders PTE., Ltd. v. Hon. Perez, 487 Phil. 211, 220-221 (2004); Montano v. People, 423 Phil. 141, 147 (2001), citing People v. Juego, 358 Phil. 499 (1998); People of the Philippines v. Delos Reyes G.R. No. 198795 (2017).

comprise anything calculated to deceive, including all acts, omissions and concealment involving a breach of legal or equitable duty, trust or confidence justly reposed, resulting in damage to another, or by which an undue and unconscientious advantage is taken of another. It is a generic term embracing all multifarious means which human ingenuity can device, and which are resorted to by one individual to secure an advantage over another by false suggestions or by suppression of truth and includes all surprise, trick, cunning, dissembling and any unfair way by which another is cheated and deceit is the false representation of a matter of fact whether by words or conduct, by false or misleading allegations, or by concealment of that which should have been disclosed which deceives or is intended to deceive another so he shall act upon it to his legal injury. The false pretense or fraudulent act must be committed prior to or simultaneously with the commission of the fraud.[96] In this crime, the fraudulent means must be executed simultaneously and the victim was made to rely on the said false pretense which induced him to part with his money or property. The crime of Estafa covers only direct extortion of money or property from other people through the use of fraudulent means.[97] Clearly, the crime of estafa involves a direct extortion of money or property from the victim.[98]

The crime of Estafa is different from the crime of Catfishing because the latter requires the use of social media with the purpose of luring other people to enter into a romantic relationship online. Once the romantic relationship is established, the perpetrator starts to ask favours from the victim without necessarily extorting money but however uses other forms such as prepaid cards/credits, giving gifts and extending loans [i.e. eCard] which are not capable of pecuniary estimation or by merely causing emotional injury to another person online. In other words, the extortion of money is made indirectly, or the scheme is employed with the intent of causing emotional damage to another person which is not capable of pecuniary estimation. Indeed, the crime of catfishing does not fall within the ambit of the crime of Estafa or *Swindling* under our Revised Penal Code.

As to the Cybercrime Prevention Act of 2012, the researcher aims to limit its discussion as to the two offenses under the said act particularly the computer-related fraud and the computer-related identity theft.

Republic Act No. 10175 entitled "An Act defining Cybercrime, Providing for the Prevention, Investigation, Suppression and the Imposition of Penalties therefor and for other purposes." It was promulgated on July 25, 2011.[99] Under its Declaration of Policy, it provides that:

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[96] Alcantara v. Court of Appeals, 416 SCRA 418 (1998); Garcia v. People, G.R. No. 144785(1985).
[97] *Id.*
[98] Estafa, *available at* http://www.mylawyer.asia/node/25, (last accessed June 29, 2018).
[99] An Act Defining Cybercrime, Providing for the Prevention, Investigation, Suppression and Imposition of Penalties Therefor and for Other Purposes [Cybercrime Prevention Act of 2012], Republic Act No. 10175 (2011).

> The State also recognizes the need to protect and safeguard the integrity of computer, computer and communications systems, networks, and databases, and the confidentiality, integrity, and availability of information and data stored therein, from all forms of misuse, abuse, and illegal access by making punishable under the law such conduct or conducts. In this light, the State shall adopt sufficient powers to effectively prevent and combat such offenses by facilitating their detection, investigation, and prosecution at both the domestic and international levels, and by providing arrangements for fast and reliable international cooperation."[100]

Clearly, the special law was enacted to protect and safeguard the communication and information contained in the computers and prevents all forms of misuse, abuse and illegal access of such information or communication contained in the computers. Article 4(b)(2) of the Cybercrime Prevention Act of 2012 provides for the definition of Computer - related Fraud, it refers to the unauthorized input, alteration, or deletion of computer data or program or interference in the functioning of a computer system, causing damage thereby with fraudulent intent.[101] Further, as based on senate deliberations, it is considered as an offense provided there are damage and fraudulent intent regardless of whether or not there is an economic benefit. It is possible that the intention of computer-related fraud is not economic gain but destruction, "Perpetuation of fraudulent activity" connotes a series of action, It should be sufficient that the perpetrator in one act shows fraudulent intent.[102] This offense is different from the crime of Catfishing because this crime involves the creation of a fake identity online with the intent of luring another person to engage into a romantic relationship and will later on seek for favours which can either be for financial [i.e. direct or indirect pecuniary gain] or by causing emotional damage to another person. This crime does not involve acts which intercepts the computer program by inputting, altering or deleting computer data but rather it focuses on luring other people online to engage in a romantic relationship.

Clearly, the crime of Catfishing does not fall within the ambit of Computer-related Fraud as defined and sanctioned by the Cybercrime Prevention Act of 2012.

On the other hand, Article 4(b)(3) of the same law provides for the definition of Computer –related Identity Theft, it refers to intentional acquisition, use, misuse, transfer, possession, alteration or deletion of identifying information belonging to another, whether natural or juridical, without right.[103] Further, as based on senate deliberations, operates when the identity or information of a natural or juridical person is used by another. The deliberations are silent as to

[100] Cybercrime Prevention Act of 2012, § 2.
[101] *Id,* § 4(2).
[102] Senate Deliberations on Cybercrime Prevention Act of 2012 page 7 dated September 12, 2011, *available at* http://senate.gov.ph/lisdata/1218410272!.pdf (last accessed September 8, 2018).
[103] Cybercrime Prevention Act of 2012, § 4(b)(3).

whether an economic benefit or pecuniary gain should be considered as an element in determining this kind of offense.[104] This offense is different from the crime of Catfishing because in this kind of fraudulent scheme it requires the creation of a fake identity it does not necessarily imply that the "catfish" will use the information of another person online but rather it involves the creation of a whole new identity online in order to lure another person to engage into a romantic relationship. It is different in a senses that, computer-related identity theft sanctions the use, misuse, transfer, possession, alteration or deletion of any information belonging to another without legal right or authority while the crime of Catfishing requires the creation or existence of a fake identity online which was used in order to employ fraudulent means which can be in the form of financial gains or by merely causing emotional damage to another. Clearly, the crime of Catfishing is entirely different to the Computer-related Identity Theft as defined and sanctioned by the Cybercrime Prevention Act 2012.

Moreover, according to the interviews conducted by the researcher before the House of Representatives and the Senate of the Philippines, the respondents stated that there are no laws yet passed punishing the crime of Catfishing. Further, both of the respondents stated that the only law which punishes cybercrimes within our country is the Republic Act No. 10175 or otherwise known as the Cybercrime Prevention Act of 2012. They also stated that there is a need to either amend the said act or create a new law which will punish the crime of Catfishing taking into consideration the fact that this fraudulent scheme continues to develop in our jurisdiction and knowing the fact that Philippines is a country where majority of its population are social media users and most of its citizens spend most of their time on social media.

Indeed, the crime of Catfishing is a fraudulent scheme which is entirely different and does not fall within the ambit of the crime of Estafa under our Revised Penal Code and Computer-related Offenses as defined and sanctioned under our Cybercrime Prevention Act of 2012. Further, at present time, our laws are not sufficient to cover the crime of Catfishing.

There is a difference of the means and treatment of this fraudulent scheme under the local and foreign jurisdiction

As discussed in the previous chapters, it can be said that there are differences on how the crime of Catfishing is treated between local and foreign jurisdiction. They also differ on how the laws sanctioned this kind of fraudulent scheme.

As to the foreign jurisdiction, the crime of catfishing is employed in the following means: first, it is employed by the catfish in social media including electronic mail apps; second, it is employed by the catfish to lure another person to engage in a romantic relationship with the

[104] *Id.*

intent of extorting money which commonly in the form of cash extensions or direct wiring of cash to another person; third, it is employed by others to obtain donations from their significant other by pretending that they are suffering with a terminal illness; fourth, the catfish also uses life events such as death of relatives and even the catfish itself in order to solicit funds from the other person and lastly, some of the catfish uses this fraudulent scheme to cause emotional injury to other persons online. As to how it is sanctioned under the foreign jurisdiction, the crime of catfishing is treated as a criminal or civil case. It is treated as a criminal case when the scheme is employed with the intent of procuring financial gains whether direct or indirect from the victim. Clearly, when the catfish was able to obtain financial benefit out of their relationship, a criminal case of catfishing may be filed.[105] On the other hand, a civil case may be filed by the victim whenever the fraudulent scheme caused emotional injury or damage on his/her part. In this action, as long as the victim suffered any form of emotional injury which was directly caused by the romantic relationship established by the catfish, the victim can file a civil case against the catfish.[106]

At the present time, there are two (2) laws passed from the foreign jurisdiction governing the crime of Catfishing. The two (2) laws are the following: the Oklahoma Catfishing Liability Act and the California Catfishing Law.

As to the Oklahoma Catfishing Liability Act, authored by Oklahoma State Representative John Paul Jordan, the said law associated the crime of Catfishing as an online impersonation which is committed by any person who knowingly uses another's name, voice, signature, photograph or likeness through social media to create a **false identity** (emphasis supplied) without such person's consent, or in the case of a minor the consent of his or her parent or legal guardian, f**or the purpose of harming, intimidating, threatening or defrauding such person** (emphasis supplied), shall be liable for online impersonation and liable for any damages sustained by the person or persons injured as a result thereof; provided, however, there shall be no liability for any online impersonation for which the sole purpose is satire or parody.[107] The remedies provided under the said act are provided under Section 2 subparagraphs (c) and (d). Section 2(c) of the said law provides a remedy of an automatic injunction preventing the continued use of the plaintiff's name, voice, signature, photograph or likeness upon filing of the complaint[108] while Section 2 (d) provides a claim for actual damages suffered by the plaintiff which shall include, but not limited to, funds spent related to counselling or imprisonment of six (6) years or more.[109] To summarize, the Oklahoma Catfishing Liability

[105] Oklahoma Catfishing Liability Act, *available at* https://www.rightofpublicityroadm ap.com/sites/default/files/pdfs/oklahoma_catfishing_bill.pdf , (last accessed September 18, 2018).
[106] California Catfishing Liability Law, *available at* http://im pactofcatfishing.blogspot.com /2017/02/the-legal-truth- about-catfishing-in.htm l, (last accessed September 18, 2018).
[107] Oklahoma Catfishing Liability Act, § 2 (b).
[108] *Id*, § 2 (c).
[109] *Id*, § 2 (d).

Act seeks to punish persons who knowingly used another's name, voice, signature, photograph or likeness through the use of social media with the intention of harming, intimidating, threatening or defrauding another person. Further, the said act provided for three (2) remedies to the victim such as an automatic grant of injunctive relief upon filing of the complaint, imprisonment and a claim for actual damages suffered by the plaintiff.

As to the California Catfishing Liability Law which was passed on 2017. The law defined the crime of Catfishing as a fraudulent scheme committed by another person called the "Catfish" in social media by using the images and information of others with the objective of luring the person to enter into a relationship and afterwards soliciting some pecuniary advantages or benefits from the other person.[110] The said law provides a remedy to the victims of this fraudulent scheme by awarding emotional damages taking into consideration the factual circumstances of the case. Also, the law provided that the minimum amount to be awarded for the victims will amount to 500 USD.[111] To summarize the said law, the remedy provided is limited to the awarding of emotional damages to the victim amounting to not less than 500 USD and to be determined in a case to case basis.

To summarize the two laws presented by the researcher, the crime of Catfishing in other jurisdiction is punishable by imposing either criminal or civil liability. For criminal liability, the victim can ask for an injunction against the culprit or an imprisonment for a minimum of six (6) years or more taking into consideration the factual circumstances of the case. For civil liability, the victim can seek an action for damages suffered which may be actual or emotional damages.

As to the local jurisdiction, the crime of catfishing is employed in social media through the following means: first, it is employed in the dating site called Tinder, in this dating site the "catfish" uses a photo of another person to create a fake profile and later on will use the said fake online profile to lure another to engage into a romantic relationship; second, this fraudulent scheme is also employed in the social media site called Facebook wherein the "catfish" will create a fake profile using random pictures of other people in the internet and will pretend to be a sick person to another person thereby he/she will now ask for financial help to the person he/she lured to enter into a romantic relationship or will use their family members/relatives who pretend to be sick in order to solicit some financial help; third, other "catfish" will pretend that they are an established businessman/businesswoman online and they will ask their online partner to venture in their business either in the form of credit or loan extension or some in the form of cash extension; fourth, some "catfish" will pretend that they live overseas and would ask some prepaid card extensions to their online partner and fifth, some "catfish" uses the social media sites with the sole intent of causing emotional damage to other persons online. Currently, our laws do not sanction the crime of Catfishing. However, some government authorities as based on the interview conducted by the researcher,

[110] Your Guide to Catfishing, *supra* note 21.
[111] *Id.*

would say that if the victim suffered a direct financial loss [i.e. cash] it can be penalized under the crime of Estafa. However, some of the government authorities are in the contrary view because the crime of Estafa requires a different set of elements provided under the Revised Penal Code which must be first satisfied in order to qualify as one, and in this case the crime of Catfishing do not involve any of the elements provided by the crime of Estafa for it requires a different set of elements. Even if we associate the crime of Catfishing under the Cybercrime Prevention Act of 2012 the same will not sanction the said crime because what is punishable under the said act are only limited to data interception, misuse of data information or possession or transfer of data information without legal right or authority. Such scope is very limited and does not cover the crime of Catfishing. Due to this gap in our law, the victims of the crime of Catfishing are left without any adequate remedy yet.

It can be inferred that our treatment of Catfishing here is different from the treatment under the foreign jurisdiction because the latter covers an entire scope of the kind of fraudulent scheme whether it is in the form of direct or indirect pecuniary gain while in our jurisdiction the scheme is only limited to the indirect pecuniary gain on the part of the catfish and on the emotional damages caused by the catfish on another person. An analysis of the treatment of how it is treated under these two (2) jurisdictions will show that in the foreign jurisdiction, as long as the scheme resulted into a financial injury whether it is direct or indirect injury or whether it resulted to an emotional injury, the case shall be considered as Catfishing while in our jurisdiction the injury which must arise out of the relationship must be one of indirect financial loss or emotional injury. As to how it is sanctioned by the two jurisdictions, foreign jurisdictions can now impose criminal and civil liability to the catfish because of the passage of their catfishing laws while in our jurisdiction as there is no law yet governing the crime of Catfishing its fraudulent schemes and acts employed by the catfish are not yet penalized and sanctioned in our jurisdiction.

Conclusion and Recommendation

Philippine laws are insufficient to cover all crimes involving the use of social media as analyzed and examined by the researcher throughout this study. Despite of the growing number of the cases involving the crime of Catfishing, our laws failed to provide an adequate remedy to the victims and appropriate punishment to the so called “catfish” or perpetrator of the crime.

The researcher, being aware of the fact that the crime of Catfishing is a developing scheme here in the Philippines and as verified by our government bodies that there are no laws or bills passed yet which sanctions or punishes this kind of crime, hereby recommends for the amendment of our Republic Act No. 10175 or otherwise known as the Cybercrime Prevention Act of 2012.

The said law serves as the backbone of all cybercrime offenses employed with the use of computer network and systems and prevents all the misuse and abuse of all data and information stored therein. Being that said, it is deem proper to consider that the crime of Catfishing which is a crime employed with the use of social media to lure another person to engage into a romantic relationship and later on will ask for favours which can be for a direct or indirect pecuniary gains or with the sole intent of causing emotional injury to another person clearly falls within the ambit of our Cybercrime Prevention Act which safeguards and protect the integrity of the computer and protects all the data and information stored therein against abuse or misuse.

PROPOSED AMENDMENT OF REPUBLIC ACT NO. 10175

AN ACT AMENDING CERTAIN PROVISIONS OF REPUBLIC ACT NO. 10175 OR OTHERWISE KNOWN AS THE "CYBERCRIME PREVENTION ACT OF 2012" AND FOR OTHER PURPOSES

Section 1. Section 4(c) of Republic Act No. 10175 or otherwise known as Cybercrime Prevention Act of 2012.

"Section 4(b) Computer-related Offenses:

(b) Computer-related Offenses:

(1) Computer-related Forgery. —

(i) The input, alteration, or deletion of any computer data without right resulting in inauthentic data with the intent that it be considered or acted upon for legal purposes as if it were authentic, regardless whether the data is directly readable and intelligible; or

(ii) The act of knowingly using computer data which is the product of computer-related forgery as defined herein, for the purpose of perpetuating a fraudulent or dishonest design.

(2) Computer-related Fraud. — The unauthorized input, alteration, or deletion of computer data or program or interference in the functioning of a computer system,

causing damage thereby with fraudulent intent: *Provided,* that if no damage has yet been caused, the penalty imposable shall be one (1) degree lower.

(3) Computer-related Identity Theft. – The intentional acquisition, use, misuse, transfer, possession, alteration or deletion of identifying information belonging to another, whether natural or juridical, without right: *Provided,* that if no damage has yet been caused, the penalty imposable shall be one (1) degree lower."

Section 2. A new Section 4(b)(4) is hereby inserted after Section 4(c)(4) of Republic Act No. 10175, to read as follows:

4.Catfishing – is a fraudulent scheme employed in the social media by creating a fake identity online for the purpose of luring another person to engage into a romantic relationship in order to obtain pecuniary benefits whether direct or indirect or with the intent of causing emotional injury. The elements of the crime are as follows:

(a) creation of a fake identity online with the use of social media;

(b) the victim was lured to engage into a romantic relationship; and

(c) the victim suffered financial loss whether direct or indirect throughout the course of their relationship or suffered emotional damages.

CAN MOTHER NATURE SUE?

PHILIPPINE ENVIRONMENTAL LAWS GEARING TOWARD CONFERRING LEGAL RIGHTS TO OBJECTS OF NATURE

Helen May M. Frias

2nd Best Thesis, 2018

Introduction

Background of the Study

Around four decades ago, a professor of law caught the attention of many to explore the possibility of conferring legal rights to objects of nature. He was Professor Christopher Stone of University of Southern California. He published in the Southern California Law Review an article that hoped to "persuade the Court in the Mineral King case, *Sierra Club v. Morton*, to consider a park a jural person."[1]

The issue of whether or not animals or even inanimate objects should be given legal standing in actions before courts of law is not new in the field of animal rights and environmental law.[2] In the same case of *Sierra Club*, Justice William O. Douglas made a dissent with regard to who has the legal standing under the laws. He said that the issue of legal standing in environmental cases may be best streamlined by allowing the case to be litigated in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage.[3]

Fast forward to the year 2015, in the Philippine setting, animal rights advocates and environmentalists, in the case of *Resident Marine Mammals of the Protected Seascape Tañon Strait vs. Reyes*, suggested to accord standing to animals. Sadly, in both cases, the Courts were not ready yet to give such legal rights to natural objects.

The truth is, each time there is a movement to confer rights on some new "entity," the proposal is bound to sound odd, frightening, or laughable.[4] One reason is because of our resistance

[1] Hope M. Babcock, A Brook with Legal Rights: The Rights of Nature in Court, 43 ECOLOGY L.Q. 1, 7 (2016).
[2] Resident Marine Mammals of the Protected Seascape Tañon Strait v. Reyes, G.R. No. 180771, Apr. 21, 2015.
[3] Sierra Club v. Morton, 405 U.S. 727 (1972).
[4] Christopher D. Stone, Should Trees have standing? – Towards Legal Rights for Natural Objects, 45 SOUTHERN CALIFORNIA L.R. 450, 455 (1972).

to confer rights to something that is only an object "for the use of us." This poses a deeper problem to objects of nature.

If we were to look at them as just objects for our consumption, then we tend to disregard valuing them for themselves. Our efforts to preserve them would only go as far as their "service to humans." As long as we are served, everything else becomes optional. Humans are not compelled at most to restore them to how they were or at the very least indemnify them for the total damage we caused them.

This is a sad reality that we face nowadays. Philippines is at its lowest when it comes to protecting the environment. Our major ecosystems suffer environmental degradation including forest and upland ecosystems which experience rapid deforestation. Although there were impressive developments in our environmental laws including the recently promulgated Rules of Procedure for Environmental Cases through A.M. No. 09-6-8-SC, it seems that there is still much to be done.

This research intends to explore the possibility of conferring legal rights on objects of nature to advocate the protection of the environment. Such a change in the paradigm could mean three important things: **first**, the thing can institute legal actions at its behest; **second**, that in determining the granting of legal relief, the court must take its injury into account; and **third**, that relief must run for its benefit.[5]

Statement of the Problem

The following are the three main questions that need to be addressed in this research:

1. What does it mean when we confer legal rights to objects of nature?
2. Will the change in the environmental paradigm address the Philippine environmental issues?
3. What is the most applicable environmental legal framework in the Philippines as it gears toward conferring legal rights to the objects of nature?

Significance of the Study

There are three primary reasons why there is a need to accord these objects of nature legal rights under our laws. **Firstly,** these natural objects do not have the legal standing under our laws

[5] *Id*. at 458.

to institute action. They have to rely on someone else's injury or a human's injury and his willingness to pursue his claims before courts can grant the relief these objects need. To illustrate, in the case of a stream, there is in general no way to challenge the polluter's actions save at the behest of a lower riparian-another human being-able to show an invasion of human rights."[6]

If there is indeed an invasion of human rights, the right to institute action is still at the option of another person. Therefore, if the riparian owner does not opt to assert his rights under the law regardless of whether there is some injury to the natural objects, then that is the end of the inquiry. **Secondly,** it is difficult to establish legal standing based on someone else's injury. To put it simply, the only time that a polluter may be penalized for the damage he caused to the stream is through someone who is able to establish a direct injury against his own person. What is not considered in this instance is the very injury that the stream, its fishes, and its other forms of life may have suffered by the polluter's actions.

Nevertheless, the issue of legal standing has been given a liberalized approach by the Supreme Court. Through the Environmental Rules of Procedure, a citizen suit may be instituted which allows any Filipino citizen in representation of others, including minors or generations yet unborn, to file an action to enforce rights or obligations under environmental laws.[7] However, this has not developed yet to conferring legal rights to an object of nature. This is supposed to allow the natural object to speak for its own injury and such injury may be primarily considered in resolving issues that concern legal standing.

In this regard, it has been suggested by animal rights advocates and environmentalists that not only natural and juridical persons should be given legal standing under the laws. The reason is that it is difficult for persons to bring actions in representation of these animals or inanimate objects because they are by themselves cannot establish that they are real parties-in-interest.[8] Even through a liberalized standing in the form of the citizen suit, the injury to nature is not primarily considered. This will be further discussed in the latter part of this research.

Thirdly, natural objects do not benefit from the favorable judgment of the courts. At most, they are not the direct beneficiaries of the favorable judgment. Under our present system, even if a plaintiff riparian wins a water pollution suit for damages, no money goes to the benefit of the stream itself to repair its damages.[9]

Considering all these, there is a need to give natural objects, the legally recognized worth and dignity in its own right, and not merely to serve as a means to benefit us.[10] This means that inside this legal fiction that considers nature as a possessor of legal rights, it can speak for its own

[6] Stone, *supra* note 4, at 459.
[7] RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, A.M. No. 09-6-8-SC, Apr. 13, 2010, annot. Rule 2 § 5.
[8] Resident Marine Mammals, *supra* note 2.
[9] Stone, *supra* note 4, at 462.
[10] *Id.*

injury. This mechanism is necessary for the protection of rivers, lakes, animals and forests which we have neglected for so long.

Scope

In essence, this research is of three prongs: **first,** the necessity to incorporate a new paradigm to Philippine environmental laws that accord legal rights to objects of nature; **second,** the beneficial effects of the change in the paradigm to objects of nature in the Philippines, and **third,** the examination of the most applicable environmental legal framework as it gears towards conferring legal rights to these objects of nature in the Philippines.

The researcher will also give special attention to two environmental legal frameworks. The first one is called the **Guardianship Approach** that was popularized by Professor Stone. It was also used as the basis of the New Zealand's Te Awa Tupua (Whanganui River Claims Settlement) Act of 2017 that conferred the legal standing to Whanganui River.

Under this approach, guardians are appointed and are given the rights to conduct assessment on the status of the natural object. The guardians may in appropriate instances bring matters relating to the object to the Court's consideration for its final findings. After which, if redress is available, the guardians would have the rights to institute the appropriate action on the object's behalf. The guardians are also tasked to monitor the object and represent it as their ward in any administrative and legislative hearings for the latter's benefit.[11]

The second approach is the **Stewardship Approach** under our Rules of Procedure which is better known as the citizen suit. The researcher will further determine the better approach to address the environmental issues in the Philippines.

