THE FAR EASTERN LAW REVIEW

The Annual Publication of the Institute of Law

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Recent Updates and Developments in Law and Jurisprudence

THE FAR EASTERN

LAW REVIEW

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The Far Eastern Law Review invites the submission of original and unpublished articles from bona fide law students of the Institute and law practitioners. The Law Review accepts submissions on interdisciplinary studies and welcomes diverse points of view on contemporary legal issues. The views, opinions, and conclusions expressed in the articles of this issue are those of the authors and do not necessarily reflect that of The Far Eastern Law Review, the Far Eastern University - Institute of Law, and the Far Eastern University. The author of each article published herein grants The Law Review the right to authorize the publication, reproduction, and distribution of the article in electronic, computerized retrieval system, and similar forms; and to transfer said rights.

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THE FAR EASTERN
LAW REVIEW

MESSAGE

Each issue of a law review is the product of many hours of painstaking legal research and precise writing contributing to the pool of knowledge of the entire legal community. This process of adding value to the law also serves as a boon to the particular school which published it, and a feather in the caps of the hardworking writers and editorial team of that publication.

Thank you, Far Eastern Law Review for your invaluable contribution to FEU and to the law. Congratulations on your latest issue!

MELENCIO S. STA.MARIA

Dean

MESSAGE

Co-Editor-in-Chief

As they say, the legal profession is a never-ending process of learning. Lawyers commit to become students of the law from the moment they start law school up to the time they retire from practice. Since laws and jurisprudence change over the course of time, lawyers and law students alike need to keep themselves up to date with the developments in the law. Like a news reporter or a journalist, a student of the law must always know what's new or what's hot in the legal world.

In this latest issue of the Far Eastern Law Review, we feature recent developments and updates in law and jurisprudence. As students of the law, the FELR aims to provide both law students and lawyers with a perspective on matters that recently rose to relevance.

This school year started just like any other. No one ever thought that it would end in the most peculiar and unprecedented of circumstances. For senior students like myself, it would have been the culmination of an arduous and tedious journey en route to our dream of becoming lawyers. However, a global pandemic stood in the way of this momentous event in our lives. This pandemic has changed the way of life and the way things are done. Amidst the changes brought about by the crisis, the FELR never stopped writing. It made the most out of the time of 'quarantine' and endeavored to release a second issue for this school year. The Law Review hopes that this issue becomes a lasting reminder for all students of the law that learning never stops and the rule of law shall stand amidst any crisis.

We are honored to feature in this issue the essay that won the 2017 Dissertation Contest of the Foundation for Liberty and Prosperity (FLP). We thank the FLP for allowing the FELR to feature this article. We also thank Atty. Raphael Pangalangan for choosing the FELR as the law journal to feature his winning essay.

The FELR introduces in this issue a revamped jurisprudence section. Instead of the usual digests of relevant jurisprudence, articles that either comment, analyze, or dissect recent Supreme Court decisions are featured in this issue. This year's Editorial Board envisions that this shall mark the start of a jurisprudence section of the FELR that

encourages discourse and analysis of Supreme Court decisions instead of mere case digests which may be more accessible and afforded elsewhere.

As this year's Co-Editor-in-Chief, I proudly present this issue of the FELR to the Institute of Law and to the legal world. This issue is a rare second issue of the FELR in a single school year. The FELR would not have been able to accomplish this feat if not for the hard work and effort of my fellow members in the Editorial Board. I wish to acknowledge in particular my Co-Editor-in-Chief, Angelica Joy Bailon, for working hard with me in making all of the FELR projects this year possible. An Editor-in-Chief (EIC) being the lead editor and the organizational head of the Law Review at the same time, Angelica and I worked hand-in-hand in fulfilling these two duties of an EIC; dividing these two primary duties with each other resulting in a more efficient and effective leadership for the Law Review both as a law journal and an organization.

More importantly, this second issue – which at the start of the school year seemed to be a long shot – will not be possible if not for the overwhelming support of our dear Institute of Law headed by Dean Mel Sta. Maria. I would also like to thank in a special way our adviser and Associate Dean, Atty. Anthony Goquingco, for challenging us to release two issues in one school year; for encouraging us to continue with this issue despite the challenges and constraints; and for providing all the needed resources to make everything possible.

On a more personal note, I thank the Institute of Law for giving me the opportunity to do more and be more as a student of law. Being part of a law journal publication – much more be an Editor-in-Chief – was not among my objectives as a law student. However, this Institute and its people gave me the chance to challenge myself and work for more than what is expected of me as a student. For this, I will forever be grateful to the Institute. Every experience and opportunity given to me by the school shall help me as I put up a 'One Brave Fight' in the journey to the legal profession.

AD IURIS REGULUM MAIOREMQUE DEI GLORIAM
For the rule of law and the greater glory of God

Joshua Emmanuel L. Cariño
Editor-in-Chief

MESSAGE

Co-Editor-in-Chief

It has been a tough season for all of us. We now live in a world where the importance of washing hands has never been overemphasized; where we have to think about how to greet someone without a handshake or a *beso;* and where a simple cough can induce fear and stigma. The pandemic has indeed brought a wave of negative outcomes, but it also revealed to us important realizations and great wisdom. To me, it has offered three lessons: the frailty of human beings, the vulnerability of our government and economy, and the certainty of hope.

The frailty of human beings. At this time of writing, the virus has affected 11 million people worldwide, causing more than 500,000 deaths. No one is invincible, after all. Not the rich, not the politicians, and not even the doctors. The virus is unbothered with our status, money, and achievements. We are all completely at the same page: weak and without answers. This pandemic is pulling us back to the basics of what it means to be human. As we struggle to live each day in this unanticipated world, our priorities and our goals are adjusting to the profound social and economic changes.

The vulnerability of our government and economy. More than a medical catastrophe, the pandemic is also a political and economic crisis. Faced with an unprecedented challenge and unparalleled devastating consequences, governments all around the world are at its wits ends trying to solve the problem and at the same time sustain public support. Regrettably, some, if not many, of those in power seem to be using the pandemic as an opportunity either to promote inaction or to further impose repressive measures. It is one thing to implement precautionary measures such as social distancing and lockdown, but it is another thing when the restrictions on our fundamental rights go beyond the limits of the law. Aside from that, the pandemic exposed the fragility of the economy. Our invisible enemy knows no boundaries, colors and class, yet, the pandemic has created a great divide in our society. The crisis, essentially, created a "new normal" and forced life online - students are attending online classes, employees are working from home, and business transactions are being conducted online. In a third world country like us, with frustratingly slow internet

connection, it is unthinkable how internet became a matter of life for many. Unfortunately, for others, their reality is far from privileged. With no job, no money, and no food, the underprivileged and marginalized sectors of the society are being oppressed more than ever.

The certainty of hope. With everything that is going on, it is hard to look to the future with optimism. But there is hope. Let us hold on to God's promise in Jeremiah 29:11: "*For I know the plans I have for you," declares the Lord, "plans to prosper you and not to harm you, plans to give you hope and a future.*" Just like every challenge we have conquered, we will get through this pandemic. When we do, and we will, it is our duty, as stewards of justice, to uphold the law and serve the nation. As we face this "new normal", may we be the light in this dark plight and be the voice in this deafening noise.

Vision forward. The transition from old to new normal is what this volume seeks to capture. With articles pointing out China's inaction, probing into the overlapping and overloading roles of the military and the police, presenting the issuances of the Securities and Exchange Commission in light of the Revised Corporation Code, and discussing the barangay law-making power, we try to make sense of what is. Through commentaries on the Supreme Court decisions on same-sex marriage and K to 12 Program, we are informed of what has been. And with articles calling for judicial activism in promoting second generation rights and in breaking down barriers for persons with disabilities, we hope to empower the readers to where we should be heading. When the pandemic ends, may we see where we are, where we were, and where we should go in the new normal.

With that, I would like to end by saying thank you to my FEU Law Review family. Three years ago, our former Editor-in-Chief Josiah David Quising took a chance on me and recruited me as an Associate Editor. Josh, thank you for believing in me. To my Co-Editor-in-Chief, Joshua Emmanuel Cariño, thank you for being the best co-EIC I could ever have. To the rest of the editorial board, thank you for your hard work and for the wonderful memories we have shared. Last but not the least, I would like to express my deepest gratitude to our adviser, Associate Dean Anthony Raymond A. Goquingco, for his immense support to the FEU Law Review and for trusting me enough to appoint me as one of the leaders of this team. I will forever be grateful.

To God be the glory!

Angelica Joy Q. Bailon
Editor-in-Chief

The Far Eastern Law Review
49th Volume

FOREWORD

"The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so we must think anew and act anew." These words uttered by Abraham Lincoln ring true as much today as in centuries past. In the midst of this unprecedented public health crisis, we are all called to rise to the occasion not only through ingenious innovation but through meaningful collaboration. For both students and scholars of the law, the law is our fabric. The law is our chosen medium to find and provide solutions to remedy – pun intended – the "ills" of our society. It is therefore in our natural interest to creatively weave new ideas and intellectual opinions on various legal issues in the hope of not only uncovering but more so, experiencing genuine truth and justice through this medium. After all, what use is there for the law, if not to continually better the lives and foster the freedoms of our people?

The youth of this digital, crisis-stricken age plays a significant role in this winnowing process of uncovering genuine truth and justice through the rule of law. Fresh eyes are the windows of imagination. As I have once said in my message to this year's bar passers, now, more than ever, the legal profession needs your youthful exuberance; your proficiency in new technologies; and most of all, your interconnected sense of community. The value of this exhortation does not mean less for our present students of the law.

Against the backdrop of this celebrated release of the Far Eastern Law Review's 49th Volume, I express my gratitude to the FEU Institute of Law for enabling our young legal minds, through this publication, to explore and express their ideas and intellectual opinions on a variety of legal issues – ranging from the international implications of a superpower's actions amidst the COVID-19 pandemic to marriage rights of same-sex couples. May you sustain these platforms of critical thought and expression, and continue to both encourage and empower this generation to innovate new legal ideas and scholarly contributions. I also take this opportunity to issue a simple request to the student contributors and the entire FEU Law student body. May you never cease to explore the vast possibilities of legal understanding and stoke the fire of creativity even beyond the accepted canon. Indulge me as I say that the rule of law is not a rule forged in black and white; it is a rule emblazoned with the illimitable shades of genuine truth and justice for all.

Thank you for this invitation to grace your journal. *Mabuhay kayong lahat!*

ESTELA M. PERLAS-BERNABE
Senior Associate Justice
Supreme Court of the Philippines

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The Annual Publication of the Institute of Law

ELEVATING "SECOND GENERATION RIGHTS" IN PHILIPPINE MUNICIPAL LAW: FROM JURIDIFICATION TO JUDICIALIZATION

Atty. Raphael Lorenzo A. Pangalangan

Winning Essay of the 2017 Foundation for Liberty and Prosperity Dissertation Writing Contest, published there as "Enforcing Liberty and Prosperity through the Courts of Law: A Shift in Legal Thought from Juridification to Judicialization."

> Constitutions are designed to meet not only the vagaries of contemporary events. They should be interpreted to cover even future and unknown circumstances. It is to the credit of its drafters that a Constitution can withstand the assaults of bigots and infidels but at the same time bend with the refreshing winds of change necessitated by unfolding events.
>
> – Panganiban, *C.J*[1]

Introduction

Liberty and prosperity embody the twin beacons of justice[2]—through liberty we uphold civil and political freedoms, while prosperity enshrines economic, social, and cultural rights. They dispense with the antiquated notion of state obligation as a negative responsibility alone;[3] and canonize positive duties to guard against the invisible hand of the market forces,[4] to combat social prisons, and to give more in law to those who have less in life.[5]

Principles of liberty and prosperity have long been recognized in the Philippine jurisdiction; entrenched in legal doctrine, yet compromised in practice. The Philippines ratified both the *International Covenant on Civil and Political Rights*[6] (ICCPR) and the *International*

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[1] Tañada v. Angara, 272 SCRA 18 (1997).
[2] Artemio V. Panganiban, *Visionary Leadership By Example*, 9th National Ayala Young Leaders Congress, the San Miguel Corporation Management Training Center, Alfonso, Cavite, February 7, 2007, *available at* https://cjpanganiban.com/2007/02/07/visionary-leadership-by-example-2/.
[3] *See* DeShaney, 489 U.S. 189.
[4] PACIFICO A. AGABIN, MESTIZO: THE STORY OF THE PHILIPPINE LEGAL SYSTEM 225 (2011).
[5] Del Rosario v. De Los Santos, G.R. Nos. L-20589-90, March 21, 1968.
[6] International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171.

Covenant on Economic, Social, and Cultural Rights[7] (ICESCR)—together, the *International Bill of Rights*—yet fail to afford them consistency. While "civil and political rights have attracted much attention in theory and practice… economic, social and cultural rights have often been neglected."[8]

Dissimilar to fundamental liberties, prosperity is recognized as aspiration rather than right. Indeed, in *Simon v. Commission on Human Rights (CHR)*,[9] the Philippine Supreme Court pronounced that the jurisdiction of the CHR excludes social and economic rights. Though the International Covenants and the Universal Declaration of Human Rights (UDHR) "suggest that the scope of human rights can be understood to include those that relate to an individual's social, economic, cultural, political and civil relation[,]"[10] Section 18, Article XIII, of the 1987 Constitution was interpreted to empower the Commission to investigate "human rights violations involving civil and political rights" alone.[11] As confirmed in the *Concluding Observations* of the *United Nations Committee on Economic, Social and Cultural Rights* (UNCESCR), the CHR "is not explicitly mandated to deal with economic, social and cultural rights."[12]

A further dilemma is the non-enforceability of liberty and prosperity against private parties. Traditional views of political law divide the world into two spheres: the public sphere, which deals with government action, and the private sphere, which regulates private relations. The United States Supreme Court has generally reserved the application of the Bill of Rights to the public sphere.[13] Philippine constitutional law having its roots in American constitutional tradition abides

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[7] International Covenant on Economic, Social and Cultural Rights, December 16, 1966, 993 U.N.T.S. 3. [hereinafter ICESCR].
[8] ASBJØRN EIDE, et al. ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 3 (Martinus, 2nd ed., 2001).
[9] Simon v. Commission on Human Rights, G.R. No. 100150, January 5, 1994. *See also* Joaquin G. Bernas, S.J., Sponsorship Remarks, I RECORD CONST. COMM'N 674, 17 July 1986 *available at* http://www.officialgazette.gov.ph/1986/07/17/r-c-c-no-32-thursday-july-17-1986/ (last accessed September 12, 2017). [hereinafter Bernas, Sponsorship Remarks]. ""[I]n the hierarchy of freedom[s]… economic freedom ranks the lowest."
[10] Simon v. Commission on Human Rights, G.R. No. 100150, January 5, 1994.
[11] *Ibid.*
[12] Committee on Economic, Social and Cultural Rights, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of the Philippines, E/C.12/PHL/CO/5-6, 26 October 2016, 9. [hereinafter, Concluding Observations].
[13] Civil Rights Cases, 109 U.S. 3 (1883).

by that same system.[14] This principle is called the *state action doctrine*, and the structure is known as the *public/private distinction*.[15]

The dichotomy was drawn on the assumption that only the state is in the position to violate fundamental rights.[16] But this premise is now radically transformed. With the shifting of political and economic powers from the sovereign to the oligarch,[17] and the blurring of the public and private spheres through privatization and government deregulation,[18] we have come to realize that "We the People" too are threats to the rights of our fellow men. Today, in the "advent of liberalization, deregulation and privatization…. even individuals [are] sources of abuses and threats to human rights and liberties."[19]

Reserving fundamental protections to public actors is as antiquated as it is inadequate. As seen through the *Limburg Principles*[20] and the *Maastricht Guidelines*,[21] states have a tripartite duty to respect fundamental rights—i.e. the duty to respect, as well as to protect and fulfill these rights from private intrusions—i.e. the duties to protect and fulfill. By limiting the ambit of fundamental protections to the *positive* acts of the *state* alone, the *state action doctrine* fails to keep apace the complexities of reality.

The orthodox approach to the inadequacies of law is the juridification of hitherto social and economic claims—the positivist approach of expanding fundamental guarantees by writing them down as law. Yet that remedy is for the political branches of the government. I ask: What are the lawyers and judges to do?

Preserving liberty and prosperity does not rest solely on the legislation of new economic programs or novel social policies—it requires a shift in judicial perspective. It is the purpose of this paper to restructure access to power through the courts; repositioning the role of the judicial

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[14] JOAQUIN G. BERNAS, S.J., A LIVING CONSTITUTION: THE ABBREVIATED ESTRADA PRESIDENCY 5 (2003).
[15] Raul C. Pangalangan, *Property as a Bundle of Rights*, 70 PHIL. L.J. 141, 152 (1996), *citing* Morton J. Horwitz, *History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982).
[16] Serrano v. National Labor Relations Commission, G.R. No. 167614, G.R. No. 117040, January 27, 2000, (Panganiban, *J*., *separate opinion*).
[17] *See* AGABIN, MESTIZO *supra* note 4, 289 (2011).
[18] Serrano v. National Labor Relations Commission, 323 SCRA 445 (Panganiban, *J*., *separate opinion*).
[19] *Ibid.*
[20] UN Commission on Human Rights, *Note verbale* dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights, 8 January 1987, E/CN.4/1987/17.
[21] International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997, ¶4. (hereinafter, Maastricht Guidelines).

branch in placing the coercive power of the state at the disposal of individuals and social movements. We will look at the following:

Chapter I will establish how human rights embraces both liberty and prosperity. Necessitous men are never truly free men.[22] "We the People" thus need not only justice, but jobs; not just freedom, but food; not only ethics, but economics.[23] This chapter seeks to determine the justiciability of social and economic rights *qua* human rights within the Philippine legal system.

Chapter II looks at the doctrinal and structural challenges in reserving the enforcement of fundamental protections against public actors. This discussion will contrast old and new paradigms. In the *Old Paradigm*, as exemplified in the cases of *People v. Marti*[24] and *Duncan v. Glaxo*,[25] the Supreme Court reserved the application of fundamental rights against the state alone. Galvanized by Chief Justice Panganiban's separate opinion in *Serrano v. National Labor Relations Commission*,[26] this chapter will delve into the *New Paradigm*; acknowledging how public rights are often the subject of private intrusions.[27]

Chapter III seeks to bridge the gap between traditional legal doctrine and contemporary complexities. Political power now lies in the hands of private parties, be they economic elites, warlords, or dynasties. By exploring jurisprudence where fundamental liberties were successfully invoked against ostensibly non-state actors, this chapter seeks to recast legal characterizations of the "public" and "private" in order to safeguard liberty and prosperity against both public evils and private wrongs.

Before concluding, Chapter IV will look at the role of the judiciary in the enforcement of human rights policies vis-à-vis the principle of separation of powers. Here we seek to reconcile judicial activism with counter-majoritarian critique by re-defining the judiciary's role in conserving liberty and prosperity within the Philippine constitutional framework.

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[22] Vernon v. Bethell (1762), 28 ER 838, 2 Eden 110.
[23] *See* Artemio V. Panganiban, *Unleashing Entrepreneurial Ingenuity, 12th General Assembly of the ASEAN Law Association*, at the Makati Shangri-La Hotel, Makati City, Feb. 26 to Mar. 3, 2015, available at https://cjpanganiban.com/2015/02/26/unleashing-entrepreneurial-ingenuity/ (last accessed September 12, 2017).
[24] People v. Marti, 193 SCRA 57 (1991).
[25] Duncan Association of Detailman-PTGWO v. Glaxo Wellcome Philippines, Inc., 438 SCRA 343 (2004).
[26] Serrano, 323 SCRA 445.
[27] Serrano, 323 SCRA 445 (Panganiban, *J.*, *separate opinion*).

While the "less favored in life will be the more favored in law,"[28] it is substantive, rather than mere formal, equality that will protect liberty and prosperity. But by empowering the everyman to harness the law to advance equal access to social goods through the courts, the author hopes to give they who have less in life more in life; and not simply in law.

I. Social and Economic Rights in the Philippine Legal System

On 11 October 2016, President Rodrigo Roa Duterte signed Executive Order No. 05, approving and adopting the *Ambisyon Natin 2040* program. In a 25 year-long plan, Duterte seeks to secure a *matatag, maginhawa at panatag na buhay*—a strongly-rooted, comfortable, and secure life.[29] While there is no contesting that poverty and gross inequality are problems besetting the nation,[30] surely the solution does not lie so far into the distance.

There exist three concepts of rights under the Philippine constitutional framework: civil liberties, political freedoms, and economic freedoms. These rights were delineated by a thin but dividing line by the Constitutional Commission of 1986:

> To *civil liberties* belong freedom from arbitrary confinement, inviolability of the domicile, freedom from arbitrary searches and seizures, privacy of correspondence, freedom of movement, free exercise of religion and free choices involving family relations. *Political freedoms* include the freedoms involving participation in the political process, freedom of assembly and association, the right to vote, the right of equal access to office, the freedom to participate in the formation of public opinion, and also non-establishment of religion or what is popularly called separation of church and state. *Economic freedom* covers everything that comes under the heading of "economic self-determination," free pursuit of economic activity; in general, free choice of profession, free competition and free disposal of property. It should be emphasized, however, that in the hierarchy of freedom under existing jurisprudence, economic freedom ranks the lowest and it is the freedom whose reasonable invasion by the state is easily allowed.[31]

The intent of the drafters of the 1987 Constitution is clear: social and economic rights—as embodied in the Declaration of Principles and State Policies, as well as the Social Justice

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[28] ROBERT H. BORK, TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 70 (Simoun and Schuster, 1990), *citing* Professor Thomas Reed Powell.
[29] NATIONAL ECONOMIC AND DEVELOPMENT AUTHORITY, PHILIPPINE DEVELOPMENT PLAN 2017-2022 (2017), xii.
[30] JOAQUIN G. BERNAS, S.J., THE 1987 PHILIPPINE CONSTITUTION 17 (2011). *See also* FoodFirst Information & Action Network (FIAN), P*arallel Report: On the Occasion of the Review of the Philippines Combined 5th and 6th Periodic Reports to the UN CESCR at the 59th Session*, 6.
[31] Bernas, Sponsorship Remarks, *supra* note 9.

provisions of the basic law—are not one of the traditional rights like those enshrined in the Bill of Rights, and are mere commands to the state.[32] But note the irony: while, domestically, social and economic rights have been demoted as second-generation rights, they are embraced as human rights in the realm of international law.[33]

Though antithetical to the thesis of the constitutional framers, both liberty and prosperity are embedded in the Philippine legal system. The Philippines has ratified twenty (20) international human rights instruments, including all seven (7) core human rights treaties:[34] the ICCPR, the ICESCR, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,[35] the *Convention on the Rights of the Child*,[36] the *Convention on the Elimination of All Forms of Discrimination against Women*,[37] the *International Convention on the Elimination of All Forms of Racial Discrimination*,[38] and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*.[39] By virtue of the *incorporation doctrine* enshrined in Section 2, Article II of the 1987 Constitution, generally accepted principles of international law, treaty or otherwise, form part of the law of the land.[40]

The dual character of social and economic rights is encapsulated in the clash of Philippine municipal law with Philippine international obligation. Effectively, the Philippines wears two hats: it exalts social and economic rights in the realm of international law, yet relegates them in the municipal legal system. The following segment seeks to disentangle the web of municipal and international doctrines by elevating the status of social and economic rights as human rights *per se*—rights for which the state is responsible as it is for civil and political liberties.

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[32] AGABIN, MESTIZO *supra* note 4 at 240.
[33] A.A. Herrera, *Realizing Economic, Social and Cultural Rights*, PHILJA JUDICIAL JOURNAL 4 (2002).
[34] Response of the Philippine Government to the concerns raised by the Committee on Economic, Social and Cultural Rights during its 59th session in Geneva, Switzerland on September 28-29, 2016, 48 [hereinafter, Response of the Philippine Government].
[35] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, 1465 U.N.T.S. 85.
[36] Convention on the Rights of the Child, November 20, 1989, 1577 U.N.T.S. 3.
[37] Convention on the Elimination of All Forms of Discrimination Against Women, December 18, 1979, 1249 U.N.T.S. 13.
[38] International Convention on the Elimination of All Forms of Racial Discrimination, December 21, 1965, 660 U.N.T.S. 195.
[39] G.A. Res., International Convention on the Protection of the Rights of All Migrant Workers and Their Families, 47th Sess., December 16, 1992, A/RES/47/110.
[40] *See* Tanada v. Angara, G.R. No. 118295, May 2, 1997.

I.A. Second-Generation Rights in International Law

International Human Rights Law may be divided into two broad categories: (i) civil and political rights, and (ii) economic and social rights. The latter is "surrounded by controversies both of an ideological and technical nature."[41] As earlier established, the Constitutional Commission of 1986 was of the opinion that second-generation rights are not true rights at all,[42] but duties imposed upon the state.[43] Another criticism of economic and social rights goes further; contesting their obligatory nature, and demoting them as mere aspiration.[44]

Underlying these criticisms are several assumptions, not all of them well-founded.[45] Common misconceptions of social and economic rights may be abridged through three issues: *Nature, State Action Liability*, and *Resource Dependency*.

I.A.1 Nature of Social and Economic Rights

The dichotomy drawn between first and second-generation rights stems from the understanding that "[h]uman rights are rights possessed by all human beings simply in virtue of their humanity."[46] Civil and political rights have openly been characterized as *natural* rights, yet social and economic rights have been shunned as a mere *political conception* of rights.[47] Liberty is accepted as absolute, enforceable, and thus, justiciable, while prosperity is merely *programmatic*, requiring realization by the state through affirmative action. Second-generation rights are therefore not "human rights" at all, but human constructs—a product of political will, rather than of our humanity.[48]

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[41] EIDE, *supra* note 8 at 5.
[42] Bernas, Sponsorship Remarks, *supra* note 9.
[43] *Ibid*. *cf.* CONST., art. II. "The Declaration of Principles and State Policies." *See also e.g.* Espina v. Executive Secretary, G.R. No. 143855, September 21, 2010.
[44] UN HANDBOOK FOR NATIONAL HUMAN RIGHTS INSTITUTION, 41.
[45] EIDE, *supra* note 8 at 10.
[46] John Simmons, *Human Rights and World Citizenship: The Universality of Human Rights in Kant and Locke, in* JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS 179–96, 185 (2001).
[47] Rowan Cruft, *The Philosophical Foundation of Human Rights: An Overview, in* PHILOSOPHICAL FOUNDATION OF HUMAN RIGHTS 4-6 (Oxford University Press, 2015).
[48] JAMES GRIFFIN, ON HUMAN RIGHTS 1–2 (Oxford University Press, 2008).

The Philippines adopted this philosophy in the proceedings of the Constitutional Commission of 1986. Commissioner Regalado E. Maambong contemplated a constitutional right which protected the citizen against every kind of enemy, whether it be human or inhuman, such as unemployment, starvation, pestilence, ignorance, poverty, or disease.[49] In response, Commissioner Joaquin Bernas argued that social and economic rights, though enshrined in the constitution, required further action by the legislature:

> [T]here have arisen in recent years, particularly under the influence of socialist teachings and also of the teachings of the Pope, certain economic and social rights which strictly are not on the same level as the traditional political and civil liberties we have in the Bill of Rights because they are not self-executory. They are more in the nature of claims or demands which the citizen may make of the state, or claims or demands made by the people in general. The provision on social justice, for instance, says that the state shall insure good working conditions for laborers. Strictly speaking, that is not one of the traditional rights under the Bill of Rights. It is more of a command to the state— "Look, you better take care of that."[50]

The distinction drawn between civil and political rights and social and economic rights is more apparent than real. First, there are a number of human rights which do not strictly conform with either of the purported clear-cut categories.[51] The right to life vis-à-vis the right to health,[52] equality of the law vis-à-vis non-discrimination in the work force,[53] the right to education vis-à-vis property rights protected by due process guarantees,[54] and the right to association vis-à-vis trade union rights[55]—all these illustrate that the alleged "subordinate" social and economic rights are often intertwined with professed "first-line" civil and political rights.

There are certain aspects of human rights which may be considered both civil and political as well as economic and social in nature. Indeed, despite arguing against the incorporation of social and economic rights in the Bill of Rights, Commissioner Bernas recognized "some of the

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[49] Regalado E. Maambong, I RECORD CONST. COMM'N 674, 17 July 1986.
[50] Bernas, Sponsorship Remarks, *supra* note 9.
[51] AOIFE NOLAN, HUMAN RIGHTS LAW IN PERSPECTIVE: CHILDREN'S SOCIO-ECONOMIC RIGHTS, DEMOCRACY AND THE COURTS 38 (Hart Publishing, 2011).
[52] Oposa v. Factoran, G.R. No. 101083, July 30, 1993. *See also* Response of the Philippine Government *supra* note 34, 3 *citing* Imbong v. Ochoa, G.R. No. 204819, April 8, 2014.
[53] ICCPR, art. 26 *cf.* IESCR, arts 3, 7.
[54] Non v. Danes II, G.R. No. 89317, May 20, 1990. *See also* Response of the Philippine Government *supra* note 34 at 3 *citing* Leus v. St. Scholastica's College, G.R. No. 187226, January 28, 2015.
[55] Victoriano v. Elizalde Rope Worker's Union, G.R. No. L-25246, September 12, 1974.

provisions of the Bill of Rights as economic rights, [such as] the due process protection for property."

Second, the professed first and second generational rights are often entwined in terms of consequence. In the drafting of the 1987 Constitution, Commissioner Minda Luz M. Quesada recognized:

> The limitation of the present conceptualization of the Bill of Rights has contributed to the lack of respect for human life. There is no such strong guarantee in our Constitution that enables us to give due respect not just to a fertilized ovum but to a fully developed being who loses his life, for instance, in a hospital. We health workers feel so helpless and powerless to do something about this because there is no such provision in our law that makes it the state's responsibility **to insure that nobody is denied this right to health and, in effect, right to life.**[56]

That relationship may even be further described as *causational*, rather than mere *co-relation*. In his seminal piece, Dean Melencio Sta. Maria examines how that relationship may be described as a double-edged sword. Indeed, "economic globalization enhances human rights because the latter 'leads to economic benefits resulting from trade and financial liberalization, and to benefits in the fields of human rights and political freedom by creating the economic conditions that allow these freedoms to flourish.'"[57] Yet in that seam breadth, the interplay of traditional civil and political rights with social and economic rights likewise bears its hazards. Utilizing the Generalized System of Preferential Plus (GSPP)—"a unilateral arrangement where a first world country provides a non-reciprocal trade benefit in favor of a developing country"[58]— Dean Sta. Maria illustrates how the *violation* of the former may result in the detriment of socio-economic interests—particularly, the withdrawal by the European Parliament of GSPP benefits amidst growing reports of gross human rights atrocities.[59] With about $901 million worth of total exports, about 48.3 percent of the Philippines' total exports, that "removal of the EU GSPP will [but] impact our economy negatively."[60]

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[56]Minda Luz M. Quesada, I RECORD CONST. COMM'N 674, 17 July 1986 *available at* http://www.officialgazette.gov.ph/1986/07/17/r-c-c-no-32-thursday-july-17-1986/ (last accessed September 12, 2017).
[57] Melencio Sta. Maria, *Human Rights, Politics, International Law and Trade Arrangement and Economic Prosperity: A Reading of the Philippine Situation*, A Paper for the Foundation for Liberty and Prosperity 2-3 (2017).
[58] *Id.* at 5.
[59] *Id.*, at 6.
[60] *Id.* at 7.