Conferring legal rights to objects of nature: what does it really mean?

At first, man was only concerned about himself. He was unable to contemplate other's rights but only his. He was self-interested. He can barely recognize that others aside from himself could have such liberties and privileges outside of his own. It was all about his own self.

Then as time went by, he started to recognize more and more "not only his welfare but the happiness of all his fellowmen." Gone are the days when "even within the family, persons we presently regard as the natural holders of at least some rights had none." Laws started to recognize

[11] *Id.*

that children have rights when previously they were considered to have none. And then there was this first woman in Wisconsin who once asserted her rights to practice law. She was told:

> The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world. The life- long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it.[12]

Then slowly, women were elevated in the society and were considered as holders of legal rights when previously they did not possess any. Fetal rights were eventually recognized. These rights were conferred by no less than our Constitution under section 12, article 2 which provides that the State shall equally protect the life of the mother and the life of the unborn from conception.[13]

Eventually, trusts, corporations, partnerships were conferred the legal rights under our laws. All these were once unthinkable, a concept which was really hard to grasp. For how can one condense the fact that mere creation of humans will have the standing to sue and be sued much the same as the natural persons?

Then, our laws started to recognize them. What was once inconceivable became common-place. These developments are like flickers of hope that one day not long from now even inanimate objects of nature will have the same legal rights under our laws. But what does it mean really by conferring legal rights to objects of nature?

Legal rights are not the same as human rights, and so a "legal person" does not necessarily have to be a human being.[14] Giving nature legal rights means the law can see "nature" as a legal person, thus creating rights that can then be enforced.[15] It is how artificial beings were created under our laws. Although they are not human beings per se, they are conferred legal rights or legal personhood under the laws. But how can we determine that natural objects are holding legal rights?

An entity is said to hold a legal right when there is some public authoritative body which is prepared to give some amount of review to actions that are colorably inconsistent with that

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[12] In re Goddell, 39 Wisc. 232, 245 (1875).
[13] PHIL. CONST. art. II, § 12.
[14] A half-day workshop in Melbourne hosted by the Centre for Resources, Energy and Environment Law as part of the Australian Earth Laws Alliance workshop series: Exploring the Legal Status of Nature, *available at* http://law.unimelb.edu.au/data/assets/pdf_file/0007/2516479/Legal-rights-for-rivers-Workshop-Report.pdf (last accessed Jan. 8, 2018).
[15] *Id.*

right.[16] It simply means that legal rights of the objects of nature will only exist if there would be some public authoritative body that would recognize and protect such rights against any actions that deprive the exercise of it. That body should be prepared to review any actions that run counter to the exercise of such rights.

For example, an accused who made an extrajudicial confession without the assistance of a competent lawyer is said to have no rights as an accused if the courts would not ask the proper authority to prove that such confession was in fact made legally.

But for a thing to be a holder of legal rights something more is needed than the existence of an authoritative body that is willing and competent to review the actions and processes of those who threaten it.[17] The following criteria must also be satisfied to say that nature possesses and holds legal rights. **First**, the thing must be able to institute legal actions at its behest; **second**, that in determining the granting of legal relief, the court must take its injury into account; and **third**, that relief must run for its benefit.[18]

This simply states three things: **one**, nature must have the right to institute action at its option, **two**, it must have the standing under the law to institute action based on its injury and not through someone else's and **three**, it must be the beneficiary of any compensation as a result of the injury caused to it.

Nature's right to institute action at its option

This has something to do with the natural objects' standing to institute action being a holder of the legal rights.[19] So far as the common law is concerned, there is in general no way to challenge the polluter's actions save at the behest of a lower riparian-another human being-able to show an invasion of *his* rights.[20]

The problem lies when that another human being whose rights were allegedly invaded opts not to institute action due to escalating costs of litigations. The lower riparian would not want to file an action if the cost of the litigation will be way more than his anticipated compensation. This is also notwithstanding the amount of time that he has to consume for instituting such action. Nature has no other recourse but wait for someone who is willing and competent to institute action although injury has been caused to it.

[16] Stone, *supra* note 4, at 458.
[17] *Id.*
[18] *Id.*
[19] Stone, *supra* note 4, at 459.
[20] *Id.*

The risk in this kind of legal framework is more than theoretical. The lower-riparians may simply not care about the pollution. They themselves may be polluting, and not wish to stir up legal waters.[21] Nature is left with no option but to suffer in silence until someone would come to its rescue and would be willing to spend money and time to file an action for any damage caused to himself and to the object of nature.

Nature does not have a voice of its own. It has to speak through someone else who is eager to prove and ask to be recompensed for his and the nature's injury. If that someone does not opt to do it, then pollution continues, deforestation carries on and environmental degradation lasts.

To best illustrate this, Professor Stone compared two societies that condone slavery. The first society is much like how our environmental laws work right now. The master instead of the slave has the fundamental right to institute action for injury caused by beating his slave. He has the right (if he chooses) to go to court and collect reduced chattel value damages from someone who has beaten his slave. In the second society, the slave can institute the proceedings *himself,* for *his* own recovery, damages being measured by, say, *his* pain and suffering.[22]

In the case of *Ricks Water Co. v. Elk River Mill & Lumber Co.*, the Court refused to enjoin pollution by an upper riparian at the instance of the attorney general on the grounds that the lower riparian owners, most of whom were dependent on the lumbering business of the polluting mill, did not complain.[23]

Therefore, no matter how detrimental the actions are against the objects of nature, if there is no one who is willing to file an action, then those illegal acts continue on and on. The only time that nature can ask for reparation is through someone who is willing to do it on its behalf.

This first criteria addresses the issue of this so-called unwilling plaintiff. If the objects of nature are given the legal rights to institute action at its option, then the difficulty of the unwilling plaintiff will be hurdled.

Nature's legal standing to institute action

The issue of the unwilling plaintiff is just the first stumbling block. Even if a person is eager to file an action on behalf of the object of nature, it would still not be enough. He must also be competent and must possess legal standing to institute such action. He must be able to establish as well his injury caused by the illegal acts.

[21] *Id.*
[22] *Id.*
[23] 107 Cal. 221, 40 Pac. 531 (1895).

Legal standing or locus standi has been defined as "a personal and substantial interest in the case, such that the party has sustained or will sustain direct injury as a result of the challenged act."[24] Interest means "a material interest in issue that is affected by the questioned act or instrument, as distinguished from a mere incidental interest in the question involved."[25]

Under Rule 3 of the 1997 Rules of Court, there are only three kinds of persons who may be parties in a civil action: natural or juridical or entities authorized by law. Based on this provision, it is not only the natural persons or natural human beings who were conferred the rights to be parties to a civil action. It includes even juridical persons or other entities which are mere creations of laws. They were elevated in the same level as the human beings as regards to their ability to enter into contracts or be parties to a suit.

Juridical persons may acquire and possess property of all kinds, as well as incur obligations and bring civil or criminal actions, in conformity with the laws and regulations of their organization.[26] Examples of entities authorized by law to be parties in a civil action are: estate of a deceased person, a registered labor union and an entity without juridical personality sued as a defendant.[27]

Juridical persons under our laws who are given the capacity to sue are those enumerated under Article 44 of the Civil Code to wit:

> (1) The State and its political subdivisions;
>
> (2) Other corporations, institutions and entities for public interest or purpose, xxx xxx;
>
> (3) Corporations, partnerships and associations for private interest or purpose to which the law grants a juridical personality xxx xxx.[28]

The first two enumerated are governed by the laws creating or recognizing them.[29] Private corporations are regulated by laws of general application on the subject. Partnerships and associations for private interest or purpose are governed by the provisions of the Civil Code concerning partnerships.[30]

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[24] Joya v. Presidential Commission on Good Government, 225 SCRA 568 (1993).
[25] Velarde v. Social Justice Society, 428 SCRA 283 (2004).
[26] An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 46 (1950).
[27] MANUEL R. RIGUERA, Primer-Reviewer on Remedial Law Vol. 1, Civil Procedure 104 (2017).
[28] CIVIL CODE, art. 44.
[29] CIVIL CODE, art. 45.
[30] *Id.*

Unlike these juridical persons, objects of nature such as lakes, rivers and forests do not have the legal standing to sue under our laws. It can only institute action through someone who is a party-in-interest or through a steward under the citizen suit who must prove its legal standing under our laws.

In the case of *Resident Marine Mammals of the Protected Seascape Tañon Strait vs. Reyes,*[31] it had been suggested by animal rights advocates and environmentalists that not only natural and juridical persons should be given legal standing under our laws. It is because it is difficult for persons to establish that they by themselves are real parties-in-interests. In effect, they cannot bring actions in representation of these animals or inanimate objects. For this reason, many environmental cases have been dismissed for failure of the petitioner to show that he/she would be directly injured or affected by the outcome of the case.

However, the Court did not agree on the advocates' position. Justice Leonen, in his concurring opinion, stated that persons and entities are already recognized by our laws and Rules of Court as having the right and the standing to sue.[32] They may be properly represented as real parties-in-interest. However, according to his opinion, the same standing cannot be accorded to animals. Although they play an important role in households, communities, and the environment and there's the desire to protect and nurture them, we are not in the best position to know how they feel.[33]

He added that we cannot go as far as saying that we represent their best interests and can, therefore, speak for them before the courts. He ended his statement by saying that as humans, we cannot be so arrogant as to argue that we know the suffering of animals and that we know what remedy they need in the face of an injury.[34]

This is quite depressing as who else aside from human beings can be in the best position to know how animals feel. If they cannot speak for their own injury, who else would speak for them. Humans know what actions are detrimental to nature. Pollution, deforestation, environmental degradation are matters which injure nature and its objects. Nature does not need to vocally convey to humans the actions that are considered harmful to it. Humans possess the highest intelligence above all animals and by mere logic and basic comprehension can determine if nature is hurt or harmed.

It is not inevitable, nor is it wise, that natural objects should have no rights to seek redress in their own behalf.[35] We cannot simply say that because they cannot speak, they cannot have the standing under our laws. Corporations cannot speak either; nor can states, estates, infants,

[31] Resident Marine Mammals, *supra* note 2.
[32] Resident Marine Mammals, G.R. No. 180771 (J. Leonen, concurring opinion)
[33] *Id.*
[34] *Id.*
[35] Stone, *supra* note 4, at 464.

incompetents, municipalities or universities.[36] Lawyers speak for them, as they customarily do for the ordinary citizens with legal problems.[37]

Allowing objects of nature to speak for its own injury is a concept that is not something new. In fact, inanimate objects are sometimes parties to a litigation.[38] The ordinary corporation is a “person” for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes.[39]

If mere artificial beings in the form of trusts, corporations or partnerships are given the standing under our laws, then why don’t our lakes, rivers, beaches, trees or brooks receive the same respect and legal rights under our laws?

Nevertheless, in our jurisdiction, locus standi in environmental cases have been given a more liberalized approach. There were impressive developments in Philippine legal theory and jurisprudence, but such have not yet progressed as far as Justice Douglas’ paradigm of legal standing for inanimate objects.[40] The current trend moves towards simplification of procedures and facilitating court access in environmental cases.[41]

In this kind of paradigm, the injury suffered by the objects of nature is not considered in determining the legal standing of a party to a suit. Since the action can only be instituted through a representative, the latter’s inability to establish injury ends all the inquiry. The primary consideration is always the damage suffered by persons who have the capacity to sue without giving some regard to the nature itself. The courts would always take into account only the best economic interests of the identifiable human beings.

What is not weighed in the balance is the damage to the stream, its turtles and "lower" life. So long as the natural environment itself is rightless, these are not matters for judicial cognizance.[42] This is quite a sad reality. The courts always lose sight of the nature’s interest and only look into the interest of those persons who can sue under our laws.

Therefore, to be a holder of legal rights, the object of nature must have the legal standing before our laws. It must have the right to institute action on its own and not through someone else.

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[36] *Id.*
[37] *Id.*
[38] Sierra Club, 405 U.S.
[39] *Id.*
[40] Resident Marine Mammals, *supra* note 2.
[41] *Id.*
[42] Stone, *supra* note 4, at 461.

Legal Relief Granted to the Benefit of the Objects of Nature

The third way in which the common law makes natural objects rightless has to do with who is regarded as the beneficiary of a favorable judgment. Here, too, it makes a considerable difference that it is not the natural object that counts in its own right.[43]

Since nature can only institute action through someone who is able to establish his standing under the laws, the primary beneficiary of any compensation is the human being himself. Worse, objects of nature are sometimes not made even an indirect beneficiary.

To illustrate, the costs of making a forest whole, for example, would include the costs of reseeding, repairing watersheds, restocking wildlife. Making a polluted stream whole would include the costs of restocking with fish, waterfowl, and other animal and vegetable life, dredging, washing out impurities, establishing natural and/or artificial aerating agents, and so forth.[44]

However, under our present system even if a lower riparian wins a suit, no amount of money goes to the nature itself. No amount of money goes to repair and recompense the injury caused to the objects of nature. Our laws only confront the polluter to make reparation with the lower riparian. Our laws and courts can neither compel the defendant to recompense the objects of nature and only in such extenuating circumstances through mandamus can it compel the defendant to desist from further polluting the rivers, for example.

There is so much danger here. For instance, in the following example cite by Professor Stone:

> It is easy to imagine a polluter whose activities damage a stream to the extent of $10,000 annually, although the aggregate damage to all the riparian plaintiffs who come into the suit is only $3000. If $3000 is less than the cost to the polluter of shutting down, or making the requisite technological changes, he might prefer to pay off the damages *(i.e.,* the legally cognizable damages) and continue to pollute the stream. Similarly, even if the jurisdiction issues an injunction at the plaintiffs' behest (rather than to order payment of damages), there is nothing to stop the plaintiffs from "selling out" the stream, *i.e.,* agreeing to dissolve or not enforce the injunction at some price (in the example above, somewhere between plaintiffs' damages-$3000-and defendant's next best economic alternative).[45]

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[43] *Id.*
[44] Stone, *supra* note 4, at 462.
[45] *Id.*

Therefore, legal rights must be granted to the benefits of nature so the natural objects may be compensated for its injury.

Current Environmental Law paradigm in the Philippines

Constitutional Guarantees for the protection of the Philippine natural resources

The 1987 Philippine Constitution provided guarantees for the protection of our natural resources. They are provided in two articles: Article 2 on the Declaration of Principles and State Policies and on Article 12 on the National Economy and Patrimony. Article 2 Section 16 provides:

> The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.[46]

For the first time in our nation's constitutional history, this fundamental legal right to a balanced and healthful ecology is solemnly incorporated in the fundamental law.[47] This is a proof of our current Constitution's intent to make such right, a basic legal right which is equally important as all other civil and political rights in the Constitution. This confirms that its protection is of a paramount importance as it is guaranteed by no less than the Constitution.

This right is in accord with the "rhythm and harmony of nature". Nature means "the world as a whole including its objects like forests, lakes, plants and animals. Such rhythm and harmony indispensably include, the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploration, development and utilization be equitably accessible to the present as well as future generations."[48]

Nonetheless, even if this right is not incorporated in our fundamental law, it still deserves the same protection from the State for it is assumed, like other civil and political rights guaranteed in the Bill of Rights, to exist from the inception of mankind.[49] These are fundamental legal rights specifically incorporated in the Constitution which are not less significant as compared to some of

[46] PHIL. CONST. art. II, § 16.
[47] Oposa v. Factoran, Jr., 224 SCRA 792 (1993).
[48] *Id.*
[49] ANTONIO E.B. NACHURA, OUTLINE REVIEWER IN POLITICAL LAW 114 (2014).

the civil and political rights in the Constitution. These rights belong to a different category of rights altogether for they concern nothing less than self-preservation and self-perpetuation.[50]

And even if the same are not incorporated in the fundamental charter, they must still be protected by the State. The reason why they have to be provided expressly is because of the "well-founded fear of its framers" that unless such rights are mentioned in the fundamental charter, there would come a time that future generations would inherit "nothing but parched earth incapable of sustaining life." But how do we give life to the Constitution's intent to provide the people a balanced and healthful ecology?

The Supreme Court did not provide for a straightforward definition of this fundamental right. It incorporated "confusing compound adjectives" to define the constitutional environmental requirement. It requires the State to "protect and advance the right of the people to a balanced and healthful ecology."[51] But does "healthful" entail balanced or does it impose an independent requirement?[52]

In the case of *Oposa*, the court held that the right of the people to a balanced and healthful ecology "implies among many other things, the judicious management and conservation of the country's forests."[53] Without such forests, the ecological or environmental balance would be irreversibly disrupted.[54] This policy is further re-stated in Title XIV, Book IV of the Administrative Code of 1987 which reads in section 1:

> SEC. 1. *Declaration of Policy.*—(1) The State shall ensure, for the benefit of the Filipino people, the full exploration and development as well as the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources, consistent with the necessity of maintaining a sound ecological balance and protecting and enhancing the quality of the environment and the objective of making the exploration, development and utilization of such natural resources equitably accessible to the different segments of the present as well as future generations.[55]

[50] Oposa, *supra* note 46.
[51] JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM (2014).
[52] *Id.*
[53] *Oposa, supra* note 46.
[54] *Id.*
[55] Instituting the "Administrative Code of 1987", Executive Order No. 292, Title XIV, Book IV (1987).

The above provision stresses “the necessity of maintaining a sound ecological balance and protecting and enhancing the quality of the environment.”[56] This right unites with the right to health which is provided for in section 15 of Article 2 of the Constitution.[57] It reads:

> The State shall protect and promote the right to health of the people and instill health consciousness among them.[58]

According to the case of *Oposa*, incorporating sections 15 and 16 of article 2 of the Constitution highlights their continuing importance and imposing upon the state a solemn obligation to preserve the environment and protect and advance the health of the people.[59]

Therefore, the right to a balanced and healthful ecology, considering all the constitutional provisions that it relates to, means the preservation of the environment so the environmental balance will not be disrupted which would in turn protect and advance the health of the people. This right “concerns nothing less than self-preservation and self-perpetuation.”

Another environmental guarantee is provided in Article 12 of the Constitution on the National Economy and Patrimony. Section 2 of the same article speaks of the *Regalian doctrine* to which we adhere to. It means that the State owns all lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources. With the exception of agricultural lands, all other natural resources shall not be alienated.[60]

The State as the owner of such natural resources, has the constitutional power to have a full control and supervision for any act that involve its exploration, development, and utilization. The exploration, development and utilization of the country's natural resources are matters of importance to the State. These are matters that involve “public interest and the general welfare of the people.” This will ensure the country's survival as a viable and sovereign republic.[61]

Accordingly, the State, in the exercise of its ***police power*** in this regard, may not be precluded by the constitutional restriction on non-impairment of contract from altering, modifying and amending the mining leases or agreements granted under PD 463, as pursuant to Executive Order No. 211.[62]

[56] Oposa, *supra* note 46.
[57] *Id.*
[58] PHIL. CONST. art. II, § 15.
[59] Oposa, *supra* note 46.
[60] PHIL. CONST. art. XII, § 2.
[61] Miners Association v. Factoran, Jr. 240 SCRA 100 (1993).
[62] *Id.*

Also the principle of ***parens patriae*** is inherent in the supreme power of the State and deeply embedded in international jurisprudence.[63] In the case of *Commonwealth of Puerto Rico v. Zoe Colocotroni*,[64] the Commonwealth was held to have the standing to sue to recover for oil pollution harm to Bahia Sucia and related resources because it has proprietary interest in the same. In its capacity as *parens patriae*, the Commonwealth has a sovereign interest in the general welfare of its citizens which transcends any injury which may be caused to its proprietary interests or to the property of its individual citizens.[65] Therefore, when a nuisance of disastrous proportions occurs such as in the case of a maritime oil spill, the special status of the body politic vis-a-vis its citizens gives rise to a right to seek redress on behalf of the collective community.[66]

As a "parent of the country", the State does not only have the obligation to protect individuals suffering from serious disadvantage. It must also advance the interest of the environment, protect it from further degradation and save it from its current dreadful conditions. In that capacity, the State can invoke its interest over all the natural objects and all the earth's domain which is separate from the interest of individuals. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.[67]

Rules of Procedure for Environmental Cases (A.M. No. 09-6-8 -SC)

On April 29, 2010, the Supreme Court promulgated Rules of Procedure for Environmental Cases through A.M. No. 09-6-8-SC. The rules govern the procedure in civil, criminal and special civil actions before the Regional Trial Courts, Metropolitan Trial Courts, Municipal Trial Courts in Cities, Municipal Trial Courts and Municipal Circuit Trial Courts involving enforcement or violations of environmental and other related laws.[68] The primary objectives of A.M. No. 09-6-8-SC are the following:

> (a) To protect and advance the constitutional right of the people to a balanced and healthful ecology; (b) To provide a simplified, speedy and inexpensive procedure for the enforcement of environmental rights and duties recognized under the Constitution, existing laws, rules and regulations, and international agreements; (c) To introduce and adopt innovations and best practices ensuring the effective enforcement of remedies and redress for violation of environmental

[63] Isagani Cruz v. Secretary of Environment and Natural Resources, 347 SCRA 128 (2000).
[64] 436 F.Supp.1127 (1978).
[65] *Id.*
[66] *Id.*
[67] Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907).
[68] RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, *supra* note 7.

> laws. (d) To enable the courts to monitor and exact compliance with orders and judgments in environmental cases.[69]

The first objective of A.M. No. 09-6-8-SC is made consonant with Section 16, Article II of the 1987 Philippine Constitution, which safeguards the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.[70]

The second objective of A.M. No. 09-6-8-SC is to provide a simplified, speedy and inexpensive procedure for the enforcement of environmental rights and duties. This objective is equally noteworthy as it guarantees that any violation of the environmental laws is acted upon by the courts effectively and efficiently. Here, time is of a transcendental importance. The effective resolution and determination of environmental matters and cases are highlighted by the Supreme Court under these Rules. If those cases or matters involve a continuous devastation of the environment, the Rules allow "a simplified, speedy and inexpensive procedure for the enforcement of environmental rights and duties."

This objective is motivated by the fact that some human activities may lead to irreversible damage in just a matter of time. To further support this goal, preventive remedies are also provided under the Rules, such as the continuing mandamus and environmental protection order or EPO.

The third objective recognizes and welcomes innovations and best practices to enforce remedies and redress for violations of environmental laws.[71] One of these innovations is the citizen suit. It allows Filipino citizen in representation of others, including minors or generations yet unborn, to file an action to enforce rights or obligations under environmental laws.[72] However, such personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned.[73] This simply means that each generation has the obligation to protect and preserve the environment for the generation yet to come. Therefore, the right to represent the succeeding generations comes with it the responsibility to protect the "rhythm and harmony" of nature for the future generations.

Explaining the rationale for this rule, the Court, in the Annotations to the Rules of Procedure for Environmental Cases, commented:

[69] *Id.*
[70] PHIL. CONST. art. II, §16.
[71] *Id.*
[72] *Id.*
[73] *Oposa*, *supra* note 46.

> To further encourage the protection of the environment, the Rules enable litigants enforcing environmental rights to file their cases as citizen suits. This provision liberalizes standing for all cases filed enforcing environmental laws and collapses the traditional rule on personal and direct interest, on the principle that humans are stewards of nature. The terminology of the text reflects the doctrine first enunciated in *Oposa v. Factoran*, insofar as it refers to minors and generations yet unborn.[74]

Oposa vs. Factoran, Jr.

This case is a landmark case as it tackles one of the most significant innovations in our environmental laws – the class suit. In a broader sense, the petition involved in this case bears upon the right of Filipinos to a balanced and healthful ecology, which the petitioners dramatically associate with the twin concepts of "intergenerational responsibility" and "inter-generational justice."[75] One of the primary issues raised in this case is whether the petitioners here have a cause of action to prevent the continued degradation of the Philippine rainforests.

Interestingly, the principal petitioners in this case are minors who were represented and joined by their parents. The complaint was instituted as a taxpayers' class suit and alleges that the plaintiffs are all citizens of the Republic of the Philippines, taxpayers, and entitled to the full benefit, use and enjoyment of the natural resource treasure that is the country's virgin tropical rainforests.[76] The minors further asseverate that they "represent their generation as well as generation yet unborn."[77]

They pointed out that adverse effects, disastrous consequences, serious injury and irreparable damage of this continued trend of deforestation to the plaintiff minors' generation and to generations yet unborn are evident and incontrovertible.[78] If this continues, as asserted by the petitioners, it will cause irreparable damage to them and the generations yet to come "who may never see, use, benefit from and enjoy this rare and unique natural resource treasure."