Clearly, the relationship of liberty and prosperity is not a one-way road. Nurturing prosperity may indeed safeguard liberties, while the violation of fundamental liberties may likewise impair prosperity. Human rights being indivisible, interdependent, interrelated, and of equal importance for human dignity,[61] the relevance of liberty to prosperity, and vice versa, is all-too-clear. As observed in the *Response of the Philippine Government* to the UNCESCR, the Duterte administration itself has adopted that school of thought; oft invoking the respect for civil and political rights to establish its compliance with ICESCR treaty obligation.[62]

I.A.2. State Action Liability

The Constitution was crafted to allow the government to control the governed, but in that same breath, oblige it to control itself.[63] The Bill of Rights is "a list of those which the state may not do. It is not a list of those which the state must do."[64] Thus, traditionally, the state is bound by a single obligation: the duty to respect.[65]

Pursuant to the *state action doctrine*, "the state is merely required to refrain from interfering in the sphere of individual rights and freedoms… [It] is under no legal obligation to take positive action in support of individuals regarding their social and economic situation."[66] Civil and political rights are thus "true rights" because they impose upon the state only negative obligations. On the other hand, social and economic rights are *programmatic*, requiring positive action from the state. It is thus argued that the latter are not, in the strict sense, rights.

The objection is flawed. Both civil and political rights as well as social and economic rights "require a combination of negative and positive conduct from states."[67] For example, in *Thurman v. City of Torrington*,[68] the Torrington Police Department's failure to respond to Tracey Thurman's reports of domestic violence gave rise to state liability. The U.S. Court ruled that such "inaction

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[61] Maastricht Guidelines, ¶4.
[62] Response of the Philippine Government *supra* note 34, 29.
[63] JAMES MADISON, THE FEDERALIST NO. 51, 321 (Clinton Rossiter ed., 1961).
[64] Bernas, Sponsorship Remarks, *supra* note 9.
[65] DeShaney, 489 U.S. 189.
[66] NOLAN, *supra* note 51 at 25.
[67] *Id.* at 25-26
[68] 595 F. Supp. 1521 (D. Conn. 1985).

on the part of the officer is a denial of the equal protection of the laws"[69]—a civil and political right. Likewise, the Inter-American Commission on Human Rights in *Lenahan v. United States*[70] and the European Court of Human Rights in *Opuz v. Turkey*[71] recognized that the systemic failure of the state to take reasonable measures to offer coordinated and effective response constituted an act of discrimination in violation of the right to equality before the law.[72]

Legal theory has departed from the narrow understanding that the state is only bound by negative obligations. The *Limburg Principles* and the *Maastricht Guidelines* are instructive in laying down the tripartite duty to respect, protect, and fulfil fundamental rights. Likewise, in the Philippine legal system the *Writ of Amparo,*[73] which safeguards the right to life, liberty, and security; the *Writ of Habeas Data*,[74] which involves the right to privacy, and the *Writ of Kalikasan*,[75] which seeks to protect the constitutional right to a balanced and healthful ecology, guard against both acts and omissions of state and non-state actors alike.

I.A.3. Resource Dependency

A blend of the *Nature* and *State Action Liability* objections, fiscal considerations are forwarded to disprove the inherent nature of social and economic rights. Because civil and political rights are intrinsic to our very humanity, they are "free" in the sense that the state is only negatively bound to respect these rights. On the other hand, social and economic rights are *programmatic*, which require expenditure.[76]

The claim is a hasty generalization and is unsustainable. Fiscal considerations depend "on the obligation in question, rather than the classification of the right imposing that obligation[.]"[77] As may be observed from *Thurman*, *Lenahan*, *Opuz*, and the Philippine *Writs*, state duties "cover

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[69] *Id.* at ¶23.
[70] Lenahan v. United States of America, Case No. 12.626, Inter-Am. Comm'n, H.R., Report No. 80/11 (2011).
[71] Case of Opus v. Turkey, European Court of Human Rights, Application No. 33401/02, 9 June 2009, ¶191.
[72] *Id.* at ¶170.
[73] THE RULE ON THE WRIT OF AMPARO, A.M. No. 07-9-12-SC (Sept. 25, 2007).
[74] THE RULE ON THE WRIT OF HABEAS DATA, A.M. No. 08-1-16-SC (Jan. 22, 2008).
[75] RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, A.M. No. 09-6-8-SC (Apr. 13, 2010).
[76] UNITED NATIONS, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: HANDBOOK FOR NATIONAL HUMAN RIGHTS INSTITUTIONS 24 (UN Publications, 2005).
[77] NOLAN, *supra* note 51 at 28

the full spectrum of obligations—from measures that are essentially cost-free to those clearly requiring significant public expenditure."[78]

I.B. Judicializing Social and Economic Rights

The canonical approach to justice is juridification—the expansion of rights through positive acts of the political branches. Yet in our fixation with juridical act, the judicial remedy is taken for granted.[79] The purpose of this section is to rethink the role of the judiciary to enable the safeguard and nurture of liberty and prosperity in the courts of law. Civil and political rights having been openly incorporated in the Bill of Rights, this section will focus on the justiciability of social and economic rights alone.

Justiciability is the quality or state of being appropriate or suitable for adjudication by a court.[80] In Philippine legalese, it refers to an "actual case or controversy,"[81] stemming from a *cause of action*—a demandable legal right[82]—which may be resolved by a court of law.[83] As opined by Chief Justice Panganiban in his Separate Opinion in *Sanlakas v. Executive Secretary*:

> [T]he existence of a live case or controversy means that an existing litigation is ripe for resolution and susceptible of judicial determination; as opposed to one that is conjectural or anticipatory, hypothetical or feigned. A justiciable controversy involves a definite and concrete dispute touching on the legal relations of parties having adverse legal interests.[84]

Economic, social, and cultural rights are argued to be non-justiciable rights in the sense that they are not capable of being invoked before the courts[85] absent enabling legislation.[86] The argument works off the assumption that enforcement of these rights rests solely with the political

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[78] UN HANDBOOK FOR NATIONAL HUMAN RIGHTS INSTITUTIONS, *supra* note 76 at 24.
[79] Committee on Economic, Social and Cultural Rights, General Comment No. 9: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, para 10. (hereinafter, General Comment No. 9)
[80] *Justiciability,* BLACK'S LAW DICTIONARY 943 (West 9th ed., 2009).
[81] Joaquin G. Bernas S.J., *Justiciability of Socio-Economic and Cultural Rights*, PHILJA JUDICIAL JOURNAL 134 (2002).
[82] RULES OF COURT, Rule 2., §2
[83] Bayan Telecommunications Inc. v. Republic, G.R. No. 161140, January 31, 2007.
[84] Sanlakas v. Executive Secretary, G.R. No. 159085, February 3, 2004.
[85] NOLAN, *supra* note 51 at 29.
[86] *See e.g.* Basco v. Phil. Amusements and Gaming Corp., G.R. No. 91649, May 14, 1991.

branches of the state. On the contrary, the *Committee on Economic, Social and Cultural Rights* recognized through *General Comment No. 9* that the judiciary too is essential in the promotion of second-generation rights.[87]

The following section will establish the justiciability of social and economic rights in the Philippine legal framework. Two approaches will be forwarded: *Direct Application*, which domestically enforces the provisions of the ICESCR through incorporation and transformation; and *Indirect Application*, an interpretative approach where traditional rights are read to integrate socio-economic interests.[88]

I.B.1. Direct Application of Economic and Social Rights the International Covenant on Economic, Social and Cultural Rights as Law of the Land

Ideally, "international human rights standards should operate directly and immediately… thereby enabling individuals to seek enforcement of their rights before national courts and tribunals."[89] The justiciability of treaty provisions, in this case, that of the ICESCR, greatly hinges on the constitutional framework of the state in which its provisions are sought to be effected.

In a dualist system, ratified treaties have no direct validity in domestic law until they are incorporated or transformed into the domestic legal system. In the case of incorporation, the treaty as a whole becomes part of domestic law through a specific statute. A treaty is transformed into domestic law by amending or supplementing legislation without any specific reference to the treaty provisions.[90]

By virtue of Section 2, Article II of the 1987 Constitution, the Philippines "adopts the generally-accepted principles of international law as part of the law of the land." Through the *incorporation clause*, the Constitution changes the status of "generally accepted principles of international law" into Philippine law.[91] As penned by Chief Justice Panganiban in *Tañada v.*

[87] General Comment No. 9, ¶9.
[88] *Id.* at ¶13.
[89] *Id.* at ¶4.
[90] EIDE, *supra* note 8 at 84
[91] MERLIN MAGALLONA, THE PHILIPPINE CONSTITUTION AND INTERNATIONAL LAW 64 (2013).

Angara, by virtue of the doctrine of incorporation, the Philippines "is bound by generally accepted principles of international law, which are considered to be automatically part of our own laws."[92]

Whether the Philippines subscribes to a monist or dualist system is the eternal debate—a query the author will not attempt to settle. However, what is for certain is that the Duterte Administration appears to lean towards the former. In its response to concerns raised by the UNCESCR during its 59th session, the Philippines "assured the Committee that [the Philippines] domestic legal order provides for the direct application and appropriate measures (sic) that protect economic, social and cultural rights[.]"[93] It thus appears that, in constitutional provision and political preference, the Philippines favors the direct incorporation, and effectively the justiciability, of the ICESCR in its domestic system.

I.B.1.a. Economic, Social and Cultural Rights in the Municipal Legal Framework

1. The 1987 Constitution

Even in the absence of the *incorporation clause*, social and economic rights are not without basis. In both its constitutional and statutory framework, the Philippines enforces the rights enshrined in the ICESCR. The *Declaration of Principles and State Policies* commits the State to value the dignity of every human person and guarantee full respect for human rights,[94] to protect and promote the right to health[95] and the right to a balanced and healthful ecology.[96] Furthermore, Article XIII of the Constitution, on Social Justice and Human Rights, seeks to protect and enhance the right of all the people to human dignity, and reduce social, economic, and political inequalities.[97]

The Constitution's drafters envisioned social justice as the centerpiece of modern constitutional tradition.[98] The purpose of social justice is to provide an "economic and social

[92] Tañada v. Angara, G.R. No. 118295, May 2, 1997.
[93] Response of the Philippine Government *supra* note 34 at 1.
[94] PHIL. CONST., art. II, §11.
[95] *Id.* at art. II, §12.
[96] *Id.* at art II, §16.
[97] *Id.* at art. XIII, §1.
[98] Ma. Teresa F. Nieva, I RECORD CONST. COMM'N, 2 August 1986.

equilibrium" for the "realization of basic human rights, the enhancement of human dignity and effective participation in democratic processes." Principles of prosperity were precisely enshrined in the Constitution in recognition of the fact that "human rights… remain illusory without social justice."[99]

2. Statutory Framework

The justiciability of the ICESCR finds further basis in its provisions' *transformation* into domestic law.[100] In addition to the *incorporation clause* of the constitution, the Philippines has transmuted social and economic rights through legislation, albeit without necessarily invoking the language of the covenant. This is aptly observed through laws such as the *Responsible Parenthood and Reproductive Health Act of 2012*,[101] the *Health Research Act,*[102] the *Magna Carta of Health Workers*,[103] and R.A. 8344, which penalizes the refusal of hospitals and medical clinics to administer appropriate initial medical treatment and support due to non-payment of deposit. These laws juridify, and thus make justiciable, the social and economic right to health.[104]

3. Jurisprudence

Jurisprudence has historically recognized the justiciability of social and economic rights. As early as 1953, the Philippine Supreme Court pronounced in *Philippine Movie Pictures Workers' Association v. Premiere Productions, Inc.* that the right to labor "is deemed to be property within the meaning of the constitutional guarantees."[105] The Duterte administration itself invoked a laundry list of cases where the Supreme Court "applied the provisions of the [ICESCR],"

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[99] *Ibid*.
[100] General Comment No. 9, ¶6.
[101] An Act Providing for a National Policy on Responsible Parenthood and Reproductive Health [The Responsible Parenthood and Reproductive Health Act], Republic Act No. 10354 (2012).
[102] An Act Providing for the Promotion of Health Research and Development, Establishing for the Purpose the National Institutes of Health (NIH), Defining its Objectives, Powers and Functions, and for Other Purposes [Health Research and Development Act], Republic Act No. 8503 (1998).
[103] The Magna Carta of Public Health Workers, Republic Act No. 7305 (1992).
[104] ICESCR, art. 12.
[105] Philippine Movie Pictures Workers' Association v. Premiere Productions, Inc., G.R. No. L-56121, March 25, 1953.

such as *International School Alliance of Educators v. Quisumbing*,[106] which involved the right to just and favorable conditions of work;[107] *Central Bank Employees Association v. Bangko Central ng Pilipinas*,[108] which "[upheld] Article 2 of the Covenant;"[109] *Imbong v. Ochoa, Jr.*, where the Supreme Court unanimously upheld and recognized the right to health;[110] and *Leus v. Sto. Scholastica's College*, which safeguarded the right to labor and security of tenure.[111]

It is well to take note that the Constitutional Commission of 1986 enshrined social and economic rights in Article II and XIII of the 1987 Constitution. Though these were intended by the Constitution's drafters to be non-justiciable, many of these rights have been treated by the Supreme Court as self-executing.[112]

Justiciability and *self-executing norms* are separate and distinct concepts, yet are tightly intertwined. *Justiciability* refers to an actual case or controversy that is the proper subject of the court, while *self-executing* is the legal quality of being capable of application by courts without further elaboration.[113] The pattern in Philippine jurisprudence shows that justiciability and self-execution go hand-in-hand.[114]

In *Oposa v. Factoran inter alia*, the Court ruled that though the right to a balanced and healthful ecology is "found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter."[115] A "denial or violation of that right by the other who has the correlative duty or obligation to respect or protect the same gives rise to a cause of action." Likewise, in *Manila Prince Hotel v. Government Service Insurance System*, the Court ruled that Section 10,

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[106] G.R. No. 128845, June 1, 2000.
[107] Response of the Philippine Government *supra* note 34, 3.
[108] G.R. No. 148208, December 15, 2004.
[109] Response of the Philippine Government *supra* note 34, 3.
[110] G.R. No. 204819, April 8, 2014.
[111] G.R. No. 187226, January 28, 2015.
[112] *See e.g.* Legaspi v. Civil Service Commission, G.R. No. L-72119 *cf.* PHIL. CONST. art. II, §28; Resident Marine Mammals of the Protected Seascape Tañon Strait v. Reyes, G.R. No. 180771, 181527, April 21, 2015 *cf.* PHIL. CONST., art. II, §16; Oposa v. Factoran, G.R. No. 101083, July 30, 1993 *cf.* PHIL. CONST., art. II, §15; Imbong v. Ochoa, G.R. No. 204819, April 8, 2014 *cf.* PHIL. CONST. art. II, §12.
[113] General Comment No. 9, ¶10.
[114] *See e.g.* Valmonte v. Belmonte, G.R. No. 74930, February 13, 1989; Laguna Lake Development Authority v. Court of Appeals, G.R. No. 110120, March 16, 1994; and Antamok Goldfields Mining Company v. Court of Industrial Relations, G.R. No. L-46892, June 28. 1940.
[115] Oposa v. Factoran, G.R. No. 101083, July 30, 1993.

Art. XII of the 1987 Constitution—on Social Justice and Human Rights— "does not require any legislation to put it in operation. It is *per se* judicially enforceable."[116]

The author agrees with this approach. As provided in General Comment No. 9, courts should dispense with an *a priori* assumption that social and economic rights are non-self-executing.[117] Indeed, it has been jurisprudentially proclaimed that "unless it is expressly provided that a legislative act is necessary to enforce a constitutional mandate, the presumption now is that all provisions of the constitution are self-executing."[118]

I.B.2. Indirect Protection of Second-Generation Rights through Civil and Political Rights

The justiciability of social and economic rights has also been effected through their re-characterization as derivatives of civil and political rights.[119] By an expansive reading of the Bill of Rights, the proverbial first-generation right may be read to encompass second-generation rights.[120] Such an approach was adopted by the Philippine Supreme Court in *Wallem Maritime Services, Inc. v. NLRC*. The court recognized labor as a property right protected by due process guarantees.[121]

The line distinguishing civil and political rights from social and economic rights is blurred. A number of guarantees categorized as traditional rights have socio and economic implications, and vice versa.[122] The right to health may be argued as a derivative of the right to life,[123] the right to non-discrimination in the work force as a derivative of equality of the law,[124] and the right to trade unionism as a derivative of the civil and political right to association and free expression.[125] Indeed, the dual nature of rights was recognized by the Constitutional Commission with regard to

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[116] Manila Prince Hotel v. GSIS, G.R. No. 122156, February 3, 1997.
[117] General Comment No. 9, ¶11.
[118] Manila Prince Hotel v. GSIS, G.R. No. 122156, February 3, 1997.
[119] SHIVANI VERMA, JUSTICIABILITY OF ECONOMIC SOCIAL AND CULTURAL RIGHTS RELEVANT CASE LAW 3 (Geneva, 2005).
[120] EIDE, *supra* note 8 at 73
[121] Wallem Maritime Services, Inc. v. NLRC, 263 SCRA 174 (1996).
[122] NOLAN, *supra* note 51 at 36
[123] Quesada, Record of the Constitutional Commission of 1986, *supra* note 56.
[124] Victoriano v. Elizalde Rope Worker's Union, G.R. No. L-25246, September 12, 1974
[125] ICCPR, art. 26 *cf.* IESCR, arts 3, 7.

due process guarantees on property rights[126]—a right both civil and political, as well as social and economic in nature.

I.C. Conclusion

Human Rights embraces both liberty and prosperity. While the drafters of the 1987 Constitution intended to exclude social and economic rights from the courts absent legislation, legal developments in the form of treaties, constitutional provisions, and jurisprudence has elevated social and economic rights as justiciable rights. Clearly, fundamental guarantees place both liberty and prosperity beyond the vicissitudes of political controversies and the expediency of the passing hour.[127] Yet the question remains: From whom are these rights protected?

II. Old Doctrines, New Paradigms

II.A. The Old Paradigm: State Action Only Liability

During the deliberations of the 1987 Philippine Constitution, the drafters contemplated a Bill of Rights that would "govern the relationship between the individual and the State and not the relationship between private individuals."[128] The reason was "simple: Only the State ha[d] authority to take the life, liberty, or property of the individual."[129] Solely the Government was powerful, which if unlimited, was tyrannical.[130]

Note the irony. While "the great ordinances of the Constitution do not establish and divide fields of black and white,"[131] the *state action* threshold effects the converse; reducing penumbral questions of fundamental rights to monochromatic concerns. Essentially, liberty and prosperity is not an issue of substance, i.e. whether there was a violation of fundamental right; but one of form, i.e. whether the violation was the result of government action.

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[126] Bernas, Sponsorship Remarks, *supra* note 9.
[127] Philippine Blooming Mills Employment Organization v. Philippine Blooming Mills Co., Inc., 51 SCRA 189 (1973).
[128] Bernas, Sponsorship Remarks, *supra* note 9.
[129] Serrano, 323 SCRA 445 (Panganiban, *J.*, *separate opinion*).
[130] JOAQUIN G. BERNAS, S.J., CONSTITUTIONAL RIGHTS AND SOCIAL DEMANDS: NOTES AND CASES PART II (1997).
[131] Springer v. Government of the Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, *J., dissenting*).

There is an incongruity in addressing substantive rights with formal remedies. Structurally, the state action threshold is destined to fall short in grasping the expanse of constitutional guarantees. Such is aptly illustrated in *Duncan v. Glaxo*,[132] where petitioner Pedro Tecson was mandated by company policy to "voluntarily" resign from his employment for having entered into a marriage with an employee of a competing company.[133] Tecson argued that this violated his right to equal protection. The Court categorically rejected this contention explaining that "the equal protection clause erects no shield against merely private conduct."[134] The employer-employee relationship being between private persons, the Bill of Rights could not be applied.

Duncan[135] illustrates the state action paradox. In protecting individual rights from government action alone, the doctrine shields non-state actors from liability for private evils which are just as coercive as public wrongs. In this case, Tecson's right of autonomy and freedom to enter into marriage—an institution specially protected under the 1987 Constitution[136]—was subdued by management prerogative. This is especially perplexing considering that labor contracts are impressed with *public interest* and are easily the subject of government regulation.[137]

II.B. Paradigm Shift

II.B.1. The New Paradigm: Private Evils, the New Face of Abuse

A paradigm shift is described as a fundamental change in underlying assumptions. The Philippines continuously undergoes this phenomenon, witnessing the clash of old doctrines with new paradigms. While the old paradigm was premised on state-monopolized power, modern case law paints a different picture for the Philippine minutiae; illustrating violations of civil, political,

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[132] *Duncan*, 438 SCRA 343.
[133] Oscar Franklin B. Tan, *Articulating the Complete Philippine Right to Privacy in Constitutional and Civil Law: A Tribute to Chief Justice Fernando and Justice Carpio*, 82 PHIL. L.J. 78, 102 (2008). "The contract provision on marrying a competitor's employee provided: 'You agree to disclose to management any existing or future relationship you may have, either by consanguinity or affinity with co-employees or employees of competing drug companies. Should it pose a possible conflict of interest in management discretion, you agree to resign voluntarily from the Company as a matter of Company policy.'"
[134] *Duncan*, 438 SCRA 343.
[135] *Id.*
[136] PHIL. CONST., art. XV, §2.
[137] *See e.g.* Manila Electric Co. v. National Labor Relations Commission, 175 SCRA 277 (1989).

social and economic rights by private individuals. *Duncan*[138] deals with the conflict of a private employer's management prerogative versus an employee's right to autonomy and equality in employment. *Victoriano v. Elizalde Rope Worker's Union*[139] is about a labor union's threats against its members' religious liberty, touching on free trade unionism enshrined in the ICESCR. *Zulueta v. CA*[140] concerns a spouse's conduct of a warrantless search and seizure under the veneer of marital privacy. *Alcuaz v. Philippine School of Business Administration*,[141] among others, involves a private school's violation of their employees' and students' rights to due process and free expression vis-à-vis the social and economic right to work and education.[142] Each of these cases involved private intrusions into fundamental rights—the new paradigm.

Private threats to public rights are all-the-more pervasive in the advent of government deregulation and privatization. Where the state has ceded its powers to the market forces, it opens the floodgates to new sources of abuse and threats to liberty and prosperity.[143] Corporate powers have been used to subvert principles of individual autonomy and impair relationships of transcendental importance.[144] What is more, the inherent economic inequality between labor and management has been given statutory and jurisprudential recognition.[145] Today, the evil sought to be avoided—government abuse—has well passed on to the invisible yet coercive hand of the market forces.[146]

Clearly, the private sphere is no longer the benign domain it was purported to be. The new paradigm has brought with it substantial changes in the Philippine socio-political landscape that necessitates a concomitant modification in legal approach. Contrary to the presumptions of the past, the economic powers of private individuals may now prevail over the sovereignty of State[147]—what more the autonomy of the lone individual.

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[138] *Duncan*, 438 SCRA 343.
[139] Victoriano v. Elizalde Rope Worker's Union, 59 SCRA 54 (1974) *cf.* ICESCR, art. 8.
[140] Zulueta v. Ct. of Appeals, 253 SCRA 699 (1996).
[141] 161 SCRA 7 (1988).
[142] ICESCR, arts. 6, 7, 8, 13.
[143] *Serrano*, 323 SCRA 445 (Panganiban, *J*., *separate opinion*).
[144] *Duncan*, 438 SCRA 343.
[145] Ledesma v. National Labor Relations Commission, 537 SCRA 358 (2007). *citing* JPL Marketing Promotions v. Ct. of Appeals, 463 SCRA 136 (2005).
[146] Artemio V. Panganiban, *Old Doctrines and New Paradigms*, 75 PHIL. L.J. 513, 2001, 519.
[147] AGABIN, MESTIZO *supra* note 4, 289.

II.B.2. Blurring of the Public/Private Spheres

a. The Living Constitution

The traditional division between the public and private spheres is no longer a reliable threshold. The comingling of the two spheres has engendered the rise of the quasi-public and quasi-private domains where it is well-nigh impossible to determine where the realm of private ends and public begins.

The quasi-public refers to that situation where public functions are assumed by private actors and spaces.[148] In *Marsh v. Alabama*,[149] private spaces and relations were made the subject of constitutional limitations when opened to the general public, or upon the assumption of public responsibilities. Similarly, the Philippine Supreme Court has ruled that when private property is used for a public purpose, it ceases to be *juris privati* only and becomes subject to public regulation.[150]

On the other hand, quasi-private property refers to property that "is publicly owned but is not open for public use."[151] Take government owned airports, such as the Ninoy Aquino International Airport, for example. Though it is "devoted to public use and thus are properties of public dominion,"[152] it is considered quasi-private as it is not open to public access.[153] There being only a *selective access* rather than a *general access* to the MIAA properties, the same is considered as a non-public forum and thereby, a quasi-private entity.[154]

The quasi-public and quasi-private spheres have blurred the once crisp boundaries of the *distinction.* The state has delegated traditional government functions to private actors through public-private partnerships and outright privatization.[155] Private actors are emancipated from state

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[148] Lloyd Corp. v. Tanner, 407 U.S. 551, 561-2 (1972).
[149] Marsh v. Alabama, 326 U.S. 501-2, 505 (1946).
[150] Republic v. Manila Electric Co., 391 SCRA 700 (2002).
[151] P. M. Schoenhard, *A Three-Dimensional Approach to the Public and Private Distinction*, 2008 UTAH L. REV. 635, 642 (2008).
[152] Manila Int'l Airport Authority v. Ct. of Appeals, 495 SCRA 591 (2006).
[153] Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 73 U.S. 788, 790, 802 (1985).
[154] Arkansas Educational Television Commission v. Forbes, 23 U.S. 666, 669-72 (1998).
[155] Republic of the Philippines Public-Private Partnership Center, *What is PPP?*, *available at* https://ppp.gov.ph/?page_id=27574.

control and are engaged in traditionally public functions.[156] In that same breath, government entities too have delved into proprietary functions.[157]

Legal experts have gone as far as to say that even the form of law has changed, springing from private arrangements rather than government legislation.[158] Today, the source of law has shifted "from political to economic power—from the people as sovereign to private individuals as economic units."[159]

The revitalized private sphere has evolved to become a real threat to constitutional rights just as much as any government act could. Clearly, the entanglement of the spheres is a formula for inevitable conflict which the traditional *distinction* is neither intended nor poised to address. Even the Constitution itself must adapt to the context in which it finds its application, lest we settle with a stalemate due to the impossibility of foreseeing novel issues that will inevitably arise.[160] As opined by Chief Justice Panganiban:

> Constitutions are designed to meet not only the vagaries of contemporary events. They should be interpreted to cover even future and unknown circumstances. It is to the credit of its drafters that a Constitution can withstand the assaults of bigots and infidels but at the same time bend with the refreshing winds of change necessitated by unfolding events… The Constitution must be quintessential rather than superficial, the root and not the blossom, the base and framework only of the edifice that is yet to rise. It is but the core of the dream that must take shape, not in a twinkling by mandate of our delegates, but slowly in the crucible of Filipino minds and hearts, where it will in time develop its sinews and gradually gather its strength and finally achieve its substance. In fine, the Constitution cannot, like the goddess Athena, rise full-grown from the brow of the Constitutional Convention, nor can it conjure by mere fiat an instant Utopia. It must grow with the society it seeks to re- structure and march apace with the progress of the race, drawing from the vicissitudes of history the dynamism and vitality that will keep it, far from becoming a petrified rule, a pulsing, living law attuned to the heartbeat of the nation.[161]

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[156] H. Shamir, *Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State*, 5 Theoretical Inq. L. 1, 4-5 (2014).
[157] Liban v. Gordon, 593 SCRA 68 (2009).
[158] AGABIN, MEZTIZO *supra* note 4, at 282, *citing* ROBERT SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY, 219 (1982).
[159] *Id.* at 282.
[160] *See* Artemio V. Panganiban *Safeguard Liberty, Conquer Poverty, Share Prosperity (Part Two – For the Legal Profession)*, Luncheon Fellowship of the Philippine Bar Association held, at the Tower Club, Makati City, March 26, 2014, available at https://cjpanganiban.com/2014/03/26/safeguard-liberty-conquer-poverty-share-prosperity-2/. *See also* R. K. Winter, *Constitutional Adjudication: The Interpretative View on The Bill of Rights: Original Meaning And Current Understanding* 25, Eugene W. Hichkok, Jr. ed., 1991.
[161] Tañada v. Angara, 272 SCRA 18 (1997).

It is said that the Constitution is but a work in progress, and will inevitably yield to change,[162] for while the meaning of constitutional guaranties never varies, the scope of its application must expand and contract with the refreshing winds of change.[163] In an ever-changing world, it is impossible that it should be otherwise.[164]

b. Public Duties of Non-State Actors

The public and private spheres have blurred most visibly in the realm of international law. That phenomenon is best illustrated by the emergence of the fields of *International Criminal Law* (ICL) and *Business and Human Rights* (BHR), both of which seek to bind non-state actors—entities that are, quite simply, not a state.[165] For the purposes of space, these two fields of law will be utilized in unison.

It was famously declared by the *Nuremberg International Military Tribunal* that:

> [C]rimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced… Individuals have international duties which transcend the national obligations of obedience imposed by the individual state."[166]

Public International Law was once state-centric,[167] yet has now penetrated into the realm of *individual* liability. Seventy years after *Nuremburg*, and twenty years following the adoption of the Rome Statute establishing the International Criminal Court (ICC),[168] it is settled doctrine that state actors and non-state actors alike bare the risk of incurring individual criminal responsibility.[169] Indeed, in all four situations brought within the jurisdiction of the ICC by self-referral[170]—that is, the Situations in Uganda, the Central African Republic, the Democratic

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[162] JOAQUIN G. BERNAS, S.J., A LIVING CONSTITUTION: CONSTITUTIONAL ISSUES ARISING DURING THE TROUBLED GLORIA ARROYO PRESIDENCY 42 (2010).
[163] Tañada v. Angara, G.R. No. 118295, 272 SCRA 18 (1997).
[164] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).
[165] Clapham, 'Non-State Actors' in MOECKLI ET AL (2nd ed.), INTERNATIONAL HUMAN RIGHTS LAW (Oxford University Press, 2014)531.
[166] *Judgment of the Nuremberg International Military Tribunal*, 1946 (1947) 41 AJIL 172.
[167] Clapham, *supra* note 165 at 532.
[168] 2187 U.N.T.S. 90 (adopted 17 July 1998, entered into force 1 July 2002).
[169] *Id.* at art. 25, *cf.* Article 7(2)(a).
[170] *Id.* at art. 13(a).

Republic of the Congo, and Mali—the governments concerned seek to have *non-state actors* tried before the international criminal tribunal.[171]

Yet this is not to say that the role of non-state actors is isolated to perpetration. On the contrary, it is in fact the paradox how non-state actors embody both the capacity to violate human rights and the potential for their protection.[172] With both roles in mind, in 2011 the United Nations Human Rights Council unanimously endorsed the *United Nations Guiding Principles on Business and Human Rights*, thus providing the first global standard for preventing and addressing adverse human rights linked to business activity.[173] These principles recognize not only the states' "obligations to respect, protect and fulfill human rights and fundamental freedoms[,]" but the "role of business enterprises… to comply with all applicable laws and to respect human rights[.]"[174]

Both ICL and BHR recognize that even private actors bare public duties.[175] Interestingly, both issues are put front and center in the campaign for *international corporate criminal liability*, which recognizes how "criminal law provides a powerful and appropriate tool to deter and punish companies… [for] gross human rights abuses amounting to crimes under international law."[176] The Office of the Prosecutor of the ICC has itself announced how both fields of law find themselves tightly entwined:

> [T]he prosecutor believes that investigation of the financial aspects of the alleged atrocities will be crucial to prevent future crimes and for prosecution of crimes already committed. If the alleged business practice continues to fuel atrocities, these would not be stopped even if current perpetrators were arrested and prosecuted.[177]

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[171] Clapham, *supra* note 164, 532. *See e.g. Situation in the Republic of Kenya*, No. ICC-01/09-19, Decision on the Authorisation of Investigation, Pre-Trial Chamber, 31 March 2010, para. 93; *Prosecutor v. Ruto et al*., No. ICC-01/09- 01/11-373, Confirmation Decision, Pre-Trial Chamber, 23 January 2012, para. 185; *Prosecutor v. Ntaganda*, No. ICC-01/04-02/06-309, Decision on the Charges, Pre-Trial Chamber, 9 June 2014, paras. 14 et seq., *See also* Hall & Ambos, 'Article 7 Crimes Against Humanity' in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (Beck, 2008), 246.
[172] Clapham, *supra* note 164 at 532
[173] UN Doc. A/HRC/17/31 (Geneva, Switzerland: United Nations, 2011).
[174] *Id.* at "Guiding Principles."
[175] John Ruggie, *Presentation of Report to United Nations Human Rights Council*, Geneva (2011).
[176] International Commission of Jurists, *Corporate Complicity & Legal Accountability, Criminal Law and International Crimes Volume 2: Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes* 6 (2008).
[177] International Criminal Court, Communications Received by the Office of the Prosecutor of the ICC, Press Release No. pids.009.2003-EN, 3-4 (16 July 2003).

In the past, there was "that belief that economics or business and human rights cannot work together"[178]— as realms that were completely distinct, never to meet.[179] Both ICL and BHR do away with that antiquated notion. In the age of globalization and privatization, non-state actors "play an increasingly important role in all levels of public life"[180]—for better or for worse.

II.B.3. Tripartite Duties in Philippine Municipal Law

In the realm of international obligation, the preservation of liberty and prosperity imposes three duties— i.e. the duties to respect, protect, and fulfill.[181] The *Maastricht Guidelines* provide guidance:

> The *obligation to respect* requires States to refrain from interfering with the enjoyment of economic, social and cultural rights… The *obligation to protect* requires States to prevent violations of such rights by third parties. The *obligation to fulfil* requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.[182]

The duty to respect embodies the traditional *state action doctrine*, as opposed to *state inaction liability.* It is a negative duty, and requires that the *state* does not *impair* fundamental rights without due process of law.[183] That conservative view is broadened through the obligations to protect and fulfill; departing from the orthodox thought that public rights are affected by public actors alone.[184] In the face of new paradigms, the duty to protect requires the state to prevent not only public wrongs, but private evils. Lastly, the obligation to fulfill is the duty to *facilitate* and *provide* basic needs.[185]

Unfortunately, Philippine constitutional tradition has taken a narrow view on state obligation: government abstinence.[186] The state merely has a negative duty to refrain from

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[178] Sta. Maria, *supra* note 57, 1.
[179] Elizabeth Aguiling-Pangalangan, 'Foreword' in VENERACION & TRIPODI, PEOPLE AND PROFITS: A GUIDE ON BUSINESS AND HUMAN RIGHTS FOR NGOS i (2017).
[180] *Ibid.*
[181] Maastricht Guidelines, ¶6.
[182] *Ibid.*
[183] *See DeShaney v. Winnebago*, 489 U.S. 189, 196-7 (1989). (hereinafter, *Deshaney*).
[184] EIDE, *supra* note 8 at 22.
[185] *Id.* at 24.
[186] *Id.* at 63.

interfering in liberty and prosperity.[187] By adopting *state action* as the ultimate threshold in enforcing fundamental rights, the Philippine legal system was neither contemplated nor poised for the duties to protect and fulfill.

II.C. Conclusion

The orthodox *state action doctrine* is incompatible with the *Maastricht Guidelines* on two points: first, the former contemplates violations by non-state actors alone, and second, it envisages only action, as opposed to omission. As established earlier, the advent of ICL and BHR precisely came to be in recognition of private perils to public rights.

The Philippines continues to apply old doctrines in new paradigms. The foregoing discussion has provided two justifications for the abandonment of the *state action* threshold to give way to the *Maastricht Guidelines'* tripartite duties: *first*, because reserving fundamental guarantees fails to guard against the private evils rampant in new paradigms; and *second*, because the *public/private distinction* is no longer a reliable standard to delineate state from non-state actors. Abandoning the *state action* requirement is key in safeguarding liberty and prosperity. In doing so, the Philippine legal framework would look beyond the duty to respect, and facilitate the incorporation of positive state duties to protect and fulfill.

III. Liberty and Prosperity in the Private Sphere: Various Approaches

There is no hard and fast rule when it comes to slippery constitutional questions.[188] The *state action doctrine* is of no exception. In the face of new paradigms, the Philippine Supreme Court has grappled with unshackling the remnants of constitutional tradition. However, rather than abandoning traditional doctrine *per se*, the Court has circumvented the *state action doctrine* by establishing exceptions to the general rule.

The following discussion will explore jurisprudential bases to safeguard public rights from private intrusions.

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[187] NOLAN, *supra* note 51 at 25.
[188] Chavez v. Gonzales, 545 SCRA 441 (2008).

III.A. Traditional Exceptions to State Action

U.S. case law has recognized a number of exceptions to the state action doctrine. These include the tests of Public Function, State Compulsion, Nexus, State Agency, Entwinement, Symbiotic Relationship, and Joint Participation.[189] While there is no single test in imputing public character to ostensible private matters, each of these exceptions involve some form of government entanglement[190]—the main consideration in Philippine jurisdiction.[191]

In *Duncan,*[192] the Philippine Supreme Court expressly limited the exceptions to traditional doctrine to cases of government entwinement or involvement. *Duncan*[193] notwithstanding, the listed tests recognized in foreign jurisprudence may be utilized in the Philippine legal system, but only to evidence an "entwinement" or "involvement" of the State.

III.B. Circumventing the State Action Threshold

III.B.1. Changing the Subject: Public Interest as State Action

Though the principle of *state action* is entrenched in legal doctrine, it is compromised in practice. The Court has many-a-time applied constitutional standards to private actors by modifying either the nature of the right invoked or the character of the parties involved. In *Marsh,* [194] the U.S. Supreme Court modified the status of a company-owned town of Chicksaw in rural Alabama from private to public. The Court ruled that when private actors or spaces assume a *public function*, then the same would be bound by constitutional limitations.[195] Philippine jurisprudence has adopted a similar doctrine, but of a lower threshold; requiring only a *public interest* to apply Bill of Rights guarantees to private relations.[196]

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[189] Julie K. Brown, *Less is More: Decluttering the State Action*, 73 MO. L. REV. 561, 565 (2008).
[190] *Id.* at 566.
[191] *Duncan*, 438 SCRA 343.
[192] *Id.*
[193] *Id.*
[194] Marsh v. Alabama, 326 U.S. 501-2, 505 (1946).
[195] *Id*.
[196] *See e.g.* Republic v. Manila Electric Co., 391 SCRA 700 (2002).

In a series of cases involving private schools, the Supreme Court invoked *public interest* to justify the application of the Bill of Rights despite the absence of state action. In *Alcuaz*, students of the PSBA were barred from re-enrolling for the subsequent semester because of their participation in student protests. The Court decided for the respondent-school under the *termination of contract theory*, i.e. that a student is admitted on a semester basis alone. Hence, after the close of the contracted semester, the PSBA no longer had any existing obligations to their students.[197] The Court concluded that "the charge of denial of due process [was] untenable. It is a time-honored principle that contracts are respected as the law between the contracting parties."[198]

Justice Abraham F. Sarmiento dissented to *Alcuaz*. He opined that education is "more than a contract" and is "impressed with a public interest."[199] Hence, it is a matter of state policy, a policy enshrined in the Constitution, to "protect and promote the right of all citizens to qualify education at all levels and shall take appropriate steps to make such education accessible to all."[200]

Justice Sarmiento's dissent would later become the majority opinion of the court, controlling till this day. In *Non v. Danes II*, [201] petitioners-students of Mabini College were prohibited by their school from re-enrolling due to their participation in student-mass actions against the academic institution. Contrary to *Alcuaz*, the Supreme Court found that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The contract between school and student being one imbued with *public interest* "the authority of educational institutions over the conduct of students […] cannot go so far as to be violative of constitutional safeguards."[202]

The application of constitutional limitations to private academic institutions is no novel issue in the Philippines. As embodied in case law, the Technological Institute of the Philippines,[203] Gregorio Araneta University Foundation,[204] National University,[205] Ateneo de Manila

[197] Alcuaz, 161 SCRA 7.
[198] *Id*.
[199] *Id.* (*dissenting, J.,* Sarmiento).
[200] *Id*.
[201] Non v. Danes II, 185 SCRA 523 (1990).
[202] *Id.*
[203] Villar v. Technological Institute of the Philippines, 135 SCRA 706 (1985).
[204] Arreza v. Gregorio Araneta Univ. Foundation, 137 SCRA 94 (1985).
[205] Guzman v. National Univ., 142 SCRA 699 (1986).

University,[206] and De La Salle University[207] have been the subject of the Bill of Rights. This string of case law shows how the Philippine jurisprudence has circumvented state action as a *sine qua non* to Constitutional protections by re-characterizing ostensibly private relations as public matters under the auspices of *public interest*.

III.B.2. Modifying the Right: Extra-Constitutional Guarantees

The *state action* requisite may be circumvented by modifying the nature of the right invoked. In *Serrano*, [208] the Court ruled that the failure to observe the "notice requirement" enshrined in the Labor Code was not a violation of constitutional due process because Constitutional rights do not apply to the exercise of private power of the employer.

In his separate opinion, Chief Justice Panganiban maintained that employees are entitled to due process from their employer by virtue of the Constitution *per se*, and not on the strength of the Labor Code alone. Indeed, the "Constitution does not say that the right cannot be claimed against private individuals and entities." Hence, "[a]n objective reading of the Bill of Rights clearly shows that the due process protection is not limited to government action alone. The Chief Justice continued:

> [T]raditional doctrine holds that constitutional rights may be invoked only against the State. This is because in the past, only the State was in a position to violate these rights, Including the due process clause. However, with the advent of liberalization, deregulation and privatization, the State tended to cede some of its powers to the "market forces." Hence, corporate behemoths and even individuals may now be sources of abuses and threats to human rights and liberties. I believe, therefore, that such traditional doctrine should be modified to enable the judiciary to cope with these new paradigms and to continue protecting the people from new forms of abuses. Indeed, the employee is entitled to due process not because of the Labor Code, but because of the Constitution. Elementary is the doctrine that constitutional provisions are deemed written into every statute, contract or undertaking.[209]

Likewise, Chief Justice Puno forwarded the theory of *private due process* in opining how "constitutional rights of labor should be safeguarded against assaults from both government and private parties."

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[206] Ateneo de Manila Univ. v. Ct. of Appeals, 145 SCRA 100 (1986).
[207] De La Salle Univ., Inc. v. Ct. of Appeals, 541 SCRA 22 (2007).
[208] *Serrano*, 323 SCRA 445.
[209] *Serrano*, 323 SCRA 445 (Panganiban, *J*., *separate opinion*).

Serrano[210] was later modified in *Agabon v. National Labor Relations Commission*[211] and *Abbott Laboratories v. Alcaraz*[212] which created the novel standards of *statutory* due process, i.e. due process founded on the Labor Code, and *contractual* due process, i.e. due process founded on the terms of a labor contract. According to these latter cases, violation of the notice requirement by a private employer may violate the right to due process, albeit one sourced extra-constitutionally.

The author submits that the distinctions among and between constitutional, statutory, and contractual due process are more apparent than real. What is alluded to by "statutory" or "contractual" due process is merely "what" process is due, rather than "from whom" it is due. Hence, notwithstanding its provenance, due process holdings in labor law are in fact no different from constitutional law. Ultimately, it is still the constitutional requirement that "no person… be deprived of life, liberty or property without due process of law" that is invoked, the Labor Code and labor contract merely defining what that process is, i.e. notice and hearing, inter alia.[213]

Agabon and *Abbott* play both sides of the argument. While recognizing the need for due process within the private sphere, the Court re-characterized the same as mere statutory or contractual right; separate and distinct from fundamental constitutional rights. In making this delineation, the Court kept intact the traditional doctrine which requires prior government action, but in that same breath extended fundamental protections against private actors.

While worth celebrating, *Agabon* and *Abbott* come with their own caveat. As opined by Chief Justice Panganiban in his opinion in *Serrano*, the Court ignores precedence recognizing one's employment as a right protected by constitutional due process protections *per se*.[214] Indeed, in *Philippine Movie Pictures Workers' Association*, recognized that "the right of a person to his labor is deemed to be property within the meaning of the constitutional guarantees[.]"[215] Here, the constitutional guarantee was directly applied to private economic power.

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[210] *Serrano*, 323 SCRA 445.
[211] Agabon v. National Labor Relation Commission, 442 SCRA 573 (2004).
[212] Abbott Laboratories v. Alcaraz, 701 SCRA 682 (2013).
[213] Nitto Enterprises v. National Labor Relations Commission, 248 SCRA 654 (1995).
[214] *Serrano*, 323 SCRA 445 (Panganiban, *J*., *separate opinion*), *citing* Wallem Maritime Services, Inc. v. Nat'l Lab. Rel. Comm'n, 263 SCRA 174(1996).
[215] Philippine Movie Pictures Workers' Association v. Premiere Productions, Inc., G.R. No. L-56121, March 25. 1953.

III.B.3. Constitutional Construction: Black Letter Law

There are two ways to interpret the Constitution: the originalist approach, where the Constitution is read "according to the original intent of the framers, regardless of the dire consequences on current and future events[,]"[216] and the liberal or progressive approach, which construes the charter as a "living Constitution; one that grows with time, solves the vagaries of the present and anticipates the needs of the future."[217] The author takes the view that lawyers and jurists alike are more than mere social technicians, but "social engineers who courageously fix their gaze on the underlying principles and overarching aspirations of the Constitution[.]"[218] With this in mind, the progressive approach is adopted.

The law must be understood not only by "the letter that killeth but by the spirit that giveth life."[219] To that end, Philippine jurisprudence adopts both the *verba legis* and *ratio legis* rules of interpretation, the latter used in the face of textual ambiguities.[220] It is the author's submission that either approach supports the conclusion that constitutional protections may be applied within the private sphere.

The obsolescence of the state action threshold finds basis within the four corners of the Constitution itself.[221] A *verba legis* reading of the Bill of Rights shows that government action is not a *sine qua non* to its application.[222] The Due Process clause, for example, merely provides that no person shall be deprived without due process of law, yet fails to distinguish between public or private impairments.

But how reliable is a plain meaning interpretation of the Constitution? Philippine constitutional law having its roots in American constitutional tradition; the case of *Barron v. Baltimore* provides guidance.[223]

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[216] *See* Panganiban, *supra* note 159. *See also* Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909 (1988).
[217] *Ibid*.
[218] *Ibid.*
[219] *Civil Service Commission v. Cortes,* G.R. No. 200103, Apr. 23, 2014.
[220] Francisco, Jr. v. Nagmamalasakit na mga Manananggol ng mga Manggagawang Pilipino, Inc, November 4, 2003.
[221] *See Serrano*, 323 SCRA 445 (Panganiban, *J*., *separate opinion*).
[222] *Ibid.*
[223] Barron v. Mayor & City Council of Baltimore, 32 U.S. 243 (1833).

Barron is the first in U.S. case law which dealt with the breadth and scope of the Bill of Rights. Here the U.S. Supreme Court distinguished between Federal Government and State Government liability under the Takings clause of the Fifth Amendment. The Court unanimously decided that when the Constitution "intended to act on State power, words [were] employed which directly express[ed] that intent". Unless expressly provided, the Bill of Rights would not apply to the State government.

The U.S. Supreme Court adopted a plain meaning interpretation of the Constitution, similar to the *verba legis* rule of interpretation utilized in the Philippine legal system. Simply put, "if the words are clear, the words should be followed."[224] Absent a "No State shall" clause, *Barron* ruled that only the U.S. Federal Government was bound. As ruled in *Chicago Co. v. Chicago,* it was not until the ratification of the Fourteenth Amendment in 1868, through the U.S. *incorporation clause*, that the Bill of Rights was wholly applied to state governments.[225]

U.S. jurisprudence sheds light on Philippine notions of state action. In both *Barron* and *Chicago*, the Court took a literal interpretation of the constitution. Similarly, the Philippine Due Process clause, not having distinguished between government acts and private acts, should apply without distinction.

Admittedly, abandoning the state action doctrine through a literal application of the Constitution would be repugnant to the intent of its drafter's. Yet the Philippine Supreme Court has ruled that the proceedings of the constitutional convention are not controlling. They merely reflect the views of the individual members of the Commission, which may be resorted to amidst ambiguity. Hence it is "safer to construe the constitution from what appears upon its face" and "how it was understood by the people adopting it [rather] than in the framer's understanding."[226]

III.B.4. Constitutional Construction: The Spirit that Giveth Life

The *state action doctrine* was expressly adopted by the U.S. Supreme Court in 1883 through the *Civil Rights Cases*. About a century later, the Philippine Supreme Court echoed that

[224] A. T. Baviera, "Teaching Civil Law in the Grand Manner", IN THE GRAND MANNER: LOOKING BACK, THINKING FORWARD 62 (Danilo L. Concepcion et al. eds., 2012).
[225] Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U.S. 226, 227 (1897).
[226] Civil Liberties Union v. Executive Secretary, 194 SCRA 317 (1991).

doctrine in *Marti* where the constitutional right against unlawful search and seizure vis-à-vis the exclusionary rule were the subject of judicial scrutiny.

While conducting a routine procedure, Mr. Job Reyes, the proprietor of a private packaging company, noticed an odor emitting from one of the boxes consigned to him. Suspecting its contents to be cannabis, he sought the aid of the police and, in their presence, opened the boxes which revealed dried marijuana leaves. The accused, Andre Marti, contended that the contraband found was inadmissible as evidence, having been obtained without a warrant. The Court categorically rejected this claim by citing the *state action doctrine*. The search, having been made by a private actor and for a private purpose, constitutional guarantees could not apply.

The same issue was brought before the court in *Zulueta*, but resulted in an opposing conclusion. The clandestine love letters between Alfredo Martin and his paramours were obtained by his wife, Cecilia Zulueta, who had ransacked her husband's office. Similar to *Marti*, Alfredo claimed that these correspondences were inadmissible as evidence. Under *Marti*, the case would have been dealt with as a matter squarely within the private sphere, hence excluding the application of the Bill of Rights. However, *Zulueta* held that "any violation of [the Constitutional right to privacy] renders the evidence obtained inadmissible for any purpose in any proceeding." The court reasoned that the:

> intimacies between husband and wife do not justify any one of them in breaking the drawers and cabinets of the other and in ransacking them for any telltale evidence of marital infidelity. A person, by contracting marriage, does not shed his/her integrity or his right to privacy as an individual and the constitutional protection is ever available to him or to her.[227]

The *state action* threshold was set aside in *Zulueta*. Instead, the court took into consideration Cecilia's underlying justification, or lack thereof.[228] Dissimilar to *Marti*, the Court ruled on the substance of the right, i.e. whether the ransacking was justified; rather than form, i.e. whether the occurrence was the product of government action.

[227] *Zulueta*, 253 SCRA 699.
[228] *Ibid.*

III.C. Conclusion

The *state action doctrine* is the threshold only in principle. In practice, jurisprudence shows that the courts have bent over backwards to accommodate new paradigms under the time-honored doctrine's inflexible standards. In some cases, Bill of Rights protections were enforced against ostensibly non-state actors "impressed with public interest," while other cases expanded due process guarantees under the veneer of statutory or contractual stipulation.

Historically, only *Zulueta* has extended Bill of Rights guarantees to non-state actors without qualifying the private nature of the conflict. Though aberrant in Philippine jurisprudence, *Zulueta* is undoubtedly a step in the right direction. The preservation of the ideals of liberty, equality and security against the assaults of opportunism,[229] requires an analysis beyond the *public/private distinction.* Where private evils are as coercive as public wrongs, the *state action doctrine* fails to justify its relevance.

Justice Oliver Wendell Holmes Jr. maintained that the "Blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."[230] In the Philippine legal system, we need not choose between one and the other. Both the letter that kills and the spirit that gives life support the conclusion that liberty and prosperity should not be reserved for public actors alone. As forwarded by Chief Justice Panganiban, an "objective reading of the Bill of Rights clearly shows that the due process protection is not limited to government action alone. The Constitution does not say that the right cannot be claimed against private individuals and entities."[231] Likewise, the courts would be working toward the spirit of the law in piercing the veil of state action and applying constitutional protections in private relations. Absent any express constitutional prohibition on applying fundamental rights to private wrongs, there exists sufficient basis to abandon the *state action* threshold. The Constitution's silence is its imprimatur to a more equitable interpretation of fundamental guarantees.

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[229] *Philippine Blooming Mills Employment Organization*, G.R. No. L-31195, June 5, 1973.
[230] Oliver Wendell Holmes, Jr., *The Path of the Law,* 10 HARV. L. REV. 457, 469 (1897).
[231] *Serrano*, 323 SCRA 445 (Panganiban, *J*., *separate opinion*).

IV. Judicial Activism and the Counter-Majoritarian Difficulty

Under the 1987 Constitution, the judiciary stands as the bulwark of fundamental rights.[232] The UNCESCR emphasized in *General Comment No. 3* that the adoption of legislative measures "is by no means exhaustive of the obligations of States parties."[233] Indeed, the safeguard of liberty and nurture prosperity requires more than juridification, it necessitates a shift in judicial thought.[234]

But that approach is not without contention. The foregoing discussion, dedicated to redefining the role of the judicial branch in protecting fundamental rights, is met by counter-majoritarian objection, argues that the "creation" of justiciable rights and the expansion of fundamental protections against non-state actors is a legislative, political, function, and not one for the apolitical courts. By expanding the law beyond its intended confines, the will of the people, acting through elected representatives, is thereby substituted with the will of the judiciary—appointed officials.

This chapter seeks to identify a place for the activist court in a system of separation of powers, though not without reservation. Hand-in-in, this chapter will likewise temper judicial activism with judicial restraint.

IV.A. Judicial Activism vis-à-vis the Separation of Powers

The principle of separation of powers ordains that the three great branches of government—the executive, legislative, and judicial branches— have "exclusive cognizance of and is supreme in matters falling within its own 'constitutionally allocated sphere.'"[235] As penned by Chief Justice Panganiban in *Santiago v. Guingona*,[236] the Constitution categorizes the functions of the state according to their nature:

> 1) The making of laws, which are allocated to the legislative department;

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[232] Economic and Social Council, Implementation of the International Covenant on Economic, Social and Cultural Rights: Periodic Reports of the Philippines, E/C.12/PHL/, 7 Sept. 2007, ¶30.
[233] General Comment No. 3: The Nature of States Parties, UNCESCR, E/1991/23, 4 Dec. 1990, ¶4.
[234] *Id.* at ¶8.
[235] Santiago v. Guingona, G.R. No. 134577, (1998).
[236] *Id*.

> 2) The enforcement of such laws and of judicial decisions applying and/or interpreting the same, which belong to the executive department; and
> 3) The settlement of disputes, controversies or conflicts involving rights, duties or prerogatives that are legally demandable and enforceable, which are apportioned to courts of justice.[237]

In the Philippine tripartite framework, the creation of demandable rights is not for the courts, but for the legislature. Counter-majoritarian critique advances the view that a judicial determination of justiciability and the enforcement of liberty and prosperity against non-state actors would expand the law beyond its intended limits. Judicial review, all-the-more judicial activism, is thus denounced as undemocratic in substituting the will of "the people" with that of the unelected judge.[238]

The counter-majoritarian difficulty collides with the courts' duty to protect and enforce constitutional rights.[239] As pronounced in *Tañada v. Angara*,[240] judicial review is not judicial superiority, but constitutional supremacy. As penned in Chief Justice Panganiban's seminal opinion, the Philippine judiciary is not merely permitted, but mandated to be activist courts:

> The Constitution imposes this intervention as a duty, not just as a power or as an authority. A power can be relinquished but a duty cannot, under any circumstance, be evaded. The judiciary, especially the Supreme Court, must uphold the Constitution at all times. It cannot shirk, waver, or equivocate. Otherwise, it will be censured with dereliction and abandonment of its solemn duty.[241]

Under the Philippine Constitutional framework, the counter-majoritarian argument does not pose an insurmountable obstacle. The judicial enforcement of civil, political, economic, and social rights is justified by the constitutionally imposed duty to protect fundamental rights.[242] Indeed, in both municipal and international law, the judiciary is not just permitted, but mandated to remedy violations of human rights.

Another way to rebut the counter-majoritarian argument is by zeroing on the justiciability of the ICCPR and ICESCR. The separation of powers ingrains in the legislative branch the power

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[237] *Ibid.*
[238] Biraogo v. Philippine Truth Commission 2010, G.R. Nos. 192935 & 193036, December 7, 2010 (*dissenting*, J., Sereno).
[239] PHIL. CONST., art. VIII, §5(5).
[240] Tanada v. Angara, G.R. No. 118295, May 2, 1997.
[241] Artemio V. Panganiban, *Judicial Activism in the Philippines*, 79 PHIL. L.J. 265, 268 (2004).
[242] PHIL. CONST. art. VIII, §5(5).

to make laws,[243] and to the judicial branch, the power to interpret them.[244] While the legislature has no authority to execute or construe, neither is the judiciary empowered to create or execute.[245] Yet as earlier established, the justiciability of both liberty and prosperity is recognized in the Philippine legal system through international obligation, constitutional provisions, and legislative fiat. If the interests of liberty and prosperity are a political question, it is submitted that these sources provide the political answer.

IV.B. Judicial Restraint vis-à-vis Judicial Activism

One of the benefits in reserving the application of liberty and prosperity to the public sphere is to afford the private sphere the freedom to structure itself as it sees fit, subject only to the constraints of legislation.[246] A wholesale application of the Bill of Rights to private acts would result in a paradox where the very freedoms afforded to the people are the very limits to their exercise.[247]

It is not the purpose of this essay to say that constitutional protections should apply in each and every case. Rather, it is proposed that the law ought to be attuned to the circumstances of the situation. If the interplay of facts and evidence merit the application of the Bill of Rights, then the judiciary should not fret from applying its protections. However, absent such exigencies, statutory rights should suffice.

As illustrated by the *Marti-Zulueta* contrast, the Court has applied the full force of the law, whether statutory or constitutional, when private actors overstep the boundaries of liberty through fraud or abuse.[248] While Job Reyes discovered the evidence during "standard operating procedure,"[249] Cecilia Zulueta obtained the inadmissible evidence by "forcibly [opening] the drawers and cabinet in her husband's clinic through abuse."[250] Similarly, the Court should do-

[243] PHIL. CONST. art. VI, §1
[244] PHIL. CONST. art. VIII, §1.
[245] Belgica v. Ochoa, G.R. No. 208566, November 19, 2013
[246] M. Kammen, *A Machine That Would Go of Itself: The Constitution in an American Culture*, 1986.
[247] *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991).
[248] Tan, *supra* note 133, at 102.
[249] *Marti*, 193 SCRA 57.
[250] *Philippine Blooming Mills*, G.R. No. L-31195.

away with the *public/private distinction,* and with it the *state action doctrine*, when non-state actors employ intentional and forcible acts.[251]

We must not lose sight of the Constitution's objective to level the playing field.[252] The Court should thus temper itself by applying the Bill of Rights within the private sphere only to situations involving relations of unequal footing. The Constitution's function as a code of fair play should not be thwarted by the mere lack of state action.

IV.C. Conclusion

The judicial function being "undemocratic" in nature, the counter-majoritarian objection is its own rebuttal. The court's undemocratic role is but necessary to compensate for the flaws of democracy. The issue at hand therefore is no longer the justiciability of civil, political, economic, and social, rights; but the "willingness of adjudicating bod[ies] to entertain, examine and pronounce on claims affecting these rights."[253]

Judicial activism is a tool to overcome state inadequacies; judicial deference is the renunciation of constitutional duty. To argue for judicial passivity would rob liberty and prosperity of any meaningful power. The courts would but pay lip service to fundamental rights; leaving no remedy for the failures of the state to deliver on its tripartite duties.