The Court held in favor of the petitioners and disagreed with the Respondents' contention. The Court held that the subject matter of the complaint is of common and general interest not just to several, but to all citizens of the Philippines. Although the defendants did not raise the issue of a valid a class suit, the Court held that that all the requisites of a valid class suit under Section 12, Rule 3 of the Revised Rules of Court were complied with in this case. The Court held that the

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[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*

petitioners can for themselves, for others of their generation and for the succeeding generations, file a class suit. However, their personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned.[79]

Resident Marine Mammals of the Protected Seascape Tañon Strait vs. Reyes

This case involves two consolidated Petitions filed under Rule 65 of the 1997 Rules of Court, concerning Service Contract No. 46 (SC-46), which allowed the exploration, development, and exploitation of petroleum resources within Tañon Strait, a narrow passage of water situated between the islands of Negros and Cebu.[80] The petitions seek to enjoin the respondents to execute the said service contract for violating the Constitution and certain international laws. Petitioners in G.R. No. 180771, collectively referred to as the "Resident Marine Mammals" in the petition, are the toothed whales, dolphins, porpoises, and other cetacean species which inhabit the waters in and around the Tañon Strait.[81] Joining them are Ramos and Eisma-Osorio who claim to be their legal guardians and friends. They were collectively called as "the Stewards". They seek to protect the marine mammals aforementioned.

Public respondents, through the Solicitor General, contend that petitioners Resident Marine Mammals and Stewards have no legal standing to file the present petition. Therefore, the procedural issue on the petitioners' locus standi was raised. However, before we delve into the intricacies of the Court's decision regarding this issue, it is worth to revisit the parties' opposing contentions.

The Resident Marine Mammals, through their Stewards, "claim" that they have the legal standing to file this action since they stand to be benefited or injured by the judgment in this suit.[82] Citing *Oposa v. Factoran, Jr.*, they also assert their right to sue for the faithful performance of international and municipal environmental laws created in their favor and for their benefit.

They assert that their right as the stewards of the marine mammals should not be a point of contention as they have an interest in the case being advocates who raise awareness among the residents of Tanon Strait who were affected by the questioned activities. They also claim as the stewards of the environment as the "primary steward, the Government, had failed in its duty to protect the environment pursuant to the public trust doctrine."

[79] *Id.*
[80] Resident Marine Mammals, *supra* note 2.
[81] *Id.*
[82] *Id.*

On the other hand, the public respondents on their part assert that the petitioners have no legal standing. They used as a basis Section 1, Rule 3 of the Rules of Court which provides that only natural, juridical and other entities allowed by law can institute or be parties to a civil action. They point out that the petitioners cannot assert their standing as representatives of the marine mammals as animals cannot be parties to a civil action under the laws. They, likewise, argue that the petitioners cannot use as a basis for their standing the case of *Oposa v. Factoran,* "pointing out that the petitioners therein were all natural persons, albeit some of them were still unborn."

The Court held that the petitioners have the legal standing to institute the action but disagreed with the petitioners to accord legal standing to the marine mammals. The Court used as a basis the Rules of Procedure for Environmental Cases which allow for a "citizen suit," and permit any Filipino citizen to file an action before our courts for violations of our environmental laws.[83] The Court retroactively applied the said rules as the petition was filed seven years prior its effectivity citing the doctrine in *Systems Factors Corporation v. National Labor Relations Commission*.[84]

Moreover, the Court stated that even before the Rules of Procedure for Environmental Cases became effective, the Court had already taken a permissive position on the issue of *locus standi* in environmental cases.[85] It referred to the case of *Oposa v. Factoran* where suit was allowed to be brought in the name of generations yet unborn.

In this case, since the Stewards are joined as real parties in the petition and not just in representation of the named cetacean species and since they were able to establish possible violations of laws concerning the habitat of the Resident Marine Mammals, they are therefore declared to possess the legal standing to file this petition.[86]

An Analysis of the Current Paradigm

The primary reason animal rights advocates and environmentalists seek to give animals and inanimate objects standing is due to the need to comply with the strict requirements in bringing a suit to court. Our own 1997 Rules of Court demand that parties to a suit be either natural or juridical persons, or entities authorized by law. It further necessitates the action to be brought in the name of the real party-in-interest, even if filed by a representative.[87]

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[83] *Id.*
[84] 346 SCRA 149 (2000).
[85] *Id.*
[86] *Id.*
[87] *Id.*

Despite the high threshold set by the Rules, there have been some recent developments in the field of Philippine environmental laws to have a more liberalized approach when the issue of legal standing comes up in environmental cases. The Rules of Procedure for Environmental Cases was promulgated by the Supreme Court that presented as well some significant innovations like citizen suits, consent decree, writ of continuing mandamus and strategic lawsuits against public participation (SLAPP).

Despite these impressive developments, however, there is still much to be done in terms of preserving our natural resources. The Philippines is home to 5% of the world's flora species, 6% of its birds, and 4% of its mammals; 67% of the species in the major groups of animals and plants are not found anywhere else in the world.[88] Sadly, at present, these ecosystems experience environmental degradation.

Also, even our forest and upland ecosystem which covers 45% of the total land area whose resources directly support about 30% of the population experience rapid deforestation.[89] Water pollution is also one of the Government's primary environmental concerns. According to the Asian Development Bank's (ADB) environmental analysis for Philippines, only one-third of Philippine river systems is considered suitable for public water supply.

In this regard, there is still a need to move a little forward to where we are now in terms of our current environmental law paradigm. Since our laws are obviously leaning toward a more favorable approach to the environment, now might be the right time to confer the legal rights to the objects of nature. This will not only encourage participation from all the stakeholders in the society to protect the environment but also discourage those who intend to harm the environment for their self-serving reasons.

Granting legal rights to objects of nature also has rhetorical importance. Naming a nonhuman, like an animal, as a party in a lawsuit tends to symbolically give the animal and its cause greater significance.[90] This might cause people to stop thinking of animals as mere property, because property cannot sue.[91]

The Philippines cannot be left far behind. Foreign jurisdictions have already started recognizing the rights of natural objects. On the 20th of March 2017, the High Court of the State of Uttarakhand (the State located on the northern border of India) declared the Rivers Ganga and Yamunaas juristic/legal persons/living entities, having the status of a legal person.[92]

This decision was reached by the said High Court primarily because of the significant risks posed to these rivers by certain human activities such as continuously polluting the rivers. Second,

[88] Ian Coxhead and Sisira Jayasuriya, The Environment and Natural Resources 241, *available at* https://aae.wisc.edu/coxhead/papers/philenvironment.pdf (last accessed January 4, 2018).
[89] *Id.*
[90] Bobcock, *supra* note 1, at 20
[91] *Id.*
[92] *Id.*

the judges argued that this step was necessary because of the status of the rivers as "sacred and revered central to the existence of half the Indian population."[93] Although this decision is not yet final and is presently on appeal, the rationale behind this decision was a big moment for the natural world.

Stewardship Approach vs. Guardianship Approach

Stewardship Approach (Citizen Suit) in the Current Paradigm

Citizen suit allows "any Filipino citizen, in representation of others, including minors or generations yet unborn, to file an action to enforce rights or obligations under environmental laws."[94] The citizen suit somehow lowered the threshold for instituting actions involving environmental cases. Prior to this innovation, a party had to hurdle the strict requirements under Rule 3 of the Rules of Court, which provides in Section 1 that "only natural, or juridical persons, or entities authorized by law may be parties to a suit."[95] If the party qualifies as one of the three enumerated above, it has to overcome another impediment under Section 2 of the same rule, which provides that only those parties-in-interest can institute an action under the law.[96] The party has to prove that it "stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit."[97]

Section 3 of the same rule also provides that "where the action is allowed to be prosecuted or defended by a representative or someone acting in a fiduciary capacity, the beneficiary shall be included in the title of the case and shall be deemed to be the real party-in-interest."[98] Even in actions in a representative capacity, the party must still prove that it is representing only natural or juridical persons or those allowed under the law and at the same time the person being represented must also be a "real-party-in-interest."[99] This is a high threshold that caused the dismissal of environmental cases in the Philippines. Therefore, the citizen suit has served like a silver lining to nature's advocates and environmentalists.

Nonetheless, even before the Rules of Procedure for Environmental Cases became effective, the Supreme Court had already taken a permissive position on the issue of *locus standi*

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93 *Id.*
94 RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, *supra* note 7.
95 1997 RULES OF CIVIL PROCEDURE, rule 3, § 1.
96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.*

in environmental cases.[100] Some laws, such as the Clean Air Act (CAA), relaxed the standing and injury requirements for citizen suits sanctioned under the same law. Section 4 of the CAA recognizes rights such as the right to breathe clean air, the right to utilize the natural resources and the right to be informed of any potential hazard of any activity that affects the air we breathe among others.[101] This is considered to be a "revolutionary feature of the CAA."[102] This section vests a petitioner or complainant in court with additional causes of action that did not exist before.[103]

This liberalized standing has become a recognized principle not only in the Philippines but also in the United States. In 2007, the court in the case of *Massachusetts v. EPA* loosened the standing requirements for a plaintiff-State. The defendant here maintains that because greenhouse gas emissions inflict widespread harm, the doctrine of standing presents an insuperable jurisdictional obstacle.[104] The court did not agree. The court stressed the special position and interest of Massachusetts as a sovereign state.[105] It highlighted that:

> This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.[106]

Therefore, it can assert that right without meeting all the normal standards for redressability and immediacy.[107]

Advancing the right to a balanced and healthful ecology as an act of self- preservation

Advancing the right to a balanced and healthful ecology as an act of self-preservation provides some gaps in the current Philippine environmental paradigm. Although there's nothing wrong in promoting "self-preservation and self-perpetuation," this primary objective alone does not completely protect the environment. If the primary purpose is self-motivation, then the only time that humans would stand up and fight for the protection of the environment is when their rights are deprived or when they are hurt or harmed by the injury to nature. Citizen suit is a

[100] Resident Marine Mammals, *supra* note 2.
[101] An Act Providing for a Comprehensive Air Pollution Control Policy and for other purposes, Republic Act No. 8749, § 4 (1998).
[102] GALAHAD R.A. PE BENITO, ENVIRONMENTAL LAW: POLLUTION CONTROL, 14 (2009).
[103] *Id.*
[104] 22 Ill.549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248, 63 ERC 2057 (2007).
[105] *Id.*
[106] *Id.*
[107] *Id.*

remarkable innovation, but seems to be less in force when it comes to advancing the interests of the environment.

In the current paradigm, objects of nature are only viewed as mere property, something that's only for the "use of us." The existing situation has real consequences for the environment—hundreds of thousands of species on the brink of extinction, and only a tiny fraction will ever find activists in or out of the government to defend them.[108] Hence, since animals are property and lack legal personality, courts view their injuries as "tangential" to the true injury - that injury suffered by the person or organization bringing the suit.[109]

There seems to be a wide gap between objects of nature and human beings. Humans may never become truly one with the environment unless they are impaired directly by the sufferings of nature. For example, if water pollution does not cause human beings some physical illness or does not affect the water they drink, then pollution would not be their matter of interest. The purpose of granting nature standing, then, is to protect other natural rights and to ensure that whatever harm to the environment occurs will be mitigated or repaired.[110]

The change in the paradigm will transform our thought process towards nature and its object, where we will start viewing them as more than something for our consumption. This has some ripple effects to the legislature, corporate polluters, illegal loggers, and even ordinary individuals.

If objects of nature would have the same legal rights as natural human beings or artificial beings under our law, our legislators would be compelled to think of more ways to protect their interest. There is no more congressional paralysis, in matters affecting the environment, which has made that branch of government the least effective of all.[111] In effect, as supported by the popular dissent of Justice Douglas, permitting nature to obtain standing will allow the natural objects as the beneficiaries of statutory protections.[112]

Guardianship Approach in the Proposed Paradigm

Under the Guardianship approach, guardians or friends of nature may be appointed by the Courts to preserve, protect, assess, and represent objects of nature in any action against any injury caused to the nature. Guardianship is a well-established system by which natural objects may

[108] Bobcock, *supra* note 1.
[109] Marguerite Hogan, *Standing for Nonhuman Animals: Developing a Guardianship Model from the Dissents in Sierra Club v. Morton,* 95 CAL. LAW REVIEW 513 (2007).
[110] *Id.*
[111] *Sierra Club*, 405 U.S.
[112] Hogan, *supra* note 105.

obtain judicial review to enforce their statutory rights and protections.[113] With court approval, animal advocacy organizations may bring suit on behalf of animals or objects of nature in the same way court-appointed guardians bring suit on behalf of mentally-challenged humans who possess enforceable rights, but lack the ability to enforce it themselves.[114]

Justice Douglas believed that the judicial system was indeed the proper vehicle for developing this new legal concept, and his impassioned model of environmental representation called for "those people who have so frequented the place as to know its values and wonders" to serve as nature's representatives.[115]

New Zealand's Te Awa Tupua (Whanganui River Claims Settlement) Act of 2017

The guardianship approach has been used in so many foreign legislations which confer legal rights to natural objects. In 2017, four rivers have been given the status of legal persons: the Whanganui River in New Zealand, the Ganges and Yamuna Rivers in India, and most recently, the Rio Atrato, in Colombia.[116] This innovation that extends rights to natural objects such as rivers is groundbreaking and largely unprecedented, and there is a great deal of uncertainty about what this novel legal development will mean in practice.[117] Nonetheless, legislators still find it as worth the risk.

Among these four rivers, the mechanism used in conferring rights to Whanganui River in New Zealand (NZ) is worth revisiting. NZ's *Te Awa Tupua (Whanganui River Claims Settlement) Act of 2017* allowed the use of guardianship approach to give legal personality to Whanganui River. Te Awa Tupua is an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements.[118]

As Te Awa Tupua was declared to be a legal person, it now exercises all the rights, powers, duties, and liabilities of a legal person. However, the exercise of such rights and responsibilities seems impossible unless someone would act in behalf of Te Awa Tupua. Therefore, the office of TePouTupua was established to be the human face of Te Awa Tupua and to act in the name of Te Awa Tupua.[119]

[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Supra* note 14.
[117] *Id.*
[118] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (N.Z.)
[119] *Id.*

Te Awa Tupua has the full capacity and all the powers reasonably necessary to achieve its purpose and perform and exercise its functions, powers, and duties in accordance with the Act.[120] Among those powers and duties are speaking and acting for and on behalf of Te Awa Tupua, promoting and protecting the health and well-being of Te Awa Tupua, developing appropriate mechanisms for engaging with, and reporting to, the iwi and hapū with interests in the Whanganui River,and participating in any statutory process affecting Te Awa Tupua in which TePouTupua would be entitled to participate under any legislation among others.[121]

Unlike the liberalized standing approach, the guardianship approach would secure an effective voice for the environment.[122] The natural objects need not wait until someone is affected by its own sufferings and would then speak on its behalf. The violation of someone's right would no longer be the primary consideration in determining legal standing under the laws. This approach would allow natural objects to go to the courts based on its own injury and ask the courts for the protection of its rights.

Appointment of Guardians as "human face" for distressed objects of nature based on Philippine existing mechanisms

Basic is the rule in corporation law that a corporation has a separate and distinct personality from its stockholders and from other corporations with which it may be connected.[123] This means that by fiction of law, it is considered as a person who can incur liabilities or can sue or be sued. The same way as how incompetent natural persons are being represented under the law, when a corporation has become "incompetent," courts appoint a trustee in bankruptcy or reorganization to oversee its affairs and speak for it in court when that becomes necessary.[124]

In the same vein, our courts should also allow the appointment of guardians when objects of nature are distressed or are in the brink of extinction. A system has to be created that would permit a friend of a natural object to apply for guardianship if he perceives them to be endangered.

There are existing mechanisms under the law that may be used as basis for appointing guardians for distressed objects of nature. In 2010, the Congress passed Republic Act No. 10142 or An Act Providing for the Rehabilitation or Liquidation of Financially Distressed Enterprises and Individuals. One of its primary policies is to "ensure a timely, fair, transparent, effective and

[120] *Id.*
[121] *Id.*
[122] Stone, *supra* note 4 at 470.
[123] Steelcase, Inc. v. Design International Selections, Inc., 670 SCRA 64 (2012).
[124] Stone, *supra* note 4 at 464.

efficient rehabilitation of debtors."[125] Debtors, as specified under this law, "shall refer to a sole proprietorship duly registered with the Department of Trade and Industry (DTI), a partnership duly registered with the Securities and Exchange Commission (SEC), or a corporation duly organized and existing under Philippine laws, or an individual debtor who has become insolvent."[126]

Working on the presumption that natural objects are conferred legal rights under our laws, this same mechanism may be used by our legislators and the Supreme Court to appoint guardians for natural objects. Natural objects will be considered in the same category as those "debtors" as defined by RA No. 10142, such that in cases of distress, guardians may be appointed for its rehabilitation.

On the other hand, rehabilitation, as defined under this law, refers to the "restoration of the debtor to a condition of successful operation and solvency."[127] However, for the purpose of the proposed paradigm, rehabilitation that concerns natural objects would mean the restoration of the natural object to its prior condition. Rehabilitation includes "restocking of fish, water-fowl, and other animal and vegetable life, dredging, or washing out impurities." This would mean a rebirth of the natural object for its continuous lifecycle.

By personifying natural objects, we are, in effect, making natural objects, through their guardians, a jural entity competent to gather up fragmented and otherwise unprecedented damage claims, and press them before the court even where, for legal or practical reasons, they are not going to be pressed by traditional class action plaintiffs.[128]

Further, rehabilitation receiver under RA No. 10142 that refers to person or persons, natural or juridical, appointed as such by the court and which shall be entrusted with such powers and duties under the law would mean "guardians" or "friends of nature" under the proposed paradigm. The Court, then, should recognize the concept of an environmental representative akin to a guardian *ad litem,* conservator, and receiver.[129] Nevertheless, finding potential friends or guardians will never be a challenge as various active organizations exist in the Philippines that promote and protect the environment.

One of such organizations is the SOS Manila Bay Coalition that is against the reclamation of Manila Bay, which was formally launched last January 5, 2013.[130] In its petition, the SOS Manila Bay gives due regard to Manila Bay as being reserved for the purposes of a national park under Proclamation 41 in 1954 by President Ramon Magsaysay.[131] Being a national park, it was

[125] An Act Providing for the Rehabilitation or Liquidation of Financially Distressed Enterprises, Republic Act No. 10142, § 2 (2010).
[126] *Id.*
[127] *Id.*
[128] Stone, *supra* note 4 at 475.
[129] Hogan, *supra* note 105.
[130] Ivan Henares, SOS Manila Bay Coalition launched, *available at* http://www.ivanhenares.com/2013/01/sos-manila-bay-coalition-launched.html (last accessed Jan. 18, 2018).
[131] *Id.*

included in the National Integrated Protected Areas System Act of 1992.[132] This is notwithstanding its national significance as being one of the "culture, art and tourism destinations whose potential should be maximized along what other great cities have done for their waterfront and historical districts and improved rather than destroyed." This is just one of the organizations among others whose presence is felt in the Philippines that promote environmental conservation and protection. Therefore, the courts would not have any difficulty looking for guardians to rehabilitate natural objects.

Powers and Duties of Guardians or Friends of Nature

As legal persons under the law (in a supposed paradigm), natural objects will exercise some rights as well obligations. The exercise of rights will not be possible unless a guardian is appointed by the Court to act on behalf of the objects. The following is a non-exclusive list of the guardians' duties and responsibilities while acting on behalf of their wards:

1) To conduct inspection or visitation on the suspected endangered natural object

As guardians or friends of nature, it might be given rights of inspection (or visitation) to determine and bring to the court's attention a report on the condition of natural objects. If there are indications under the substantive law that some redress might be available on the objects' behalf, then the guardian would be entitled to raise the objects' rights in the objects' name.[133] This is one of the most important duties of the guardians as this will determine the present condition of the objects and if additional actions are necessary to prevent further degradation. This includes conducting assessments and evaluations that would conclude whether an object is in the verge of extinction or not. There would be a continuous supervision over a period of time, with a consequent deeper understanding of a broad range of the ward's problems, not just the problems present in one particular piece of litigation.[134]

Under RA No. 10142, one of the duties conferred upon the rehabilitation receivers is to come up with a rehabilitation plan. This shall refer to a plan by which the financial well-being and viability of an insolvent debtor can be restored using various means.[135] This may be well incorporated under the guardians' duty to inspect. This would mean that guardians will be coming

[132] *Id.*
[133] Stone, *supra* note 4 at 466.
[134] Stone, *supra* note 4 at 471.
[135] Republic Act No. 10142, *supra* note 122.

up with a rehabilitation proposal that would prevent the extinction of natural objects or restore them to how they were prior to the damage.

2) To represent the objects in any legislative and administrative hearings

In any hearing that would involve the presence of the natural objects, the guardians would represent them on their behalf. This includes any legislative hearings in aid of legislation that may involve the natural objects. Under the law, the Senate or any of its Committees may conduct formal inquiries or investigations in aid of legislation. Such inquiries may refer to the implementation or re-examination of any law or appropriation, or in connection with any proposed legislation or the formulation of, or in connection with future legislation.[136] This is much like how TePou Tupua represents Te Awa Tupua in any statutory process involving the latter.

3) To employ specialized professionals and experts

Upon approval of the court, and after notice and hearing, the rehabilitation receiver or the management committee may employ specialized professionals and other experts to assist each in the performance of their duties.[137] This can include specially qualified lawyers who have the long-standing commitment to the resource in question and/or special expertise and the means to represent it in court.[138] The qualifications or disqualifications of the experts must be determined by the courts through their rules of procedures that specially govern this matter.

4) To sue in behalf of the natural object

Out of all the duties, this is the most important one. Guardians are empowered to assert and vindicate actions that concern natural objects as their wards. This is much like how the guardians on behalf of a resident minor or incompetent who has no parent or lawful guardian can institute action on behalf of the wards. Under the proposed paradigm, the guardians can now act in a representative capacity on behalf of the natural object who is now regarded as a legal person. The

[136] Senate, 15th Cong., Rules of Procedure Governing Inquiries in Aid of Legislation [Senate Rules on Inquiries in Aid of Legislation], (Aug. 21, 1995).
[137] Republic Act No. 10142, *supra* note 120.
[138] Bobcock, *supra* note 1.

natural object now belongs to the same category as the natural persons and artificial beings under the law.

This is another avenue that the Courts can look into aside from looking at the strict requirements of the law when resolving the issue on legal standing. The guardians no longer need as well to prove that the legal fundamental right for a balanced and healthful ecology is violated through a citizen suit to establish standing. It will now be all about the natural objects' injury. Once the guardians, through proper assessments and evaluations of the objects' condition determine that an action is necessary to prevent further damage then they can easily file the appropriate action.

5) Other rights and duties necessary in the assumption of its roles as guardians

This refers to other rights and obligations that the guardians assumed as the properly appointed representatives of the natural objects.

Objections to the proposed paradigm and how to overcome objections

Conferring legal rights to natural objects through the guardianship approach is definitely not a perfect paradigm. There are objections that require some careful consideration and a way out. **The first objection** is with regard to a situation where several guardians apply for guardianship before the courts. Some critics say that this will cause confusion and will wreak havoc in the courts as they will be flooded with several guardians wanting to represent an object of nature. This will allow some bystanders who will pretend to be affected by the outcome of the case, specifically those lacking a direct connection matter[139] The critics' fear is that courts might be swamped with dubious claims and that it would be more difficult for nature to establish an injury. The reason is that it would have to compete with third-party plaintiffs who in reality do not have a legitimate claim.

However, the first objection does not seem so problematic. As regards to the number of applicants for guardianship, the Courts can simply promulgate rules with regard to qualifications and disqualifications for guardianship. This process is not new to the Courts as rules are already existing under our Civil Code and rules of procedure of the Supreme Court on guardianship.

Therefore, only those who are qualified under the law may be appointed as guardians to take care and act on behalf of the natural object. This idea has its seeds in Justice Blackmun's

[139] Bobcock, *supra* note 1.

concept of allowing organizations with a longstanding commitment to, and expertise in, the environment to gain standing.[140]

The **second objection** concerns the clogging of court dockets due to the significant number of environmental cases that will be filed before the courts. According to critics, this will burden the courts further by cases that they need to litigate. This argument is a red herring. The standing requirement which was liberalized by the Supreme Court in the case of Oposa and in the Environmental Rules of Procedure did not cause the clogging of the dockets of courts. Therefore, this situation that the critics are trying to paint is unlikely to happen.

In any event, this situation may still be addressed in two ways. **One,** the principle of res judicata still applies in the proposed paradigm. Res judicata literally means "a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment."[141] The doctrine of *res judicata* is a rule that pervades every well-regulated system of jurisprudence and is founded upon two grounds embodied in various maxims of the common law, namely: (1) public policy and necessity, which dictates that it would be in the interest of the State that there should be an end to litigation *republicaeut sit litium*; and (2) the hardship on the individual that he should be vexed twice for the same cause *nemo debetbisvexari pro una et eadem causa*.[142]

The court can simply designate the guardian de jure representative of the natural object, with rights of discretionary intervention by others, but with the understanding that the natural object is “bound” by an adverse judgment.[143] This will also answer the first objection in cases that several persons qualified as guardians under the law.

Two, the cases that nature can bring will only be limited to meritorious claims and those that involve important and/or irreplaceable natural resources put in jeopardy by government inaction.[144] This will also not render nugatory the State’s role as *parens patriae* of the natural resources. It is only when the State failed to protect or prevent the extinction or danger to the natural objects that a suit may be filed on the natural objects’ behalf.

The **third objection** would be the objects’ inability to speak and convey its needs and wants to the guardians. In the words of Justice Leonen, we cannot be so arrogant as to argue that we know the suffering of animals and that we know what remedy they need in the face of an injury.[145]

This objection does not hold so much water. Natural objects can communicate their wants (needs) that are not terribly ambiguous. Humans know best that waste and trash should not be thrown to the seas or lakes or rivers. Humans know that illegal logging or pollution are wrong.

[140] Degayo v. Magbanua-Dinglasan, 755 SCRA 1 (2015).
[141] *Id.*
[142] Selga v. Brar, 658 SCRA 108 (2011).
[143] Stone, *supra* note 4 at 471.
[144] Bobcock, *supra* note 1.
[145] *Id.*

Humans know when to water the plants. Even in the case of corporations, estates or trusts, people understand how these artificial beings feel, allowing the people to know when they are distressed or in need of rehabilitation.

Therefore, to understand what nature feels does not require special intelligence and advanced comprehension. Understanding nature only requires some basic understanding or some compassion on the part of the human beings. We make decisions on behalf of, and in the purported interests of, others every day; these "others" are often creatures whose wants are far less verifiable, and even far more metaphysical in conception, than the wants of rivers, trees, and land.[146]

Conclusion and Recommendation

The shift towards a different paradigm is generally a tedious process in itself. This is especially so when it involves a novel mechanism which might produce effects that are still unknown. To confer rights to natural objects and elevate them in the same category as natural human beings is really inconceivable. The most difficult part of the process would be the starting point. Major questions would be when and how to start the process.

Nevertheless, the primary institutions of the State can be a vehicle towards the change in the paradigm. Gearing towards this proposed paradigm may either be initiated by Congress by enacting a law that confers legal rights to natural objects or by the Supreme Court through its constitutional power to promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts.[147] Although this is a barely new concept in the Philippines, we already have the existing mechanisms under the law as we shift towards this paradigm.

For Congress, there already exists various laws, such as the Corporation Code of the Philippines that recognized corporations as artificial being created by operations of law having the right of succession and the powers, attributes and properties expressly authorized by law or incident to its existence.[148] The Congress can use this law as its blueprint in granting natural objects the legal personality under the law. There is also Republic Act No. 10142, an act providing for the rehabilitation or liquidation of financially distressed enterprises and individuals which as discussed earlier provides for the mechanism to incorporate the guardianship approach in the proposed paradigm.

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[146] Stone, *supra* note 4 at 471.
[147] PHIL. CONST. art. VI, § 5.
[148] Corporation Code of the Philippines [CORPORATION CODE], Batas Pambansa Blg. 68, § 2 (1980).

If the existing mechanism in the Philippines is not sufficient to support the proposed paradigm through the Congress' initiative, the Congress can look into the NZ's Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 as a basis for its legislation. To support the implementation of the new rights, the said legislation was able to establish a broad institutional framework made up of several new actors and rules.[149]

The Supreme Court, on the other hand, may also initiate the change through its constitutional power to promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts.[150] Administrative Matter No. 09-6-8-SC, or the Rules of Procedure for Environmental Cases, has liberalized the legal standing of plaintiffs in cases that involve environmental issues. When the citizen suit was first incorporated under our rules, it was then considered a novel provision to advance the interests of nature. Therefore, the Supreme Court has become a vehicle for changes and innovations promoting the environment. Likewise, the Supreme Court may also confer legal rights to natural objects through future decisions involving environmental cases.

This was the same mechanism that was used by the High Court of the State of Uttarakhand in India to confer legal personality to the Rivers Ganga and Yamunaas. The High Court ruling of India has fueled a movement among jurists around the world to revisit their judicial decisions in matters concerning the environment. A move just like this on the part of the Judiciary would not only inspire judges and justices but also would compel the enforcement agencies to do their job as protectors of the environment. Orders from the court have the force and authority under the law that is why the Judiciary has a significant role towards conferring the legal rights to natural objects.

This proposed paradigm, of course, does not claim to be a perfect paradigm. Although there are still gaps to fill, we can come up with a better approach to resolve environmental issues in the Philippines. There are definitely risks to take. Nonetheless, this research aims to call the attention of our Congress and our Judiciary to consider an alternative solution to long standing issues of environmental degradation in the Philippines.

Of course, the constitutional duty to preserve our ecological balance is not only the business of the State. The people, likewise, assume the correlative duty to refrain from impairing the environment. The only time that this constitutional right is safeguarded is by making sure that the people also protect the environment from further loss and destruction. This ensures that the spirit and intent of the Constitution are given life and are turned into reality for how can we be in harmony with nature if we advocate for its demolition.

[149] http://law.unimelb.edu.au, *supra* note 14.
[150] PHIL. CONST. art. VI, § 5.

LIGHTS, CAMERA, BEQUEATH:

THE CASE FOR A VIDEO WILL IN THE PHILIPPINES

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3rd Best Thesis, 2019

Introduction

> Shancai Lim, thinking that she was in the last few days of her life, decided to make a will on January 2, 2018. Shancai is dyslexic, and her properties consist of inheritance from her deceased parents and income from said properties. Without a family of her own, she wants to give her properties to her favorite nephew, niece, and brother and sister. Her favorite nephew taught her how to use Facebook to create videos using a smartphone and how to upload those videos on Facebook. She decided to take a video of herself making a video will, giving half of her properties to her favorite nephew, and the rest to be divided among her niece, brother, and sister. On June 20, 2018, Shancai passed away.[1]

If Shancai's video will be submitted for probate in the Philippine courts, it would be held invalid for not complying with the formalities of the law. The court would not look beyond the format of the will to ascertain her intent, her estate will be probated intestate, and her intention to divide the property testate goes to waste.

A will is an act where a person is permitted, with the formalities prescribed by law, to control to a certain degree the disposition of their estate to take effect after their death.[2] To create a valid will in the Philippines, the testator must comply with the statutory formalities. These cover the due execution of a will or its extrinsic validity, which pertains to whether the testator, being of sound mind, freely executed the will in accordance with the formalities prescribed by law.[3] The Philippines recognizes two ways on how a testator can control the disposition of his estate: notarial will, and holographic will, which are both written and paper-based. As we go through the 21st century, it is time to consider some reforms to the country's inheritance law in order to keep up

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[1] McInnesWilson Lawyers, Our Thinking Be Careful, That Video Might Be a Will…, citing Justice Burns as quoted by Alexandria Utting, 'Queensland court rules dying woman's phone video will legal', *Courier Mail*, 28 March 2018 *available at* https://www.mcw.com.au/page/Publications/wills-and-estates/2018/be-careful-that-video-might-be-a-will/ (last accessed Aug. 10, 2018).

[2] An Act to Ordain and Institute the Civil Code of Philippines [CIVIL CODE], Republic Act No. 386, art. 783 (1950).

[3] Baltazar v. Laxa, 669 SCRA 249, 262 (2012).

with the technological advancements vis-à-vis forms of communication, which may include conveying intentions of disposing assets, as in a will. This is because the law may not be kept up with the technological advancements that may be sanctioned or covered by the law, had there been provisions of the law which are applicable to them.

Technological advances can also be felt in the classroom. Professors and instructors nowadays would rather have essays uploaded in an online drive rather than have it physically submitted to them by the students. It is also a typical scene in school where students are using laptops, tablets, iPads, Galaxy Note, and cellular phones to read their materials. We are quickly moving towards a paperless environment, whether at work, school, or home. It is thus inevitable that technology will cause changes in laws or statutes as it changes the way humans deal with each other, as in making of contracts or other written instruments, which also has implication in making wills, it being a written instrument.

Considering the advances in technology, a videographic will – a form or will that conveys intention to dispose property in the event if death in video format – finds relevance in the Law of Succession, which is covered by the testamentary provisions of the Civil Code. The Civil Code was approved on July 18, 1949, and took effect on August 30, 1950. As the drafting of this Code took place on a post-war era, the drafters of the New Civil Code did not envision the rapid technological changes facing us today, e.g., the Internet, Facebook, Instagram, Tweeter, Mobile Apps, Smartphones, and so on.

With the latest smartphones having video recording capabilities built-in them, their users are more inclined to take a photo or video of their daily lives, make their own videos or films, and upload them in their social media account. With a device containing technology which enables people around the world to document practically every aspect of their lives, it is only proper to consider how it can allow a person, particularly a testator, to control the disposition of his estate upon his death. However, unlike technological advances, the law of succession develops very slowly.[4]

The country's inheritance law, specifically testamentary provisions, should reflect the present conditions and circumstances facing the society to fully realize the intent of the testator. Recognizing and giving legal effect to a videographic will is long overdue, considering the availability and development of technology.

Hence, this study argues that testators should be given another option. It must be noted however that it does not seek to replace the formalities in a notarial and holographic will. Corollary to that, this paper aims to examine the possibility of incorporating video or videographic wills to modernize the country's testamentary law. The author argues that videographic wills: 1) Facilitate the easy determination whether the testator was of sound mind and capacitated when he executed his will; 2) Show the presence or absence of fraud in its execution; 3) Show the presence or absence of undue and improper pressure and influence in its execution; 4) Enhance further the

[4] Darrell Dies, Are Electronic Wills Coming to a state Near You? *available at* https://www.isba.org/sections/trustsestates/newsletter/2014/10/areelectronicwillscomingstatenearyou (last accessed July 22, 2018).

clarity in the ascertaining the intent of the testator as compared to the paper-based ones; 5) Lead to a greater chance of allowance of the will due to the presence of the testator in the flesh; 6) Show that public policy supports its incorporation in the Civil Code provisions on Testamentary Succession; 7) Provide a durable physical representation of the testator's will; 8) Serve as a viable alternative to those who are blind or unable to read or write; 9) Serve the functions of written will; 10 Make use of the available technology; 11) Take advantage of the convenience and accessibility of video and audio recording device; and 12) Encourage more people to make wills.

Relevant Laws and Jurisprudence

Nuncupative Wills

Previously, an oral will was recognized in the Philippines. In the case of *Matias v Alvarez*,[5] the Supreme Court held that:

> Should anyone make his nuncupative testament or last will before a notary public, he should do so in the presence of at least three witnesses, who must be residents of the locality wherein the will is made; and should be residents of the locality wherein the will is made; and should the will be made without the attendance of a notary public, the presence of at least five witnesses, who, as stated above, shall be residents of the locality, must be secured if they can be found therein; and should neither the presence of a notary public nor that of five witnesses be obtained in said locality there must be in attendance at least three witnesses, residents thereof; ...
>
> We hereby order and decree that the provisions contained in the statute of the King Don Alfonso ..., relative to the number of witnesses required for the execution of a will, be understood to be applicable to open wills, be made among children or legitimate heirs, or among strangers. But in the execution of closed wills, called *in scriptis* in Latin, we direct that there must be in attendance at least seven witnesses and a notary public.[6]

Meanwhile, in the United States, Oral or Nuncupative wills are recognized in the States of Indiana, Kansas, Mississippi, Missouri, New York, North Carolina, Ohio, Tennessee, Texas , and Vermont .

[5] 10 Phil 398,402-403(1908).
[6] *Id.*

Civil Code Testamentary Provisions on the Formalities of a Will

The Civil Code is the authority when it comes to the formalities of a notarial and holographic wills. The Code provides that a notarial will must be:

> 1) subscribed at the end by the testator, or by the testator's name written by another person in their presence and by their express direction; 2) attested and subscribed by three or more credible witnesses in the presence of the testator and of one another; 3) signed by the testator or the person he requested to sign, and the witnesses on the left margin of every page, except the last page; 4) numbered on every pages correlatively in letter placed on the upper part of each page; 5) attached with an attestation stating the number of pages of the will, that the testator signed the will and its every page, or they caused another person to sign it on their behalf, under their express direction, in the presence of the witnesses, and that they witnessed and signed the will and all of its pages in the presence of the testator and of each other; and 6) acknowledged before a Notary Public by the testator and the witnesses.[7]

The Code also provides that the will must be written and executed in a dialect that is known to the testator,[8] and must be witnessed by at least three (3) competent witnesses.[9] Meanwhile, a holographic will must be entirely handwritten, dated and signed by the testator, subject to no form and need not be witnessed.[10] Regardless of the form, the Code provides that all wills must be probated in accordance with the existing Rules of Court on the Probate of Wills for real or personal property of the decedent to pass upon their heirs.[11]

[7] CIVIL CODE, art. 805.
[8] *Id.,* art. 804.
[9] *Id.*, art. 805.
[10] *Id.,* art. 810.
[11] *Id.,* art. 838.

Video as Electronic Evidence

The relevant provision under the Rules on Electronic Evidence**[12]** concerning videos is found in its Rule 11. It provides that audio, photographic and video evidence of events, acts or transactions are admissible in court proceedings, provided that they must be shown, presented or displayed to the court, and must be identified, explained or authenticated by the person who made the recording or by some other person competent to testify on their accuracy.[13] In the case of *MCC Industrial Sales v. SSangyong Corporation*,[14] the Supreme Court explained how a video stored in a computer is covered by the Rules on Electronic Evidence, to wit:

> Thus, when the Senate consequently voted to adopt the term electronic data message, it was consonant with the explanation of Senator Miriam Defensor-Santiago that it would not apply to telexes or faxes, except computer-generated facsimiles, unlike the United Nations model law on electronic commerce. In explaining the term electronic record patterned after the E-Commerce Law of Canada, Senator Defensor-Santiago had in mind the term electronic data message. This term then, while maintaining part of the UNCITRAL Model Laws terminology of a data message, has assumed a different context, this time, consonant with the term electronic record in the law of Canada. It accounts for the addition of the word electronic and the deletion of the phrase but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex, or telecopy. Noteworthy is that the Uniform Law Conference of Canada, explains the term electronic record, as drafted in the Uniform Electronic Evidence Act, in a manner strikingly similar to Sen. Santiago's explanation during the Senate deliberations:
>
>> ...*video records are not covered, though when the video is transferred to a website, it would be because of the involvement of the computer*. Music recorded by a computer system on a compact disk would be covered. (emphasis supplied)
>>
>> In short, not all data recorded or stored in digital form is covered. A computer or similar device has to be involved in its creation or storage. The term similar device does not extend to all devices that create or store data in digital form. Although things that are not recorded or preserved by or in a computer system are omitted from this Act, they may well be admissible under other rules of law. This Act focuses on replacing the

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[12] RULE ON ELECTRONIC EVIDENCE, A.M. No. 01-7-01-SC, July 17, 2001.
[13] *Id.,* Rule 11, § 1.
[14] MCC Industrial Sales v SSangyong Corp, 536 SCRA 408,447-448(2007).

> search for originality, proving the reliability of systems instead of that of individual records, and using standards to show systems reliability.

There is no question then that when Congress formulated the term electronic data message, it intended the same meaning as the term electronic record in the Canada law. This construction of the term electronic data message, which *excludes telexes or faxes, except computer-generated facsimiles*, is in harmony with the Electronic Commerce Laws focus on paperless communications and the similar functional approach that it espouses. The deliberations of the Legislature are replete with discussions on paperless and digital transactions. [15]

Analysis

A videographic will is a subset of an oral will.[16] In North Carolina, a nuncupative will, to be admitted, must have been made by a person during his last sickness or in imminent peril of death, and having made by this person who died to the same previous illness or impending danger of death under which he executed the nuncupative will. It is also required by the statute that said will be declared before two competent witnesses. Furthermore, no nuncupative will may be probated later than six months from the time it was made unless it was reduced to writing within ten days after it was made.[17]

Indiana, on the other hand, restricts nuncupative wills to persons in imminent peril of death and they died as a result of such impending peril. It also authorizes the disposition of personal property only to an amount of $1,000 dollars and those in military, air or naval service in time of war to $10, 000.00. It is also admitted to probate if it is declared before two disinterested witnesses, reduced to writing within 30 days after such declaration and submitted to probate within 6 months.

In Kansas, nuncupative will extends to personal property only and said will must have been made during the last sickness of the decedent. In addition it must be reduced to writing within 30 days from speaking of the testamentary words, by two competent disinterested witnesses.

In Mississippi, the nuncupative will must also be made in the time of the last sickness of the deceased or the value of the property bequeathed is not more than $100 USD. If the amount exceeds $100 USD it must be proved by two witnesses .

In Missouri, the nuncupative will must be made by a person in imminent peril of death, whether from illness or otherwise and the testator died as a result of the impending peril. Said will must be reduced to writing within 30 days after such declaration and submitted to probate within

[15] *Id.*
[16] Willing Learn, Willing Staff, The Legal Requirements of a Will, July 2018, *available a*t https://willing.com/learn/legal-requirements-of-a-will.html (last accessed July 9, 2018).
[17] N.C. Gen Stat § 28A-2A-10.

6 months. A nuncupative will may also dispose a personal property with an amount not exceeding $500 USD.

Under New York law, a nuncupative will can be made only by a member of the armed forces of the USA, a person who serves with or accompanies an armed force, or a mariner while at sea. An unwritten nuncupative will must also be established by at least two witnesses.

Ohio Revised Code provides that an oral will should be made in the last sickness and extends only to personal property and must be reduced to writing and subscribed by two competent disinterred witnesses within 10 days after the speaking of the testamentary words. It must also be offered for probate within 3 months after the death of the testator.

In Tennessee, a nuncupative will can be made only by a person in imminent peril of death, whether from illness or otherwise, and he dies as a result of the impending peril. The will must be declared before 2 disinterested witnesses and must also be reduced to writing within 30days after such declaration. Finally, the such will must be submitted to probate within 6 months after the death of the testator. A nuncupative will can also be made by any person to dispose of a personal property with a value not exceeding $1,000 USD. For persons in active military, air or naval service the aggregate amount may be $10,000.00.

In Texas, a nuncupative will extends to personal property with a value not exceeding $30 USD and must be made in the time of the last sickness of the deceased. If the value exceeds $30 USD, the will must be proved by three credible witnesses.

Finally in Vermont, a nuncupative will can be made by any person and it extends to personal property with a value not exceeding $200.00. Said will must be made in writing by a person present at the time of making the will within 6 days from the making of it. Furthermore, said will must be presented for probate within 6 months from the death of the testator.

From the various legislation and jurisprudence from different states in the United States of America, nuncupative wills are allowed only to those who are under imminent danger of death, or to those in the military, naval or air force. Some statutes also limit the type of property as well as the amount which can be disposed of by this type of will. A certain number of disinterested witnesses are also required to be present before whom the testator must declare his will.

Meanwhile, in the Philippines, the Supreme Court stresses in *Matias v Alvarez*[18] that the validity and efficiency of a nuncupative testament is essentially found in the open and public statement of the will of the testator, whether announced orally or by the reading of a paper, script, annotation, or a memorandum, in order that those present at its execution may understand and remember its contents in the cases prescribed by law, citing a decision of the Supreme Court of Spain dated December 6, 1861.[19]

[18] *Matias,*10 Phil at 402-403.
[19] Emily Sanchez, Are we ready for electronic wills?, *available at* https://thegadgetdelight.files.wordpress.com/2016/06/vol9no2.pdf (last accessed August 2,2018).

Because the nature of oral wills leaves ample opportunity for perjury and fraud, courts do not favor them and require strict compliance with statutory requirements.[20] Among the other types of wills, it is the most difficult to prove and substantiate in court due to its reliance on witnesses who are not always reliable and the prevalence of fraud. It most likely one of the reasons why oral will was not included as one of the recognized forms in the New Civil Code. Otherwise, the provision regarding nuncupative wills would have been adopted and would be in force. It is submitted, however, that there should nonetheless be legal recognition of nuncupative wills. That there is a possibility of fraud or perjury, which would taint a nuncupative will should be prevented by safeguards that are attainable with technology.

For a will to be valid under the Philippine legal system, it must comply with the statutory provisions in the Civil Code. As mentioned earlier, it is required for a will to be submitted for probate for it to be a source of right, and for the estate to be distributed among the heirs of the decedent.[21] The presentation of a will to the court for probate is mandatory, and its allowance by the court is essential and indispensable to its efficacy.[22] The general rule is that in probate proceedings, the scope of the court's inquiry is limited to questions on the external validity of the *will*; the probate court will only determine the will's formal validity and due execution,[23] which pertains to whether the testator, being of sound mind, freely executed the will in accordance with the formalities prescribed by law.[24]

Videographic will, therefore, strikes at the heart of the formalities attending a will as regulated by the Civil Code because non-observance of the strict requirements of the formality in the execution of a will render it invalid and hence, has no force and effect, thereby defeating the intent of the testator to dispose of his property via testamentary succession.

The courts are given a certain amount of discretion under the principle of substantial compliance,[25] which applies to notarial will only and not to a holographic will or any other form of will. In *Caneda v. Court of Appeals,*[26] the Supreme Court explained how this doctrine should be applied, to wit:

> … the manner of proving the due execution and attestation has been held to be limited to merely an examination of the will itself without resorting to evidence *aliunde*, whether oral or written...the defect is not only in the form or language of the attestation clause but the total absence of a specific element required by Article 805 to be stated explicitly in the attestation clause of a will…[27]

[20] Gerry W. Beyer & Claire Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution*,33 Ohio N.U. L. Rev. 865 , 874 (2007).
[21] Dorotheo v Court of Appeals, 320 SCRA 12, 20(1999).
[22] Guevarra v Guevarra, 74 SCRA 479,485 (1943).
[23] Morales v Olondriz, 783 SCRA 151,159(2016).
[24] Pastor Jr. V Court of Appeals, 122 SCRA 885 (1983).
[25] CIVIL CODE, art. 809.
[26] Caneda v Court of Appeals, 222 SCRA 781,794-795 (1993).
[27] *Id.*

This suggests that the court is committed to the will formalities- and compliance with the formalities are still required for a valid will- even though the judiciary may be inclined to apply the doctrine of liberal interpretation in satisfaction of those formalities.

Wills have always been creatures of form rather than substance. Langbein's proposition is that "the first principle of the law of wills is freedom of testation."[28] The principle that people should be able to devise their property as they wish, although deeply rooted in the common law, has always described as an ideal rather than a reality. [29] The Philippines currently has a hybrid of civil law and common law. It is then wrong to state that common law has no applications in the Philippines.

The Philippines currently does not have any law which allows for videographic wills, whether in substantive or procedural law. It is quite plain that under our legal system, only a written will is valid. An oral will is not recognized in our jurisdiction under the Civil Code even under exceptional circumstances. Thus, videographic will as a subset of oral will is excluded. However, the reasons why oral will is not recognized, aside from the possible proliferation of fraudulent manipulations, is chiefly because of the waning memory of witnesses over time. A videographic will offers an option, if not a much better advantage as compared to nuncupative wills since the former is duly recorded removing the fraudulent manipulations from the witnesses in nuncupative wills. It also carries with it a higher assurance that a will was in fact executed by the testator as compared to a pure nuncupative will which comes from the mouth of the witnesses.

In other states, videotape is now being admitted as evidence of the execution of the will. In India, for instance, the New Delhi High Court admitted in evidence the videotape of the execution of the will, and it was ruled as further strengthening the decision of the High Court as to the genuineness of the will and its due performance in the case of Kumari vs. State & Ors.[30] The court appreciated the videotaping the execution of the will as it made the task of the court in determining its due execution easier.