Recommendations

The common approach to the inadequacies of law is the creation of more law. While there is no denying the vital role of the political branches in the safeguard of fundamental rights, the judicial recourse should not be dispensed with.

Adjudication excludes juridification. Indeed, the judiciary has no power to make the law just as the legislature has no authority to construe it.[254] This paper avoids the dilemma entirely by offering structural and procedural reforms to enforce fundamental rights. Chapter I establishes the

[251] Tan, *supra* note 133, at 102.
[252] *Philippine Blooming Mills*, G.R. No. L-31195.
[253] UN HANDBOOK FOR NATIONAL HUMAN RIGHTS INSTITUTIONS, 26.
[254] *Government of the Philippines Islands v. Springer*, 277 U.S. 189, 203 (1928).

justiciability of liberty and prosperity in the realms of international and municipal law. The Philippines ratified core human rights instruments recognizing civil, political, economic, and social rights, and has transmuted them into municipal law by incorporation or transformation. Chapter II shows how the presumptions of old paradigms have been overtaken by history. The orthodox *state action* threshold was the product of an antiquated assumption that only the government is in a position to violate fundamental rights. But old doctrine has failed to keep apace the complexities of new paradigms, and have hindered the state's compliance with its tripartite duties. By abandoning the *state action* standard, the courts would loosen the state's fixation with the duty to respect and streamline compliance with the duties to protect and fulfill. Restructuring our access to power through the courtroom will transform fundamental rights into a private cause of action against non-state actors.

The protection of human rights is not solely hinged on state programs or social policies, but on the willingness of the judiciary to position itself in a way that would most empower individuals to harness the law. In Chapter III we observe how the court has historically enforced public rights against private parties to preserve liberty and prosperity—a power endowed by the social justice provisions of the Philippine Constitution. Lastly, as seen in Chapter IV, the counter-majoritarian nature of activist courts is constitutionally mandated precisely to safeguard liberty and prosperity from the inadequacies of democracy.

Liberty and prosperity forwards common sense in pursuit of uncommon justice. It recognizes how civil and political rights are tightly intertwined with social and economic relations—how freedom from fear necessitates freedom from want.

While unshackling the chains of old paradigms may be fueled by noble convictions, the same must be tempered to avoid the paradox where our freedoms are their own limits. Traditional notions of *state action* having been premised on the supremacy of the state over the plebeian individual, it is recommended that the laws on liberty and prosperity be similarly extended within the private sphere only to level the playing field, tilting the scales of justice in favor of the penury.

The safeguard and nurture of liberty and prosperity requires the rule of law to realize lessons of the past, but more importantly, to live within the realities of the present.[255] Traditional

[255] Artemio V. Panganiban, *Safeguard Liberty, Conquer Poverty, Share Prosperity (Part Three — for the Business Community),* 4th Integrity Summit with the Makati Business Club and the European Chamber of Commerce and

doctrine must give way to allow the judiciary to continue with its plight against new forms of abuse whether within the public or private spheres. The *state action doctrine* should thus be abandoned to facilitate a change in legal theory: negative duties alone do not suffice, the state must also protect and fulfill liberty and prosperity through positive action.

The Philippine legal system has reached a crossroads and must now choose which path to take: that with antiquated, yet tried-and-tested views of state action, or the path less traveled, unchartered, but full of auspicious promise.

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Industry, at Dusit Thani Hotel, Makati City, *available at* https://cjpanganiban.com/2014/09/19/safeguard-liberty-conquer-poverty-share-prosperity-part-three-for-the-business-community/.

FUSION OR CONFUSION (?):

A CONSTRUCTIVE REALIST ANALYSIS OF THE ROLE OF THE PHILIPPINE MILITARY IN THE WAR AGAINST DRUGS[1]

Hon. Maria Josefina G. San Juan-Torres

Introduction

Illegal drugs -- a serious issue that has traversed boundaries of States. An issue once treated as a domestic offense but has now evolved into a transnational crime. An issue with some criminalized States[2] taking the front act in the underground economy theater.

Illegal drugs destroy lives. It can turn society into chaos. It can change a country's political landscape, influence the course of events and even destabilize a State. History has proven how, in the mid-19th century, the infamous Opium War was utilized as a *military* strategy by the United Kingdom (UK) which eventually led to China's downfall. Thus, the Treaty of Nanking was entered into where China ceded Hong Kong Island to UK.

Within the domestic arena, as illegal drugs become so rampant in all levels of Philippine society, to the extent that it has become a mere "commodity" even to the marginalized sector, the country's breakdown is not far-fetched. Admittedly, the proliferation of illegal drugs of unprecedented magnitude, poses an *existential threat* that strikes deep into the survival of the individual, of families, of communities, and eventually of the State as well.

It is reported that the illegal drug trade in the Philippines is operated by three (3) major groups: the Chinese/Filipino-Chinese syndicates, the African drug syndicates and the Mexican-Sinaloa Drug Cartel. Just recently, even high-ranking public officials particularly tasked with law enforcement allegedly received bribes from drug lords/suppliers in order to protect the syndicates.

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[1] The paper is based on the author's personal analysis of references and sources and does not reflect *in toto* the view of the institution it represents.

[2] Douglas Farah, 8 Convergence in Criminalized States: The New Paradigm, *available at* https://cco.ndu.edu/News/Article/980815/8-convergence-in-criminalized-states-the-new-paradigm/ (last accessed April 2020).

It is claimed that there are about seven (7) to eight (8) million estimated drug users in the Philippines as of February 2019.[3] Topping the list as the most abused drug is methamphetamine hydrochloride otherwise known as "*shabu*" or "poor man's cocaine". In a 2012 United Nations report, the Philippines had the highest rate of methamphetamine abuse among countries in East Asia and about 2.2% of Filipinos between the ages 16-64 years were methamphetamine users.[4]

The Issue from a National Security Lens

The Philippine government's program in addressing the "drug menace" has been a controversial issue that raked positive and negative reviews in both the domestic and international fora. One such challenge is the seemingly overlapping mandate of the Armed Forces of the Philippines (AFP) and the Philippine National Police (PNP) from a national security perspective given that defense forces are at times mobilized to address a peace and order situation with transnational implications. A known Filipino political analyst would aptly put it as the "*strategic ambiguity*"[5] in the roles of the AFP and the PNP that is, when a non-security, localized law enforcement issue such as illegal drugs trade is elevated into a national security threat that legitimizes the participation of the military in drug operations. This also portrays the dynamic interplay of key State and non-State actors on how the drug problem is perceived, accepted, and challenged through a cross-paradigm analysis of the Realist-Constructivist approach.

President Rodrigo Roa Duterte made the drug problem his primordial policy agenda, initially as his campaign platform and reiterating through the years that he will not be stopped of the anti-drug campaign during his administration. Duterte's unconventional leadership style is even compared to *realist* advocates such as Niccolo Machiavelli and Hans Morgenthau. President Duterte, relying on strong populist support, declared that illegal drugs is a national security issue

[3] Jonathan de Santos, PNP, PDEA, NBI agree: Duterte's estimate of 8M drug users has basis, PHILSTAR, February 28, 2019, *available at* https://www.philstar.com/headlines/2019/02/28/1897470/pnp-pdea-nbi-agree-dutertes-estimate-8m-drug-users-has-basis (last accessed April 2020).

[4] Nymia Simbulan, et. al., The Manila Declaration on the Drug Problem in the Philippines, *available at* DOI.ORG: https://doi.org./10.5334/aogh.28 (last accessed January 2020).

[5] Ananda Devi Domingo-Almase, Militarising the police, constabularising the military: Insights on Philippine Public Safety and Security Strategy. Philippines, *available at* https://theasiadialogue.com/2019/06/03/militarizing-the-police-constabularising-the-military-insights-on-philippine-public-safety-and-security-strategy/ (last accessed April 2020).

and calls on the AFP to "assist" in addressing it. His anti-illegal drugs campaign has been unrelenting and consistent, catapulting him to national prominence. Duterte framed his drug war as an **existential challenge – a battle to preserve peace and order and a crusade to save the lives and protect the future of the Filipino youth**. "*If you destroy the youth of my land, I will kill you...*" has been his recurring proclamation.[6]

Thus, what would have been an issue of law enforcement and criminality which could have been dealt with through the criminal justice system, escalated into an "all-out war" policy due to the perceived threat to national security, with international drug syndicates embedded within the political system, and the issues of public health and public safety that called for the "use of force" to resolve the drug problem. Upon **orders from the President**, law enforcement agencies such as the Philippine National Police, Philippine Drug Enforcement Agency, the National Bureau of Investigation, and to a certain extent, the **Armed Forces of the Philippines**, are also involved in the anti-drugs operations. Given the priority of President Duterte in his all-out war against illegal drugs, the issue of drugs, which is generally a local security issue, has been raised to the level of one of national interest and a matter of national security that demands the use of military force to avert and quell the destructive effects upon the **people as a nation and the very existence of the State**. A law and order menace evolved into a monster with the culture of narco-politics and narco-terrorism creeping into the Philippine political and social landscape.

Simply put, Duterte, as President and primary State actor, securitized a non-traditional security issue such as illegal drugs, by employing military force as an extraordinary measure or emergency initiative[7] to protect the people and to secure the State. Duterte's persuasive pronouncement created a grim scenario of chaos and imminent destruction of future Filipino generations (e.g. youth) and the State being in danger of extinction should the drug problem be ignored. As the primary securitizing actor, Duterte employed *panic politics*,[8] and with this, popular survey results show that Duterte still *enjoys the trust* of majority of the Filipino people in

[6] Lucio Blanco Pitlo III The other side of Duterte's war on drugs:rehabilitation, rescue and rooting out corruption, SMCP, *available at* https://www.scmp.com/author/lucio-blanco-pitlo-iii (last accessed April 2020).
[7] BARRY BUZAN, SECURITY, THE STATE, THE "NEW WORLD ORDER", AND BEYOND." ON SECURITY. (R. D. Lipschutz, ed. 1998).
[8] Ole Waever, Securitization and Desecuritization, *available at* https://www.libraryofsocialscience.com/assets/pdf/Waever-Securitization.pdf (last accessed January 2020).

his continuing crackdown on illegal drugs.[9] This acceptance by the public completes the securitization act.[10]

Upon the other hand, non-state actors like the Roman Catholic Church and some civil society groups interpret the President's use of the strong arm of the law in the fight against illegal drugs as a manifestation of authoritarian rule bordering on dictatorship with implications on human rights violations. This perception takes off from a *constructivist* approach to national security as introduced by post-Cold War leaders like Roosevelt.[11]

Research Puzzle

However, in analyzing the securitization of a public safety issue through employment of military force and the apparent "strategic ambiguity" of the National Security Plan and the complementary policies reflecting the combined mandates of the AFP and the PNP on public safety interests, one might ask: *Should the military operations on illegal drugs be sustained indefinitely as a joint undertaking with the police and other law-enforcement authorities? How should government delineate military and police functions to ensure the country's first core interest of "public safety, law and order, and the administration of justice"? Should we revisit and/or redefine the Constitutional provisions on matters involving national policy (e.g., Article II of the 1987 Constitution)*?

Deconstructing Duterte's political narrative combined with his gutter-talk rhetorics in the use of force to confront the drug pandemic as well as unravelling the *structural ambivalence* in the language of the Philippines' national security strategies are imperative. With that, key policy decision makers in national security will have a solid unified direction in defending our territorial integrity and national sovereignty and adopt strategic options in areas where policies seem to overlap or are inconsistent. As they say, *confusion breeds chaos and wreaks havoc.*

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[9] Arianne Merez, "Not Surprising": Palace flaunts Duterte's high trust, approval ratings, ABS CBN NEWS, *available at* https://news.abs-cbn.com/news/07/18/19/not-surprising-palace-flaunts-dutertes-high-trust-approval-ratings (last accessed April 2020).

[10] BARRY BUZAN, SECURITY, THE STATE, THE "NEW WORLD ORDER", AND BEYOND." ON SECURITY. (R. D. Lipschutz, ed. 1998).

[11] RALPH PETTMAN, COMMON SENSE CONSTRUCTIVISM OR THE MAKING OF WORLD AFFAIRS (2000).

The current National Security Strategy (NSS) and its complementary operational plans like the Joint AFP-PNP Campaign (KAPANATAGAN) and the Development Support Plan (KAPAYAPAAN) merge the "security operational mandates" of both institutions by placing public safety, law and order and protecting the welfare of the people as "core national interests". This fusion blurs the security parameters of both the AFP and the PNP in defending external (AFP) and internal (PNP) threats. A respected Philippine national security analyst and esteemed academician refers to it as the "**role overlapping and role overloading**" of the military and the police, brought about by the strategic ambiguity in their respective security/defense mandates.[12] Thus, with the war on drugs, the strategic dimension of the AFP in defending the State appears to be sidelined or is effectively weakened as it focuses on an "internal" national threat instead of safeguarding the State's external frontiers. The discourse can be broken down into the key variables and their causal relationship.

The role of the military is a dependent variable as the military has a role to defend the territorial integrity of the State and our national sovereignty, meaning the welfare of the people as enshrined in Section 3, Article II of the 1987 Constitution. This is further supported by the constitutional policy declaring the supremacy of civilian authority over the military.

President Duterte's "war" on drugs is the independent variable. The magnitude or gravity of the drug issue determines whether or not the military should be called upon to address it. The seriousness of the drug problem dictates whether it is an internal security issue of *law and order* OR an issue of *national interest* to ensure public safety.

Concept of Securitization

What is the causal link between these variables? Justifying the securitization of a non-traditional security issue like illegal drugs as a national security threat mandating the use of extraordinary measures (e.g., military) involves an understanding of the Buzan concept of securitization.

[12] Ananda Devi Domingo-Almase, Militarising the police, constabularising the military: Insights on Philippine Public Safety and Security Strategy. Philippines, *available at* https://theasiadialogue.com/2019/06/03/militarizing-the-police-constabularising-the-military-insights-on-philippine-public-safety-and-security-strategy/ (last accessed April 2020).

President Duterte anchored the threat on the State's survival to legitimize the role of the military as an extraordinary measure.[13] Also, analyzing our national security strategy that engages the military in development support campaigns (i.e., peace building) at the community level, this illustrates a *desecuritization* process or transitioning to a "new normal".[14]

Reflecting on these questions, I pondered over the underlying rationale of the Realist and Constructivist theories in analyzing the justification of the role of the President (as a realist with the likes of Niccolo Machiavelli and Hans Morgenthau) and the role dynamics of the other State actors (military and the police) and non-State actors (citizenry/civilians, international community), in a constructivist angle, on how they perceived the use of illegal drugs as a national security threat and the consequences of the "war on drugs".

Articles have been written by established political analysts on Duterte's war on drugs campaign and the overlapping mandates of the AFP and the PNP in public safety concerns as a national security strategy and a core interest. In the course of my reading, I also encountered understanding the unconventional behavior of a "good leader/ruler" like Duterte whose interest in good governance of a country in the brink of lawlessness and destruction due to the rampant drug trade is comparable to the decisive and "strong State" approach espoused by realist thinkers like Niccolo Machiavelli[15] in his famous discourse "*the end justifies the means"* and like Hans Morgenthau, who argues that morality becomes irrelevant when force is demanded to quell an anarchic situation.[16]

Upon the other hand, from a constructivist point of view, President Duterte, in the campaign against illegal drugs as a threat to national security, called upon the AFP to protect the well-being of the people and to secure the State by assisting in drug clearing operations and temporary manning of critical government installations but implemented his program in a calibrated way by also engaging persuasive techniques (e.g., Operation Tokhang) and community relations in the "battlefield" of the drugs war, that is the community or barangay.

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[13] BARRY BUZAN, SECURITY, THE STATE, THE "NEW WORLD ORDER", AND BEYOND." ON SECURITY. (R. D. Lipschutz, ed. 1998).
[14] *Id.*
[15] Angela Craig, Machiavelli's Principles of Leadership, *available at* https://www.angelalcraig.com/2013/06/machiavellis-principles-of-leadership/ (last accessed April 2020).
[16] HANS MORGENTHAU, POLITICS AMONG NATIONS:THE STRUGGLE FOR POWER AND PEACE (5th ed. 1978).

In this sense, the anti-drugs operations became human-centric in its approach, both in a positive and negative way, depending on the perception of the actors within the political setting. For the international community, President Duterte's unconventional way of governance created a negative impact by raising alleged human rights violations, with impunity allegedly taking the reigns against the rule of law. Yet interestingly, President Duterte enjoyed a high trust rating from the Filipino public who agree that the anti-drugs war has restored peace and order within their communities.[17]

Where lies the fusion or confusion?

A common mandate of both the AFP and the PNP is ensuring public safety.

The relevant provisions of the 1987 Constitution state:

> Article II Declaration of Principles and State Policies:
> x x x
> Section 3. Civilian authority is, at all times, supreme over the military. The Armed Forces of the Philippines is the **protector of the people** and the State. Its goal is to secure the sovereignty of the State and the integrity of the national territory.
> Section 4. The prime duty of the Government is to serve and **protect the people**. The Government may call upon the people to defend the State and, in the fulfillment thereof, all citizens may be required, under conditions provided by law, to render personal military or civil service.
> Section 5. The maintenance of **peace and order, the protection of lif**e, liberty and property, and the promotion of the general welfare are essential for the enjoyment by all the people of the blessings of democracy.
> x x x x " (emphasis ours).[18]

These State policies were reiterated in the National Security Policy 2017-2022 (NSP) and in the National Security Strategy (NSS) 2018. The NSP 2017-2022 provides, *viz*:

> The Government envisions a Philippines that by 2022 shall become "a secure and prosperous nation wherein the **people's welfare, well-being,** ways of life and core values; government and its institutions, territorial integrity and sovereignty are protected and enhanced x x x" (emphasis ours).

[17] Arianne Merez, "Not Surprising": Palace flaunts Duterte's high trust, approval ratings, ABS CBN NEWS, *available at* https://news.abs-cbn.com/news/07/18/19/not-surprising-palace-flaunts-dutertes-high-trust-approval-ratings (last accessed April 2020).
[18] PHIL. CONST. ART II, §§ 3, 4, 5.

And in the National Security Strategy 2018, the first strategic line of action states, *viz*:

> 1. **Guarantee Public Safety and Achieve Good Governance.** The strategy begins with the determination to protect the nation against the range of threats that directly impact on the **safety and welfare of the Filipino people.** These are terrorism, insurgency and subversion, transnational crimes, criminality and **illegal drugs,** and graft and corruption.
> x x x x", (emphasis ours)

Admittedly while their strategic actions are guided by the same mandate (of protecting the people) emanating from the same source – the 1987 Constitution as translated into the National Security Policy and enhanced by the National Security Strategy, it cannot be discounted that in the implementation of the common mandate, they differ in most terms on their role orientation. Below is a simple illustration:

	Military (AFP)	**Police (PNP)**
Job Orientation	Overcome/defeat enemy/aggression is the name of the game	Protect/prevent Observance of due process and legal procedures
Use of Force	Always a priority	Last resort
Work environment	Hostile/ volatile/war/combat	Maintain peace and order in day to day living or under normal living conditions
Negotiations in hostage taking	Less relevant /course of action is attack and defeat	Relevant / course of action is to protect lives and prevent collateral damage
Communications/contact with community and civilians	Restricted or limited but it is interesting to note that the Department of National Defense promotes AFP's engagement with stakeholders in the community (e.g., Internal Peace and Security Plan "Bayanihan")	Direct and personal communications with community
Organizational Structure	Hierarchical/Command guidance – Obey first	Hierarchical/Command Guidance – Obey first

Thus, while it may be beneficial to some degree that a congruence of mandates wherein one can call on both the military and police to "protect the people" (both from internal and external

threats), this may, in certain circumstances, cause confusion on both the State actors (military and police) and non-state actors (civilians) as to **who actually is "in charge"**.

Confining our arguments on the anti-illegal drugs campaign, the collaboration of both the military and the police in conducting searches, raids and arrests may be more effective and efficient especially when dealing with high-value targets/suspects. Collaboration and convergence open the door for opportunities for joint capacity building, mutual transfer/exchange of skills and techniques, technology/equipment especially when illegal drugs trade are intertwined with weapons smuggling, narco-terrorism, narco-politics, human trafficking and similar transnational crimes. To some extent, the military are doing "community policing".

On the opposite side of the spectrum, the blurring delineation of roles may create ambiguity in their respective roles. The police, as civilian authority and who are expected to ensure that individual rights are *protected*, may tend to absorb military mindsets and tactics in their dealings with the people and the community. This may give rise to the police evolving into paramilitary groups which, if left unchecked, may become "rogue soldiers" or may be used as "private armies" by civilian authorities (e.g. local government leaders). *Can one imagine a policeman in full military battle gear with long firearms, roaming around the streets, day and night, to keep the peace*? Civilians may cower in "fear or feel intimidated" instead of feeling "protected". In the same wise, *if the military is confined too long on internal defense operations* like the anti-drugs campaign, they may *tend to lose touch on the primary focus of external defense* and may **decrease their "war-fighting" effectiveness from external threats** on the State's sovereignty and territorial integrity (e.g. West Philippine Sea claim) .

Further, the convergence may also cause debates on budgetary implications on defense capability. For instance, should priority be given for the purchase of more guns, patrol vehicles, body cameras (for anti-illegal drugs operations) rather than on acquisition of naval ships, combat planes, tanks and military artillery to boost our external defense capacity?

Another angle that may cause confusion on the overlapping mandates is accountability on post-operations consequences where lives and property are at stake or when human rights violations are allegedly committed during the enforcement of searches, arrests, raids, etc. We have witnessed in the past how the overlapping mandates created havoc on command guidance and

command responsibility in the field during the Mamasapano incident thus "unearthing cracks in the ties of the military and police."[19]

Way Forward

Given this scenario, how do we promote a healthy and harmonious fusion of the operational mandates of the military and police and minimize the negative impact of confusion due to its overlapping roles?

One solution is to ensure **proper role management supervision** on both the military and police to minimize occupational and civil rights challenges that may threaten the country's democracy and the individual's civil rights and liberties.

Another option is to create a **special "third force"** (a ***gendarmerie*** perhaps?) – a hybrid of law enforcers and soldiers, who are skilled and can easily transition or adapt to and from warring functions to policing functions as the situation may arise – in times of combat/war, enforcing day to day peace and order, humanitarian missions. A special force would demand substantial alterations in the organizational culture of both professions – military and the police – new orientation, new set of norms, new values, and new mindset

Considering the intent of the national security policy framers to harmonize the mandate/framework of both the military and the police when it comes to protecting the people and securing the survival/existence of the State, the present set up which show gaps and overlaps admits that is actually quite far from realizing that harmonized system. The goal of harmonization, convergence or fusion should not only provide for better protection of the people and the State but likewise afford better confidence for legal safeguards by the direct security actors (military and police) in the performance of their official functions.

Efforts exerted by the policy makers and the consensus-oriented measures provided by our government leaders will not be futile but should instead be a source of motivation to further facilitate integration and convergence, active collaboration and mutual assistance by both the

[19] Bea Cupin, President Aquino and the ghosts of Mamasapano, Rappler, September 29, 2015, *available at* https://www.rappler.com/newsbreak/in-depth/106243-aquino-truth-saf-mamasapano (last accessed April 2020).

military and police towards addressing national security issues that threaten the welfare of the people and State sovereignty.

At this juncture, the aspects of "overlaps and/or overloads"[20] only show that there is still room for improvement – aspects for our leaders, policy makers and regulators should look into as opportunities that move for convergence/fusion of the administration, management and system of our national security sector, so that it could work more efficiently and effectively and to adapt accordingly while upholding the rule of law in times of conflict that pose a risk to the people's well-being and the State's sovereignty.

A security environment is, by nature, volatile, uncertain, complex and ambiguous. To contain its anarchic tendencies, we established States, democratic or otherwise, and forged social contracts based on rules.

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[20] Ananda Devi Domingo-Almase, Militarising the police, constabularising the military: Insights on Philippine Public Safety and Security Strategy. Philippines, *available at* https://theasiadialogue.com/2019/06/03/militarizing-the-police-constabularising-the-military-insights-on-philippine-public-safety-and-security-strategy/ (last accessed April 2020).

RULES OF THE NEIGHBORHOOD:

A CLOSE LOOK TO THE *BARANGAY* LAW-MAKING POWER

Atty. Manuel A. Rodriguez II

The Barangay Origin

When the first Spaniards arrived in the Philippines in the 16th century, they found a well-organized, independent villages called barangays. The name barangay originated from *balangay,* a Malay word meaning "sailboat."[1] As written in the *Maragtas* Code,[2] the original barangays were coastal settlements of the migration of these Malayo-Polynesian people (who came to the archipelago) from other places in Southeast Asia.

During the Spanish occupation, through the *Reduccion*[3] policy, smaller scattered barangays were consolidated (and thus, "reduced") to form compact towns.[4] Each barangay was headed by the *cabeza de barangay* (barangay chief), who formed part of the *Principalia.*[5] The Spanish Monarch ruled each barangay through the *cabeza*, who also collected taxes (called tribute) from the residents for the Spanish Crown.[6]

When the Americans arrived, "slight changes in the structure of local government were effected."[7] Later, Rural Councils, with four councilors, was created to assist the community. Now renamed *Barrio* Lieutenant, it was later renamed *Barrio* Council, and then *Barangay* Council.[8]

The Spanish term "barrio" was used for much of the 20th century. Atty. Ramon D. Bagatsing Jr., then Mayor of the City of Manila, established the first Barangay Bureau in the

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[1] SONIA M. ZAIDE, THE PHILIPPINES: A UNIQUE NATION 62 (1999).
[2] The Maragtas is a work by Pedro Alcantara Monteclaro titled (in English translation) History of Panay from the first inhabitants and the Bornean immigrants, from which they descended, to the arrival of the Spaniards. It purports to be based on written and oral sources of which no copy has survived.
[3] Term used for the Spanish resettlement policy. The Spaniards relocated, forcibly id necessary, native inhabitants of their colonies (the indios) into settlements which were modeled on towns and villages in Spain.
[4] PATRICIO N. ABINALES & DONNA J. AMOROSO, STATE AND SOCIETY IN THE PHILIPPINES 53-55 (2005).
[5] The elite ruling class of the municipalities of the Spanish Philippines.
[6] RENATO CONSTANTINO & LETIZIA R. CONSTANTINO, THE PHILIPPINES: A PAST REVISITED 60-61 (1975).
[7] MARIO D. ZAMORA, POLITICAL CHANGE AND TRADITION: THE CASE OF VILLAGE ASIA 247-253 (1966).
[8] *Id.*

Philippines - creating the blueprint for the barangay system as the basic socio-political unit for the city in the early 1970s. This was quickly replicated by the National government. In 1974, President Ferdinand E. Marcos ordered the renaming of barrios to barangays.[9]

The name survived the 1986 EDSA Revolution, though older people would still use the term *barrio*. The Municipal Council was abolished upon transfer of powers to the barangay system. Marcos used to call the barangay part of Philippine participatory democracy, and most of his writings involving the New Society[10] praised the role of *baranganic* democracy in nation-building.[11]

After the 1986 EDSA Revolution and the drafting of the 1987 Constitution, the Municipal Council was restored, making the barangay the smallest unit of Philippine government. The first barangay elections conducted under the new constitution was held on March 28, 1989 under Republic Act No. 6679.[12]

The Barangay in the 1987 Constitution

The State, as a national principle and policy, guarantees the "autonomy of local government units."[13] Towards this end, there is a separate article on Local Governments.[14] The State subdivided its territory into "local government units" or LGUs, namely the Provinces, Cities, Municipalities, and Barangays and delegated to each LGU more powers, authority, and resources to manage its local affairs as "political subdivisions" of the Republic.

Thus, LGUs, including the Barangay, as "territorial and political subdivisions of the Republic of the Philippines" had been engaged in an unprecedented active governance and development as "self-reliant communities" and "effective partners in the attainment of national goals."

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[9] Declaring All Barrios in the Philippines as Barangays, and for Other Purposes, Presidential Decree No. 557 (1974).
[10] New Society Movement (Filipino: Kilusang Bagong Lipunan, KBL) is a political party in the Philippines. It was formed in 1978, as an umbrella coalition of parties supporting then-President Ferdinand E. Marcos for the Interim Batasang Pambansa (National Assembly), and was his political vehicle during his rule. In the post-Marcos era, it was reorganized as a political party in 1986.
[11] FERDINAND E. MARCOS, NOTES ON THE NEW SOCIETY (1973).
[12] Rappler.com, *Looking back: The first barangay polls in PH,* RAPPLER (May 17, 2015) *available at* https://www.rappler.com/newsbreak/iq/93450-first-philippine-barangay-elections-may-1982
[13] PHIL. CONST. art. II, § 25.
[14] PHIL. CONST. art. X.

To operationalize the State policy for a genuine and meaningful autonomy for LGUs, Congress was mandated to enact a "Local Government Code" with the declared policy:

> It is hereby declared the policy of the State that the territorial and political subdivisions of the State shall enjoy genuine and meaningful local autonomy to enable them to attain their fullest development as self-reliant communities and make them more effective partners in the attainment of national goals. Towards this end, the State shall provide for a more responsive and accountable local government structure instituted through a system of decentralization whereby local government units shall be given more powers, authority, responsibilities, and resources. xxx.[15]

Thus, through an Act of Congress, "The Local Government Code of 1991" or Republic Act (RA) No. 7160 and its Implementing Rules and Regulations,[16] the National Government established the legal framework for local governance for guidance and compliance of all LGUs.

The *Sangguniang* Barangay

Section 390 of the Local Government Code provides that:

> The sangguniang barangay, the legislative body of the barangay, shall be composed of the punong barangay **as presiding officer**, and the seven (7) regular sangguniang barangay members elected at large and the sangguniang kabataan chairman**, as members**.[17]

This collegial body shall discharge the indispensable collegial duty and function of "legislation". As expressly provided, the *punong* barangay is not a "**member**" of the *sangguniang* barangay but its "**presiding officer**".

Interestingly, unlike their counterparts in higher *sanggunians* who are exclusively delegated "legislative duties and functions", the *sangguniang* barangay members (*kagawad*) are delegated "executive duties and functions" in addition to their principal "legislative" functions, to *wit*:

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[15] An Act Providing for a Local Government Code of 1991 [Local Government Code of 1991], Republic Act No. 7160, § 2 (1991).
[16] Office of the President, Prescribing the Implementing Rules and Regulations of the Local Government Code of 1991, Administrative Order No. 270 (1992).
[17] LOCAL GOVERNMENT CODE, § 390.