Indiana has a statute allowing the videotaping of the execution of the will. The law does not confine the recording to any events during the execution process.[31] *"A videotape* may be admissible." Consequently, *any* part or *all* of the will-making process may be filmed, including the testator reading the will, and the courts could still enter this evidence in the record to document satisfactory execution.[32] Under the statute, a videotape will predominantly be utilized as additional documentation of compliance with statutory execution precepts.[33] Further, the law allows videotapes to evidence the authenticity of a will as well as the testator's intent and mental

[28] John H. Langbien, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489,491 (1975).
[29] Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1037.
[30] Delhi High Court, TEST CAS No. 29 of 1985,9 October 2009.
[31] William R. Buckley, *Indiana's New Videotaped Wills Statute: Launching Probate into the 21st Century*, 20 Valparaiso University Law Review 83, 87(1985).
[32] *Id.*
[33] *Id.*, at 92.

capacity.[34] The Act was not intended to empower videotape to operate as a testamentary medium.[35] Written wills cannot be replaced by videotaped counterparts.[36]

In a similar vein, Louisiana also admits videotape of the execution of testament. The admissibility of the videotape as evidence, insofar as it relates to the execution of testament, is limited only to the following: (1) the proper execution of the testament; (2) the intentions of the testator; (3) The mental state or capacity of the testator; (4) The authenticity of the testament; and (5) Matters that are determined by a court to be relevant to the probate of the testament.

Also, the videotape can also be presented in a contradictory trial. Article 2904 contains five subsections, each representing an element for which videotape evidence may be admissible.[37] These elements can be sorted into two categories: objective and subjective.[38] The Objective Factors are Proper Execution and Authenticity of the Testament.[39] The Subjective Factors are Testamentary Intentions, Capacity, and Undue Influence.[40]

In the case of *King v Brown*,[41] the execution of this will was videotaped. The matter proceeded to trial, and, after viewing the videotaped execution of both wills, the jury found that the 2003 will was invalid. The general verdict did not indicate whether the jury based its verdict on grounds of testamentary incapacity, undue influence, or both. On appeal, the higher court ruled that the lower court did not err reasoning that the jury was able to view the videotaped execution of the 2003 will in order to draw its own conclusion regarding the extent of Decedent's lucidity or incapacity at that time. In addition, medical records and testimony from a psychiatrist showed that Decedent had been suffering from dementia and was likely confused at the time the will was signed. Also, testimony from others showed that Decedent suffered from a few symptoms associated with dementia, including the inability to recognize family members.

In the case of *Wall v. Hodges*,[42] had the testator videotaped his will as he proposed to his lawyer, his testamentary capacity and undue influence over him wouldn't have been much of an issue and would have been rebutted by the videotaped will. Since the court could have easily determined from said video if there was undue influence over the testator and whether he has the testamentary capacity to execute the will.

The question of videotaping the execution of the will and videotaping the will itself are two different species. The scarcity of jurisprudence relating to videographic wills is understandable due to the novelty of the idea, as brought about by technological advances. The concept of a will

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[34] Joseph K. Grant, *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will,* 42 U. Mich. J. L. Reform 105,109 (2008), *available at* https://repository.law.umich.edu/mjlr/vol42/iss1/4 (last accessed July 30,2018).
[35] Buckley, *supra* note 36, at 92-93.
[36] Buckley, *supra* note 36, at 93.
[37] Alison V. Nunez, *A Testament to Inefficacy: Louisiana's New Legislation Allowing for the Admissibility of Videotape Evidence in the Probate Process*, 67 LA. L. REV 871, 879 (2007).
[38] *Id.*
[39] *Id.* at 880.
[40] *Id.* at 883.
[41] 632 S.E.2d 638 (2006) 280 Ga. 747.
[42] 465 So. 2d 359 (1984).

has evolved and changed throughout the centuries into what it is today.[43] However, as technological advances become available, attempts have been made to expand the form of a will to include an audio or videotape will.[44] In light of the evolving society and technology, the testamentary law should likewise evolve to reflect these changes.

In other jurisdictions, experience shows that there is a slow acceptance of a videographic will. The landmark case in New South Wales Australia Re Estate of Wai Fun Chan, Deceased[45] the Supreme Court ordered the video will recorded in DVD admitted to probate as in informal will. In this case the court admitted the video will as a document within "Section 8" will, together with a declaration under Section 10(3)(c). The legal system of New South Wales provides for the admission of wills which does not comply with the strict statutory requirements under the harmless error provision found in Section 8 read together with Section 10(3)(c). This ruling was possible in the jurisdiction of New South Wales due to their statutory provision on harmless error which allows the court discretion to admit to probate those wills that did not meet the strict statutory requirements.

The applicable principles were identified in *In the Estate of the Late Stanley Trafford Fry*[46] as follows: *In the Estate of Masters (deceased)*; *Hill v Plumber*[47] was a case involving an application under Section 18A of the *Wills Probate and Administration Act* 1898 (NSW). However, it is accepted by the parties that the applicable test in respect of the plaintiff's application under Section 8 of the *Succession Act* is as identified by Mahoney JA in that case, as follows:

> There is, in principle, a distinction between a document which merely sets out what a person wishes or intends as to the way his property shall pass on his death and a document which, setting out those things, is intended to cause that to come about, that is, to operate as his will. A will, like, for example, a contract, a deed, and a sale, is, as it has been said, "an act in the law". It is something to which the law attaches the legal consequences of that kind of transaction: see *Salmond and Williams, Principles of the Law of Contracts*, 2nd ed (1945) at 4 et seq, citing *Salmond, Jurisprudence*, 7th ed (1924) at 360. Ordinarily, a transaction will or will not be an act in the law of the kind according to whether it was of the relevant form or nature and was intended to operate as such. Thus, a document which is in form a will, will not operate as such if it is, for example, a draft or "a trial run", not intended to have a present operation. A person may set down in writing what are his testamentary intentions but not intend that the document be operative as a will. This may occur, for example, in informal circumstances, in a letter or a diary or the like. What is to be determined in respect of a document propounded under s 18A is whether, assuming it to

[43] Beyer, et al., *supra* note 56, at 886. (Gerry W. Beyer & Claire Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution*, 33 OHIO N.U. L. REV. 865 ,874 (2007).
[44] *Id.*
[45] [2015] NSWSC 1107.
[46] [2015] NSWSC 598.
[47] [1994] 33 NSWLR 446 cited in [2015] NSWSC 598.

> embody the testamentary intentions of the deceased, it was intended by the deceased as his testamentary act in the law, that is, to have present operation as a will.[48]

A video tape made by the will testator was considered in the case of *Cassie v. Koumans*.[49] The video was put before the Court as an addition to the will that altered the terms of the will in question. While the Court was satisfied that the video recording could constitute a "document", the document was not admitted to probate as the Court was not fully satisfied that the statements made in the video were intended by the deceased to alter her final will and testament.

In the case of *Mellino v. Wnuk*,[50] the Supreme Court of Queensland admitted a video stored in DVD ruling that is a document within the meaning of the Succession Act, and that the document embodies or was meant to embody the testamentary intentions of the deceased man. The intention of the testator was also clear from the fact that he has written "my will" on the DVD itself and from the substance of what he says in the video recording on DVD. It is clearly made in contemplation of death and that the document purports to dispose of the testator's property after death.

Under Section 18[51] of the Queensland Acts Interpretation Act 1954, a will which does not conform to the formal requirements may be proved as a valid will if it met the three tests under said Section. These tests are the following: 1) There must be a document in existence; 2) The document purports to state the testamentary intentions of the deceased; and 3) The deceased must have intended the document to form his will. All these tests were satisfied in the case of *Mellino v Wnuk*[52] thereby allowing the DVD to be admitted to probate.

In the case of *Treacey v Edwards*,[53] the court was satisfied on the evidence that the audio tape was made prior to the will and that the will referred to the attached list on the audio tape. The court considered evidence of the deceased's testamentary intentions and was concerned with giving effect to those intentions by endorsing substance over form.[54]

In the case of *Cassie v. Koumans & Ors*,[55] a video tape made by the will testator was considered. The video was put before the Court as an addition to the will that altered the terms of the will in question. While the Court was satisfied that the video recording could constitute a "document", the document was not admitted to probate as the Court was not fully satisfied that the statements made in the video were intended by the deceased to alter her final will and testament.

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[48] *Id.* at 445.

[49] Hentys Lawyers, The Requirements of a Valid Will, *available at* https://www.willcontesting.com.au/requirements-valid-will/ (last accessed August 20,2018).

[50] [2013] QSC 336.

[51] Acts Interpretation Act of 1954(QS).

[52] [2013] QSC 336.

[53] (2000) 49 NSWLR 739.

[54] Keri Neveldsen, *Digital Wills and the Application of Judicial Dispensing Powers*, RMIT LSS LAW JOURNAL 50, 53 (2016).

[55] [2007] NSWSC 481.

This case highlights the importance of having a valid will in place as any document that is not valid will only be admitted to probate at the discretion of the Court. If the Court does not consider that the deceased intended the document to be their last will and testament, it will not be taken into consideration when distributing the deceased's estate. In this instance, the wishes of the deceased as to how their assets will be distributed at the time of their passing may not be carried out.

In another more recent case of *In the matter of Denowbray*,[56] the Queensland Supreme Court admitted a video recording in the cellular phone of the deceased. It ruled that the testatrix intended the video to be her will.

These cases were decided by the courts under their own harmless error rule. Under the harmless error rule, the court is given discretion to accept a will in another format, which is not written on a physical paper, if it satisfies the requirements laid down under the harmless error rule of that jurisdiction.

The Philippine legal system, however, does not have any harmless error rule which the courts can resort to. Formalism runs deep through our legal system. This means that unless there is a law or statute explicitly allowing a videographic will as a stand-alone instrument apart from a written will, the courts will not accept or recognized a videographic will. There is a stark preference by the judicial system to paper based will and printed hard copy documents.

Although we have been boxed in the legal paradigm of written wills, undoubtedly, those who grew up with video technology will begin thinking of other possibilities. Technological advances can be felt in every aspect of our life and the discerning legislator would know that these possibilities can become realities. Specifically, as far as these advances go, there is a need to update the law with respect to Wills in order to embrace the present conditions and circumstances of the citizens. Senator Jinggoy Estrada in 2007 proposed a senate bill with the goal of amending certain testamentary provisions of the Civil Code. This goes to show that the need to update the testamentary provisions in the Civil Code and a call for legal reform of the same started almost a decade ago.

Video recordings are finding its way into the judicial system of the Philippines. Under the provisions of the Rule of Electronic Evidence, there should be no difficulty in the Courts acting upon and accepting as evidence video or digital recordings of Wills subject to compliance with the requirement of the Rules of Evidence.

In our jurisdiction, a video is considered as demonstrative evidence. Demonstrative evidence is not the actual thing but it is referred to as "demonstrative" because it represents or demonstrates the real thing.[57] This category of evidence is not separately defined in the Rules of

[56] McInnesWilson Lawyers, Our Thinking Be Careful, That Video Might Be a Will…, citing Justice Burns as quoted by Alexandria Utting, 'Queensland court rules dying woman's phone video will legal', *Courier Mail*, 28 March 2018 *available at* https://www.mcw.com.au/page/Publications/wills-and-estates/2018/be-careful-that-video-might-be-a-will/ (last accessed Aug. 10, 2018).
[57] Willard Riano, EVIDENCE (THE BAR LECTURES SERIES) 102 (2016 ed.).

Court and appears to have been incorporated under the general term "object" evidence.[58] The rules of evidence that apply photographs generally apply to motion pictures and recordings.[59]

A videographic will is capable of different modes of storage. And the probability of it being stored in a computer hard drive is not remote. According to the Supreme Court, a video footage once stored and processed by a computer is considered as an electronic data message falling within the Rule of Electronic Evidence.[60] Thus, a videographic will stored and processed by a computer is an electronic data message. For purposes of the Rule on Electronic Evidence, the term "electronic document" may be used interchangeably with "electronic data message".[61] It is also provided that an electronic document shall be regarded as the equivalent of an original document under the Best Evidence Rule if it is a printout or output readable by sight or other means, shown to reflect the data accurately.[62]

Arguments

Advantages and Benefits of Videographic Will

A law recognizing videographic wills will reform the testamentary landscape and would be more attuned to the technological shift seen in our country. Videographic wills provide a good alternative to the paper based notarial will and holographic will not just because of the medium used but how it greatly affects evidentiary requirements of probate.

The law favors testacy rather than intestacy but, despite that, majority of Filipinos are not inclined to make a will. This would naturally result in persons dying intestate, leaving their heirs squabbling over their properties, if any is left at all. And those who have died testate, surprisingly, due to the improper execution of the will even with the aid of a lawyer, the failure of probate would convert the estate to one of intestacy due to the fatal defect of a will.

Therefore, it is proposed to simplify the process of making a will without sacrificing its integrity by allowing a testator to make a videographic will by himself or cause another person to make a videographic of his will without any other requirements than it be the testator speaking or executing his will. This proposal was derived from a cost-benefit analysis spectrum shown below.

[58] *Id.*
[59] *Id.* at 104.
[60] MCC Industrial Sales v SSangyong Corp, 536 SCRA 408(2007).
[61] RULES ON ELECTRONIC EVIDENCE, Rule 2, § 1(h).
[62] *Id.*, Rule 4,§ 1.

Videographic will facilitates the easy determination whether the testator was of sound mind and capacitated when he executed his will

Various cases in different jurisdiction shows that the videotaping of the execution of a will can be quite useful. In *Trautwein v. O'Brien*,[63] the Ohio Appellate Court stated that the most compelling evidence presented on the issue of testamentary capacity was a videotape of the will execution ceremony.[64]

In the case of *King v. Brown*,[65] the execution of the 2003 Will was videotaped and the jury was able to satisfy itself as to the lucidity or incapacity of the testator at the time of the execution of the will.[66] In addition to the medical records and testimony of the psychiatrist the jury was able to view from the videotape that the testator was incapacitated to execute the 2003 Will.[67]

Meanwhile in the case of *Stotlar v. Cook*,[68] the Court found that the testatrix did not possess the testamentary capacity by reasoning that the videotape of the first will execution ceremony established that it was necessary to remind the testatrix of the nature of her investments, and that despite the reminder, she failed to understand their nature.[69]

In the case of *In re Moles,*[70] the Court ruled that the testatrix possess testamentary capacity despite testimony of the videographer to the contrary.[71] The court gave more weight to the behavior of the testatrix as shown in the videotape.

In *Peterson v. Glinn*,[72] the court affirmed the ruling of the jury that the testatrix had the testamentary capacity.[73] The jury viewed the videotape and saw the testatrix had the testamentary capacity at the time she executed her will.[74]

In the case *Wall v. Hodges*[75] the testamentary capacity was raised as an issue and the appellants contended that there was also undue influence on the part of Wall. In this case, had the testator videotaped his will as he proposed to his lawyer his testamentary capacity and the undue influence over him wouldn't have been much of an issue.[76] The court could have easily determined

[63] 391 US 367 (1968).
[64] *Id.*
[65] 632 S.E.2d 638 (2006) 280 Ga. 747.
[66] *Id.*
[67] *Id.*
[68] Stotlar v. Cook, 1987 WL 6091.
[69] *Id.*
[70] In re Moles, N.Y.L.J. Sur.Ct. New York County April 15,2011.
[71] *Id.*
[72] Peterson v. Glinn, 439 N.W.2d 516 (Neb.1989).
[73] *Id.*
[74] *Id.*
[75] Wall v. Hodges, *supra* note 47.
[76] *Id.*

from said video if there was undue influence over the testator and whether he has the testamentary capacity to execute the will.

Videographic will can show presence or absence of fraud in its execution

For fraud to make a will attended with vitiated consent, there must be intent to defraud.[77] This intent, and the nature of the fraud, must be proved of course.[78] Testamentary fraud has five elements: (1) a misrepresentation told (2) with the intent to deceive the testator and (3) with the intent to influence the will, which misrepresentation (4) does deceive the testator and (5) does influence the will.[79] Fraud is a strong defense in the probate of will. The decree of probate is conclusive with respect to the due execution thereof and it cannot impugn on any of the grounds authorized by law, except that of fraud, in any separate or independent action or proceedings.[80]

Fraudulent tampering of a videographic will is one of the criticisms of its use because it may be argued that the video can be modified. The activities where fraud can happen in the making of a videographic will are the pre-shoot activities, filming of the will, video editing, and video storage. However, it can also be argued that the testator can put security measures to heighten the protection of the will from being defrauded, and create a higher barrier for those who would wish to change, delete, make additions to, or revoke it. The testator can include the following security measures:

1. Have disinterested witness attest to the execution of the will.
2. Hire a professional videographer, who shall likewise be a disinterested party.
3. He can utilize encrypted technology to mask the data, which is in the form of a video, from unintended audience.
4. Use a videocamera, mobile gadget, or other similar video and audio recording device which has timestamping technology embedded.
5. Have the videographer authenticate the video will.
6. He can have multiple copies of the video will reproduce to assure that at least one copy of the will is submitted to probate.
7. The testator can submit his videographic will for probate ante-mortem.

[77] Pecson v. Coronel, 45 Phil. 216(1923).
[78] *Id.*
[79] E. Gary Spitko, *Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms through Minority-Culture Arbitration,* 49 Case W. Res. L. Rev. 275, 279 (1999) citing Thomas E. Atkinson, Handbook of the Law of the Wills 232 (2d ed. 1953.) at 265-67.
[80] Manahan v Manahan,58 Phil. 448,451(1933).

In Civil Cases, in order to successfully prove fraud, there must be a clear and convincing evidence by the proponent. Clear and convincing proof is "...more than mere preponderance, but not to extent of such certainty as is required beyond reasonable doubt as in criminal cases ..."[81] Consequently, in the hierarchy of evidentiary values, proof beyond reasonable doubt at the highest level, followed by clear and convincing evidence, preponderance of evidence, and substantial evidence, in that order.[82]

Fraud is never presumed but must be proved by clear and convincing evidence, mere preponderance of evidence not even being adequate. [83]Contentions must be proved by competent evidence and reliance must be had on the strength of the party's evidence and not upon the weakness of the opponent's defense.[84]

Videographic will can show presence or absence of undue and improper pressure and influence in its execution.

Article 1337 of the Civil Code describes what undue influence is, to wit:

> There is undue influence when a person takes improper advantage of his power over the will of another, depriving the latter of a reasonable freedom of choice. The following circumstances shall be considered. The *confidential, family, spiritual* and *other relations* between the parties, or the fact that the person alleged to have been unduly influenced was suffering from *mental weakness,* or was *ignorant,* or in *financial distress* (emphasis supplied).[85]

For a testator executing a videographic will, any undue influence could be shown by testator himself while reciting his will by attempting to adapt some body movement or signal to indicate such. The image in the pupil of his eye may also be reconstructed to show the scene that is confronting him at the time of the execution of the will with the use of corneal refraction technology. A study was performed that by zooming in on high-resolution passport-style photographs, they were able to recover images of bystanders from the reflections in the eyes of

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[81] Manalo v Roldan-Confesor, 215 SCRA 808, 819 (1992).
[82] *Id.*
[83] Department of Public Works and Highways vs. Quiwa, 665 SCRA 479,483(2012).
[84] *Id.*
[85] CIVIL CODE, art. 1337.

photographic subjects.[86] It was also noted that the reflection images also contain cues to bystanders' emotional state and interest, via facial expression,[87] gaze direction,[88] and posture.[89]

In the case of Estate of *Seegers v. Combrink,[90]* the videotape showed the testator as well as the conduct of various individuals involved with the will execution ceremony.[91] This recording was one of the factors the court cited as supporting *prima facie* showing of undue influence.[92]

Meanwhile in the case of *Stotlar v. Cooks*,[93] the Court ruled that the videotape of the second will showed that the attorney of the testatrix avoided any mention of her assets and in addition the fact that the codicil was not videotaped appeared to support the judge's finding that the codicil was procured by undue influence.[94]

Nothing in this paper precludes the testator from having a witness attest to the execution of his videographic will. The attestation of witness who was present at the time of the making of the video will ensures that the testator voluntary executed the video will. The concept of "attestation of the execution (making)" of a video will is, in principle, can be applied to a person present at the time the will is made, for the deliberate purpose of witnessing the will-maker's statement of testamentary intentions and assisting in the recording of that statement.[95]

Videographic will can further enhance the clarity in the ascertaining the intent of the testator as compared to the paper-based ones

The paramount consideration in the provisions of the Civil Code regulating the formalities in the execution of the will is the fruition of the testator's desire rather than its defeat. The desire of the testator in disposing his property can also be ascertained with clarity in a video will. The testator can convey a message with methods other than written words.

It is often the case that an valid will presents difficult problems of construction because of ambiguities in the language employed.[96] In our jurisdiction the Civil Code provides for rules in

[86] Jenkins R. Kerr, Identifiable Images of Bystanders Extracted from Corneal Reflections, *available at* https://doi.org/10.1371/journal.pone.0083325 (last accessed July 22 2018).
[87] *Id*. citing Ekman P , Facial Expression and Emotion, 48 Am Psychol 384 , 1993.
[88] Andrew J. Calder, Andrew D. Lawrence, Jill Keane, Sophie K. Scott, Adrian M.Owen ,Ingrid Christoffels, and Andrew Young, *Reading mind from the eye gaze*, 40 Neuropsychologia 1129, 1129–1138. (2002).
[89] Sarah-Jayne Blakemore and Jean Decety, From the perception of action to the understanding of intention *available at* http://baillement.com/texte-intention-decety.pdf (last accessed July 22, 2018).
[90] 733 P.2d 418,421-22 Okla. Ct. App. 1986.
[91] *Id.*
[92] *Id.*
[93] Stotlar v. Cook, 1987 WL 6091.
[94] *Id.*
[95] [2015] NSWSC 1107.
[96] Edwin T. Pullen, *Wills—Admission of Extrinsic Evidence to Explain Ambiguities in Wills,* 35 N.C. L. Rev. 167,168 (1956).

ascertaining the ambiguity in a will. However, this does not prevent the parties from going all the way to the Supreme Court due to the ambiguity in the wording or clause in the will. Article 789 of the Civil Code provides:

> When there is an imperfect description, or when no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence, excluding the oral declarations of the testator as to his intention; and when an uncertainty arises upon the face of the will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into consideration the circumstances under which it was made, excluding such oral declarations.[97]

Regarding testamentary intentions and capacity, videotape arguably aids the trier of fact since the footage displays the testator's "dialogue, soliloquy, [and] conduct" during the execution.[98] One commentator describes videotape evidence as "clearly superior to any secondary source of information regarding capacity inquiries."[99] This exalted status arises from the potential unreliability of testimony of relatives or friends on both sides of a will contest.[100] These parties often possess conflicting interests that may taint their recollections.[101]

In the case of *Peterson v. Glinn*,[102] Mrs. Peterson executed her last will and testament, on September 6, 1972, and a codicil to the will on January 16, 1985.[103] The testatrix was videotaped discussing her distribution plan with her attorney and then executing a codicil to her will.[104] The jury viewed the tape, heard other evidence, and then decided that the testatrix had capacity.[105] The jury ruled that the testatrix had the testamentary capacity at the time she executed her will.[106] The decision of the jury was upheld by the Nebraska Supreme Court despite various difficulties with the tape. Dora Caudy, the laundry supervisor at the nursing home, testified that she had been asked to witness the codicil, but was reluctant to do so because, "I just didn't think that she knew what she was doing."[107] The jury saw the videotape of the signing of the codicil, and by its verdict, it is apparent that it gave little weight to the testimony of the witness. Their examination of the

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[97] CIVIL CODE, art. 789.
[98] Alison V. Nunez, *A Testament to Inefficacy: Louisiana's New Legislation Allowing for the Admissibility of Videotape Evidence in the Probate Process*, 67 LA. L. REV 871, 879(2007*)* at 883.
[99] Nunez, *supra* note 42 citing Gerry W. Beyer & William R. Buckley, Videotape and the Probate Process: The Nexus Grows, 42 OKLA. L. REv. 43, 46 (1989).
[100] *Id.* at 55.
[101] *Id.*
[102] 439 N.W.2d 516 (Neb.1989).
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*

videotape leads to the same conclusion that the videotape, its faults notwithstanding, justified giving little weight to this testimony.[108]

The videotape in this case greatly contributed to the success of admitting the will in probate since the jury was able to witness the testatrix. She was also able to dispel any doubt that may have lingered in the minds of everyone when she bequeathed a bigger share of the estate to one of her children. This case strengthens the value of a videographic will as compared to a paper-based will in putting the ambiguity in the will to finesse. A testator in a videographic will can give more details to any disposition which reflects greatly his intent.