Section 392. Other Duties of Sangguniang Barangay Mambers.
In addition to their collegial powers, duties and functions as members of the sangguniang barangay, each sangguniang barangay members may:
i) Assist the punong barangay in the discharge of his duties and functions;
ii) Act as peace officers in the maintenance of public order and safety; and
iii) Perform such other duties and functions as the punong barangay may delegate."[18]

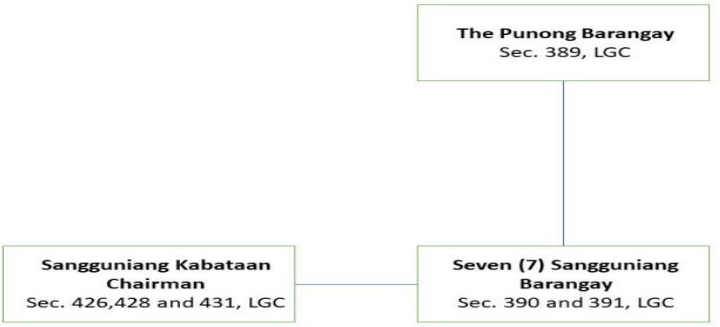

Figure 1. *The sangguniang barangay shall be composed of the punong barangay as presiding officer, the seven regular members to be elected at large and the sangguniang kabataan chairman as members.*

Powers and Duties of the *Sangguniang* Barangay

The powers and duties of the *sangguniang* barangay as provided for in Section 391 of RA 7160 now known as the Local Government Code of 1991 are:

1. Enact ordinances as may be necessary to discharge the responsibilities conferred upon it by law or ordinance and to promote the general welfare of the inhabitants therein.

2. Enact tax and revenue ordinances, subject to the limitations imposed by law.

3. Enact annual and supplemental budgets.

4. Provide for the construction and maintenance of barangay facilities and other public works and projects.

5. Submit to the *sangguniang panlungsod* or *sangguniang bayan* such suggestions or recommendations as it may see fit for the improvement of the barangay or for the welfare of the inhabitants.

[18] LOCAL GOVERNMENT CODE, § 392

6. Assist in the establishment, organization, and promotion of cooperative enterprises that will improve the economic condition and well-being of the residents.

7. Regulate the use of multi-purpose halls; multi-purpose pavements; grain or copra dryers; patios and other post-harvest facilities; barangay waterworks; barangay markets; parking areas or other similar facilities constructed with government funds within the jurisdiction of the barangay and charge reasonable fees for the use thereof.

8. Solicit or accept monies, materials and voluntary labor for specific public works and cooperative enterprises of the barangay from residents and landowners; monies from grants-in-aid, and resources made available to the barangay from national, provincial, city or municipal funds; provided, that monies or properties donated by private agencies and individuals for specific purposes shall accrue to the barangay as trust fund and that in soliciting or accepting such cooperation, the *sangguniang* barangay need not pledge any sum of money for expenditure in excess of amounts currently in the barangay treasury or encumbered for other purposes.

9. Provide compensation, reasonable allowances or per diems as well as the expenses for *sangguniang* barangay members and other barangay officials, provided, however, that no increase in the compensation or honoraria of the *sangguniang* barangay members shall take effect until after the expiration of the full term of all members of the *sangguniang* barangay approving such increase.

10. Hold fund-raising activities for barangay projects without the need of securing permits from any national or local office or agency; provided that no fund raising activities shall be held within a period of 60 days immediately preceding and after a national or local election, recall, referendum or plebiscite. The proceeds from such activities shall be tax-exempt and shall accrue to the general fund of the barangay.

11. Authorize the *punong* barangay to enter into contracts on behalf of the barangay.

12. Authorize the barangay treasurer to make direct purchases in an amount not exceeding P1,000.00 at any time for the ordinary and essential administrative needs of the barangay.

13. Prescribe fines in amounts not exceeding P1,000.00 for violation of barangay ordinances.

14. Provide for the administrative needs of the *lupong tagapamayapa* and the *pangkat ng tagapagkasundo.*

15. Provide for the organization of community brigades, barangay *tanod*, or community service units as may be necessary.

16. Organize regular lectures, programs for community problems such as: sanitation; nutrition; literacy and drug abuse and convene assemblies to encourage citizens' participation in government.

17. Adopt measures to prevent and control the proliferation of squatters and mendicants in the barangay.

18. Provide for the proper development and welfare of children in the barangay by promoting and supporting activities for the protection and total development of children, particularly those below seven years of age.

19. Adopt measures towards the prevention and eradication of drug abuse, child abuse and juvenile delinquency.

20. Initiate the establishment of a barangay high school and a non-formal education center in the barangay whenever feasible, in coordination with the Department of Education.

21. Exercise such other powers and perform such other duties and functions as may be prescribed by law or ordinance.[19]

Sessions at the Barangay

Barangay sessions are conducted in accordance with its Internal Rules of Procedures (IRP). The Local Government Code provides that on the first day of the session immediately following the elections of its members, the *sangguniang* barangay shall, by resolution, fix the day, time and place of its regular sessions. Within ninety (90) days thereafter, it shall adopt its IRP.[20] The said IRP adopted shall provide the following: (1) election of its officers and creation of committees; (2) order and calendar of business for each session; (3) legislative process; (4) parliamentary procedures; (5) discipline of members; and (6) such other rules as the *sanggunian* may adopt.

The existing IRP may only be adopted or updated by the new set of elected barangay officials or amend certain provisions thereof. The reason for this is that the IRP of the previous *sangguniang* barangay is not automatically carried over in the present set of *sangguniang* barangay. The term of office of barangay officials is separate and distinct.[21]

A. Regular Session versus Special Session

The holding of a **regular session** is a mandatory function of the *sanggunian*. The Code fixes the minimum number of regular sessions for *sangguniang* barangay at **twice a month**.[22] Under earlier laws, one session per month was required wherein they could be paid per diems.

Special Sessions may be called by the *punong* barangay or by a majority of the members of the *sangguniang* barangay. When the *punong* barangay calls for a special session, a written notice to the members shall be served personally at their usual place of residence at least 24 hours

[19] LOCAL GOVERNMENT CODE, § 391
[20] Administrative Order No. 270, art. 103.
[21] LOCAL GOVERNMENT ACADEMY, GUIDE FOR PUNONG BARANGAY AND SANGGUNIANG BARANGAY OFFICIALS 7 (2018).
[22] LOCAL GOVERNMENT CODE, § 52(a).

before the schedule. Unless otherwise agreed upon by 2/3 (two-thirds) of the members present, there being a quorum, no agenda may be deliberated on a special session except on what is stated in the notice.[23]

The Local Government Code strictly prohibits the holding of two sessions, regular or special in a single day.[24] There is no prohibition, however, on the holding of legislative sessions outside the premises of the barangay hall or office as long as the members agree on the venue.

B. Legislative Session versus Meeting

The terms "session" and "meeting" are oftentimes used interchangeably. Both are gatherings or assemblies of a number of persons for purposes of discussing and acting upon some matters in which they have common interest.

However, when used in legislation, each term obtains a specific meaning. A **session** is a meeting or series of connected meetings devoted to a single order of business, program, agenda, or announced purpose.[25] An organization's by-laws may define a specific meaning of the term "session." In the case of *sanggunians*, the term "session" is used when the fully constituted members of the legislative council sit to transact its proper business. It is the period during which the body is assembled in form, and engages in the transaction of business.

A session may either be a single sitting or a series of sittings of the members of the council that may last for any length of time.

A **meeting** on the other hand, in its ordinary usage, refers to the event or consequence when two (2) or more individuals meet together. However, in parliamentary parlance such as in cases of *sanggunians*, the term refers to a gathering of three (3) or more organized groups of persons, or members of an organization in order to transact business. It refers to the coming together of the members of a legislative committee for the purpose of studying a proposed ordinance or resolution and recommending its findings to the assembly in session.

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[23] Local Government Code, § 52(d).
[24] Local Government Code, § 52(c).
[25] HENRY M. ROBERT, ET. AL., ROBERT'S RULES OF ORDER NEWLY REVISED 82 (2011).

C. The Rule on Quorum

A Quorum refers to the minimum number of members of a deliberative assembly[26] necessary to conduct the business of that group. According to Robert's Rules of Order Newly Revised,[27] the "requirement for a quorum is protection against totally unrepresentative action in the name of the body of an unduly small number of persons.[28]

Under the Local Government Code, a **majority** of all the members of the *Sanggunian* who have been elected and qualified shall constitute a quorum. Should a question on quorum be raised during a session, the presiding officer shall immediately proceed to call the roll of the members and thereafter announce the result.[29]

When there is no quorum, the presiding officer may declare a **recess** until such time a quorum is constituted, or a majority of the members present may adjourn from day to day.[30] If there is still no quorum, the presiding officer, upon motion by the members present, shall declare the **session adjourned** for lack of quorum.[31] In determining a quorum, the chairman of the *sangguniang kabataan* shall be included but in the case of the *punong* barangay, the rule is not clear.

The inclusion or non-inclusion of the *punong* barangay as presiding officer in the determination of the number of members required to transact the legislative and non-legislative businesses is very important. The number of votes required may increase or decrease depending on the participation of the presiding officer in the voting of any motion presented before the *sangguniang* barangay.

Since there is no specific provision on the law or jurisprudence on whether the presiding *punong* barangay shall be included in the determination of votes required, say to adopt a motion

[26] A body that uses parliamentary procedure, such as a legislative body like a sanggunian
[27] Commonly referred to as Robert's Rules of Order, RONR, or simply Robert's Rules, it is the most widely used manual of parliamentary procedure in the United. States. It governs the meetings of a diverse range of organizations – including church groups, county commissions, homeowners associations, nonprofit organizations, professional societies, school boards, and trade unions – that have adopted it as their parliamentary authority.
[28] ROBERT, *supra* note 25 at 21.
[29] Local Government Code, § 53 ¶ a.
[30] Local Government Code, § 53 ¶ b.
[31] Local Government Code, § 53 ¶ c.

or resolution, or enact an ordinance, the **internal rules of procedure** of a given *sanggunian* shall prevail.[32]

D. *Punong* Barangay as the Presiding Officer

The *punong* barangay's membership in the *sanggunian* barangay may be viewed as limited to being the presiding officer and voting only to break a tie during the sessions of the *sangguniang* barangay.

The issue on whether the *punong* barangay, as presiding officer, shall be allowed to propose a legislative measure and to participate in the deliberations is still an unsettled issue.

Unlike governors and mayors of local government units who are clearly given the power to initiate and propose legislative measures to their *sanggunian*, the *punong* barangay is not given such power to propose ordinances and resolutions to the *sangguniang* barangay except in the submission of barangay budgets and development plans.

E. The Power to Compel Attendance of *Sangguniang* Barangay

When there is no quorum, the presiding officer may compel the immediate attendance of any member whose absence is without justifiable cause by designating, for this purpose, a member of the *sanggunian* to arrest the absent member with the assistance of a member or members of the police force assigned in the territorial jurisdiction of the barangay.

Absences by *sanggunian* barangay members without justifiable cause for four (4) consecutive sessions may result in censure, reprimand or suspension of not more than sixty (60) days or expulsion. The penalty of suspension or expulsion shall require the concurrence of at least two-thirds (2/3) of all *sangguniang* barangay members.[33] Such delinquency is further punishable

[32] In a DILG opinion dated 24 July 2017 signed by Undersecretary Austere Panadero, it stated that "All concerned offices are hereby advised that in the conduct of business of the Sangguniang Panlungsod, the presiding officer should be counted for purposes of ascertaining the existence of a quorum, but not in the determination of the required number of votes necessary to uphold a matter before the Sangguniang Panglungsod." However, the opinion does not fall in all-fours in the case of a Sangguniang Barangay.
[33] LOCAL GOVERNMENT CODE, § 50 (5).

by imprisonment of one month and one day to six months or a fine not exceeding one thousand pesos or both.[34]

Ordinances and Resolutions

The terms "resolution" and "ordinance" are not synonymous. An ordinance is law, but a resolution is merely a declaration of the sentiment or opinion of a lawmaking body on a specific matter.[35] Resolutions, which are ministerial and private acts passed by the *sangguniang* barangay, includes the acceptance of the barangay treasurer's appointment, the expression of congratulations or condolences and of sentiments or opinions on particular issues. An ordinance possesses a general and permanent character, but a resolution is temporary in nature.[36] Just like barangay ordinances, which directly affects the affairs of the community and may prescribe fines for their violation, matters relating to the proprietary functions of the barangay and to private concern shall also be acted upon by resolutions.

Proposed ordinances require three separate readings before they can be enacted. Once an ordinance is enacted, it requires the passage of another ordinance to amend or repeal it, except those whose life or application is for a definite period like in the case of the annual appropriations ordinance which generally lapses after every fiscal year. On the other hand, acts of the *sanggunian* that are required by law but do not pertain to legislation may be made through resolutions. i.e. (a) approval of barangay development plans; (b) acceptance of resignation of a member of the *sangguniang* barangay, and (c) authorizing the *punong* barangay to enter into contracts or the barangay treasurer to disburse barangay funds.

An ordinance is also deemed repeated or amended if Congress passes a law or an ordinance enacted by the provincial, city or municipal *Sanggunian* concerned rescinding its effectivity or modifying its content due to legal mandate or requirement. Lastly, ordinances are "enacted" by the *sangguniang* barangay and should be reviewed by the city or municipal *sanggunian* before they

[34] An Act Revising the Revised Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815, art. 234. (1932) (as amended).
[35] Mascuñana v. Provincial Board of Negros Occidental, 79 SCRA 399 (1977).
[36] Administrative Order No. 270, art. 107 (a) and (c).

can be implemented. On the other hand, resolutions are merely "adopted" and do not require the review of the higher *sanggunian*.

A. Major Classifications of Barangay Ordinances according to Purposes

> **General welfare ordinance** – An ordinance enacted by a local legislative body in the exercise of its police power whose primary aim is the general welfare of the people by prescribing certain regulatory measures.
> **Tax ordinance** – enacted in the exercise of the local government unit's taxing power whose primary purpose is to raise local revenue through the imposition or levying of taxes, fees, charges subject to certain limitation prescribed by existing law.[37]
> **Appropriations ordinance** – an ordinance whose primary aim is to appropriate local funds for purposes allowed by law.
> **Special Ordinance** - an ordinance aimed for a special purpose.

An ordinance, in order to be valid, must apply the particular requisites of a valid ordinance as laid down by the accepted principles governing municipal corporations. They are the following:

1. It must not contravene with Philippine Constitution or any statute.
2. It must not be unfair or oppressive.
3. It must not be discriminatory.
4. It must not be prohibited but may regulate trade.
5. It must not be unreasonable.
6. It must be general and consistent with public policy.[38]

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[37] Section 152 of the Local Government Code as amended provides that:

> The barangays may levy taxes, fees, and charges, as provided in this Article, which shall exclusively accrue to them:
> (a) Taxes - On stores or retailers with fixed business establishments with gross sales or receipts of the preceding calendar year of Fifty thousand pesos (P=50,000.00) or less, in the case of cities and Thirty thousand pesos (P=30,000.00) or less, in the case of municipalities, at a rate not exceeding one percent (1%) on such gross sales or receipts.
> (b) Service Fees or Charges - barangays may collect reasonable fees or charges for services rendered in connection with the regulation or the use of barangay-owned properties or service facilities such as palay, copra, or tobacco dryers.
> (c) Barangay Clearance - No city or municipality may issue any license or permit for any business or activity unless a clearance is first obtained from the barangay where such business or activity is located or conducted. For such clearance, the sangguniang barangay may impose a reasonable fee. The application for clearance shall be acted upon within seven (7) working days from the filing thereof. In the event that the clearance is not issued within the said period, the city or municipality may issue the said license or permit.
> (d) Other Fees and Charges - The barangay may levy reasonable fees and charges:
> (1) On commercial breeding of fighting cocks, cockfights and cockpits;
> (2) On places of recreation which charge admission fees; and
> (3) On billboards, signboards, neon signs, and outdoor advertisements.

[38] The Solicitor General v. The Metropolitan Manila Authority, 204 SCRA 837 (1991).

B. Fundamental Principles in the enactment of Tax Ordinance

The fundamental principles in the enactment of tax ordinance are as follows:

1. Taxation shall be uniform in each local government unit.
2. Taxes, fees and charges, and other impositions shall:
    a. be equitable and based as far as practicable on the taxpayer's ability to pay;
    b. be levied and collected only for public purposes;
    c. not be unjust, excessive, oppressive, or confiscatory;
    d. not contrary to law, public policy, national economic policy, or in restraint of trade.
3. The collection of local taxes, fees, charges and other imposition shall in no case be let to any private persons.
4. The revenue collected pursuant to the provision of this Code shall inure solely to the benefit of, and be subject to disposition by, the local government unit levying the tax, fee or charge or other imposition unless otherwise specifically provided herein, and
5. Each local government unit shall, as far as practicable, evolve a progressive system of taxation.

Barangay Legislative Committees

The *sangguniang* barangay, like other legislative bodies, is divided into committees composed of their members to consider, investigate, study, and hold meetings or public hearings if necessary or otherwise act on matters referred to them. The general jurisdiction of every committee shall be defined by the *sanggunian* as it adopts its internal rules and procedure.

As a rule, no legislative action may be taken up during sessions unless the proper committee has submitted its recommendation to the *sanggunian.* The exception is that an administrative measure certified as urgent by the chief executive (in the case of the barangay, the *punong* barangay) as urgent, even if it is not included in the agenda for the day, shall be formally discussed in the ongoing session.

A. The Committees

In parliamentary jargon, a "committee" is understood to mean as a body of members appointed by the presiding officer (or another authority specified by existing the chamber's rules)

to consider and make recommendations concerning disposition of bills, resolutions and other related matters.[39]

Standing Committees (also known as regular committees) are those committees tasked or assigned a continuing function and usually remain "standing" or existing co-terminus with the life of the chamber that created them. The Standing Committees Required by the Local Government Code are the following:

- Committee on Appropriations
- Committee on Women and Family
- Committee on Environmental Protection
- Committee on Human Rights
- Committee on Youth and Sports Development
- Committee on Cooperatives and
- Other committees to address such concerns as the *sanggunian* may determine[40]

The *sanggunian* is not precluded, however, to create ad hoc or special committees for special purposes and which shall cease to exist as soon as their reports are submitted to the *sanggunian.* Usually, these types of committees are independent of the standing committees but its working procedure are the same with that of a standing committee.

B. Legislative Process

The legislative process in the *sanggunian* barangay involves the same procedures and requirements followed by the *sanggunian* of provinces, cities, and municipalities, to *wit*;

1. A proposed ordinance or resolution may be submitted by any *sanggunian* barangay member to the barangay secretary for inclusion in the agenda of the scheduled session.

   A proposed ordinance may also be submitted through a petition by at least fifty (50) voters in the barangay.

2. The proposal is either read or accepted depending on its origin and then referred to the proper committee. This is known as the first reading.

[39] National Conference of State Legislatures, Legislative term: Committee, *available at* https://www.ncsl.org/research/about-state-legislatures/glossary-of-legislative-terms.aspx (last accessed March 20, 2020).
[40] Local Government Code, § 50 (b).

3. No proposal shall be considered for second reading unless it has been reported out by the proper committee to which it had been referred to or unless certified as urgent by the *punong* barangay.

4. During the session, the proposed ordinance or resolution shall be submitted by the committee for discussion, amendment, and approval or disapproval. This is known as second reading.

5. Only those proposed ordinances approved on second reading are calendared for third reading. In case of resolutions, approval on its second reading shall be deemed passed.

6. On the third reading, the members of the *sanggunian* shall vote for the approval or disapproval of a proposed ordinance. A majority vote of the members present is needed to pass an ordinance or resolution.

   In the case of an ordinance or resolution authorizing or direct payment of money or creating liability, the affirmative vote of a majority of all the *sanggunian* members is required for its passage.

   An ordinance transferring the seat of the barangay government to another site requires a vote of 2/3 of all the members of the *sanggunian* barangay;

   An ordinance amending or repealing an ordinance approved through initiative and referendum may only be done 18 months after its approval and by a vote of ¾ of all its members.

7. Ordinances shall, upon approval by the majority of all its members, be signed by the *punong* barangay.

According to Section 54 (a) of the Local Government Code: "Ordinances enacted by the *sanggunian* barangay shall, upon the approval by the majority of its members, be signed by the *punong* barangay."

The existing law did not give the *punong* barangay the power to veto any ordinance approved by the *sanggunian* barangay.

C. Review by the higher *Sanggunian*

Within ten (10) days after the approval of an ordinance, it shall be forwarded to the *sangguniang bayan* or *panlungsod,* as the case may be, for review. The reviewing *sanggunian,* which shall determine whether the ordinance is consistent with law, is given thirty (30) days to act on the measure except in the case of annual appropriations ordinance (budget) where the review

period is for a longer period of sixty (60) days. If the reviewing *sanggunian* fails to act on it within the period mentioned, the ordinance is considered approved.[41]

If an ordinance is returned to the *sanggunian* barangay for adjustment or amendment, the effectivity of the ordinance is suspended.[42] In case the *sanggunian* barangay disagrees with the action made by the *sangguniang panlungsod* or *sangguniang bayan*, such action may be appealed to the city or municipal legal officer whose duty is to review and submit recommendations on ordinances and executive orders issued by component barangays.

D. Except in cases of budget ordinance, the reviewing *sanggunian* cannot declare ordinance invalid

If the *sanggunian panlugnsod* or *bayan* finds a barangay ordinance inconsistent with law or its own ordinances, it shall, within thirty (30) days from receipt thereof, return the same with comments and recommendations to the *sangguniang* barangay for adjustment, amendment, or modification. In which case, the effectivity of the barangay ordinance is merely suspended until such time revision is effected.[43]

In the case of approved annual budget of the barangay, within sixty (60) days from receipt of said annual appropriations ordinance, the *sangguniang panlugsod* or *bayan*, pursuant to Section 324 of the Local Government Code, may declare the said ordinance inoperative in its entirety or in part. Items of appropriation contrary to, or in excess of, any of the general limitations or the maximum amount prescribed shall be disallowed or reduced accordingly.

E. Effectivity of ordinance

Unless otherwise provided in the ordinance, it shall take effect after ten (10) days from the date a copy thereof is posted. The posting shall be made within five (5) days after approval, in a

[41] Local Government Code, § 57 (a) and (b).
[42] Local Government Code, § 57 (c).
[43] *Id.*

bulletin board at the entrance of the barangay hall and in at least two (2) other conspicuous places in the barangay.[44]

The text of the ordinance shall be in Filipino or English and in the language or dialect understood by the majority of the people in the barangay. The barangay secretary shall record such fact in a book kept for the purpose, stating the dates of approval and posting.[45]

F. Penalty allowed to be imposed by a barangay ordinance

The *sanggunian* barangay may prescribe a fine of not less than one hundred (100) pesos nor more than one thousand (1000) pesos. It cannot impose imprisonment for violation of barangay ordinances, unlike higher *sanggunians,* which may punish an offender with imprisonment from one (1) month to six (6) months.[46]

Means Where People May Directly Participate in Barangay Legislative Process

A. Barangay Assembly

A barangay assembly is a gathering of actual residents of the barangay at least six (6) months and who are at least fifteen (15) years old.[47] It serves as a forum wherein they can participate directly in barangay affairs. The assembly shall meet at least twice a year to hear and discuss the semestral report of the *sanggunian* barangay as well as the problems affecting the barangay.

The *Punong* Barangay, or in his absence, the *sanggunian* barangay member acting as *Punong* Barangay, or any assembly member selected during the meeting shall act as presiding officer in the meetings of the barangay assembly. The barangay secretary, or in his absence, any member designated by the presiding officer to act as secretary, shall discharge the duties of secretary of the barangay assembly.[48]

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[44] Local Government Code, § 59 (a).
[45] Local Government Code, § 59 (b).
[46] Local Government Code, § 516.
[47] Local Government Code, § 397 (a).
[48] Local Government Code, § 397 (c).

The assembly shall have the following powers:

> (a) Initiate legislative processes by recommending to the *sangguniang* barangay the adoption of measures for the welfare of the barangay and the city or municipality concerned;
> (b) Decide on the adoption of initiative as a legal process whereby the registered voters of the barangay may directly propose, enact, or amend any ordinance; and
> (c) Hear and pass upon the semestral report of the *sangguniang* barangay concerning its activities and finances. [49]

B. Public Hearing

A public hearing shall be conducted prior to the enactment of the following ordinances:

1. Transfer or relocation of the seat of government and transfer relocation or conversion of local government unit offices and facilities;
2. Cooperative undertakings among local government units;
3. Tax and revenue measures
4. Special levy on real property.
5. Reclassification of agricultural lands for other uses. However, special levy on real property may only be done at the provincial and city *sanggunians,* and reclassification of agricultural lands is a function of the city and municipal *sanggunians.*

Public hearings are conducted to inform the people of the proposal, to get more facts about the subject of legislation, and to consider the reaction of the affected community members. The decision to pursue the issue or enact the measure will entirely depend on the members of the *sanggunian.*

[49] Local Government Code, § 398.

C. Initiative

Initiative refers to the right of competent persons and institutions to introduce for the consideration of a legislative body a bill or proposal to enact a new law or an amendment to or a repeal of existing legislation; legislative initiative entails the obligation to discuss the inclusion of the bill on the agenda of the legislative body.[50]

Local initiative is the legal process whereby the registered voters of a local government unit may directly propose, enact, or amend any ordinance.[51] The procedure of the exercise of initiative at the barangay are as follows:

> (a) Not less than one thousand (1,000) registered voters in case of provinces and cities, one hundred (100) in case of municipalities, and fifty (50) in case of barangays, may file a petition with the *sanggunian* concerned proposing the adoption, enactment, repeal, or amendment of an ordinance.
>
> (b) If no favorable action thereon is taken by the *sanggunian* concerned within thirty (30) days from its presentation, the proponents, through their duly authorized and registered representatives, may invoke their power of initiative, giving notice thereof to the *sanggunian* concerned.
>
> (c) The proposition shall be numbered serially starting from Roman numeral I. The COMELEC or its designated representative shall extend assistance in the formulation of the proposition.
>
> (d) Two (2) or more propositions may be submitted in an initiative.
>
> (e) Proponents shall have ninety (90) days in case of provinces and cities, sixty (60) days in case of municipalities, and thirty (30) days in case of barangays, from notice mentioned in subsection (b) hereof to collect the required number of signatures.
>
> (f) The petition shall be signed before the election registrar. or his designated representatives, in the presence of a representative of the proponent, and a representative of the *sanggunian* concerned in a public place in the local government unit, as the case may be. Stations for collecting signatures may be established in as many places as may be warranted.
>
> (g) Upon the lapse of the period herein provided, the COMELEC, through its office in the local government unit concerned, shall certify as to whether or not the required number of signatures has been obtained. Failure to obtain the required number defeats the proposition.
>
> (h) If the required number of signatures is obtained, the COMELEC shall then set a date for the initiative during which the proposition shall be submitted to the registered voters in the local government unit concerned for their approval within sixty (60) days from the date of certification by the COMELEC, as provided in subsection (g) hereof, in case of provinces and cities, forty-

[50] Farlex, The Free Dictionary, *available at* https://encyclopedia2.thefreedictionary.com/Legislative+Initiative (last accessed March 19, 2020).
[51] Local Government Code, § 120.

> five (45) days in case of municipalities, and thirty (30) days in case of barangays. The initiative shall then be held on the date set, after which the results thereof shall be certified and proclaimed by the COMELEC.[52]
>
> If the proposition is approved by a majority of the votes cast, it shall take effect fifteen (15) days after certification by the COMELEC as if affirmative action thereon had been made by the *sanggunian* barangay.[53]

The power of local initiative has the following limitations:

> (a) The power of local initiative shall not be exercised more than once a year.
>
> (b) Initiative shall extend only to subjects or matters which are within the legal powers of the *sanggunian* to enact.
>
> (c) If at any time before the initiative is held, the *sanggunian* concerned adopts in *toto* the proposition presented and the local chief executive approves the same, the initiative shall be cancelled. However, those against such action may, if they so desire, apply for initiative in the manner herein provided.[54]

The *sanggunian* barangay can repeal or amend an ordinance enacted through an initiative provided, that the repeal shall be done after eighteen (18) months from its approval.[55]

D. Referendum

Local referendum is the legal process whereby the registered voters of the local government units may approve, amend or reject any ordinance enacted by the *sanggunian.*

The local referendum shall be held under the control and direction of the COMELEC within sixty (60) days in case of provinces and cities, forty-five (45) days in case of municipalities and thirty (30) days in case of barangays. The COMELEC shall certify and proclaim the results of the said referendum.[56] It is not exercised to introduce a new ordinance, unlike in the case of an initiative. Like in the initiative, the *sanggunian* barangay can repeal or amend an ordinance enacted

[52] Local Government Code, § 122 (a) to (h).
[53] Local Government Code, § 123.
[54] Local Government Code, § 124.
[55] Local Government Code, § 125.
[56] Local Government Code, § 126.

through a referendum provided, that the repeal shall be done after eighteen (18) months from its approval.[57]

E. Plebiscite

A plebiscite has been defined as a direct vote by the people of a country or region in which they say whether they agree or disagree with a particular policy.[58] It is a legislative process whereby a law or an ordinance already approved in the legislative body is still submitted to the voters for further approval before it can become effective.

Its holding is necessary in the creation, division, merger, abolition, or substantial alteration of boundaries of local government units. The plebiscite shall be conducted by the Commission on Elections within one hundred twenty (120) days from the date of effectivity of the law or ordinance, unless said law or ordinances fixes another date.[59]

Conclusion

Every Filipino belongs to a barangay system. Though they belong to a larger city or municipality, province, and the Philippines as a whole, they see their barangays as the immediate face of the government. As front liners in public service, the barangays are in vital position as first responders to all matters of governance – both the urgent and the fundamental. Barangays serve as the leaders in their respective areas and this entails much work encompassing executive, quasi-judicial, and the legislative. On top of all these, political pressures and community realities are very much felt in the community governance level as much as it is felt nationwide.

With these gargantuan responsibilities, the law empowered them enough to function effectively. The Barangay can levy taxes and other revenue measures; provide for construction and maintenance of community facilities and public works, and many more including to enact ordinances that will ensure a safe, secure and peaceful community. As the law properly authorized

[57] Local Government Code, § 125.
[58] Collins, Definition of Plebiscite, *available at* https://www.collinsdictionary.com/dictionary/english/plebiscite (last accessed March 19, 2020).
[59] Local Government Code, § 10.

the barangays to perform a vast slice of governmental functions, the task left to the elected barangay officials is to accomplish its goals with a strong leadership.