Statements made by the testator could prove very helpful in determining the correct interpretation and construction of various provisions of the will.[109] Video wills allow the testator to speak about his will freely with clarity and provide insights as to why he made a disposition. He has the freedom to add more details as to each disposition he makes. By explaining what the testator means by certain words and phrases, the testator can preserve evidence of the testator's intent which would prove invaluable should a dispute later arise.[110] Further, he can even converse with his intended audience and it is as if he is alive in front of them in person.

The testator's personal appearance in the videographic will lead to a greater chance of allowance of the will.

It is conceded that in keeping with the Civil Code, a videographic will shall be not exempted from probate in keeping with the provision of Article 838 of the Civil Code. Most sections of Rule 76 of the Rules of Court are generally worded in that they refer to a will without any qualification which makes them applicable to a videographic will. In the probate of a will, courts are tasked to determine nothing more than the extrinsic validity.[111]

The formalities in written notarial and holographic wills are not wholly applicable in a videographic will. It is submitted that the formalities in the execution of videographic wills concern the making of the video will – the safeguards said creation was subjected to in order to ensure the integrity of the will of the testator. This should include the testator's intention to dispose of his assets and intending said video to be his will. Safeguarding the whole creation process is vital to ensure the integrity of the videographic will. After having filmed or taken the video will the testator can review the entire video to determine whether his will and intention was captured in the way he wanted it to be.

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[108] *Id.*
[109] Gerry Beyer, Anticipating will contests and how to avoid them, *available at* https://www.fbtservices.com/wp-content/uploads/2017/04/Newsletter-April-2017.pdf (last accessed August 5, 2018).
[110] *Id.*
[111] Baltazar v Laxa, 669 SCRA 249,262 (2012).

Attestation of any witness need not be altogether required to allow the testator to make a video will whenever he feels like it. In the case of *Abangan v Abangan*[112] the Supreme Court stated:

> The object of the solemnities surrounding the execution of wills is to close the door against bad faith and fraud, to avoid substitution of wills and testaments and to guaranty their truth and authenticity. Therefore, the laws on this subject should be interpreted in such a way as to attain these primordial ends. But, on the other hand, also one must not lose sight of the fact that it is not the object of the law to restrain and curtail the exercise of the right to make a will. So, when an interpretation already given assures such ends, any other interpretation whatsoever, that adds nothing but demands more requisites entirely unnecessary, useless and frustrative of the testator's last will, must be disregarded.[113]

A holographic will does not require an attestation clause. In proving a holographic will all that is required by the Rules of Court are witnesses who can attest that the signature and handwriting in the will is the signature and handwriting of the testator although the number of witnesses who can attest to such signature varies whether the holographic will is contested or not.

A videographic will, where the testator has been filmed talking in person, should carry more weight than a holographic will. In similar fashion, witnesses should be called also to attest to the identity of the testator if he is in fact the person he claims to be.

However, nothing in this paper precludes the testator from having a witness attest to the execution of his videographic will. The attestation of witness who were present at the time of the making of the videographic will to ensure that the testator voluntary executed the videographic will. The concept of "attestation of the execution (making)" of a videographic will is, in principle, capable of application to a person present at the time the will is made, for the deliberate purpose of witnessing the will-maker's statement of testamentary intentions and (as in the present proceedings) assisting in the recording of that statement.[114]

Public policy supports videographic will

The Philippine Government have jumped into the bandwagon of paperless transactions years ago. Local governments have also established paperless campaign in their respective localities. The judiciary have also recognized the detriment of paper in the environment and thus

[112] Abangan v Abangan, 40 Phil. 476 (1919)..
[113] *Id.*
[114] [2015] NSWSC 1107.

shared in the responsibility of lessening the usage of papers with the Efficient Paper Rule.[115] Videographic will does not involve the use of paper and is in harmony with public policy mentioned above. From its creation, storage, and presentation in court, videographic will remains paperless. Thus, in line with the public policy, the making of videographic wills can minimize the demand for paper and will contribute to the reduction of deforestation. Therefore, the making of videographic will results to the enhancement of the protection of the environment.

Videographic will provides a durable physical representation of the testator's will

The probate of a will does not normally happen in a date near the date of its execution. More often, there is a span of a few decades before the will is presented for probate, depending on the age of the testator. Hence, the preservation of the physical representation of the will of the testator becomes apparent.

The ways of storing a videographic will come into view. Videographic wills can be stored in a computer hard drive, in a cellular phone, in cloud, in the national library for storage of digital video data, and digital video data. It should also be noted that a videographic will once it has been stored in a computer becomes an electronic data message.

Videographic will is a viable alternative to those suffering from disability or unable to read and/or write

Article 804[116] of the Civil Code provides that "[e]very will must be in writing and executed in language or dialect known to the testator."[117] It can be one of the grounds for invalidating the will since it is one of the formalities required.

In a videographic will, the testator may speak in a language or dialect that he knows. Thus, invalidating a videographic will for nonconformance with the requirement of being executed in a dialect or language known to the testator is now remote.

Furthermore, there are those who lack trust in written wills since they cannot see or understand what it means. Those who are blind or deaf and do not know how to read and write and have no way of ascertaining whether their will was written in the way they intended it to be. A videographic will can reassure them that it expresses their intended will in the context they meant it to be unaltered by anyone else.

[115] EFFICIENT USE OF PAPER RULE, A.M. No. 11-9-4-SC, January 1, 2013.
[116] CIVIL CODE, art. 804.
[117] *Id.*

To a senior citizen, writing a will may be an insurmountable task and they would prefer to just speak in front of a camera rolling. And to those who are not able to write anymore, as in the case of *Payad v. Tolentino*,[118] where the lawyer assisted the testatrix in putting her thumbmark on her will. The case was fraught with opposition that it was not the testatrix herself who affixed her thumbmark. With a videographic will the testatrix in the same case would have no need for the lawyer anymore since she will be able to speak and say what her will is. This argument removes one opposition in the probate of the will.

Videographic will can serve the functions of written will

Professor G. Douglas Miller claimed in his paper that given contemporary advances in technology there is substantial ground for arguing that electronic or videotaped wills can serve all the functions of a written will and possibly even improve the intent-verifying and authenticating aspects of the traditional attested will.[119] The will formalities, rather than being ends in themselves, are the means by which the legal system discerns the authenticity of a person's purported intentions for the disposition of his property at death.[120]

Arguably, videographic will can serve the same functions. In probate action, a tape of the testator may be probative of his competency or reflect the existence of disputed familiar relationship or show compliance with all the statutory formalities in execution of a will.[121]

A videographic will can serve an evidentiary function. The object of the solemnities surrounding the execution of wills is to close the door against bad faith and fraud, to avoid substitution of wills and testaments and to guarantee their truth and authenticity.[122] Videographic will can preserve the evidence of the will itself for a long period of time. Considering also that the Philippines have an ante-mortem probate system, the testator can have his videographic will probated while he is alive which would minimize fraud. The videographic will also eliminates the blunder of proving the genuineness of testator's signature, if the will was not probated during his/her lifetime because from the start of the fil, it is the testator who is speaking and no one else.

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[118] Payad v Tolentino, ,63 Phil. 395,395-403(1936).
[119] G. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism,* 43 Fla. L. Rev. 599, 667 (1991).
[120] *Id.* citing John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 Colum. L. Rev. 3 (1987).
[121] (Gregory P. Joseph, Modern Visual Evidence,2005 edition, p 4-22)
[122] Abangan v Abangan, *supra* note 117, at 479.

As Protective Function

By adding a protective measure in the formality covering the execution of a videographic will, a testator is assured that their will cannot be tampered. Tampering is one avoidable pitfall with enough formalities focusing on safeguarding the execution of a video will. There are various security features available in the market to prevent any manipulative intentions.

As Cautionary Function

Lest we forget, Article 828[123] of the Civil Code provides that a will may be revoked by the testator at any time before his death.[124] Any waiver or restriction of this right is void. Apparently, this provision is applicable to all types of will. The fact that the testator executed a Video will does not lessen the chance of the will being revoked by the testator at any time before death. With the proper prescribed formalities for a videographic will the testator can be forewarned that he is in fact making a testamentary disposition. One of the formalities that may be required in videographic will is the intent of the testator that such videographic will be his will and to take effect upon his death.

As Channeling Function

New laws can be provided for the standardization of the proper execution of a video will. Consequently, these laws can be learned and mastered by the practitioners and they can provide the testator with assistance in properly executing a videographic will should the testator wishes to seek their assistance. The courts, being aware of the formalities prescribed for a video will, do not have to guess whether what the testator made was in fact a will.

Availability of technology

The technology to facilitate the creation of a video will is available, accessible and at the tip of the fingertips of every Filipino. There is no denying that almost 32% of Filipinos use smart phones capable of recording video and audio.[125] This number is expected to rise to 40 percent by the year 2021.[126]

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[123] CIVIL CODE, art. 828.
[124] *Id.*
[125] Number of smartphone users in the Philippines from 2015-2022, available at https://www.statista.com/statistics/467186/forecast-of-smartphone-users-in-the-philippines/ (last accessed July 31, 2018).
[126] *Id.*

The convenience and accessibility of video and audio recording device in making the videographic will

Today, with the prevalence of high-resolution video capabilities of electronic devices, it will be quick, simple, and natural for a testatrix to video herself while she states her sincerest testamentary wishes and declares the video to be her will.[127] In the Philippines, almost all households have a video digital recording device which makes it easier for someone who wants to make a will to do so. Creating a video will is indeed as easy as taking a video to be uploaded in one's social media account. All that a person needs are a video-and-audio recording-capable gadget, and that person can make a video will, wherever he may be and in whatever situation he is in, provided that he complies with the other legal requisites for making a will.

More people would be encouraged to make a will

Despite the presence of provisions in the Civil Code regarding testamentary disposition majority of the Filipinos are not inclined to make a will. Often, the preparation of a notarial will is done with the assistance of a lawyer to help the testator navigate the strict formalities of the law before the same is probated and subsequently given effect. Hence, making a will seems to be a herculean task to ordinary citizens who cannot afford the assistance of lawyers resulting to most losing interest in making one.

As has been mentioned earlier, that it is convenient and simple to make a video will. Handheld technologies are in a time of rapid change.[128] Using smartphones embedded with video and audio recording capability has been a natural daily habit of Filipinos. This gadget along with similar devices embedded with similar technology are available everywhere. A person would always carry such a mobile device everywhere throughout his life.[129] Making a video will would be naturally convenient for them to do so. As such more people would be encouraged to make a will.

[127] Kyle B. Gee, Electronic Wills At Our Fingertips Should They Be Admitted to Probate?, *available at* https://www.sssblaw.com/media/1141/published_with_distribution_rights_gee_dec_2013_cmba_article_electronic_wills.pdf (last accessed July 31, 2018).
[128] Anastasios A. Economides and Amalia Grousopoulou, Use of mobile phones by male and female Greek Students, *available at* https://pdfs.semanticscholar.org/4e77/1466a7439ef0c7405de7547ef60afd6184f4.pdf (last accessed August 10, 2018).
[129] Anastasios A. Economides and Amalia Grousopoulou, Use of mobile phones by male and female Greek Students, *available* at https://pdfs.semanticscholar.org/4e77/1466a7439ef0c7405de7547ef60afd6184f4.pdf (last accessed August 10, 2018) citing Sharples, M. (2000) 'The design of personal mobile technologies for lifelong learning', Computers & Education, Vol. 34, pp. 177-193.

Challenges Facing the Legality of Videographic Wills

Alienation of the technologically illiterate

Videographic will appeal more to the generation which grew up and are well aware on how these digital tools can be utilized. In terms of information age, people can be classified into two according to March Persky:[130]

> Digital Natives are those who represent the first generations to grow up with new technology. They spent their entire lives surrounded by and using computers, videogames, digital music players, video cams, cell phones, and all the other toys and tools of the digital age.
>
> Those who were not born into digital world but have, at some point in our lives, become fascinated by and adopted many or most aspects of the new technology are, and always be compared to them, Digital Immigrants.[131]

The Digital Immigrants may still prefer to have the traditional method of doing their last will and testament. These Digital Immigrants have grown up in a paper-based culture where they would prefer to have agreements or transactions written on a physical paper rather than have them other forms.

Nevertheless, in the case of *Wall v Hodges,*[132] the testator was already inclined to have his will videotaped in 1981 and the digital age phenomenon has not started way back then.[133] Thus, it is not correct to say that a videotaped will shall result in alienation of non-tech savvy individuals.

Question of security

Another concern by both lawyers, legislators is about the safety, confidentiality, fraudulent tampering and other similar acts . While others will be concerned about the long-term storage of

[130] Marc Pernsky,*Digital Natives, Digital Immigrants*, 9 ON THE HORIZON 1 ,1-2 (2001).
[131] *Id.*
[132] Wall v. Hodges, *supra* note 47.
[133] *Id.*

video wills and protecting them from accidental destruction. With technology nowadays anything can be changed and without effective safeguards, the video will can easily altered.

As a safeguard, the testator can make sure that his videographic will is what he intended it to be, as well as whether it embodies his trues wishes. He may have the videographic will accompanied by a transcript of what he stated in the film and which is signed by him. This can add more to the authenticity, reliability and integrity of the videographic will.

Further, he can hire a professional videographer who is competent and is aware of the confidentiality and sensitivity of the information he is about to film, which would require him to exercise a higher degree of diligence in performing his duty. The contract of the videographic may include a confidentiality clause in it. This videographer can also be made to identify the authenticity of the original video of the videographic will he made.

Another security feature of videographic will is the timestamping technology of a video. This will show that the will was created in such a time when the testator was still alive, of sound mind, and had the legal capacity to execute the video will. Digital videocameras and cellular phones nowadays are capable of embedding a timestamping technology in them. The date and time when the video was taken can be easily extracted. In cellular phones operating in the Android System, a timestamping app can be downloaded from the Playstore without any additional cost. On the other hand, those using Apple phones can also get Timestamp photo and video on Itunes.

In the case of identical twins or an impostor, they may look alike but there are certain traits where they are not the same. Their voice, mannerism, accent, behavior, to name some, cannot be similar as to eliminate the idea of individuality of each person. The body of a person is incapable of substitution, corollary to this, it will be harder to substitute another person to pretend to be the testator. This should not escape the experts in voice forensics or video forensics.

In sum, this is not an insurmountable problem since a video is already accepted as evidence in court and there is already a system in place to safeguard such evidence from alteration. These systems can be further enhanced in case of a video not just as an evidence but substantively as the will itself.

At what cost?

It can be as inexpensive as the making of a holographic will. Nowadays everyone is attached to their cellular phone more than any piece of technology and owning a smarthphone nowadays is a norm in the society. And these cellular phones are capable of taking a video anytime, as long as it has sufficient battery.

The Philippines as a third world country can benefit a lot from moving towards a paperless testamentary mode. Economic stringency is more in demand among the citizens of the Philippines

as compared to other nations. The commitment of the government to enrich their citizens and minimize their expenses so as they have more wealth is evident in the passage of the TRAIN Law,[134] which increased the take home pay of working Filipinos who are subject to income tax. In the same tune, the testamentary medium needs to be simplified and make be made more accessible to the Filipinos.

How about storage?

There are various ways of storing a videographic will. It can be stored in a computer hard drive, mobile gadgets (cellphones,tablets, iPads), in cloud, in the National Library for storage of digital video data, digital video data (DVD), USB flash drives, and other similar storing methods and/or devices. It should also be noted that a videographic will, once it has been stored in a computer, becomes an electronic data message falling within the Rule on Electronic Evidence.

Resistance to Change

The courts have comfortably used video footage as well in the examination of child witnesses. Practitioners in the Philippines are increasingly familiar with technology and videography. The Philippine Courts also have the facility to probate a video will. It is enough reason not to shy way to the recognition of videographic will as another method of testamentary disposition.

Authenticity Concerns

In the case of notarial and holographic will the case of *Ajero v. Court of Appeals*[135] is instructive about the requirement of authenticity in said types of will:

> In the case of holographic wills, on the other hand, what assures authenticity is the requirement that they be totally autographic or handwritten by the testator himself. For purposes of probating non-holographic wills, these formal

[134] *The Tax Reform for Acceleration and Inclusion Act*, [TRAIN LAW] Republic Act No. 10963 (2017).
[135] Ajero v. Court of Appeals, 236 SCRA 489,495-496(1994).

> solemnities include the subscription, attestation, and acknowledgment requirements under Articles 805 and 806 of the New Civil Code.
>
> In the case of holographic wills, on the other hand, what assures authenticity is the requirement that they be totally autographic or handwritten by the testator himself. Thus, unless the unauthenticated alterations, cancellations or insertions were made on the date of the holographic will or on testator's signature, their presence does not invalidate the will itself. The lack of authentication will only result in disallowance of such changes.[136]

A videographic will, after it has been filmed or recorded, undergoes video editing if the testator wishes to remove some images therefrom and thereafter it is stored. It may also be duplicated by the testator. The testator can ask for the videographer to authenticate the original video will and have a transcript of the video will as well. In this manner, the original will of the testator will not be corrupted by any future manipulations.

What if it was the executor who made the will himself without anybody else to assist him, what will assure the court of the authenticity of the video? The holographic will made entirely by the testator is quite similar to a video will executed by the testator himself without any assistance from anyone. Against the same backdrop, the requirement that the will is executed by the testator himself should assure the court of its authenticity. It is quite evident from watching the video whether or not it is really the testator executing the will or not.

Conclusion and Recommendation

In this paper, the possibility of incorporating videographic will in the testamentary provision of the civil code has been probed. Legal, social, and economic perspective of a videographic will were also shown. The legislations and jurisprudence cited provided support for the possibility of incorporating videographic will in the Philippines.

The introduction of videographic will provide for several social, economic, and political advantages such as (i) a videographic will satisfies or even exceeds the requirement of the Civil Code provision that the will be in writing; (ii) facilitates the easy determination whether or not the testator was of sound mind and capacitated when he executed his will; (iii) preserves the integrity of the will minimizing the incidence of fraud or undue and improper pressure and influence in its execution; (iv) it can further enhance the clarity in the ascertaining the intent of the testator as compared to the paper-based ones; (v) the testator's presence in flesh in the videographic will make lead to a greater chance of allowance of the will; (vi) public policy supports the adaptation of videographic will; (vii) the testamentary provision or dispositions contained in a

[136] *Id.*

videographic will provides a durable physical representation of the testator's will; (viii) a videographic will is a viable alternative to those who are blind or unable to read or write as it can serve the functions of written will; (ix) the availability of technology ,convenience and accessibility of video and audio recording device as opposed to seeking the assistance of a lawyer for the preparation of a will; and (x) more people would be encourage to make a will for the proper disposition of their property upon their death, eliminating family disputes which may give rise to more litigation.

Applying cost-benefit analysis, the advantages of a videographic will far outweighs the counter arguments. Quoting Han Fei Tzu,[137] placing too much value on minor advantages will impede major advantages.

Indeed, our society has evolved alongside technology. Technology advances has been adapted by the citizens of the Philippines in all walks of life. Congress should consider amending the Civil Code to incorporate videographic wills because Filipinos will use available technology for this purpose. We will see in the future that technology will rapidly advance in the future and the law cannot prevent it from doing so. Rather than being left behind or arrest the evolution of technology, it is submitted that amending the Civil Code is a better avenue.

[137] Chinese Philosopher, born *c.* 280, China—died 233 BCE, Han Fei Tzu (c280 BC-233 BC) Quotes *available at* http://www.rodneyohebsion.com/han-fei-tzu.htm (last accessed Aug. 5,2018).

Obligation to Provide Fair and Equitable Treatment to Foreign Investors: its Development from a Treaty-Based Rule to a Rule of Customary International Law

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3rd Best Thesis, 2018

Introduction

One of the most controversial areas of international law is the law relating to foreign investments. The field of foreign investment law is expanding rapidly and changes overtime.[1] The number of investment treaties in effect has continued to increase, and there has been a veritable explosion of foreign investment disputes being resolved through international arbitration.[2]

With the growth of foreign investment law is the proliferation of bilateral investment treaties (BITs). BITs encourage foreign direct investment by creating stable and predictable markets through establishing minimum standards of treatment for investors / investments.[3] Although a BIT binds only the two signatory states, the general effect of the BIT movement has been to establish an increasingly dense network of treaty relationships between capital-exporting states and developing countries -- a trend that appears to continue and accelerate in the future.[4]

Almost 3,000 BITs have been signed in the past forty years with remarkably similar provisions, leading some scholars to conclude that they may now express the customary international law standards for foreign investment.[5] These BITs guarantee certain standards of treatment that are enforceable through a binding dispute settlement agreement which may be invoked by the State-party and the investor.

The general obligations undertaken by State-parties to a BIT often require them to provide investors and investments with fair and equitable treatment (FET); full protection and security;

[1] Doak R. Bishop, James R. Crawford, W. Michael Reisman, Foreign Investment Disputes: Cases Materials and Commentary (2d ed. 2014) [*hereinafter* Bishop, Crawford and Reisman]
[2] *Id*.
[3] Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law 817, (Oxford University Press 2012) [*hereinafter* Dolzer & Schreuer]
[4] Jeswald W. Salacuse, BIT by BIT: The Growth of Bilateral Investment Treaties and their impact on Foreign investment in Developing Countries, 24 Int"l Law. (1990)
[5] Bishop, Crawford and Reisman, s*upra* note 1

treatment no less favourable than that required by international law; national treatment; most favoured nation treatment; and the protection against direct and indirect expropriation.[6]

The FET standard is emerging as one of the core concepts governing the relationship between foreign investors and host states in international investment law, and has "the potential to reach further into the traditional 'domaine réservé' of the host state than any one of the other rules of investment treaties".[7]A debate exists on whether the FET standard merely reflects the international minimum standard of treatment of aliens, as contained in customary international law, or offers an autonomous standard that is in addition to general international law.[8] Arbitral Tribunals,[9] in determining violations of FET obligations, recognized different elements and applied different standards of FET according to the circumstances presented.

Another controversial question in relation to FET obligation under BITs is whether the obligation to provide FET to foreign investors had itself developed as a rule of customary international law.[10] There are different views propounded on that matter, the supporters of the proposition based it on the fact that the standard is found in the overwhelming majority of BITs reflecting state practice and the generality and consistency of such practice reflects *opinio juris* while those who do not support the proposition argue that it lacks the element of *opinio juris* which negates its crystallization to customary international law.[11]

This study deals with the latter question, and the author supports the proposition that the obligation to provide FET protection is in and of itself a rule of customary international law. This study addresses the issue of whether or not the obligation to provide FET to foreign investors should now be considered in and of itself a rule of customary international law. Specifically, the questions sought to be addressed are whether: (a) the practice of according FET to foreign investments / investors is considered general, widespread, uniform, consistent and representative, as to reflect "state practice"; and (b) States have the requisite belief that they have an obligation under international law to provide FET protection to the foreign investments / investors, as to reflect "*opinio juris*".

While it is now estimated that around 3000 BITs have been concluded, these BITs only cover 13% of the total number of the States worldwide.[12] This shows that a majority of foreign

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[6] *Id*.
[7]Stephan W. Schill, Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law, IILJ Working Paper 2006/6 Global Administrative Law Series, available at (www.iilj.org) [*hereinafter* S. Schill]
[8] Bishop, Crawford and Reisman, *supra* note 1, at 757
[9] *See* Saluka Investments BV (The Netherlands) v Czech Republic, UNCITRAL, Partial Award (17 March 2006) [*hereinafter* Saluka v. Czech Republic]; SD Myers, Inc v Canada, UNCITRAL, First Partial Award (13 November 2000); CME v Czech Republic, UNCITRAL, Final Award (14 May 2003); Waste Management v. Mexico, ICSID Case No ARB(AF)/00/3 (NAFTA), Award, 30 April 2004, 43 ILM 967 (2004). [*hereinafter* Waste Management v. Mexico]
[10] Patrick Dumberry, Has the FET standard become a rule of customary international law? Journal of International Dispute Settlement, 2016, 1 [*hereinafter* P. Dumberry, 2016]
[11] *Id*.
[12] UNCTAD, Recent Trends, in IIAs and ISDS, IIA' Issues Note, No. 1, February 2015

investors are not protected by BITs. These foreign investors will nevertheless receive some legal protection under a contract or under the domestic legislation of the country where they invest.[13] They may also benefit from existing customary rules in the field of international investment law as custom applies to all States.[14] In the latter case, the foreign investor may be sponsored by its/his state of origin which can file a case on behalf of such investor against the host state before the International Court of Justice for the violation of an international obligation.[15]

Custom in the Context of Investment Arbitration

Majority if not all the scholars in the field of international investment acknowledged the rules of customary international law as one of the sources of international investment arbitration. Customary international law is defined as "those rules of international law that derived from and reflect a general practice accepted as law."[16]

State Practice as element of international customs comes in many forms, including: diplomatic correspondence; declarations of government policy; the advice of government legal advisers; press statements, military manuals, votes and explanation of votes in international organizations; the comments of governments on draft texts produced by the ILC; national legislation, domestic court decisions; and pleadings before international tribunals.[17] State practice as element of customs requires a general, widespread, uniform, consistent and representative participation of States in the convention, including that of States whose interests were specially affected. *Opinio juris* is the belief by the States that their practice is legally required by the norm, not because of the demands from other sources of obligation.

With the proliferation of BITs in the present time, one would question the necessity of custom in providing protections to foreign investors and to their investments. According to *Dumberry,*[18] the reason for the continuing importance of custom in today's investment arbitration is because these rules represent the applicable legal regime of protection in the absence of any BIT.[19] Therefore, a foreign investor originating from a State that has not entered into a BIT with the State where the investment is made will not be given protection which would have otherwise

[13] P. Dumberry, 2016, *supra* note 10, at 4
[14] *Id*.
[15] *See* Case Concerning The Barcelona Traction, Light And Power Company, Limited (New Application: 1962) (Belgium V. Spain) Second Phase Judgment of 5 February 1970
[16] International Law Commission, 'Second Report on Identification of Customary International Law', by Michael Wood, Special Rapporteur, Sixty-Sixth Session, Geneva 8, 5 May–6 June and 7 July–8 August 2014, UN Doc A/CN.4/672 [*hereinafter* referred to as ILC, Second Report, 2014],
[17] Ian Brownlie, Principles of Public International Law 5 (4th ed., 1990).
[18] Patrick Dumberry, The Formation and Identification of Rules of Customary International Law in International Investment Law (CUP 2016). [*hereinafter* P. Dumberry]
[19] *Id*.

been typically offered under such a treaty.[20] Customary rules will apply to that investor. So, even in light of the proliferation of BITs, these rules continue to play an important role in investment protection.[21]

At the same time, customary rules apply even in the presence of the BIT if the BIT itself referred to the rules of customary law for purposes of filling the gap of the treaty protection and to interpret the provisions thereof.

For this study, it is important to note that customs is a source of obligation that the State must comply with in treating the foreign investors and their investment and that violation of such obligation is enforceable in the international sphere. Hence, it is important to determine the rules in international investment that have developed as customs which protect the investors despite the absence of the BIT.

How treaty practice transforms into customary rules

While treaties and customs are two different sources of international law, treaties can generate customs binding on all States. There are three recognized ways on how treaties generate customary rules:

First, the codification and elucidation of customary international law through treaties. Traditionally, the purpose of treaty is not to confirm existing customary law but to derogate from it, however a particular treaty might contain some provisions meant to reflect existing customary law, and others which constitute progressive development.[22] Sometimes a treaty also declares that its provision, or certain of them, are declaratory of existing customary law.[23] Aside from the declaration in the treaty itself, courts may also find that a provision of a treaty constitutes a codification of customary law.

Second, the consensus formed through the process of treaty negotiation can sometimes crystallize rules of customary international law as reflected in the treaty text before the treaty comes into force.[24]

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[20] *Id*.
[21] *Id*.
[22] See Mark E Villiger, Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources (2nd edn, Kluwer 1997) 195ff [*hereinafter* M. Villiger]; Michael P. Scharf, "Accelerated Formation of Customary International Law" (2014). Faculty Publications. Paper 1167.http://scholarlycommons.law.case.edu/faculty_publications/1167 [*hereinafter* M. Scharf]
[23] *Id*.
[24] M. Scharf at 319.

Third, a treaty rule may commend itself to States generally, who then adopt it in practice even if they fail to become parties to the treaty.[25]

The Author suggest that the obligation to provide FET protection to foreign investor has developed into a rule of customary international law through the third way discussed. Most scholars agree that, in theory, the content of a series of bilateral treaties may contribute to the development of a new customary rule.[26]

In assessing whether a treaty based rule contained in a bilateral treaty can transform into a rule of custom, the ICJ suggest that a provision must be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law.[27] For some writers, the FET standard has the potential to develop as a rule of custom.[28]

In concluding that the obligation to provide FET has developed into a new rule of custom it will be shown that significant number of States entered into BITs which contain FET provision, a practice which is general, widespread, uniform consistent and representative. The act of including the FET provision in the BITs reflects that the States consider the obligation to provide FET protection to foreign investors as a rule in international investment law.

To prove the second element of customs, it will be shown that the States who are parties to the BITs or even those who are not, adopted in their own practice outside the treaty the type of conduct prescribed in the convention.[29] In other words, the Author will show that the States consistently provide FET to foreign investors and to their investment outside the treaty framework. This will prove that States recognized themselves the legal obligation to provide FET as to constitute *opinio juris.*

Arbitral Tribunals and Their Contribution to the Development of Customary International Law

Tribunals have different views as to whether the obligation to provide FE has evolved as a rule of customs. Some consider it as customs considering that its consistent presence in the BITs reflects state practice. Those who opposed argued that the element of *opinion juris* must also be present for the obligation to provide FET to foreign investors be considered to have developed as a customary rule and stated that lack of it make the standard remain as a treaty standard.

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[25] M. Scharf, *supra* note 22, at 320
[26] P, Dumberry *supra* note 18, at 163.
[27] North Sea Continental Shelf Case, I.C.J. Reports 1969, at para 72.
[28] Iona Tudor, The Fair and Equitable Treatment Standard in International Foreign Investment Law (OUP 2008) 133 [*hereinafter* I. Tudor]; Stephen Vasciannie, "The Fair and Equitable Treatment Standard in International Investment Law and Practice" (1999) 70 British YIL 157-158
[29] Y Dinstein, "The Interaction between Customary International Law and Treaties (2006) 322 Rec des cours 294

Pope & Talbot Inc. v Canada (Award in Respect of Damages, 31 May 2002) UNCITRAL

In this case, Pope & Talbot, Inc., instituted a claim against Canada under the UNCITRAL rules, alleging, among others, that Canada violated Article 1105 (minimum standard of treatment)[30] of the North American Free Trade Agreement (NAFTA), in its implementation of U.S.-Canada Softwood Lumber Agreement. Under the said agreement, Canada agreed to charge a fee on exports of softwood lumber in excess of a certain number of board feet.[31] According to *Pope and Talbot*, Inc.—which was a U.S. company, with investment in Canada through a Canadian subsidiary that operates softwood lumber mills in British Columbia -- Canada's assertions of non-existent policy reasons for forcing them to comply with very burdensome demands for documents, refusals to provide them with promised information, threats of reductions and even termination of the Investment's export quotas, serious misrepresentations of fact in memoranda to the Minister concerning the Investor's and the Investment's actions and even suggestions of criminal investigation of the Investment's conduct was unfair and inequitable because it violated its minimal standard of treatment obligation under international law.[32]

The tribunal found that Canada breached Article 1105 of the NAFTA, and on May 31, 2002, issued an award in respect of damages.[33] Canada argued that the principles of customary international law were frozen in amber at the time of the *Neer* decision and it was on this basis that it urged the Tribunal to award damages only if its conduct was found to be an "egregious" act or failure to meet the internationally required standards.[34] In rejecting Canada's argument, the tribunal ruled that, there has been evolution in customary international law concepts since the 1920's and added that customary international law evolves through state practice and that international agreements constitute practice of states and contribute to the grounds of customary international law.[35]

According to the Tribunal, Canada's views on the appropriate standard of customary international law for today were shaped by its erroneous belief that only 70 BITs have been negotiated; while the true number, now acknowledged by Canada, is in excess of 1800. With the

[30] North American Free Trade Agreement (NAFTA), Article 1105, Para 1: *Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security*.
[31] Pope & Talbot Inc. v. Canada, UNCITRAL (Award in Respect of Damages, May 31, 2002), at para 1. [*hereinafter* Pope & Talbot].
[32] *Id*. at para 68.
[33] *Id*.
[34] *Id*. at para 57
[35] *Id*. at para 59.

above consideration, the Tribunal applying the ordinary rules for determining the content of custom, concluded that the practice of states is now represented by those treaties.[36]

ADF Group Inc. v United States (Award, 9 January 2003) ICSID Case No ARB (AF)/00/1

ADF Group Inc. ("ADF"), a Canadian corporation that designs, engineers, fabricates and erects structural steel, has filed a claim under the ICSID Arbitration Rules on its own behalf and on behalf of ADF International Inc., its Florida subsidiary.[37] ADF claims damages for alleged injuries resulting from the federal Surface Transportation Assistance Act of 1982 and the Department of Transportation's implementing regulations, which require that federally-funded state highway projects use only domestically produced steel.[38]

The tribunal dismissed ADF's claims against the United States including its claim of violation of the minimum standard of treatment requirement of NAFTA's Article 1105(1).[39] In its award issued on January 9, 2003, the Tribunal criticized the pronouncement of tribunal in Pope & *Talbot* with regard to the customary status of FET obligation by adopting the argument of United States and Mexico.[40] In the memorial submitted by the United States, it argued that the Tribunal in *Pope & Talbot* was not in position to state whether any particular BIT obligation such as FET obligation has crystallized into a rule of customary international law as the said Tribunal failed to examine the mass of existing BITs to determine whether those treaties represent concordant state practice and whether they constitute evidence of the *opinio juris* which are the elements of customary international law.[41] Similarly, Mexico argued that given the absence of "a careful analysis of state practice and *opinio juris*," the sheer number of extant BITs today does not suffice to show that conventional international law has become customary international law.[42]

Merrill & Ring Forestry LP v Canada (Award, 31 March 2010) UNCITRAL

In this case, Merrill & Ring Forestry L.P., a forestry and land management company incorporated under the laws of the state of Washington, filed a claim against the Government of Canada, alleging that measures imposed by the federal and provincial government, *i.e.*, the federal

[36] *Id*.. at para 62.
[37] ADF Group Inc. v United States (Award, 9 January 2003) ICSID Case No ARB (AF)/00/1, para 1, available at https://www.state.gov/s/l/c3754.htm.
[38] *Id*. at para 45.
[39] *Id*. at para 199 (5).
[40] *Id*. at para 112.
[41] *Id*.
[42] *Id*. at para 125.

surplus testing procedure and the provincial surplus testing procedure in British Columbia requiring that logs from both private and public land must be deemed surplus to provincial needs before they can be exported, caused private landowners such as Claimant loss and damage.[43]

Claimant alleges that Canada has violated NAFTA Article 1102 (national treatment), Article 1103 (most favored nation treatment), Article 1105 (minimum standard of treatment), Article 1106 (prohibition on performance requirements), and Article 1110 (expropriation).[44]

In its decision, the tribunal rejected the claims of the Claimant including the claim of violation of the minimum standard of treatment under Article 1105.[45] In its award issued on March 31, 2010, the Tribunal explicitly stated that the fair and equitable treatment has become a part of customary law.[46] It explained that, a requirement that aliens be treated fairly and equitably in relation to business, trade and investment is the outcome of this changing reality and as such it has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*.[47] The tribunal held that, the name assigned to the standard does not really matter. What matters is that the standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness.[48] Of course, the concepts of fairness, equitableness and reasonableness cannot be defined precisely: they require to be applied to the facts of each case.[49] In fact, the concept of fair and equitable treatment has emerged to make possible the consideration of inappropriate behavior of a sort, which while difficult to define, may still be regarded as unfair, inequitable or unreasonable.[50]

<u>Role of Arbitral Tribunals in the Development of Customary Rule</u>

While judicial decisions and arbitral awards are not formal sources of international law, judicial decisions count both as a form of State practice within the meaning of Article 38 of the Statute of the ICJ, and as a "subsidiary means for the determination of rules of law" within paragraph (d) of that Article.[51]

It could be observed from the cases discussed that even the arbitral tribunals have different stands as to the customary status of the obligation to provide FET to foreign investors. *Pope and Talbot* Tribunal, the first to openly adopt the view that FET obligation has developed as custom

[43] Merrill & Ring Forestry LP v Canada (Award, 31 March 2010) UNCITRAL, para 1. [*hereinafter* Merrill & Ring]
[44] *Id*.
[45] *Id*. at para 266.
[46] *Id*. at para 211
[47] *Id*. at Para 210
[48] *Id*.
[49] *Merill & Ring,* at para 210.
[50] *Id*.
[51] Statute of International Court of Justice, Article 38.

supported its view by saying that, the fact that the FET obligation was found in so many BITs basically established the element of State practice necessary to prove the existence of a rule of customary international law.[52] Similarly, in the case of *Merrill & Ring Forestry LP v Canada*, the Tribunal stated that fair and equitable treatment has become a part of customary law'.[53] On the other hand, ADF Tribunal disagreed with the pronouncement made in *Pope and Talbot* and stated that it was not convinced that the obligation to accord fair and equitable treatment to foreign investments is now a rule of customary international law. The Tribunal however did not make any further explanation to support such conclusion.

In sum, majority of the arbitral awards which examined the customary status of FET adopted the position that FET obligation has become a rule of custom while the reasoning of some may be interpreted as an endorsement of such possibility.

Application of the Elements of Customs

It was already established that for the Treaty obligation to develop as rules of customary law, it must; (1) generally and uniformly placed in the BITs by different States to establish State Practice and (2) that the States recognized the obligation to provide FET to foreign investors even outside the BIT to establish *opinion juris.*

To prove the generality of the practice, the Author examined the BITs entered into by different States to check whether the inclusion of the FET provision is general and uniform based on the latest BITs recorded by the United Nations Conference on Trade and Development (UNCTAD).[54]

In examining the practice to provide FET, the Author intentionally chose to include both the developed and developing countries BITs to show the trend that BITs with no FET provision are more popular in developing countries.

State/Total no. of BITs in force	With FET provision	Without FET provision
Philippines (32 BITs)	Argentina, Australia, Austria, Bangladesh, BLEU (Belgium-Luxembourg Economic Union), Canada, Chile, China, Czech Republic, Denmark, Finland, France, Germany, India, Italy, Republic of Kuwait, Mongolia, Netherlands, Portugal, Romania, Russian Federation, Saudi Arabia, Switzerland, Syrian Arab	Korea, Myanmar, Spain

[52] Pope & Talbot, para 62.
[53] Merrill & Ring, para 211.
[54] UNCTAD is the main U.N. body dealing with trade, investment and development issues, *available* at investmentpolicyhub.unctad.org/IIA

	Republic, Taiwan Province of China, Thailand, Turkey, United Kingdom, Vietnam	
Romania (78 BITs)	Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Belarus, BLEU (Belgium-Luxembourg Economic Union), Bolivia, Plurinational State of, Bosnia and Herzegovina, Bulgaria, Canada, Chile, China, Croatia, Cuba, Cyprus, Czech Republic, Finland, France, France, Gabon, Georgia, Germany, Greece, Hungary, India, Indonesia, Iran, Islamic Republic of Israel, Jordan, Kazakhstan, Korea, Republic of Kuwait, Latvia, Lebanon, Lithuania, Macedonia, The former Yugoslav, Republic of Malaysia, Mauritania, Mauritius, Moldova, Republic of Mongolia, Montenegro, Morocco, Netherlands, Nigeria, Norway, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Thailand, Tunisia, Turkey, Turkmenistan, Ukraine, United Arab Emirates, United Kingdom, United States of America, Uruguay, Uzbekistan, Viet Nam	Senegal, Albania, Cameroon, Egypt, Pakistan
Albania (35 BITs)	Belgium, Bosnia and Herzegovina, Bulgaria, China, Cyprus, Denmark, Czech Republic, France, Germany, Hungary, Finland, Israel, Italy, Lithuania, Korea, Malaysia, Netherlands, Poland, Portugal, Russia, Yugoslavia, Slovenia, Spain	Austria, Republic Of Croatia, Egypt, Greece, Moldova Macedonia, Romania
Australia (20 BITs)	Argentina, China, Czech Republic, Egypt, Hong Kong, China SAR, Hungary, Indonesia, Lao People's Democratic Republic, Lithuania, Mexico, Pakistan, Papua New Guinea, Peru, Philippines, Poland, Romania, Sri Lanka, Turkey, Uruguay, Vietnam	N/A
United Kingdom (95 BITs)	Albania, Antigua and Barbuda, Argentina, Armenia, Azerbaijan, Bahrain, Bangladesh, Barbados, Belarus, Belize, Benin, Bolivia, Plurinational State of, Bosnia and Herzegovina, Bulgaria, Burundi, Cameroon, Chile, China, Colombia, Congo, Côte d'Ivoire, Croatia, Cuba, Czech Republic, Dominica, Ecuador, Egypt, El Salvador, Estonia, Georgia, Ghana, Grenada, Guyana, Haiti, Honduras, Hong Kong, China SAR, Hungary, India, Indonesia, Jamaica, Jordan, Kazakhstan, Kenya, Korea, Republic of, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Lithuania, Malaysia, Malta, Mauritius, Mexico,	N/A

	Moldova, Republic of, Mongolia, Morocco, Mozambique, Nepal, Nicaragua, Nigeria, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Romania, Russian Federation, Saint Lucia, Senegal, Serbia, Sierra Leone, Singapore, Slovakia, Slovenia, Sri Lanka, Swaziland, Tanzania, United Republic of, Thailand, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, Uruguay, Uzbekistan, Venezuela, Bolivarian Republic of, Vietnam, Yemen,	
Germany (129 BITs)	Afghanistan, Albania, Algeria, Angola, Antigua and Barbuda, Argentina, Armenia, Azerbaijan, Bahrain, Bangladesh, Barbados, Belarus, Benin, Bosnia and Herzegovina, Botswana, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cabo Verde, Cambodia, Cameroon, Central African Republic, Chad, Chile, China, Congo, Democratic Republic of the Congo, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Czech Republic, Dominica, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Gabon, Georgia, Ghana, Greece, Guatemala, Guinea, Guyana, Haiti, Honduras, Hong Kong, China SAR, Hungary, Islamic Republic of, Jamaica, Jordan, Kazakhstan, Kenya, Korea, Republic of, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Libya, Lithuania, Macedonia, The former Yugoslav Republic of, Madagascar, Mali, Malta, Mauritania, Mauritius, Mexico, Moldova, Republic of, Mongolia, Montenegro, Morocco, Mozambique, Namibia, Nepal, Nicaragua, Nigeria, Occupied Palestinian territory, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Russian Federation, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Serbia, Sierra Leone, Slovakia, Slovenia, Somalia, Sri Lanka, Sudan, Swaziland, Syrian Arab Republic, Tajikistan, Tanzania, United Republic of Thailand, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, Uruguay, Uzbekistan, Venezuela, Bolivarian Republic of, Viet Nam, Yemen, Zambia, Zimbabwe	Iran, Liberia, Malaysia, Niger, Rwanda, Senegal, Singapore, Togo
Japan (24 BITs)	Cambodia, Colombia, Hong Kong, China SAR, Iraq, Kazakhstan, Kenya, Korea, Republic of, Kuwait, Lao People's Democratic Republic, Mozambique, Myanmar, Papua New Guinea, Peru, Russian	Pakistan, Sri Lanka, Turkey,

	Federation, Saudi Arabia, Ukraine, Uzbekistan, Viet Nam	Bangladesh, China, Egypt
Egypt (73 BITs)	Algeria, Argentina, Armenia, Australia, Austria, Bahrain, Belarus, BLEU, (Belgium-Luxembourg Economic, Union), Bosnia, and, Herzegovina, Bulgaria, Canada, China, Comoros, Croatia, Cyprus, Czech, Republic, Denmark, Ethiopia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Jordan, Kazakhstan, Korea Dem. People's Rep. of, Korea, Republic of Kuwait, Latvia, Lebanon, Libya, Malawi, Malaysia, Mali, Malta, Mauritius, Mongolia, Morocco, Netherlands, Occupied Palestinia territory, Oman, Poland, Portugal, Qatar, Russian, Federation, Serbia, Singapore, Slovakia, Slovenia, Somalia, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syrian Arab Republic, Thailand, Tunisia, Turkey Turkmenistan, Ukraine, United Arab Emirates, United Kingdom, Uzbekistan, Vietnam, Yemen	Japan, Romania, United States, Albania
Pakistan (33 BITs)	Australia, Bahrain, BLEU (Belgium-Luxembourg Economic Union), Bosnia and Herzegovina, China, Denmark, France, Germany, Iran, Islamic Republic of, Italy, Kazakhstan, Korea, Republic of, Kuwait, Lao People's Democratic Republic, Lebanon, Mauritius, Netherlands, Oman, Portugal, Singapore, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Turkey, United Arab Emirates, United Kingdom, Uzbekistan	Japan, Romania

For a customary rule to emerge, state practice must be general, widespread and sufficiently extensive and convincing.[55] The number of BITs which contain provisions for FET, as seen above, tend to establish a general and widespread practice among states of providing FET to foreign investors.

That some BITs do not contain a FET provision negate the consistency and effectiveness of the practice of States in providing FET, because complete consistency is required to establish state practice. It has been opined that there is no precise number of percentage of States required to demonstrate general practice.[56]

[55] North Sea Continentals Shelf, *supra* note 27, at para 74.

[56] Maurice H. Mendelson, The Formation of Customary International Law 218 (1998), [hereinafter M. Mendelson], at 219-224.

The data would show that significant number of States entered into BITs which contain a FET provision. While some States omitted the provision in some of their BITs, the omission have done only in minority of their BITs. Overall, the practice of States to include FET provisions in their BITs is general and widespread.

State Practice is Representative

Representative practice means that it includes those states from all major political and social economic systems.[57]

While the FET standard was first developed by western States to provide protection to their companies when investing in developing countries, it remains that today it has also been embraced by developing States.[58] Thus, the standard was included in regional multilateral instruments related to the protection of foreign investments not only in Europe (Energy Charter Treaty) and in North America (NAFTA) but also in Latin America, Asia and Africa and in model BITs of developing States.[59] FET clauses have also been included in BITs entered into between developing countries.[60]

Considering the foregoing, the practice of States to include FET clauses in their BITs meets the representative criteria of state practice.

State Practice is Uniform and Consistent

Some writers misinterpreted the requirement of consistency and uniformity of state practice in the formation of custom. The opposition to the idea that the obligation to provide FET protection to foreign investors argued that there is no uniformity considering that there are different FET models.[61] Perhaps, they applied the required constant and uniform usage in its literal sense disregarding the pronouncement and clarification made by the Court that perfect consistency is no required.[62]

Therefore, the fact that FET provision is worded in different ways does not negate the uniformity and consistency of the practice as long as the States generally includes FET provision with the intention to provide such standard of protection to foreign investors.

[57] M. Villiger, *supra* note 22, at 29
[58] P. Dumberry, 2016, *supra* note 10, at 17
[59] *Id*.
[60] *Id*.
[61] *Id*. at 19
[62] M. Scharf, *supra* note 22, at 315

To determine the uniformity and consistency of practice, what's important is that different States engaged in substantially similar conduct,[63] it doesn't have to be perfectly consistent and uniform in the sense that the provision must be identically worded. Upon examination of the arbitral decisions[64] interpreting FET provisions, majority of the arbitral tribunals applied the minimum standard of treatment under international law despite the differences in the wordings of the FET provisions in the applicable treaties. The minimum standard of treatment includes the obligation to act in good faith, due process, transparency, candor, fairness and protection from arbitrariness, grossly unfair, unjust or idiosyncratic, and discriminatory conduct. Clearly, Arbitral Tribunals have acknowledged that the phrase "fair and equitable treatment" whether takes an autonomous meaning or a meaning under customary international law, provides for the same substantive elements required to be satisfied by the States.

In addition, as what *Tudor* argued, there is enough uniformity in State practice for the emergence of customary rule because the language differences contained in FET provisions refer to the level of the treatment to be accorded to the investor not to the standard within its content.[65]

Duration of Practice

While it was recognized that there is no precise length of time during which a practice must exist, some authors suggest that in determining state practice as element of customs duration of practice must still be considered.