National development needs strong leadership from the localities to help the country build robust communities as its foundation. The *Punong* Barangays and the *Sangguniang* Barangays are vital in making sure that their communities are well-managed and aligned with the national development goals by not only enforcing laws, but also through enacting laws that are tailored-fit to the need of their respective communities.

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ENABLING THE DISABLED:
Evaluating Persons with Disabilities' Rights and Access to Justice

Angelica Joy Q. Bailon

Introduction

The global health crisis that caught the whole world off guard are exposing the inequalities in our societies. News are replete of reports showing videos of panic buying, scarcity of face masks and alcohol, as well as images of people who are helping others who have less in life. However, an aspect of society that is often overlooked, more so during this pandemic, is the persons with disability (PWD) sector.

In fact, during the typhoons Sendong and Yolanda, 80% of PWD were not informed about emergency warnings and did not receive appropriate interventions from concerned government agencies.[1] Also, in one of the disaster preparedness activity conducted in Marikina a few years back, the limited audio signals failed to cater to all types of disability, especially the hearing impaired.[2] Recently, a social media post by Roy Moral, a resident of Imus, Cavite, who was diagnosed with a physical defect, went viral. Despite his illness, which makes walking difficult for him, as well as the possibility of acquiring the virus, he was asked to personally appear at the office of the Department of Social Welfare and Development (DSWD) to personally claim his emergency subsidy.[3] A lot of citizens expressed raged over the incident, calling the authorities insensitive and inconsiderate of his plight.

Unfortunately, the discrimination does not end there. Even in courts, these vulnerable groups of people are being denied access to justice. They could not access the justice system due

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[1] Fritzie Rodriguez, Hard truths about Disasters and Women with Disabilities, RAPPLER, July 15, 2015, *available at* https://www.rappler.com/move-ph/issues/gender-issues/99231-women-with-disabilities-disasters (last accessed January 6, 2020).
[2] Maria Feone Imperial and Yvette B. Morales, PWDs left behind in Marikina's disaster preparedness efforts, VERA FILES, September 27, 2017, *available at* https://verafiles.org/articles/pwds-left-behind-marikinas-disaster-preparedness-efforts (last accessed April 5, 2020).
[3] Francisco Mendoza, Walang konsiderasyon: Despite illness, PWD made to claim subsidy at DSWD office, RAPPLER, April 29, 2020, *available at* https://www.rappler.com/nation/259304-pwd-asked-claim-coronavirus-emergency-subsidy-dswd-despite-condition (last accessed April 5, 2020).

to several factors such as distance, inaccessibility, lack of information, or simply fear. Hence, in pursuit of creating and maintaining an environment that will make the courts fully accessible to persons with disabilities, this article aims to see if the current status of the Philippine legislation and court rules adheres to the objectives laid down under the United Nations Convention on Rights of Persons with Disabilities (UNCRPD) and other international treaties in which the Philippine is a state party. In addition, this article will determine the legal impediments that obstruct PWD from accessing the courts and attaining justice and thereafter recommends possible actions for improving their access to the justice system.

Understanding Disability

Disability is defined as "(1) a physical or mental impairment that substantially limits one or more psychological, physiological or anatomical function of an individual or activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment."[4] The UNCRPD defines PWD as those individuals with long-term mental, physical, intellectual, and sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.[5] The Magna Carta for Disabled Persons, on the other hand, refers to PWD as "those who are suffering from certain limitations to perform an activity in the manner considered normal for a human being, as a result of a mental, physical or sensory impairment."[6]

An estimation of fifteen percent (15%) of the world's population lives with some form of disability.[7] Common forms of disabilities are vision impairment, disabling hearing loss or deafness, mental illness, intellectual disability, and physical disability.

[4] An Act Providing for the Rehabilitation, Self-Development and Self-Reliance of Disabled Persons and their Integration into the Mainstream of Society and for other Purposes [Magna Carta for Disabled Persons], Republic Act No. 7277 as amended, § 4c (1992).
[5] U.N. Convention on the Rights of Persons with Disabilities, A/RES/61/106 [hereinafter UNRPD].
[6] Magna Carta for Disabled Persons, § 4a.
[7] World Health Organization, World Report on Disability available at https://www.who.int/disabilities/world_report/2011/report/en/ (last accessed January 5, 2020).

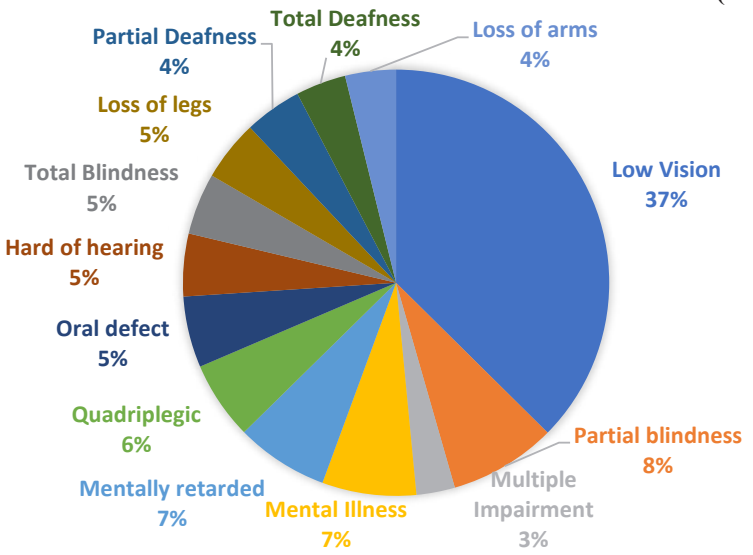
Visual impairment, which is the most common form of disability affecting 1.3 billion people,[8] pertains to the decrease or severe reduction in vision that cannot be corrected with standard glasses or contact lenses and reduces and individual's ability to function at specific or all tasks while blindness is the total inability to see.[9] This was followed by the deaf or hard of hearing, affecting over 466 million people in the world.[10] Disabling hearing loss refers to the decrease in hearing sensitivity of any level while deafness is the profound or total loss of hearing in both ears.[11] Mental illness, which affects 450 million people around the world,[12] is characterized by some combination of abnormal thoughts, emotions, behaviors, and relationships with others.[13] Intellectual disability is characterized by intellectual development and capacity that is significantly below average and 200 million of the world population is said to be affected by it.[14] Lastly, mobility impairment, which said to affect more than 75 million people globally,[15] includes people with varying types of physical disabilities including the upper or lower limb loss, manual dexterity and disability in co-ordination with different organs of the body.[16]

Based on the latest Philippine census, there are about 1.57% Filipinos who have disability.[17] Out of 92.1 million Filipinos, 1.443 million are persons with disabilities.[18] Statistics also show that males account for 50.9% while females comprised 49.1% of the PWD population.[19] It was also shown that the majority of persons with disabilities are in the rural areas. Among the

[8] World Health Organization, Blindness and vision impairment, available at https://www.who.int/news-room/fact-sheets/detail/blindness-and-visual-impairment (last accessed January 6, 2020).
[9] World Health Organization, Prevention of blindness and deafness, available at https://www.who.int/pbd/en/ (last accessed January 5, 2020).
[10] World Health Organization, Deafness and hearing loss, available at https://www.who.int/news-room/fact-sheets/detail/deafness-and-hearing-loss (last accessed January 6, 2020).
[11] World Health Organization, Prevention of blindness and deafness, available at https://www.who.int/pbd/en/ (last accessed January 6, 2020).
[12] World Health Organization, Mental disorders affect one in four people, available at https://www.who.int/whr/2001/media_centre/press_release/en/ (last accessed January 6, 2020).
[13] World Health Organization, Mental Disorders, available at https://www.who.int/mental_health/management/en/ (last accessed January 6, 2020).
[14] Special Olympics, What is Intellectual Disability, available at https://www.specialolympics.org/about/intellectual-disabilities/what-is-intellectual-disability (last accessed January 6, 2020).
[15] World Health Organization, Better health for people with disabilities: infographic, available at https://www.who.int/disabilities/infographic/en/ (last accessed January 6, 2020).
[16] Disabled World, Disabilities: Definition, Types and Models of Disability, available at https://www.disabled-world.com/disability/types/ (last accessed January 6, 2020).
[17] Philippine Statistics Authority, Persons with Disability in the Philippines (results from the 2010 Census) *available at* https://psa.gov.ph/tags/persons-disability (last accessed January 6, 2020).
[18] *Id.*
[19] *Id.*

seventeen regions in the Philippines, Region IV-A had the highest number of PWDs and this was followed by the National Capital Region.[20] It must be noted however that statistics on PWD in the Philippines are not particularly reliable due to stigma and the refusal of families to declare that they have members with disabilities. **Figure 1** shows the distribution of persons with disability by type of impairment and sex based on the latest 2000 census.[21]

FIGURE 1:
PERSONS WITH DISABILITY BY TYPE OF DISABILITY (2000)



Around our world, discriminatory acts happen every day to PWD who are helpless to stop them. Inaccessible environments create barriers to inclusion as well as participation. The alarming truth is that PWD's victimization remains largely invisible and unaddressed because most often than not, they experience communication difficulty and unable to call for help. The maltreatment and general insensitivity towards PWD has something to do with the notion that people with disabilities are nuisance in the society. According to the former Philippine Deaf Resource Center, one out of three deaf women in the Philippines is sexually harassed or raped.[22] The findings of

[20] *Id.*
[21] National Statistics Office, 2000 Census of Population and Housing, available at https://psa.gov.ph/sites/default/files/Philippines.pdf (last accessed January 6, 2020).
[22] Office of the President of the Philippines, Stories of Silence: Deaf Women and Sexual Abuse, *available at* https://www.cfo.gov.ph/news/cfo-news-and-events/976-stories-of-silence-deaf-women-and-sexual-abuse.html (last accessed January 6, 2020).

Social Weather Stations also confirms continuing discrimination of PWD and those with hearing or speech disability were worst off, followed by those with visual impairment.[23] In fact, a review of Philippine laws and policies in 2018 revealed that laws for PWD were not effectively enforced and many barriers remained.[24]

These figures are not just statistics, but actual lives. Seeing the overall situation of the Philippines with respect to PWD reveals violation of civil, political, cultural and economic rights as undeniable realities in the lives of many PWD. It is often forgot that PWD, like normal people, adopt children, inherit from family, file for annulment, are accused of crimes, witness crimes, and many other things. Each interaction with the legal system requires communication, whether it be oral, written or any other mode. Sadly, PWDs are substantially underrepresented and greatly challenged when engaging in the criminal and investigative proceedings. Although people with disabilities possess the same constitutional rights as people with no disabilities, they are often denied full protection of those rights, as they continually face discrimination, exclusion and neglect.

The struggle for recognition of PWD rights has been long and arduous. Fortunately, a lot of stockholders, civil society organizations and even the PWD themselves have heeded the call to fight for PWD rights. In 2010, a group of PWD rallied to the Commission on Elections (COMELEC) in Intramuros due to the disapproval of the party-list accreditation of the Disabled Pinoy Party (DPP).[25] Eventually in 2012, COMELEC approved for the first time the party-list Pilipinos with Disabilities Inc. (PWD Inc.), the first party-list for PWDs.[26] Unfortunately, they failed to obtain at least 2 percent of the votes cast for party-list system in the last two preceding elections.[27]

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[23] The Asia Foundation, Getting it Right: Reporting on Disability in the Philippines, https://asiafoundation.org/publication/getting-it-right-reporting-on-disability-in-the-philippines/ (last accessed January 6, 2020).
[24] United States Department of State, 2018 Country Reports on Human Rights Practices: Philippines, available at https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/philippines/ (last accessed January 6, 2020).
[25] Kathrina Alvarez, Disabled Pinoys fight for rights, SUNSTAR, April 16, 2010, available at https://www.sunstar.com.ph/article/189130 (last accessed January 6, 2020).
[26] Sheila Crisostomo, 19 more party-list groups dropped, PhilStar, November 8, 2012, available at https://www.philstar.com/headlines/2012/11/08/864303/19-more-party-list-groups-dropped (last accessed January 6, 2020).
[27] RG Cruz, CHINOT, ALE, BIDA, atbp: Part-list groups excluded in 2019 polls, ABSCBN News, available at https://news.abs-cbn.com/news/03/29/18/chinot-ale-bida-atbp-party-list-groups-excluded-in-2019-polls (last accessed January 6, 2020).

Also in 2012, the Autism Society of the Philippines and other PWD marched to the House of Representatives to express their sentiments and to pressure the lawmakers to pass House Bill No. 6079 or an Act declaring Filipino Sign Language as the National Sign Language of the Filipino Deaf.[28] After six years, President Rodrigo Duterte finally signed into law Republic Act No. 11106 or the Filipino Sign Language Act last October 30, 2018.[29]

In 2016, PWD appealed to the Congress to transmit to the President the bill that exempts PWD from 12 percent value-added tax on certain goods and services.[30] A month after, President Benigno Aquino III signed Republic Act No. 10754 into law, exempting PWD from value added tax payment.[31]

Despite these recognitions, it is undeniable that many PWD are still experiencing forms of discrimination and neglect in different sectors of the society. Due to their peculiar condition, PWD are at a higher risk of becoming victims of crime and exploitation and denied access and opportunities because of their disability. When they file complaints or testify in courts, they have to go through the harrowing experience of dealing with inaccessible courts and insensitive authorities. These barriers are manifested in the country's national laws and institutional framework for justice, law enforcement and court systems. For PWD, especially those with mental, speech, or hearing disabilities, communication with legal practitioners can be very difficult, as they may not have the adequate interpretation facilities. Despite legal provisions recognizing the capacity of PWD to validly testify in court proceedings, it cannot be denied that such sensory or cognitive impairment largely affects the probative value of their testimony which is further aggravated by the lack of training of judges in handling cases involving PWD.

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[28] John Paul J. Petrola, Paralympics: Spheres of Recognition for PWDs in the Philippines, 11 November 2017, IJSR, Volume 6, Issue 11 at 2026.
[29] Alexis Romero, Duterte signs Filipino Sign Language Act into law, PHILSTAR, November 12, 2018, *available at* https://www.philstar.com/headlines/2018/11/12/1868108/duterte-signs-filipino-sign-language-act-law (last accessed January 6, 2020).
[30] Paolo Romero, Congress urged to submit PWD bill to Malacañang, PhilStar, February 28. 2016, available at https://www.philstar.com/headlines/2016/02/28/1557989/congress-urged-submit-pwd-bill-malacaang (last accessed January 6, 2020).
[31] Bea Orante, Aquino signs law on VAT exemption for PWDs, RAPPLER, April 2, 2016, available at https://www.rappler.com/move-ph/127515-aquino-signs-law-pwd-vat-exemption (last accessed January 6, 2020).

International Law/Treaties relating to PWDs

On December 13, 2006, the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol were adopted at New York, making it the first disability-specific, international legal instrument that provides a comprehensive approach to respecting, protecting and fulfilling the rights of PWDs. The Convention explicitly empowers PWD as holders of rights and promotes respect for their inherent dignity. Currently, there are 162 signatories and 179 ratifications to the Convention. The Philippines signed and ratified it on September 25, 2007 and April 15, 2008, respectively. [32] By ratifying this Convention, the Philippines recognize its obligation to uphold the principles of the convention and is expected to adopt implementing legislation which promotes, protects and ensures full and equal enjoyment of all human rights by PWDs. It is important to note that the UNCRPD does not create new rights for the disabled, but it merely emphasizes and reiterates that PWD must enjoy the equal and the same opportunities that everyone else enjoys.

The UNCRPD mandates that all States shall ensure effective access to justice for PWD on an equal basis with others, such as but not limited to the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings.[33] It further prescribes positive measures to be taken for the fulfilment of the rights of PWDs in relation to justice such as trainings for those persons involved in the administration of justice such as lawyers, judges, police and investigators. The United Nations was set to review the Philippines' implementation of the UNCRPD last September 12, 2018 but a report was yet to be published.[34]

An estimated fifteen percent (15%) of the population or 650 million PWDs live in Asia and Pacific region.[35] Hence, on May 23, 2012, member states of the Economic and Social Commission for Asia and the Pacific (UN ESCAP) proclaimed a new Asian and Pacific Decade of PWDs for the period 2013 to 2022, through adoption of a resolution. The High-Level Intergovernmental

[32] United Nations Convention on the Rights of Persons with Disabilities, A/RES/61/106 [hereinafter UNCRPD].
[33] UNCRPD, art. 13.
[34] Joyce Ann L. Rocamora, UN to review PH implementation of PWD rights convention, PNA, September 5, 2018, *available at* https://www.pna.gov.ph/articles/1047084 (last accessed January 6, 2020).
[35] UN ESCAP, A New Decade to Make the Right Real for Persons with Disabilities, *available at* https://www.unescap.org/ru/node/5541 (last accessed January 6, 2020).

Meeting on the Final review of the implementation of the resolution was held in Incheon, Republic of Korea from October 29 to November 2, 2012. During the said meeting, the participants, including the Philippine delegation, adopted the Ministerial Declaration on the Asian and Pacific Decade of Persons with Disabilities, 2013-2022, and the Incheon Strategy to "Make the Right Real" for Persons with Disabilities in Asia and the Pacific.[36]

In 2015, the UN ESCAP released a report[37] on the regional overview of disability legislation, policies and practices as well as relevant country-specific information. According to the report, in some countries, people must be considered 'physically and mentally healthy' or 'sound' to represent oneself in a court of law, which effectively rule out large numbers of PWDs from accessing the justice system. Moreover, the report stated that lack of accessible information and communication infrastructure in different institutions prevent and inhibit PWD from engaging in different social activities. Clearly, despite the protection afforded under international law, PWDs still face difficulties and discrimination in terms of access to justice in their respective countries.

Historical and Legal Framework in the Philippines

The 1987 Constitution recognizes the PWD sector as an important part of the state. In fact, it has four (4) provisions acknowledging the PWD. Article IV of the Constitution mandates the Congress to design a procedure for the disabled and the illiterates to vote without the assistance of other persons.[38] With respect to health, the Constitution prioritizes the needs of the underprivileged sick, elderly, disabled, women and children.[39] In relation to this, "the State is mandated to establish a special agency for disabled persons for rehabilitation, self-development and self-reliance, and

[36] Proclamation No. 688, Declaring the Period of 2013-2022 as the Philippine Decade of "Make the Right Real" for Persons with Disabilities in Support of the 3rd Asian and Pacific Decade of Persons with Disabilities, November 22, 2013.
[37] UN ESCAP, Disability at a Glance 2015: Strengthening Employment Prospects for Persons with Disabilities in Asia and the Pacific, *available at* https://www.unescap.org/sites/default/files/SDD%20Disability%20Glance%202015_Final.pdf (last accessed January 6, 2020).
[38] PHIL. CONST. art IV, § 2.
[39] PHIL CONST. art. XIII, § 11.

their integration into the mainstream of society,"[40] and "provide adult citizens, the disabled, and out of school youth with training in civics, vocational efficiency and other skills."[41].

Furthermore, there is at least nineteen (19) disability related laws and executive orders since the 1950s in the Philippines.[42] For easy reference, **Figure 2** shows the various laws that were passed for the welfare of PWDs.

Figure 2: Disability-related laws in the Philippines

LAW	TITLE	DATE APPROVED
R.A. No. 1179	An Act to provide for the Promotion of Vocational Rehabilitation of the Blind and other handicapped persons and their return to Civil Employment	June 19, 1954
R.A. No. 1373	An Act authorizing the Philippine Sportswriters Association to hold One Benefit Boxing Show every year, the net proceeds of which shall constitute a trust fund for the benefit or disabled Filipino-boxers	June 18, 1955
R.A. No. 3562	An Act to Promote the Education of the blind in the Philippines	June 21, 1963
R.A. No. 4564	An Act Authorizing the Philippine Charity Sweepstakes Office to hold annually one special sweepstakes race for the exclusive use of the Office of Vocational Rehabilitation, Social Welfare Administration, in its development and expansion program for the physically disabled throughout the Philippines	June 19, 1965
R.A. No. 5250	An Act establishing a ten-year training program for teachers of special and exceptional children in the Philippines and authorizing the appropriation of funds thereof	June 15, 1968
P.D. No. 1509	Creating the National Commission Concerning Disabled Persons and for other purposes	July 11, 1978
B.P. Blg. 344	An Act to enhance the mobility of disabled persons by requiring certain buildings, institutions, establishments and public utilities to install facilities and other devices	Feb 25, 1983
Executive Order No. 232	Providing for the structural and functional reorganization of the national council for the welfare of disabled persons and for other purposes	July 11, 1987
R.A. No. 6759	An Act declaring August one of each year as White Cane Safety day in the Philippines and for other purposes	July 24, 1989
R.A. No. 7277	An Act providing for the Rehabilitation, Self-development and Self-reliance of disabled person and their integration	July 22, 1991
R.A. No. 9442	An Act amending Republic Act No. 7277, otherwise known as the "Magna Carta for Disabled Persons, and for other purposes	July 24, 2006

[40] PHIL CONST. art XIII, § 13.
[41] PHIL CONST. art. XIV, § 2(5).
[42] National Council for Disability Affairs, Disability Laws, *available at* https://www.ncda.gov.ph/disability-laws/ (last accessed January 6, 2020).

R.A. No. 10070	Establishing institutional mechanism to ensure the implementation of programs and services for persons with disabilities in every province, city and municipality, amending Republic Act No. 7277, otherwise known as the Magna Carta for Disabled Persons, as amended, and for other purposes	July 27, 2009
R.A. No. 10366	An Act authorizing the Commission on Elections to establish precincts assigned to accessible polling places exclusively for persons with disabilities and senior citizens	July 23, 2012
R.A. No. 10524	An Act expanding the positions reserved for persons with disability, amending for the purpose Republic Act No. 7277, as amended, otherwise known as the Magna Carta for Persons with Disability	July 23, 2012
R.A. No. 10372	An Act amending certain provisions of Republic Act No. 8293, otherwise known as the "Intellectual Property Code of the Philippines" and for other purposes	July 23, 2012
R.A. No. 10754	An Act expanding the benefits and privileges of persons with disability (PWD),	July 27, 2015
R.A. No. 10905	An Act requiring all franchise holders or operators of television stations and producers of television programs to broadcast or present their programs with closed captions option, and for other purposes	July 21, 2016
R.A. No. 11106	An Act Declaring the Filipino Sign Language as the National Sign Language of the Filipino Deaf and the Official Sign Language of Government in all Transactions involving the Deaf, and mandating its use in schools, broadcast media and workplace	July 23, 2018
R.A. No. 11228	An Act Providing for the Mandatory PhilHealth Coverage for all Persons with Disability (PWDs), amending for the purpose Republic Act no. 7277 as amended, otherwise known as the Magna Carta for Persons with Disability	July 23, 2018

Figure 2 shows that as early as 1954, R.A. No. 1179,[43] also known as the Vocational Rehabilitation Act, was enacted by Congress to promote vocational rehabilitation of the blind and other handicapped persons. This law was meant not just to address the needs of PWDs but also to help them in their employment.

Congress also promulgated laws as fundraising activity for PWDs. One such example is R.A. No. 1373,[44] an act authorizing the Philippine Sportswriters Association to hold One Benefit Boxing Show every year to generate funds for disabled Filipino-boxers. In 1965, Congress passed

[43] An Act to provide for the promotion of vocational rehabilitation of the blind and other handicapped persons and their return to civil employment, [Vocational Rehabilitation Act], Republic Act No. 1179 (1954).
[44] An Act Authorizing the Philippine Sportswriters Association to hold one benefit Boxing Show every year, the net proceeds of which shall constitute a trust fund for the benefit for Disabled Filipino-boxers, Republic Act No. 1373, (1955).

R.A. No. 4564,[45] which authorizes the PCSO to hold annually one special sweepstakes race for the exclusive use of the office of vocational rehabilitation, social welfare administrations.

In 1963, R.A. No. 3562[46] was promulgated promoting the education of the blind in the Philippines. In connection to this, R.A. No. 5250[47] establishing a ten-year training program for teachers of special and exceptional children in the Philippines was enacted.

Presidential Decree No. 1509,[48] enacted on June 11, 1978, created the National Commission Concerning Disabled Persons (NCCDP) which later on became the National Council for the Welfare of Disabled Persons (NCWDP) by virtue of Executive Order No. 232.[49]

Probably one of the greatest milestones in accessibility policies for PWD is the enactment of Batas Pambansa Blg. 344, also known as the Accessibility Law. BP 344 mandates that no license or permit for the construction, repair or renovation of public and private buildings shall be issued unless the owner shall install and incorporate in such building such architectural facilities that will enhance the mobility of disabled persons.[50]

The Magna Carta for Disabled Persons,[51] enacted on July 22, 1991, is the chief policy document for Filipinos with Disabilities. In 2006, R.A. No. 9442[52] amended Republic Act No. 7277 by adding social and economic provisions like the 20% discount on purchase of medicine and daily essentials including transportations and recreational services. On July 27, 2009, R.A.

[45] An act Authorizing the Philippine Charity Sweepstakes Office to hold annually one special sweepstakes race for the exclusive use of the Office of Vocational Rehabilitation, Social Welfare Administration, in its development and expansion program for the physically disabled throughout the Philippines, Republic Act No. 4564, (1965).
[46] An Act to Promote the Education of the blind in the Philippines, Republic Act No. 3562, (1963).
[47] An Act establishing a Ten-year Training Program for teachers of Special and Exceptional Children in the Philippines and Authorizing the Appropriation of Funds thereof, Republic Act No. 5250, (1968).
[48] Creating the National Commission Concerning Disabled Persons and for other Purposes, Presidential Decree No. 1509 (1978).
[49] Office of the President, Providing for the Structural and Functional Reorganization of the National Council for the Welfare of Disabled persons and for other Purposes, Executive Order No. 232 [E.O. No. 421] (July 22, 1987).
[50] An Act to enhance the mobility of Disabled Persons by requiring certain buildings, institutions, establishments and public utilities to install facilities and other devices, [Accessibility Law], Batas Pambansa Bilang 344, (1983).
[51] An Act Providing for the Rehabilitation, Self-Development and Self-Reliance of Disabled Persons and their Integration into the Mainstream of Society and for other Purposes [Magna Carta for Disabled Persons], Republic Act No. 7277 as amended, (1992).
[52] An Act Providing for the Rehabilitation, Self-Development and Self-Reliance of Disabled Persons and their Integration into the Mainstream of Society and for other Purposes [Magna Carta for Disabled Persons], Republic Act No. 7277 as amended, (1992).

No. 10070 amended R.A. No. 7277 mandating the establishment of Persons with Disability Affairs Office (PDAO) in every province, city and municipality in the Philippines.[53]

On July 23, 2012, R.A. No. 10366[54] and R.A. No. 10524[55] were enacted authorizing the COMELEC to establish precincts assigned to accessible polling places exclusively for PWD and requiring at least one percent (1%) of all positions in all government agencies, offices or corporations reserved for PWD respectively.

In 2013, Congress introduced R.A. No. 10372, an amendment to the Intellectual Property Code of the Philippines, to include provisions recognizing the use of sound recording or audiovisual works or fixations for PWD.[56]

On July 27, 2015, R.A. No. 10754[57] was enacted expanding the benefits and privileges of PWDs by amending the Magna Carta for Persons with Disabilities. Section 1 of R.A. No. 10754 amended Section 32 of R.A. No. 7277 entitling the PWDs to at least 20% discount and exemption from the VAT on the purchase of certain goods and services from all establishments. In line with this, the Department of Health issued Administrative Order No. 2017-0008, repealing in effect DOH Administrative Order 2009-0011 to include the additional benefits and privileges stated in the R.A. No. 10754.[58]

R.A. No. 10905 lapsed into law in July 21 2016. Its Implementing Rules and Regulations (IRR) was promulgated by the Movie and Television Review and Classification Board (MTRCB) on December 8, 2016. Three days later, or on July 23, 2018, President Rodrigo Duterte signed into law R.A. No. 11106,[59] commonly known as The Filipino Sign Language Act. It declares Filipino

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[53] Establishing Institutional Mechanism to Ensure the Implementation of Programs and Services for Persons with Disabilities in every province, city and municipality, amending Republic Act No. 7277, otherwise known as the Magna Carta for Disabled Persons, as amended, and for other purposes, Republic Act No. 10070, (2009).
[54] An Act authorizing the Commission on Elections to establish precincts assigned to accessible polling places exclusively for Persons with Disabilities and Senior Citizens, Republic Act No. 10366, (2012).
[55] An Act expanding the positions reserved for Persons with Disability, amending for the purpose Republic Act No. 7277, as amended, otherwise known as the Magna Carta for Persons with Disability, Republic Act No. 10524, (2012).
[56] An act amending certain provisions of Republic Act no. 8293, otherwise known as the "Intellectual Property Code of the Philippines" and for other purposes, Republic Act No. 10372 (2012).
[57]An Act expanding the benefits and privileges of persons with disability (PWD), Republic Act No. 10754, (2015).
[58] Department of Health, Implementing Guidelines of Republic Act 10754, otherwise known as "An Act Expanding the Benefits and Privileges of Persons with Disability", for the Provision of Medical and Health-related Discounts and Special Privileges, Administrative Order 2017-0008 (June 1, 2017).
[59] An Act Declaring the Filipino Sign Language as the National Sign Language of the Filipino Deaf and the Official Sign Language of Government in all Transactions involving the Deaf, and mandating its use in schools, broadcast media and workplace, [The Filipino Sign Language Act], Republic Act No. 11106 (2018).

Sign Language as the national sign language of the deaf and the official sign language of government in all transactions involving the deaf. On that same date, R.A. No. 11228,[60] which mandates all PWDs to be automatically covered under the National Health Insurance Program of the Philippine Health Insurance Corporation, was signed into law.