As regards the time element of FET, leading commentators often trace the history of FET to treaty negotiations that followed the Second World War.[66] As early as the 1920s and 1930s, the United States petitioned other States to provide compensation for injuries to US nationals as a matter of 'just and equitable treatment' (which it also called 'fair and equitable treatment').[67] The reference to FET obligation however was general as it applies to all foreign nationals not particularly to foreign investors.

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[63] International Law Association, Statement of Principles Applicable to the Formation of General Customary International Law (2000), Final Report of the Committee on the Formation of Customary Law, Conference Report London, at 21 [*hereinafter* ILA Final Report].
[64] Waste Management v. Mexico, *supra* note 9, at par. 98; GAMI Investment, *supra* note 10, at para 97.; International Thunderbird Gaming Corporation v. Mexico, UNCITRAL (NAFTA), Award, 26 January 2006; Glamis Gold, Ltd. v. United States, UNCITRAL (NAFTA), Award, 8 June 2009.
[65] I. Tudor, *supra* note 28, at 77
[66] *See* Dolzer & Schreuer, *supra* note 1, at 119–20.
[67] Andrew C. Blandford, ICSID Review - Foreign Investment Law Journal, Volume 32, Issue 2, 1 May 2017, *available at* https://doi.org/10.1093/icsidreview/six002

The first reference to "equitable" treatment standard specific to foreign investors and their investment was found in the 1948 Havana Charter for International Trade Organization.[68] Its Article 11(2) contemplated that foreign investments should be assured "just and equitable treatment".[69]

This shows that the practice to provide FET protection as a rule in international investment has been exercised for a considerable length of time.

In conclusion, the first condition for a treaty based rule to generate into customary rule is present as the practice of States to include FET provisions in their BITs is general and widespread, representative, consistent and uniform.

Examination of Opinio Juris

To determine the existence of o*pinion juris* with respect to the obligation to provide FET to foreign investors, this study will show that States provide FET protection to foreign investors even outside of treaty obligations, as shown in the FET provisions found in numerous domestic laws. This is to show that States believe that they have legal obligation to provide FET protection to each foreign investor despite having no formal treaty obligation to do so.[70]

Some commentators argued that, the very fact that States are still consistently signing BITs today containing FET clauses can equally be interpreted as evidence that no such standard of protection exist under custom.[71] This act allegedly negates their belief that there is such legal obligation existing under international law. That, if the FET truly existed under custom, it may be argued that States would not need to include such protection in their BITs.[72] However, as what *Villiger* stressed, one cannot simply deduce from the fact that States have entered into a treaty that they necessarily consider that no customary rules exist at all.[73] In facts, there are States who sign a treaty and at the same time consider some specific provisions contained in that treaty as codifying existing custom.[74]

For purposes of this study, the author will prove the *opinio juris* of according FET protection: *First*, by showing that States are actually providing FET to foreign investors in their own practice, outside the treaty framework; and *Second*, that in including FET clauses in their

[68] OECD (2004), "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment, 2004/03, OECD Publishing. *Available at* http://dx.doi.org/10.1787/675702255435
[69] *Id*.
[70] See, ILC, Second Report, *supra* note 38, at 55.
[71] T Weiler, The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context 236 (Martinus Nijhoff 2013).
[72] P. Dumberry, 2016, *supra* note 10, at 1.
[73] M. Villiger, *supra* note 22, at 189.
[74] *Id*.

BITs, the States believe that they have an obligation under international law to provide FET protection to each other's investors notwithstanding the fact that such protection is set out in the BIT.[75]

To show that States are actually providing FET to foreign investors in their own practice outside the treaty framework, the author has recently undertaken an analysis of the different domestic laws of both developed and developing states to determine whether there is a widespread and general guarantee of FET protection to foreign investors.

The author examined (100) domestic laws of both developed and developing countries and found that 90% of which contain a provision guaranteeing FET protection in favor of the foreign investors—twenty (20) of theses domestic provisions will be presented in this study to show the actual clauses used by different States in guaranteeing FET which would be essential in proving that the content of FET obligation in the domestic sphere is substantially similar to that FET standard under the BITs. The study will be presented in a table which contains the name of the States, the domestic laws granting the same and the specific provisions which contain the FET obligation.

Table Representing Domestic Laws Which Guarantee FET Protection

STATE	DOMESTIC LAW/S GRANTING FET PROTECTION	PROVISION GUARANTEEING FET
MYANMAR	Myanmar Investment Law (Chapter XI)	The Government guarantees to the investors ***fair and equitable treatment*** in respect of the followings: a) the right to obtain the relevant information on any measures or decision which has a significant impact for an investor and their direct investment; b) the right to due process of law and the right to appeal on similar measure, including any change to the terms and conditions under any license or permit and endorsement granted by the Government to the investor and their direct investment *(Par. 48)*
PEOPLE'S REPUBLIC OF CHINA	Foreign Investment Law of The People's Republic of China	Chapter 7: Investment protection • ***Transparency*** - The State will timely publish foreign investment-related laws, regulations and judicial decisions in accordance of the law *(Art 113)* • Protection of the IP of foreign investors *(Art 116)* • Dispute resolution *(Art 118)*

[75] P. Dumberry, 2016, *supra* note 11 at 22

INDONESIA	Law of The Republic of Indonesia, No. 25/2007 Concerning Capital Investment Chapter IX	Rights, Obligations and Liabilities of The Investors Each investor is entitled to: a. certainty of rights, law and protection; b. transparent information on the business sectors being operated; c. rights to service; and d. all facilities under prevailing laws and regulations. *(Article 14)*
UNITED ARAB EMIRATES	Constitution of 1971 with Amendments through 2004	Foreigners shall enjoy, within the Union, the rights and freedoms stipulated in international charters which are in force, or in treaties and agreements to which the Union is party. They shall be subject to the equivalent obligations *(Article 40)*
PAKISTAN	Foreign Private Investment (Promotion and Protection) Act, 1976 Act No. XLII of 1976	**Equal treatment** Industrial undertakings having foreign private investment shall be accorded the ***same treatment as accorded to similar industrial undertakings***, having no such investment in the application of laws, rules and regulation, relating to importation and exportation of goods. (*Section 9)*
EGYPT	Law No. 72 of 2017 Promulgating the Investment Law Section II	All the investments established within the Arab Republic of Egypt shall receive ***fair and just treatment***. The State shall ensure to the foreign investor the ***same treatment given to the national investor.*** Under a decree issued by the Council of Ministers, an exception can be made granting the foreign investors a preferential treatment in application of the principle of reciprocity. The invested funds shall not be governed by any arbitrary procedures or discriminatory decisions *(Investment Safeguards and Incentives, Chapter 1, Investment Safeguards, Article 3)*
REPUBLIC OF UZBEKISTAN	Law of the Republic of Uzbekistan On Guarantees and Measures of Protection of Foreign Investors' Rights April 30,1998, N 611-I	The state guarantees and protects the rights of foreign investors who carry out investment activity on the territory of the Republic of Uzbekistan. It is ***not allowed to discriminate foreign investors based on their nationality, place of residence, religion, a place of execution of economic activity, country of origin of investors or investments*** Legislative acts including departmental normative acts shall not have retroactive effect if their execution causes damage to foreign investor or foreign investments. -If the subsequent legislation of the Republic of Uzbekistan worsens investment conditions, ***the legislation effective on the date of investment shall be applied to foreign investments within ten years from the date of investment.*** The foreign investor has the right at its own discretion to apply those provisions of new

		legislation that are more advantageous to the investor's investment conditions. *(Article 3. Guarantees of foreign investors' rights)* In addition to the common guarantees and measures of protection of foreign investors, additional guarantees and measures of protection may be granted by the legislation, including the ones providing the ***absolute fulfillment by the partners of their obligations to foreign investors.*** ***Additional guarantees and measures of protection can be granted to foreign investors in every particular case investment*** is made in the following: in priority branches providing stable economic growth and progressive structural changes of country's economy; *(Article 4. Additional guarantees and measures of protection granted to foreign investors)*
REPUBLIC OF MACEDONIA	LAW ON FOREIGN INVESTMENTS (FOREIGN INVESTMENT LAW) (Published in the Official Gazette of the Republic of Macedonia No. 31/93-732) (Unofficial Translation)	Should the basic law be amended upon the conclusion of the investment agreement, the establishment of a mixed enterprise or the statute for establishing a private enterprise, ***the provisions of the agreement or statute effective on the date of the legal enforcement of the agreement or statute are applicable, under condition that those provisions are more favorable for the investor or founder or unless the investors***, i.e. founders settle certain issues in compliance with the amended basic Law. *(Article 7)* Enterprises in which foreign investments have been made are ***entitled the same rights and liabilities as domestic enterprises*** on the territory of the Republic of Macedonia. *(Article 8)*
REPUBLIC OF ALBANIA	Law No. 7764, dated 02.11.1993 "For Foreign Investments"	The People's Assembly of the Republic of Albania Decided: ***2.*** In all cases and at any time, ***investments have an equal and impartial treatment and enjoy complete protection and security.*** 3. In any case, foreign investments have treatment not less favorable than the one provided by generally accepted norms of international law *(Article No 2: Permission and treatment)*
KOSOVO	Law No. 02/L-33 on Foreign Investment	General Treatment 3.1 Kosovo shall accord fair and equitable treatment to foreign investors and their investments in Kosovo. Kosovo shall also provide foreign investors and their investments with full and constant protection and security. In no case shall the treatment, protection or security required by this Article 3.1 be less favorable than that required by international law or any provision of the present law. *(Chapter 2, Fundamental Rights, Guarantees and Privileges Article 3)*

FEDERAL REPUBLIC OF YUGOSLAVIA	Law on Foreign Investments (Official Gazette of the Federal Republic of Yugoslavia Nos. 3/2002 and 5/2003)	With regard to its investment, any foreign investor shall enjoy the same status, rights and duties as domestic individuals and legal entities, unless otherwise provided by this Law. Any enterprise in which a foreign investment has been made shall enjoy the same legal status and operate under the same conditions and in the same way as Yugoslav enterprises in which no foreign investment has been made. *(Article 8)*
IRAN	Law on Encouragement and Protection of Foreign Investment Organ of the Ministry of Finance and Economic Affairs June 3, 2002, Vol. 1, No. 4	**Chapter IV: Guaranteeing and Transfer of Foreign Capital** Foreign investment subject to this ***law shall enjoy all rights, support and facilities provided for domestic investors on an equal footing***. *(Article 8)* Foreign investment shall not be exposed to dispossession of property or nationalization except for cases involving national interests and according to legal process and through non-discriminatory methods in return for paying compensations in proportion to the real value of the investment immediately before dispossession of property. *(Article 9)*
CUBA	Law No. 118 Foreign Investment Act	Chapter III. Guarantees for investors The Cuban State shall see to it that ***the benefits granted to foreign investors and their investments are maintained throughout the entire period for which they were granted.*** *(Article 3)*
REPUBLIC OF LATVIA	On Foreign Investment in the Republic of Latvia	Section 8. Protection of Foreign Investments 3. In case of a dispute, the extent of loss shall be determined by a court. 4. If subsequent Republic of Latvia legislative enactments worsen investment conditions, such legislative enactments as were in force at the time the investment was made shall apply to the foreign investment for ten years.
CHILE	Foreign Investment Statute Decree Law 600 (DL600)	Foreign investors receive treatment similar to Chilean nationals, and there is no overall economic or industrial strategy that has discriminatory effects on foreign investors or foreign-owned investments.
BANGLADESH	The Foreign Private Investment (Promotion and Protection) Act, 1980 (Act No. XI of 1980)	Protection and equitable treatment 4. ***The Government shall accord fair and equitable treatment to foreign private investment*** which shall enjoy full protection and security in Bangladesh.
BULGARIA	Private and Regulatory Framework for Domestic Foreign Investment	Guarantees for foreign investor:

		Guarantee that the overall approach of the legislator towards foreign investments may not result in a discriminatory legal environment.
BURUNDI	Law No. 1/24 of September 10, 2008, establishing the Investment Code of Burundi (Investment Code)	The New Investment Code protect and facilitate the acquisition and disposition of all property rights. The law also guarantees adequate protection for such intellectual property as patents, copyrights and trademarks.
TURKEY	Foreign Direct Investment Law Law No. 4875 Date of Passage: 5 June 2003 Date of Official Gazette: 17 June, 2003	Foreign investors shall be subject to equal treatment with domestic investors. *(Article 39 (a) (2))*
ALGERIAN	The Algerian Investment Code (*Code des Investissements*), amended by Ordinance 01-03 of August 20, 2001	The investor can benefit from the guarantees of stability and security that are provided for by law. Said guarantees are: - Non-discrimination; - Legal security and inviolability of the law; - Settlement of disputes.

General and Widespread Practice of States to Provide FET Outside the Treaty Framework

To prove *opinio juris*, it must be shown that States have adopted 'a practice in-line with that prescribed (or authorized) by the treaty, but which is in fact independent of it because of the general rule that treaties neither bind nor benefit third parties'.[76]

While admittedly as shown in the table presented, the guarantees to provide FET protection are expressed in different ways in different jurisdictions, this however does not affect the conclusion that there is indeed general and widespread practice of states to provide FET outside the treaty framework. In fact, according to *Tudor*, as regards the obligation to provide FET protection to foreign investors, the situation as it stands today is that most developed and developing countries do recognize in their domestic laws that FET is to be applied to foreign investors.[77] This is the case even though the term FET itself may not be employed as such but the

[76] ILA Final Report, *supra* note 63, at 46.
[77] I. Tudor, *supra* note 28, at 104.

content of FET, namely procedural and substantive guarantees for foreign investors, is found in national provisions.[78]

Upon examination of the domestic laws, while the guarantees are worded in different languages, the substantial obligation refers to the obligation to provide FET protection. Arbitral Tribunals recognized that the obligation to provide FET to foreign investors substantially includes the obligation to grant treatment no less favorable than the domestic investors and nationals of other States, treatment that is not discriminatory[79], arbitrary and unreasonable[80], as well as the obligation to be transparent,[81] to provide legal stability[82] and to accord due process protection.[83]

These substantial FET protections are embodied in the domestic laws of most of the states worldwide.[84] For instance, the Law of the *Republic of Uzbekistan* on Guarantees and Measures of Protection of Foreign Investors' Rights did not use the wordings "fair and equitable treatment" it expressly prohibits discrimination of foreign investors based on their nationality, place of residence, religion, a place of execution of economic activity, country of origin of investors or investments and guarantees legal stability. Similarly, countries like *Cuba*, *Latvia*, *Federal Republic of Yugoslavia*, *Iran* and *Republic of Macedonia* while did not expressly used the words "fair and equitable" they all consistently guarantee legal stability and non-discriminatory treatment in favor of the foreign investors. On the other hand, *Bangladesh*, *Egypt* and *Myanmar* used the words "fair and equitable treatment" in their foreign investment laws as a standard of protection granted to the foreign investors.

The grant of legal stability in most of the domestic laws is similar to that under the regime of a BIT, where changes in the host State's legislation is examined primarily against the standard of FET treatment.[85] In *CMS v. Argentina* the tribunal stated that the legislative framework existing at the time of the investment will often be the basis for legitimate expectations of the investor.[86] Arbitral Tribunals have recognized that any drastic change in that framework, that seriously affects the investment, is likely to constitute a breach of the BITs fair and equitable treatment.[87]

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[78] *Id*.
[79]Enron Corporation and Ponderosa Assets v Argentina, ICSID Case No ARB/01/3, Decision on Jurisdiction (Ancillary Claim) (2 August 2004) para 281
[80] National Grid PLC v. Argentine Republic, UNCITRAL Award (3 November 2008) para 197
[81] *See* Saluka v. Czech Republic, supra note 10, at para 304
[82] Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016
[83] White Industries Australia Ltd. V. The Republic of India, UNCITRAL Award (30 November 2011) para 10.4.7
[84] I. Tudor, *supra* note 28, at 104
[85] CHRISTOPH H. SCHREUER with LORETTA MALINTOPPI, AUGUST REINISCH and ANTHONY SINCLAIR, THE ICSID CONVENTION: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (2nd ed,2009) 592.
[86] See e.g., CMS v. Argentina, Award, 12 May 2005, paras. 274–276; LG&E v. Argentina, Decision on Liability, 3 October 2006, paras. 124–133; PSEG v. Turkey, Award, 19 January 2007, paras. 240, 250.
[87] *Id*.

In conclusion, the practice of the States to provide FET protection to the foreign investors outside BITs is general and widespread demonstrating their recognition and belief that there is legal obligation to grant such treatment to foreign investors even without any formal treaty obliging them to do so. Therefore, such practice reflects that there is *opinio juris* in according FET protection to foreign investors.

Recognition of the States to accord FET protection as a legal obligation under international law

Those who do not support the proposition that there is recognition of the legal obligation to provide FET under international law argued that there is no indication in treaty text (or in the *travaux preparatoires* or anywhere else) showing that States include FET clauses in their BITs out of a sense of conviction that this is the type of protection they should provide to foreign investors under international law.[88] Contrary to the above position, the author argues that the repetition of FET clauses in the BITs and the subsequent practice of complying to such clauses support an inference that States in fact recognized that the content of such clause is obligatory under international law and thus can be an expression of *opinio juris*.

This conclusion is supported by Professor D'Amato, of Northwestern University, who proposed an alternative formulation to explain the formation of customary rules, focusing on what he calls "articulation" and "act."[89] In D'Amato's view, the articulation can either accompany the initial act, or it can be embodied in a treaty, draft instruments of the ILC, or resolutions of the U.N. General Assembly.[90] Acts that follow and are consistent with the articulation will crystallize the policy into a principle that takes on life as a rule of customary international law.[91] In other words, once there is a consensus articulation that States ought to conform to a given rule of conduct, a legal custom can emerge when some level of spontaneous compliance with the rule is manifest.[92]

Therefore, the act of including the FET clauses in the BITs with the intention of complying therein creates an inference that the States recognized the legal obligation to accord FET protection under international law, a practice that could emerged into a custom.

[88] P. Dumberry 2016, *supra* note 2016, at 23.
[89] M. Scharf, *supra* note 22, at 314 *citing* Anthony A. D'amato, Concept of Custom in International Law 88 (1971).
[90] *Id*.
[91] *Id*.
[92] *Id*.

BITs FET standard – The minimum standard of treatment under customary international law

Majority of the FET provision in the BIT linked FET to the minimum standard of treatment under customary international law. For instance, in Croatia- Oman BIT (2004), Article 3 (2) contains the FET provision which provides that:

> Investments or returns of investors of either Contracting Party in the territory of the other Contracting Party shall be accorded fair and equitable treatment in accordance with international law.[93]

Also, most of the model BITs and foreign investment promotion and protection agreements linked the FET obligation to the minimum standard of treatment under international law such as the US Model BIT and the Canada's new FIPA Model.

The new 2004 US Model BIT in its Article 5[94] and the recently concluded US Free Trade Agreements in their Chapter on Investment go further and attempt to define the minimum standard of treatment. It stated that, the obligation to provide "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world…"[95]

Similarly, Canada's new Foreign Investment Protection and Promotion Agreement (FIPA) model[96], contains similar language and links the "fair and equitable treatment" to the minimum standard of treatment under international law.[97]

The *United Nations Centre on Transnational Corporations* has issued a study which stated that "fair and equitable treatment is a classical international law standard" and "classical international law doctrine considers certain elements to be firm ingredients of fair and equitable

[93] Art. 3 (2) Croatia-Oman BIT (2004).
[94] Article 5, 2004 US Model BIT; *"Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.*
[95] Ibid.
[96] "*The Minimum Standard of Treatment ensures investments of investors, fair and equitable treatment and full protection and security in accordance with the principles of customary international law. The minimum standard provides a "floor" to ensure that the treatment of an investment cannot fall below treatment considered as appropriate under generally accepted standards of customary international law*", For the text of the new FIPA model see http://www.dfait-maeci.gc.ca/tna-nac/what_fipa-en.asp.
[97] OECD (2004), *supra* note 157.

treatment, including non-discrimination, the international minimum standard and the duty of protection of foreign property by the host State".[98]

In interpreting the FET provision in these BITs, Arbitral tribunals were able to provide the substantive content of the FET standard. At this point of the development of the FET obligation, it is possible to single out certain types of improper and discreditable State conduct that would constitute a violation of the standard. Such relevant concepts include: (a) Defeating investors' legitimate expectations (in balance with the host State's right to regulate in public interest); (b) Denial of justice and due process; (c) Manifest arbitrariness in decision-making; (d) Discrimination; and (e) Outright abusive treatment.[99]

In view of the existing arbitral jurisprudence on fair and equitable treatment, seven specific normative elements can be discerned that occur in recurring fashion in the reasoning of arbitral tribunals and are presented as elements of fair and equitable treatment.[100] These elements are (1) the requirement of stability, predictability and consistency of the legal framework, (2) the principle of legality, (3) the protection of investor confidence or legitimate expectations, (4) procedural due process and denial of justice, (5) substantive due process or protection against discrimination and arbitrariness, (6) the requirement of transparency and (7) the requirement of reasonableness and proportionality.[101]

FET standard under Domestic Laws

The FET provision found in most of the Domestic laws contain substantially similar protection to that of the FET obligation under the BITs. For instance, *Myanmar's Investment Law* guarantees to the investors fair and equitable treatment in respect of the right to due process of law and the right to appeal on similar measure, including any change to the terms and conditions under any license or permit and endorsement granted by the Government to the investor and their direct investment.[102]

Similarly, Egypt's Law No.72 of 2017, Promulgating the Investment Law provides that: "All the investments established within the Arab Republic of Egypt shall receive fair and just treatment. The State shall ensure to the foreign investor the same treatment given to the national investor. Under a decree issued by the Council of Ministers, an exception can be made granting

[98] Ibid.
[99] UNCTAD, FAIR AND EQUITABLE TREATMENT, Series on Issues in International Investment Agreements II, 2012, p. 62.
[100] See S. Schill, *supra* note 7, at 11.
[101] *Id.*
[102] Par. 48, Chapter XI, Myanmar Investment Law.

the foreign investors a preferential treatment in application of the principle of reciprocity. The invested funds shall not be governed by any arbitrary procedures or discriminatory decisions."[103]

Other Domestic Laws governing foreign investment guarantees protection against discrimination, arbitrary conduct and unreasonableness of treatment from the government of the host state.

Considering the above discussions, the author concludes that the FET standard applied both in the BITs and domestic laws contain substantially similar elements. This standard has developed as customary rule by general and widespread application of the States in their BITs and consistently making it a rule under their domestic laws as the standard of treatment to be accorded to the foreign investors. Majority of the FET provisions in the BITs, the interpretation of the arbitral tribunals and the FET standard applied in the domestic spheres show that the minimum standard of treatment under customary international law includes the obligation to act in good faith, due process, transparency, candor, fairness and protection from arbitrariness, grossly unfair, unjust or idiosyncratic, and discriminatory act of the host state.

Conclusion

Given the foregoing discussions, it can be seen that the obligation to provide a minimum standard of FET to foreign investors and their investments exists as a matter of custom. The inclusion of FET provisions in an overwhelming number of BITs, provision of FET to foreign investors in the realm of domestic laws, outside of treaty obligations, and the various decisions of tribunals upholding a customary obligation to provide FET to foreign investors / investments, all show a general, widespread, uniform, consistent and representative state practice of providing FET to foreign investors, observed by states as a matter of *opinio juris.*

The existence of the customary character of the obligation to provide FET provision is likewise supported by the fact that both the FET standard as seen in most of the treaties and domestic laws contain substantially similar elements which point to the minimum standard of FET which has been well-established in international law.

Few words should be said about the practical consequences of considering the obligation to provide FET protection to foreign investors as customary international rule. *First*, this new development would surely contribute in the growth of Foreign Direct Investments internationally and would strengthen the relationship of the foreign investors and the host states. Foreign investors can now legitimately expect that they and their investments are protected under international law despite the absence of the BIT or despite the absence of the FET provision in the governing BITs.

[103] Investment Safeguards and Incentives, Chapter 1, Section II, Investment Safeguards Article 3, Law No. 72 of 2017 Promulgating the Investment Law.

Second, my conclusion regarding the customary status of FET protection in foreign investors would grant foreign investors remedy under international law for the violation of FET obligation as customs bind all States.

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