To enhance public awareness, the government issued Proclamation No. 1870[61] declaring the third week of July as the National Disability Prevention and Rehabilitation Week. In relation to this, R.A. No. 6759[62] also known as the "White Cane Act" was promulgated declaring August 1 of each year as White Cane Safety Day in the Philippines. Proclamation No. 361[63] was subsequently issued on August 19, 2000 resetting the dates of the annual observance of the National Disability Prevention and Rehabilitation Week which culminates on the birthdate of the sublime paralytic Apolinario Mabini on July 23 each year. On October 16, 2006, Proclamation No. 1157[64] was issued declaring December 3 as the "International Retarded Children's Week,[65] Deaf Awareness Week,[66] Mental Health Week,[67] National Down Syndrome Consciousness Month,[68] National Epilepsy Awareness Week,[69] National Attention Deficit/Hyperactivity Disorder (AD/HD) Awareness Week,[70] Cerebral Palsy Awareness and Protection Week,[71] and Autism

[60] An Act Providing for the Mandatory PhilHealth Coverage for all Persons with Disability (PWDs), amending for the purpose Republic Act No. 7277 as amended, otherwise known as the Magna Carta for Persons with Disability, Republic Act No. 11228, (2018).
[61] Office of the President, Declaring the third week of July every year as the National Disability Prevention and Rehabilitation Week, Proclamation No. 1870 (June 22, 1979).
[62] An Act Declaring August one of each year as White Cane Safety Day in the Philippines and for other purposes, Republic Act No. 6759, (1989).
[63] Office of the President, Declaring the third week of July as the National Disability Prevention and Rehabilitation week which shall culminate on the birthdate of the sublime paralytic: Apolinario Mabini on July 23 each year, Proclamation No. 361, (August 19, 2000).
[64] Office of the President, Declaring December 3, 2006 and every year thereafter as "International Day of Persons with Disabilities in the Philippines", Proclamation No. 1157, (October 16, 2006).
[65] Office of the President, Designating the Period from February 14 to 20, 1975, and every year thereafter, as "Retarded Children's Week", Proclamation No. 1385, (February 12, 1975).
[66] Office of the President, Declaring the Period from November 10 to 16 of every year as "Deaf Awareness Week", Proclamation No. 829 (November 8, 1991).
[67] Office of the President, Declaring the second week of October of every year as National Mental Health Week, proclamation no. 452, (August 25, 1994).
[68] Office of the President, Declaring the month of February as "National Down Syndrome Consciousness Month", Proclamation No. 157 (February 18, 2002).
[69] Office of the President, Declaring the first week of September of every year as "National Epilepsy Awareness Week", Proclamation No. 230 (August 12, 2002).
[70] Office of the President, Declaring the third week of October of every year as "National Attention Deficit/ Hyperactivity Disorder (AD/HD) Awareness Week", Proclamation No. 472 (September 18, 2003).
[71] Office of the President, Declaring the period from September 16 to 22, 2004 and every year thereafter as Cerebral Palsy Awareness and Protection Week, Proclamation No. 588 (March 25, 2004).

Consciousness Week[72]. These proclamations aim to increase public awareness of the different disability groups and issues in the country. On May 3, 2002, President Gloria Macapagal-Arroyo issued Administrative Order No. 35[73] directing all departments, bureaus, Government-owned and/or Controlled Corporations, Government Financial Institutions, Local Government Units, State Universities/Colleges and Schools and other Government Instrumentalities to promote and conduct relevant activities during the annual observance of the National Disability Prevention and rehabilitation Week.

Insufficiency of the Laws

These recent laws indicate a growing public and political awareness of the problems of the handicapped. However, a report by the CHR revealed that the implementation of the laws remains inadequate if not manifestly scarce.[74] Communication, infrastructure and transportation system in the Philippines remain neglectful in addressing the needs of PWDs. Moreover, during the 1st International Conference of Public Librarians, it was revealed that some of the existing disability laws in the Philippines were not fully harmonized with UNCRPD.[75] The definition of PWD in the Magna Carta for Disabled Persons differs from how the United Nations views disabilities and persons that have them. The Magna Carta focuses on medical and functional model and is different from how it was defined by UNCRPD.[76] In fact, when applying for a PWD identification card, the applicant must submit a clinical abstract signed by a licensed medical doctor. On the other hand, the UNCRPD uses the social model and views disability as a result of the interaction between

[72] Office of the President, Declaring the third week of January as Autism Consciousness Week, Proclamation no. 711, (January 4, 1996).
[73] Office of the President, Directing all Departments, Bureaus, Government-owned and/or controlled corporations, Government Financial Institutions, Local Government Units, State Universities/Colleges and Schools, and other Government/Instrumentalities to promote and conduct relevant activities during the annual observance of the national disability prevention and rehabilitation week, Administrative Order No. 35 (May 3, 2002).
[74] Diana Mendoza, Persons with Disabilities and the State with Disabilities, BussinessWorld, November 11, 2019, available at https://www.bworldonline.com/persons-with-disabilities-and-the-state-with-disabilities/ (last accessed January 5, 2020).
[75] Edgardo F. Garcia, Persons with Disabilities: Status in the Philippines, *available at* http://web.nlp.gov.ph/nlp/sites/default/files/20Mar2014/Persons%20with%20Disabilities%20by%20Edgardo%20garcia.pdf. (last accessed January 6, 2020).
[76] The Asia Foundation, *supra* note 20.

persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.[77]

Also, the concept of 'independent living' under the Magna Carta is different from that of the UNCRPD.[78] Under the Magna Carta, independent living enshrined in its declaration of policy concerns only the ability of PWD to perform activities on their own. However, UNCRCPD goes deeper than mere actual and physical performance for it also recognizes the respect for the preference, autonomy, and decision-making of persons with disabilities.[79]

Furthermore, the only existing social protection mechanisms for PWDs in the Philippines are: (1) the disability benefits for those who are employed and who acquired their disability while working, (2) the Philippine health insurance generally afforded only by PWD who are employed and, (3) the 20% discount on transportation, medicine, medical services, restaurant and cultural establishments. In fact, PWD are presumed to be at greater risks and are charged higher premiums for insurance. Moreover, since many of them are also poor, they would not even have the minimum capacity to purchase medicine and avail other services. Also, labor market programs for PWD have not been systematic enough to have a significant impact. In addition, the landmark Accessibility Law addresses only the physical environment but does not address the accessibility needs of other PWDs like the blind and the deaf.

Aside from the generally inadequate implementation of disability related laws, a National Plan of Action for the Philippine Decade for Persons with Disabilities (2003-2012) formulated by the then National Council for the Welfare of Disabled Persons, which is based on the Biwako Millennium framework, was not fully implemented. Despite the enactment of R.A. No. 10070 amending R.A. No. 7277, only 60% of local government units have Persons with Disability Office (PDAO).[80] While the presence of PDAOs in LGUs lowers the chance of PWDs having limited access to various services, the low compliance with this requirement has severely impaired the implementation of the law assuring the delivery of services to PWDs.

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[77] *Id.*
[78] Disability Rights Promotion International, Monitoring the Human Rights of Persons with Disabilities: Laws and Programs in the Philippines, *available at* http://www.yorku.ca/drpi/files/PhilippinesLawsRep.pdf (last accessed January 6, 2020).
[79] *Id.*
[80] Mylene C. Orillo, Getting through life's disability, THE MANILA TIMES, January 26, 2019, *available at* https://www.manilatimes.net/getting-through-lifes-disability/501979/ (last accessed January 6, 2020).

Also, in a review made by the Disability Rights Promotion International, it was revealed that access to justice is a major issue that has to be promptly pursued.[81]

While the UNCRPD acknowledges the fact that PWD continually possess legal capacity, the study also pointed out that with PWD still tagged as 'legally incompetent' by the justice system, substantial efforts are needed to attain equality before the law. According to the study, the Civil Code are contributing to these barriers by identifying certain PWD as not able to independently manage themselves, their properties and their relations to others.[82] Specific provisions of the Civil Code[83] provides:

> Art. 38. Minority, insanity or imbecility, the state of being a **deaf-mute**, prodigality and civil interdiction are mere restrictions on capacity to act, and do not exempt the incapacitated person from certain obligations, as when the latter arise from his acts or from property relations, such as easements.[84] (Emphasis supplied)
>
> Art. 39. The following circumstances, among others, modify or limit capacity to act: age, insanity, imbecility, the state of being a **deaf-mute**, penalty, prodigality, family relations, alienage, absence, insolvency and trusteeship. The consequences of these circumstances are governed in this Code, other codes, the Rules of Court, and in special laws. xxx. [85] (Emphasis and omission supplied)
>
> Art. 820. Any person of sound mind and of the age of eighteen years or more, and not **blind**, **deaf or dumb**, and able to read and write, may be a witness to the execution of a will mentioned in Article 805 of this Code.[86] (Emphasis supplied)
>
> Art. 1327. The following cannot give consent to a contract:
> xxx
> (2) Insane or demented persons, and **deaf-mutes** who do not know how to write.[87] (Emphasis and omission supplied)

In 2017, the United Nations Human Rights Council adopted a Resolution requesting the Office of the High Commissioner for Human Rights (OHCHR) to prepare a study on article 13 of the UNCRPD.[88] In this respect, the OHCHR asked United Nations member states to submit to the Special Rapporteur a report on access to justice and of persons with disabilities. The Commission

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[81] Disability Rights Promotion International, *supra* note 76 at 757.
[82] *Id.*
[83] An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386 (1950).
[84] *Id*. art. 38.
[85] *Id*. art. 39.
[86] *Id*. art. 820.
[87] *Id*. art. 1327(2).
[88] G.A. Res. 31/6, ¶ 18, U.N. Doc. A/HRC/RES/31/6 (March 23, 2016).

on Human Rights (CHR) of the Philippines, submitted its responses to the OHCHR last May 3, 2017.[89] With respect to the question of whether the country has laws, policies or guidelines recognizing the individual legal standing in all administrative and judicial procedures, CHR responded that:

> Despite legal provisions allowing persons with disabilities to validly testify in court proceedings, the problem lies with the appreciation or the weight of the litigant's testimony. It should be taken into consideration that for instance, in cases of persons with psycho-social or sensory impairments, the weight of testimonies would depend solely on the presiding judge.[90]

When asked if the country has procedural and age-appropriate accommodation laws, protocols, and guidelines, the CHR discussed the Rule on Examination of a Child Witness putting emphasis on asking developmentally appropriate questions asked to a child witness. However, this is inadequate since no accommodation was specifically provided for PWD witness. As a result, it was observed that most PWD who are victims of crimes and violations of their rights prefer to keep silent.[91]

Protecting the PWDs has come a long way but there is still a huge gap between the laws and its implementation. In addition, greater attention needs to be made in improving PWD's access to justice. Presently, our criminal justice system is inadequate, especially in providing adequate safeguards and accommodations to PWDs in courts, tribunals, and investigative board. As a result, it was observed that most PWDs who are victims of crimes and violations of their rights prefer to keep silent.[92]

PWD and the Philippine Justice System

Access to justice, as recognized by the Philippine Bill of Rights, is a fundamental right of every person, including PWDs. Unfortunately, our justice system is characteristically slow, tedious

[89] Commission on Human Rights of the Philippines, Inputs on Access to Justice of Persons with Disabilities in the Philippines, *available at* http://chr.gov.ph/wp-content/uploads/2018/04/Inputs-on-Access-to-Justice-of-Persons-with-Disabilities-in-the-Philippines.pdf (last accessed January 7, 2020).
[90] *Id.*
[91] Disability Rights Promotion International, *supra* note 76 at 757.
[92] *Id.*

and expensive. Furthermore, accommodations in law enforcement, prosecution and courts have not been provided to PWDs. While the Magna Carta for Disabled Persons recognizes the disabled persons as part of the Philippine society, PWDs still often find themselves marginalized by the society and by the justice system.

For instance, PWDs are being excluded from the legal system based on the belief that they are incompetent to provide accurate and reliable testimony. The basic qualifications of witness pursuant to the Rules of Court[93] are (a) he can perceive; (b) he can make known his perceptions to others; (c) he must take either an oath or an affirmation and (d) he must not possess any of the disqualifications imposed by law or the rules. All four requisites must be met before a witness will be deemed to be competent to testify.

The Rules provides that a witness can testify only to those facts which he knows of his personal knowledge; that is, which are derived from his own perception. However, in case of PWDs who have mental and sensory impairment, the first and second qualification seems problematic especially to those who have communication difficulties such as the deaf and the blind. Not only does a witness must have personal knowledge acquired through his senses but also he must have the ability to remember what has been perceived and communicate the remembered perception and this qualification may be problematic for persons with cognitive and mental disabilities.

The determination of a witness' competency and credibility lies with the judge. Judges are entrusted to evaluate and determine the truth by questioning the witness and observing the witness' behavior and speech. However, PWDs may have different verbal, behavior and oral expressions and understanding. Hence, they need special attention as they are not capable to act in certain activities.

The Supreme Court addressed this issue in *People v. Tuangco.*[94] The Court explained that deaf-mutes are not incompetent as a witness. They are competent where they can understand and appreciate the sanctity of an oath, comprehend facts they are going to testify and communicate their ideas through a qualified interpreter. Thus, in several occasions, the Court convicted the accused on the basis of the deaf-mute's testimony.

[93] Rules of Court, rule 130, § 20.
[94] People v. Tuangco, G.R. No. 130331, November 22, 2000.

In a controversial case of robbery with homicide involving a real estate broker named Ramon Jaime Birosel, the Supreme Court upheld the conviction of Edwin Aleman based on the testimony of the lone witness who is a 14 year old deaf-mute boy named Mark Almodovar.[95] During the hearing, Almodovar was assisted by a licensed sign language interpreter from the Philippine Registry of Interpreters for the Deaf named Daniel Catinguil, who has been teaching in the Philippine School for the Deaf since 1990.[96] Even though Aleman tried to discredit Almodovar's testimony and competency, the Supreme Court established his competency in this wise:

> …With the help of Catinguil, the trial court determined that Almodovar is not mentally deficient and that he was able to tell time, space and distance. He was able to draw and make sketches in open court to show the relative position of things and persons as he perceived like a normal person. By using signs and signals, he was able to recount clearly what he witnessed in the evening of February 10, 2003…[97] (Omission supplied)

The Supreme Court also explained in the same case that the inability to hear and speak may prevent a deaf-mute from communicating orally with others but he/she may still communicate with others in writing or through signs and symbols and, as in the case of Almodovar, sketches.[98] Thus, the Court firmly stated that "a deaf-mute is competent to testify in court so long as he/she has the faculty to make observations and he/she can make those observations known to others"[99] through the help of interpreters and other qualified persons who can understand him. Sadly, not all deaf witnesses were given the same opportunity to enjoy the services of an interpreter. According to the CHR, "of 213 cases from 2006 to 2012 involving deaf parties, only 24% have appointed court interpreters. Of 63 cases of unschooled deaf parties requiring deaf relay interpreters, 75% have no interpreter."[100]

The Rules of Court also recognizes that being deaf and mute does not automatically make one unqualified to be a witness. Thus, the presence of qualified sign language interpreters becomes

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[95] People v. Edwin Aleman y Longhas, G.R. No. 181539, July 24, 2013.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] Diana Mendoza, Persons with Disabilities and the State with Disabilities, BussinessWorld, November 11, 2019, available at https://www.bworldonline.com/persons-with-disabilities-and-the-state-with-disabilities/ (last accessed January 5, 2020).

crucial in all stages of criminal prosecution. To facilitate the ability of PWDs to access justice, the government should provide them qualified sign language interpreters that will entertain and interpret their complaints and testimonies and who are competent and familiar with the terminologies and procedures of the justice system.

With respect to the blind, there are no legal impediments imposed on them to testify as long as they can perceived thru hearing, smell, taste and they can make known their perceptions to others. In *People v. Lascano and Delabajan,*[101] the Supreme Court viewed the blind victim's testimony to be clear, convincing and credible, to wit:

> It bears stressing that identification of an accused by his voice has been accepted, particularly in cases where, as in this case, the victim has known the perpetrator for a long time; for the blind voice recognition must be a special sense that has been developed to a very high degree. Besides, it is inconceivable that a blind woman would concoct a story of defloration, allow an examination of her private parts and subject herself to public trial or ridicule if she has not, in truth, been a victim of rape and impelled to seek justice for the wrong done to her.[102]

While most blind and visually impaired people can easily communicate using their voice in courts, it is better to create and have alternative accommodations such as braille or any other means in order to make the courts and the proceedings as inclusive as possible. In fact, in Sweden, their laws mandate the translation of the proceedings and rules to and from Braille, so that those with visual impairment can understand the procedures better. [103]

Persons with cognitive and mental disabilities pose an additional challenge to evidence law. Their disability alters the way they perceive and understand things. Some of the essential requirements upon which a person must testify, such as memory and recollection, may differ when offered by persons with cognitive and mental disabilities. However, this can be addressed by presenting and framing questions appropriate and understandable for persons with cognitive and mental disability. In other words, the ability of persons with mental and cognitive disabilities to be reliable and competent witness depends on the external factors such as the setting and the questioning style. In the United States, House Bill No. 151 was passed by the State of Florida mandating the courts to set any other conditions it finds just and appropriate when taking the

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[101] People v. Lascano and Delabajan, G.R. No. 192180, March 21, 2012.
[102] *Id.*
[103] The Administrative Court Procedure Act, § 50. and The Swedish Code of Judicial Procedure, § 9.

testimony of a person who has an intellectual disability including the use of a therapy animal or facility dog.[104]

The foregoing discussion reveals that in order to address PWD's needs, various types of accommodations must be introduced. In courtrooms, sign language interpreters play a critical role in extracting information, evidence and testimony from deaf witnesses. In 2004, the Supreme Court issued Memorandum Order No. 59-2004 authorizing the Court Administrator to act on and approve requests of lower courts for the hiring of sign language interpreters.[105] Three years after, the Office of the Court Administrator issued Circular No. 89-2007,[106] essentially quoting the earlier Memorandum Order authorizing the Court Administrator to act on and approve requests of lower courts for the hiring of sign language interpreters. A month later, the Supreme Court issued a guideline on the payment of services of a hired sign language.[107] On July 19, 2011, the Supreme Court Office of the Court Administrator issued Circular No. 102-2011[108] authorizing the Court Administrator to act and approve requests of lower courts for the hiring of services of foreign language interpreters.

However, existing memorandum and policies deal only with compensation of interpreters but there are no guidelines on the qualifications, ethical conduct and standardized process of hiring interpreters. The Philippine Federation of the Deaf noted that the circulars have no clear guidelines on the choice and assignment of qualified and ethical court interpreters and it only provides interpretation only during the reading of charges and testifying. They also contended that there is no organized system for interpreting sign language in court rooms here in the country.

The thing is, not only the PWD witness are being oppressed but also the interpreters. In a report by the CHR in 2017, it was revealed that there was no specific institutional budget items for

[104] Julinda Beqiraj, Lawrence McNamara and Victoria Wicks, *supra* note 345.
[105] Supreme Court Memorandum Order No. 59-2004, Authorizing the Court Administrator to act on and approve requests of lower courts for the hiring of Sign Language Interpreters (September. 10, 2004).
[106] Office of the Court Administrator Circular No. 89-2007, Authorizing the Court Administrator to act on and approve requests of lower courts for the hiring of sign language interpreters, (September. 14, 2007).
[107] Office of the Court Administrator Circular No. 104-2007, Guidelines on the Payment of the Services of a Hired Sign Language (October 18, 2007).
[108] Office of the Court Administrator Circular No. 102-2011, Authorizing the Court Administrator to Act and Approve Requests of Lower Courts for the Hiring of Services of Foreign Language Interpreters in Actions or Proceedings in Courts (July 19, 2011).

the compensation of services of sign language interpreters.[109] Unless the Philippine government implements policies and programs that will recognize the critical role of interpreters not only in the justice system but in every aspect of the society, the daily oppression of PWDs and interpreters alike will continue.

For people who are blind or visually-impaired, it is expected that these PWDs may soon have wider access to alternative information materials after the Intellectual Property Office of the Philippines (IPOPHL) relaxed its rules on copyright protection, thus liberalizing the mass production of materials in accessible format in braille and audio books.[110] With increased access to these alternative forms, the blind and the visually-impaired are given more access and opportunity to know and understand court proceedings, legal documents, and even the laws itself. This would greatly contribute to the awareness about their rights, their privileges and the procedures in courts.

As for the physically disabled people, the implementation of B.P. Blg. 344 should be given serious attention by the government. Ironically, there were lots of government and private structures, and similar establishments that have not complied with the required facilities and structure mandated by B.P. Blg. 344. Most buildings and infrastructure lack ramps or if there are, it is too steep or narrow. Some, if not most, elevators are not operational or do not even contain any Braille markings. Moreover, most courts in the Philippines are usually too small which makes it hard for wheelchair maneuvering. With such environment, the movements of physically disabled persons are certainly restricted if not totally barred. Thus, the government should do something about it. With strict and effective implementation of the law, every building and infrastructure in the country, including the courts, should be barrier-free and PWD-accessible.

Moreover, the adoption of technological assistance would greatly improve the convenience and accessibility of the PWDs. This is proven by other countries that have employed different means to make the courts accessible to PWDs. As early as 1995, Israel enacted the Public Defense Act which mandates that PWD shall be entitled to public representation and recognizes untypical mode of acquiring evidence and conducting legal proceedings by using video testimony and

[109] Diana Mendoza, Persons with Disabilities and the State with Disabilities, BussinessWorld, November 11, 2019, available at https://www.bworldonline.com/persons-with-disabilities-and-the-state-with-disabilities/ (last accessed January 5, 2020).
[110] Kris Crismundo, IPOPHL eyes to ease limitation on accessible formats, PNA, January 4, 2019, available at https://www.pna.gov.ph/articles/1057992 (last accessed January 5, 2019).

special investigators.[111] Meanwhile in the United States of America, the use of digital technologies was considered to provide solution and accommodations to PWD's access to the courts. In particular, an Online Dispute Resolution was adopted and developed first in the private sector to facilitate the quick resolution of conflicts and due to its success, it has now been used in public courts. Under Croatia's Criminal Procedure Act, witnesses who cannot appear at court due to their serious physical disabilities may give testimony in their place of residence or any other premises where they are situated.[112] They may be questioned by means of technical devices for video and audio taping.[113]

Indeed, disability is a cross-cutting issue that needs cross-cutting measures. The issues of non-inclusion and non-access to basic social services for PWDs must be addressed. Without access to these basic services, PWDs will not be able to overcome barriers, attain justice and enjoy their full capacity as human beings.

Conclusion and Recommendation

The quest for justice and equality for PWD can be daunting but it is achievable. A lot has been done but there remains much to work on. Access to justice for PWD includes ensuring that they have access to courts and legal proceedings, and they have legal standing to exercise their rights in court. Technology is just one of the many ways to enable the disabled. It is imperative to check which accommodations are effective and are more likely to improve PWD's access to justice. Some of the challenges involve access to information, resources and training. Moreover, disability statistics are a source of contention. Hence, the following recommendations are given to make the court and its proceedings fully accessible to PWDs.

First, the government must conduct comprehensive statistical surveys that is accurate and reliable. Accurate and reliable statistics on PWD is essential to make well informed laws, policies, and to monitor progress and effectiveness of the measures and laws made for PWD**.**

[111] State of Israel Ministry of Justice, About the Public Defense, *available at* https://www.justice.gov.il/En/Units/PublicDefense/About/Pages/default.aspx (last accessed June 21, 2019).
[112] Criminal Procedure Act, art. 247(3), (2009) (HRV).
[113] *Id.* at art. 273.

Second, more than creating laws and rules for PWDs, the government must ensure that these laws and rules are fully implemented and that there is a mechanism through which such accommodations are monitored and provided.

Third, pursuant to the primary objective of promoting PWD's access to justice, the rules may be improved by conducting culturally sensitive research design and developing alternative means of accommodating PWD in the legal system.

Fourth, a collaborative effort of the government, the PWDs, the stakeholders, the legislators and other significant groups is crucially important in promoting and protecting the rights of the PWD. While laws are necessary, they are not always sufficient. To be effective, the law must be supported and followed by the community, by the family and by every individual.

Lastly, it is equally important to educate the public on PWD's rights. Greater community awareness of PWD's rights may serve as an effective deterrent against stigma, discrimination, exclusion, and violence.

The neglect of disabled people as subjects of the justice system is an inevitable consequence of their separation from the mainstream. Thus, the government and the society as a whole must break down the barriers that disadvantage PWDs in fully realizing their rights. If PWDs are afraid to go to courts because they felt discriminated by the physical and communication barriers in courtrooms, it is the obligation and responsibility of the court, the government and the society to come to them and make the courts accessible and barrier-free to PWDs. As we embark on this "new normal" journey, may no person be left behind, not even the PWDs.

ABOUT THE AUTHOR

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NEW NORMS:

THE RECENT ISSUANCES OF THE SECURITIES AND EXCHANGE COMMISSION PERTAINING TO THE NEW CONCEPTS INTRODUCED BY THE REVISED CORPORATION CODE

Joshua Emmanuel L. Cariño

Introduction

Since 1980, Batas Pambansa Blg. 68,[1] then known as the Corporation Code of the Philippines,[2] has been the bible of corporate law practice in the Philippines. The world of corporate law as we know it revolved around this Code. However, times have vastly changed. Though still relevant in every respect, the provisions of the Corporation Code needed to adapt to the fast changing and evolving world of commerce in the country and the world. Technology plays a big role in making commerce and business effective and efficient. The role of technology in corporate law practice is needed to be recognized.

Commerce and Business in the Philippines has also developed and expanded. Unlike before, businesses do not necessarily have to be established as a big entity with a huge capital and employee workforce. Thanks to technology and globalization, businesses now have the capacity to start and operate even through the management of a single person, with very minimal capital to being with. The present times have also allowed for more diversity in business ventures. Corporations seek opportunities outside of their usual scope to expand their business ultimately increasing productivity and livelihood in the country. The risks involving these ventures and diversification need to be protected by law to ensure confidence of investments.

The old ways of corporate practice have slowly but greatly evolved thanks to technology and globalization. In the past, the normal way of doing transactions involve communication through physical delivery of documents. For instance, filing reportorial requirements before the

[1] The Corporation Code of the Philippines [CORPORATION CODE], Batas Pambansa Blg. 68 (1980) (repealed 2019).
[2] *Id.,* § 1.

Securities and Exchange Commission (SEC) are done through submission of written documents, duly signed and authenticated. Now, the SEC has allowed submission of reportorial requirements through online means. Notice of meetings, in the past, are sent through physical mail delivery – either through postal mail or courier services. However, these take time and communication in general has shifted through electronic means. Hence, most notices are already sent through electronic mail and other means of electronic communication.

Globalization has made the world a smaller place for everyone. Technology has contributed a lot in the globalization because it made it easier for everyone to connect to each other with less delays and almost real time communication. Hence, conduct of business and its activities are not only limited to a singular place or location. Globalization transformed the world as a one big market of business opportunity. Hence, our laws on corporate practice need to address these emerging trends in business because these trends are slowly becoming the new norms of business practice.

This writing provides a glimpse of the salient provisions introduced by the Revised Corporation Code of the Philippines, which took effect in 2019, thirty-nine years after the enactment of the Corporation Code of the Philippines. The provisions of the Revised Corporation Code that will be discussed in this writing are the provisions that the Securities and Exchange Commission has set guidelines for from the effectivity of the new law up to the time of writing.

The Revised Corporation Code

Republic Act No. 11232, or the Revised Corporation Code (RCC) introduced updates and new concepts relating to the present practices of corporations and commerce. Overall, the general framework and provisions of the 1980 Corporation Code are retained in the Revised Code. The changes brought about in the new law comprise the whole body of doctrines and jurisprudence that have evolved under the 1980 Corporation Code.[3] Apart from those, the RCC has also introduced new provisions which are adaptive to the signs of times and technology. The primary goal of the Revised Corporation Code is to promote ease of doing business in the Philippines. It aims to make it easier for businesses to start up, expand, or diversify which ultimately leads to

[3] CESAR L. VILLANUEVA, COMMENTARIES ON THE REVISED CORPORATION CODE, iii (2019).

more productivity and job generation in the country. Some of the key developments introduced by the RCC include recognition of electronic means of communication for sending of notices and conduct of meetings, the perpetual existence of corporations, and the introduction of one person corporations.

The RCC has also imbibed in Corporate Law the promotion of good governance by codifying the need to keep record the details of its beneficial ownership and the introduction of the concept of corporations engaged in business vested with public interest. The RCC requires that corporations vested with pubic interest shall have independent directors that will constitute twenty percent (20%) of the board.[4] Corporations vested with public interest covered by the requirement are enumerated by the RCC as:

- Corporations whose securities are registered with the SEC
- Corporations listed with an exchange or with assets of at least Fifty Million Pesos and have two hundred (200) or more holders or shares, each holding at least one hundred (100) shares of a class of its equity shares
- Banks, quasi-banks, Non-Stock Savings and Loan Associations, pawnshops, corporations engaged in money service business, pre-need, trust and insurance companies, and other financial intermediaries
- Such other corporations as may be determined by the SEC[5]

The Revised Corporation Code has also made into law a number of the powers and functions of the Securities and Exchange Commission such as investigation powers, power to administer oaths, issue subpoenas and cease and desist orders, hold a person in contempt, and impose administrative sanctions. The RCC has also specified offenses such as the unauthorized use of corporate name, violation of duty to maintain records, fraudulent conduct of business, among others. Penalties for offenses are also provided by the RCC. Essentially, most of the powers that the SEC exercises are codified in the Revised Corporation Code.

[4] An Act Providing for the Revised Corporation Code of the Philippines [REVISED CORPORATION CODE], § 22 (2019).
[5] *Id*, § 22.

Scope and Limitation

This writing does not intend to provide a comprehensive commentary on the changes brought about by the Revised Corporation Code. This article would only cover such pertinent changes under the new law that are accordingly given new guidelines by the Securities and Exchange Commission from the enactment of the Revised Corporation Code until the time of this writing.

Though issued in relation to the provisions of the RCC on the powers of the SEC and on the duty to keep corporate records involving beneficial ownership, SEC Memorandum Circular No. 15, series of 2019 shall not be included in this writing. The author believes that the concept of beneficial ownership is brought to life by several other laws such as the Anti-Money Laundering Act[6] and the Terrorism Financing and Suppression Act of 2012,[7] not by the RCC. Hence, a discussion on beneficial ownership will have to touch on other laws and will deviate from the provisions of the RCC. Moreover, SEC Memorandum Circular No. 15 is an amendment of a Pre-RCC Circular on declaration of Beneficial Ownership.[8] The significant changes brought about by Memorandum Circular No. 15 include the penalties arising from failure to comply with the requirements of the circular and a more comprehensive manner of determination of beneficial ownership of a corporation.

This writing shall discuss the following: changes in the manner of incorporating Private Corporations; the guidelines in the establishment of a One Person Corporation; the perpetual existence of corporations, the guide on revival of corporations; and the new guidelines on notices and meetings.

[6] An Act Defining the Crime of Money Laundering, Providing Penalties Therefor and for other Purposes [Anti-Money Laundering Act of 2001], Republic Act No. 9160 (2001).
[7] An Act Defining the Crime of Financing of Terrorism, Providing Penalties Therefor and for other Purposes [The Terrorism Financing Prevention and Suppression Act of 2012], Republic Act No. 10168 (2012).
[8] Securities and Exchange Commission, Revision of the General Information Sheet (GIS) to Include Beneficial Ownership Information, SEC MC No. 7 s. 2018 (Nov 27, 2018).

Incorporating Private Corporations

New Rules on Number of Incorporators

The Revised Corporation Code has introduced significant changes in incorporating a Private Corporation. Section 10 of the RCC provides, to wit:

> SEC. 10. Number and Qualifications of Incorporators. – Any person, partnership, association or corporation, singly or jointly with others but not more than fifteen (15) in number, may organize a corporation for any lawful purpose or purposes: Provided, That natural persons who are licensed to practice a profession, and partnerships or associations organized for the purpose of practicing a profession, shall not be allowed to organize as a corporation unless otherwise provided under special laws. Incorporators who are natural persons must be of legal age.
> Each incorporator of a stock corporation must own or be a subscriber to at least one (1) share of the capital stock.
> A corporation with a single stockholder is considered a One Person Corporation as described in Title XIII, Chapter III of this Code.[9]

The RCC has removed the minimum number of incorporations, which was at five under the Old Corporation Code, while maintaining the maximum number of incorporators. It must be noted, however, that the minimum number of incorporators for a standard private corporation must be **two** persons or entities. A corporation with only one (1) incorporator will be considered as a One Person Corporation (OPC), governed by a different set of rules to be discussed in the succeeding part of this writing.

Under the RCC, certain juridical personalities may now be incorporators of a domestic corporation. Partnerships, associations, and corporations may be listed as incorporators of a new domestic corporation. The Securities and Exchange Commission has issued Memorandum Circular No. 16, series of 2019[10] in July 2019 to lay down the specific requirements for incorporators especially for juridical persons.

The Circular defined what is an incorporator. It states that incorporators are those stockholders or members that are mentioned in and signatories of the Articles of Incorporation as the original formators of the corporation.[11] For juridical persons, an authorized individual shall

[9] REVISED CORPORATION CODE, § 10.
[10] Securities and Exchange Commission, Guidelines on the Number and Qualifications of Incorporators under the Revised Corporation Code, SEC Memorandum Circular No. 6, series of 2019 (July 30, 2019) [hereinafter SEC MC No. 6 s 2019].
[11] *Id.*, § 2.

sign on behalf of said juridical entity.[12] Said individual must indicate the entity being represented and for whom the documents are being executed.

Section 8 of the Circular imposes that the all signatories must indicate their respective Taxpayers' Identification Numbers (TIN) in the submitted Articles of Incorporation. Further, it requires that registration documents reflect the TIN or Passport Number of all foreign investors, if any, other than foreign corporations which have not yet been issued a TIN. After incorporation, all foreign investors, natural and juridical, are required to secure a TIN and all regular reportorial requirements shall not be accepted unless these are indicated in the respective documents.[13]

Incorporators may be composed of a combination of natural persons, partnerships, associations, or corporations. However, there must be at least one incorporator who is a natural person that will qualify as a Board of Director or Trustee. This is rightly so, because if all of the incorporators are juridical entities, there can be no natural person who will qualify to constitute the Board and will exercise the powers and duties of the corporation. Section 8 of Memorandum Circular No. 16 provides that an individual who signs the Articles of Incorporation on behalf of an incorporator who is not a natural person may not be named a director or trustee unless he is also an owner of at least one (1) share of stock or a member of the corporation being formed. For instance, the President of an incorporator company or the Managing Partner of an incorporator partnership who signed the Articles of Incorporation on behalf of the company or partnership, cannot become a member of the Board of the new corporation *ex officio*. Such President or Managing Partner, in his personal capacity, must own a share or be a member of the new corporation to become a member of the Board of Directors or Trustees. Hence, at least one incorporator must be a natural person to form and organize a corporation.

The SEC has explicitly set forth that two (2) or more persons, but not more than fifteen (15) may organize themselves and form a corporation.[14] Accordingly, the Circular explicitly states that only SEC-recorded partnerships, SEC-registered domestic corporations and associations, and foreign corporations who have duly complied with the documentary requirements are authorized to become an incorporator.[15] Thus, dissolved or expired partnerships, and domestic corporations

[12] *Id.*, § 7.
[13] *Id.*, § 7.
[14] *Id.*, § 1.
[15] *Id.*, §§ 4-6.

with delinquent, suspended, revoked, or expired status cannot be incorporators of a new corporation. However, the circular is silent on whether corporations that are dissolved, or those under rehabilitation, liquidation, or winding-up may be incorporators.

It is worthy to note that the RCC has now explicitly stated that natural persons licensed to practice a profession, and partnerships or associations organized for the purpose of practicing a profession is not allowed to organize a corporation unless otherwise provided by special laws. The law governing the practice of a particular profession must explicitly allow the professional to organize a corporation for the purpose of practicing such profession. Professions that are allowed to form and organize a corporation for purposes of practice include architects[16] and licensed real estate brokers, appraisers, and consultants.[17] Engineers, Certified Public Accountants, and Lawyers are among the professionals expressly prohibited by law to incorporate for the purpose of practicing their respective professions.

New Guidelines for submission of Articles of Incorporation

To register a new corporation, the fundamental requirement is to submit an Articles of Incorporation before the SEC. Section 13 of the RCC requires that articles of incorporation be filed at the SEC in any of the official languages, duly signed and acknowledged or authenticated in the manner and manner allowed by the Commission.[18] In relation to this provision, the SEC has issued Memorandum Circular No. 16, series of 2020,[19] which shall apply to the registration of new domestic corporations.

Under the RCC, the articles of incorporation or any amendment thereto may be filed with the SEC in the form of an electronic document.[20] This is another major development introduced

[16] An Act Providing for A More Responsive and Comprehensive Regulation for The Registration, Licensing and Practice Of Architecture, Repealing For The Purpose Republic Act No. 545, As Amended, Otherwise Known As "An Act To Regulate The Practice Of Architecture In The Philippines," And For Other Purposes [The Architecture Act of 2004], Republic Act No. 9266 § 37 (2004).
[17] An Act Regulating the Practice of Real Estate Service in The Philippines, Creating For The Purpose A Professional Regulatory Board Of Real Estate Service, Appropriating Funds Therefor And For Other Purposes [Real Estate Service Act of the Philippines], Republic Act No. 9646 § 32 (2009).
[18] REVISED CORPORATION CODE, § 13
[19] Securities and Exchange Commission, Guidelines on Authentication of Articles of Incorporation in Applications for Registration of New Domestic Corporations, SEC MC No. 16, series of 2020 [hereinafter SEC MC No. 16 s. 2020]
[20] REVISED CORPORATION CODE, § 13

by the RCC. Prior to this, written copies of articles of incorporation or any amendment thereof shall be filed before the SEC at its main office or any of its extension offices.[21] Now, filing of those can be done in the form of an electronic document and it is authorized not by mere regulation of the SEC but by express provision of the Revised Corporation Code.

In the past, the regular practice is that the filing of articles of incorporation of a new corporation is accompanied by an acknowledgment before the notary public. SEC Memorandum Circular No. 16, series of 2020 has now relaxed such practice and requirement of notarization of articles of incorporation for registration of new corporations. The SEC now accepts, for registration, articles of incorporation accompanied by a Certificate of Authentication signed by all incorporations.[22] The only requirement is that said certificate shall be in the form prescribed by the SEC annexed to the said circular. Both the articles of incorporation and certificate of authentication need not be notarized nor consularized.[23] This, however, is without prejudice to the choice of the incorporators to have said documents acknowledged before a notary public.[24]

If the authentication of the articles of incorporation is done abroad, the same may either be apostilled in accordance with the Apostille Convention; or notarized or authenticated by a Philippine diplomatic or consular officer.[25] For registration of domestic corporations with more than forty percent (40%) foreign equity, SEC Form F-100 shall be part of their requirements. This SEC Form F-100 need not be authenticated if not executed outside the Philippines.

Since the requirement for authentication of new corporations is now relaxed, the SEC has provided penalties to safeguard the relaxed rules against fraud or misrepresentation. Any registration obtained through fraud or misrepresentation shall be revoked.[26] Those responsible, or those who assisted, for the formation of a corporation through fraud or misrepresentation shall be punished with a fine ranging from Php 200,000 to Php 2,000,000.[27] When such violation is injurious or detrimental to the public, the penalty shall be a fine ranging from Php 400,000 to Php 5,000,000.[28] If the person certifying the articles of incorporation willfully executes the certificate

[21] Securities and Exchange Commission, SEC MC No. 7, series of 2009
[22] SEC MC No. 16, s. 2020, § 2
[23] *Id.*
[24] SEC MC No. 16, s. 2020, § 3
[25] *Id.* § 4
[26] SEC MC No. 16, s. 2020, § 6
[27] *Id.*
[28] *Id.*

while knowing that it contains inaccurate, false, or misleading information of statements, said person shall be fined.[29] The fine shall range from Php 20,000 to Php 200,000; and from Php 40,000 to Php 400,000 if such willful certification is injurious or detrimental to the public.[30]

Consistent with the goal of promoting ease of doing business, the RCC has significantly changed the manner by which corporations may be formed. Permitting juridical entities to incorporate allows for easier expansion of investments and business opportunities. This development may lead to corporations and conglomerates to venture in other businesses while maintaining the separate personalities of their respective companies. Allowing juridical entities to incorporate gives majority shareholders more security in expanding their businesses as they may not need to infuse fresh capital out of their individual coffers just to form a new corporation. Capital to be used for a new corporation, which may be a business expansion, can be directly invested by the existing corporation itself without the need to revolve funds from the existing company to the individual persons to the new corporation. The change in Section 10 of the RCC can be significantly helpful for ease of doing business especially for companies or conglomerates looking to expend or venture in industries with minimum capital requirements. The change also means that individual majority shareholders need not risk incurring another individual personal liability for being a shareholder in a new corporation. The goal of promoting ease of doing business is also supported by the SEC in relaxing the rules in authenticating incorporation documents. This leads to more efficient and expedient manner in processing the incorporation of entities wanting to do business as a corporation.

One Person Corporation

A major contribution of the RCC in the goal of ease of doing business is the establishment of One Person Corporations (OPC). This development allows entrepreneurs and individuals to establish their own corporations without the burden of the need to have four (4) more incorporators required by the Old Corporation Code. Furthermore, the RCC allows trusts and estates to be

[29] SEC MC No. 16, s. 2020, § 7
[30] *Id.*

established as an OPC that would allow these entities to be more properly and efficiently managed and protected.

Section 116 of the RCC defines a One Person Corporation as a corporation with a Single Stockholder, who must either be a (i) natural person; (ii) a trust; or (iii) an estate.[31] Banks, quasi-banks, pre-need, trust, insurance, public and publicly-listed companies, and non-chartered government-owned and -controlled corporations are not allowed to be established as an OPC.[32] Professionals are only allowed to establish an OPC if the special law regulating their profession allows them to establish a corporation for the purpose of practicing the profession.[33] In order to distinguish One Person Corporations, the RCC provides that its corporate name shall indicate the letters "OPC" either below or at the end of such name.[34]

In line with the requirements of the RCC, the Securities and Exchange Commission has issued SEC Memorandum Circular No. 7, Series of 2019[35] setting forth the guidelines for the establishment of a One Person Corporation. This circular fulfills the provisions of the RCC on requirements, fees, and other requisites that the SEC should provide.

First, the Circular makes a clarification on what trust is allowed to establish an OPC. It states that the "trust" used by law does not refer to a trust entity, but the subject being managed by a trustee.[36] This means that the trust allowed to be established as an OPC is the natural person acting as a trustee of a property held in trust. The natural person may incorporate the trust property into an OPC, and the said trustee is its single stockholder.[37] However, the trust cannot be established as an OPC if the trustee is a juridical entity because the foremost requirement of an OPC is a single stockholder that is a natural person.

Under the RCC, a One Person Corporation's corporate existence is perpetual. However, SEC Memorandum Circular No. 7 qualifies that in case of trusts and estates, their corporate existence is co-terminus with the existence of the trust or estate. Thus, when the trust is terminated, the OPC of the trust estate is dissolved. Likewise, when an estate is properly partitioned or settled,

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[31] REVISED CORPORATION CODE, § 116.
[32] *Id.*, § 116 ¶ 2.
[33] *Id.*
[34] REVISED CORPORATION CODE, § 120.
[35] Securities and Exchange Commission, Guidelines on the establishment of a One Person Corporation (OPC), SEC Memorandum Circular No. 7 series of 2019 (April 25, 2019) [hereinafter SEC MC No. 7, s. 2019].
[36] *Id.*, § 1.
[37] VILLANUEVA, *supra* at 108.

the OPC of the estate shall also be dissolved. For proper dissolution, the Circular provides that a proof of termination of trust (in case of trust OPCs) or a proper proof of partition such as an Order of Partition duly issued by a competent court or a Deed of Extrajudicial Settlement (in case of estate OPCs) shall be provided.[38]

The OPC to be incorporated only needs to submit its Articles of Incorporation upon registration. In the Articles of Incorporation, the single stockholder must designate a nominee and an alternate nominee who shall replace the single stockholder in event of death or incapacity. The nominee and alternate nominee must consent to their nomination and said consent must also be attached to the articles of incorporation.[39] The nominee and alternate nominee may be changed by the single stockholder at any time. The single stockholder must simply submit to the SEC the names of the new nominees and their written consent.[40]

The concept of having a nominee and alternate nominee introduced by the RCC for One Person Corporations is for the purpose of ensuring that an OPC would still enjoy *some sort* of corporate succession in case the single stockholder is unable or incapacitated to run the affairs of the OPC. The nominee of an OPC may take the place of the single stockholder in a temporary or permanent capacity. In case of temporary incapacity of the single stockholder, the nominee shall sit as the director and manage the affairs of the corporation until the owner, through self-determination, regains capacity to direct and manage the affairs of his corporation.[41] In case the nominee is likewise incapacitated, unable, or refuses to take charge, the alternate nominee shall take direct of the affairs of the OPC in the same manner and time as the nominee would have.

In case the single stockholder dies, there are a number of ways the OPC may proceed in its existence. First, the nominee shall become the director of the OPC and manage its affairs until the legal heirs of the single stockholder have been determined, and such heirs have designated one of them who shall take the place of the deceased[42] or have agreed that the estate shall be the single stockholder of the OPC.[43] Section 132 of the RCC also provides that the OPC may be converted

[38] SEC MC No. 7, s. 2019, § 2.
[39] *Id.*, § 5.
[40] *Id.*, § 11.
[41] REVISED CORPORATION CODE, § 125.
[42] SEC MC No. 7, s. 2019, § 12.
[43] REVISED CORPORATION CODE, § 125 ¶ 2.

to an ordinary stock corporation in case of death of the single stockholder. Section 132 of the RCC is instructive, to wit:

> SEC. 132. Conversion from a One Person Corporation to an Ordinary Stock Corporation
> In case of death of the single stockholder, the nominee or alternate nominee shall transfer the shares to the duly designated legal heir or estate within seven (7) days from receipt of either an affidavit of heirship or self-adjudication executed by a sole heir, or any other legal document declaring the legal heirs of the single stockholder and notify the Commission of the transfer. Within sixty (60) days from the transfer of the shares, the legal heirs shall notify the Commission of their decision to either wind up and dissolve the One Person Corporation or convert it into an ordinary stock corporation.[44]

Hence, under Sections 125 and 132 of the RCC,[45] when the single stockholder of a One Person Corporation dies, the OPC shall proceed as a juridical entity through any of the following ways:

1) be taken over by one of the heirs as agreed upon by them (Sec. 125, RCC);
2) be taken over by the sole heir of the single stockholder (Sec. 132, RCC);
3) the estate of the deceased shall be the single stockholder of the OPC (Sec. 125, RCC);
4) the legal heirs of the single stockholder may decide to wind-up and dissolve the OPC; or
5) convert the OPC to an ordinary stock corporation, with the legal heirs as the stockholders (Sec 132, RCC)

The provisions of Sections 125 and 132 of the RCC suggest that except in cases where the single stockholder has a sole heir, the OPC will eventually end up either dissolved or converted into an ordinary stock corporation in case of death of the single stockholder. In the event that the estate of the deceased becomes the single stockholder of the OPC, it may still lead to its eventual dissolution in the event that the estate is properly partitioned or extrajudicially settled among the heirs. If the single stockholder, through testamentary disposition, bequeaths his OPC shares to a single person, the OPC may still be subjected to dissolution or conversion in case of disallowance of the will or inofficious disposition. The SEC has not yet issued its guidelines on the conversion of OPCs to an ordinary stock corporation or other specific guidelines in case of death of the single

[44] *Id.*, § 132 ¶ 2.
[45] *Id.*, §§ 125, 132

stockholder. The author believes that this area of discussion on the death of the single stockholder brings up a lot of questions on the continuity of an OPC.

A One Person Corporation does not need to submit and file its by-laws.[46] However, it must maintain a Minutes Book[47] that will contain all actions, decisions, and resolutions of the corporation. This must be kept by the OPC's Corporate Secretary. Any action made by the single stockholder may be done through a written resolution signed and dated by the single stockholder. This shall be recorded in the minutes book of the OPC, [48] and such record justify the action or resolution made by the single stockholder in lieu of a board meeting for ordinary corporations. Moreover, the RCC also requires the OPC to file reportorial requirements to the SEC. Failure to do so for three (3) times, consecutively or intermittently within a five (5) year period will place the OPC under delinquent status.[49] The reportorial requirements are composed of the following:

> (a) Annual financial statements audited by an independent certified public accountant: Provided, that if the total assets or total liabilities of the corporation are less than Six Hundred Thousand Pesos (P600,000.00), the financial statements shall be certified under oath by the corporation's treasurer and president.
> (b) A report containing explanations or comments by the president on every qualification, reservation, or adverse remark or disclaimer made by the auditor in the latter's report;
> (c) A disclosure of all self-dealings and related party transactions entered into between the One Person Corporation and the single stockholder; and
> (d) Other reports as the Commission may require.[50]

The single stockholder of the OPC will be its sole director and president.[51] However, the single stockholder cannot be its corporate secretary at the same time. He must have another person acting as a Corporate Secretary who, among other functions in the corporation, has special functions designated by the Revised Corporation Code, to wit:

> (a) Be responsible for maintaining the minutes book and/or records of the corporation;
> (b) Notify the nominee or alternate nominee of the death or incapacity of the single stockholder, which notice shall be given no later than five (5) days from such occurrence;
> (c) Notify the Commission of the death of the single stockholder within five (5) days from such occurrence and stating in such notice the names, residence addresses, and contact details of all known legal heirs; and

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[46] *Id.*, § 119
[47] *Id.*, § 127
[48] *Id.*, § 128
[49] REVISED CORPORATION CODE, § 129 ¶ 3
[50] REVISED CORPORATION CODE, § 129; SEC MC No. 7, s. 2019, § 13.
[51] REVISED CORPORATION CODE, § 121.

> (d) Call the nominee or alternate nominee and the known legal heirs to a meeting and advise the legal heirs with regard to, among others, the election of a new director, amendment of the articles of incorporation, and other ancillary and/or consequential matters.[52]

Apart from the Corporate Secretary, the OPC must also have a treasurer and such other officers as may be necessary in the fulfillment of the corporation's purpose. These officers shall be appointed by the OPC within fifteen (15) days from the issuance of its Certificate of Incorporation and must be communicated to the SEC within five (5) days from the appointment of said officers.[53] The single stockholder may also act as the Corporation's treasurer. However, if the single stockholder does so, he must file a bond before the SEC. He must also undertake in writing that he shall faithfully administer the OPC's funds properly, and to disburse and invest it according to its articles of incorporation.[54]

SEC Memorandum Circular No 7, series of 2019 provides for the amount of surety bond required for a self-appointed treasurer. The bond is computed based on the Authorized Capital Stock of the OPC, as follows:

Table 1: Bond Requirement for the Self-Appointed Treasurer[55]

Authorized Capital Stock	Surety Bond Coverage
1.00 to 1,000,000	1,000,000
1,000,001 to 2,000,000	2,000,000
2,000,001 to 3,000,000	3,000,000
3,000,001 to 4,000,000	4,000,000
4,000,001 to 5,000,000	5,000,000
5,000,001 and above	Amount equal to the OPC's ACS

The bond shall be renewed every two (2) years or as may be required by the SEC upon a review of the OPC's Audited Financial Statements submitted annually. The Circular also clarifies that this bond should be a continuing requirement so long as the single stockholder acts as the treasurer.[56] Should another person be appointed as treasurer; the bond may be cancelled upon proof of appointment duly filed with the SEC.

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[52] *Id.*, § 123.
[53] REVISED CORPORATION CODE, § 122 ¶ 1; SEC MC No. 7, s. 2019, § 9.
[54] REVISED CORPORATION CODE, § 122 ¶ 3.
[55] SEC MC No. 7, s. 2019, § 10.
[56] *Id.*, § 10.

Section 15 of the Circular states that a foreign national may also establish an OPC here in the Philippines. However, the establishment for foreign owned OPCs is subject to the applicable capital requirement and constitutional and statutory restrictions on foreign participation in certain activities.[57] Corollary, the prohibitions on ownership of land and other restrictions on foreign ownership of property shall also apply in foreign OPCs.

By being able to establish One Person Corporations, individual entrepreneurs and business owners are able to secure their businesses' opportunity for growth. Incorporating single proprietorship businesses allows for more protection on both its owner and the business as there can be created an entity separate and distinct from the individual owner notwithstanding the principle of piercing the veil of corporate fiction. A One Person Corporation enjoys the powers of an ordinary corporation and would also be taxed like one. The establishment of OPCs eliminate the old practice of singe proprietorship owners that would like to incorporate to get four (4) individuals to be incorporators. These other incorporators will own one (1) or few minimal shares in the corporation and only serve as stockholders and directors in paper and would in fact have very minimal to no participation in the affairs of the corporation. Apart from that, the ability to establish OPCs would boost public confidence to venture into entrepreneurship as it mitigates the personal liability of entrepreneurs for commercial risks that come with doing business.

Perpetual Existence of Corporations

In the Old Corporation Code, a corporation shall exist for a period not exceeding fifty (50) years and may be extended for periods not exceeding fifty (50) years.[58] Hence, there comes a point for most successful corporations and conglomerates that their corporate existence would have to be renewed to continue pursuing their business. Under the Revised Corporation Code, all corporations now have perpetual existence unless its articles of incorporation provides otherwise.[59] By default, all corporations existing before the enacted of the new Corporation Code and those to be incorporated in the future can exist perpetually and does not have to renew their incorporation. This is a welcome development for seasoned and long-standing corporations as it lessens the

[57] *Id.*, § 15.
[58] CORPORATION CODE, § 11 (repealed 2019)
[59] REVISED CORPORATION CODE, § 11

burden of having to do extra corporate housekeeping come the expiration of the fifty-year period of their corporate registration. This development is again in line with the goal of the RCC to ease doing business in the country.

It must be noted, however, that a corporation may still provide for a specific term of existence in its articles of incorporation. This specific term may also be extended or shortened by amending the articles of incorporation.[60] For corporations already existing at the time of the enactment of the RCC, their corporate existence is automatically deemed perpetual. They need not do any act to formally have perpetual existence. Should the corporation wish to retain its original corporate term, the stockholders representing a majority of its outstanding capital stock must vote for its retention which must be filed with the SEC. The dissenting stockholders may always exercise their appraisal right in case of retention of the original term or any change in the existence of the corporation.

The RCC also provides that expired corporations may now be revived and may also exist perpetually unless another term of existence is provided. To set the guidelines and procedural requirements for the revival of expired corporations, the Securities and Exchange Commission issued Memorandum Circular No. 23, series of 2019. The circular enumerates which corporations may actually file for the revival of its corporate existence. Thus, the following corporations may file a Petition for Revival of Corporate Existence:

> a. Generally, a corporation whose term has expired;
> b. An Expired Corporation whose Certificate of Registration has been revoked for non-filing of reports (e.g. General Information Sheet, and Audited Financial Statements);
> c. An Expired Corporation whose Certificate of Registration has been suspended; or
> d. An Expired Corporation whose corporate name has already been validly re-used, and is currently being used, by another existing corporation duly registered with the Commission[61]

In this circular, the SEC laid down the procedural and documentary requirements in order to complete the revival of an expired corporation. For the expired corporations due to revocation or suspension of Certificate of Registration, their Petition for Revival must be accompanied by the proper Petition to Lift its Revoked/Suspended status, as may be appropriate, and must settle the

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[60] *Id.*
[61] Securities and Exchange Commission, Guidelines on the Revival of Expired Corporations, SEC MC. No. 23, s 2019, § 1 (Nov 21, 2019) [hereinafter SEC MC No. 23, s. 2019].

corresponding penalties charged by the SEC. If the expired corporation's corporate name has been validly re-used by another corporation, it must change its corporate name within thirty (30) days after the issuance of Certificate of Revival.[62]

Accordingly, the circular also provides who may not apply for revival of corporate existence. The following cannot file a Petition for Revival:

> a. An Expired Corporation which has completed the liquidation of its assets;
> b. A corporation whose Certificate of Registration has been revoked for reasons other than non-filing of reports;
> c. A corporation dissolved by virtue of Sections 6(c) and 6(d) of Presidential Decree No. 902-A, as amended by Presidential Decree No. 1799; or
> d. An Expired Corporation which already availed of re-registration, in accordance with Memorandum Circular No. 13, series of 2019 (Amended Guidelines and Procedures on the Use of Corporate and Partnership Names), or other memorandum circulars issued by the Commission pertaining to re registration[63]

It is worthy to note that Sections 6(c) and 6(d) of P.D. No. 902-A, as amended by P.D. No. 1799 pertain to corporations in rehabilitation, receivership, or under a management committee appointed by the SEC.[64] Corporations which availed of re-registration pertain to those corporations that use a corporate name that has been previously used by another corporation already dissolved or revoked of its registration. If an expired corporation already availed of re-registration, it may still file for a petition for revival provided that:

> a. The re-registered corporation has given its consent to the Petitioner to use its corporate name, and has undertaken to undergo voluntary dissolution immediately after the issuance of the Petitioner's Certificate of Revival; or
> b. The re-registered corporation has given its consent to the Petitioner to use its corporate name and has undertaken to change its corporate name immediately after the issuance of the Petitioner's Certificate of Revival.[65]

Hence, a corporate name that has been used by an expired corporation and is currently being used by another (re-registered) corporation may only be used by one of them in case the former elects to revive its corporate existence.

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[62] *Id.*
[63] SEC MC No. 23, s. 2019, § 2.
[64] Amending Further Section 6 of Presidential Decree No. 902-A, Presidential Decree No. 1799, § 1 (1981).
[65] SEC MC No. 23, s .2019, § 2 ¶ d subsecs. i, ii

To initiate a revival of an expired corporation, at least a majority of the board of directors/trustees and at least a majority of the outstanding capital stock/members must vote for such revival.[66] The same circular recognizes that there may be changes in the composition of the expired corporation's stockholders or members, and in its board of directors/trustees and officers. Moreover, it requires that the Petition for Revival be signed by the duly elected directors/trustees and officers of the corporation. Thus, the circular implies that there could be activity within such corporation despite the fact that is has an expired status and cannot validly make corporate acts.

Along with the Petition for Revival, several documents are required to be submitted to the SEC to be issued a Certificate of Revival of Corporate Existence. The following documents shall be referred to and filed along with the petition:

a. Photocopy of Petitioner's Certificate of Incorporation and Articles of Incorporation;
b. Photocopy of Petitioner's Certificate/s of Filing of Amended Articles of Incorporation, with the respective Amended Articles of Incorporation, if Petitioner's Articles of Incorporation were amended;
c. Revived Articles of Incorporation, consisting of Petitioner's latest Amended Articles of Incorporation and the proposed changes in the corporate term to be effected by the revival, which shall be underlined;
d. Petitioner's duly accomplished General Information Sheet (GIS) as of the date of expiration of its corporate term, or an equivalent document, such as, but not limited to, the Secretary's Certificate indicating the list of stockholders and officers with the corresponding stockholdings;
e. Notarized list of stockholders or members as of the date of approval of the revival, stating their names, their nationalities, and number of shares subscribed, amount subscribed and paid, or the respective members' contributions for nonstock corporations, certified by the Corporate Secretary;
f. If there has been a change in the composition of the stockholders or members since the expiration of Petitioner's corporate term, the GIS of the Petitioner as of the date of stockholders' or members' approval of the resolution to file the Petition for Revival of its corporate existence, or the date of the board of directors' or trustees' approval of the filing of the said Petition, whichever is later;
g. Photocopy of the supporting evidence (e.g. Deed of Sale with the Certificate Authorizing Registration, Deed of Assignment, Death Certificate of a stockholder/member, and Extrajudicial Settlement of the Estate of a stockholder/member) referred to in the Reconciliation of the changes in the composition of the stockholders or members;
h. Photocopy of Petitioner's Audited Financial Statements as of the date of expiration of its corporate term, and for the year immediately preceding, as audited by an independent Certified Public Accountant;
i. Photocopy of Petitioner's Audited Financial Statements as of a date not exceeding one hundred twenty (120) days prior to the date of filing of the Petition for Revival, and for the year immediately preceding, as audited by an independent Certified Public Accountant;
j. Photocopy of the Official Receipt(s) for the payment of the Petition fee and Filing fee;
k. A favorable recommendation of the appropriate government agency in the case of banks, banking and quasi-banking institutions, preneed, insurance and trust companies, NSSLAs,

[66] *Id.*, § 3

pawnshops, corporations engaged in money service business, and other financial intermediaries;

l. If Petitioner's corporate name has already been validly reused, and is currently being used, by another existing corporation duly registered with the Commission, Proof of Reservation of Petitioner's Proposed New Corporate Name; and

m. If Petitioner is an expired corporation which already availed of re-registration, in accordance with Memorandum Circular No. 13, series of 2019 (Amended Guidelines and Procedures on the Use of Corporate and Partnership Names), a Certification, under oath, issued by the Corporate Secretary of the re-registered corporation stating that:

   i. the re-registered corporation has given its consent to the Petitioner to use its corporate name, and has undertaken to undergo voluntary dissolution immediately after the issuance of the Petitioner's Certificate of Revival; or

   ii. the re-registered corporation has given its consent to the Petitioner to use its corporate name and has undertaken to change its corporate name immediately after the issuance of the Petitioner's Certificate of Revival.[67]

The Petition for Revival, along with the documents mentioned above, shall be filed before the SEC's Company Registration and Monitoring Department, more commonly known to many as the CRMD. Corresponding fees must also be paid upon the filing of the petition. A petition fee of Php 3,060 and a filing fee for extension of term of existence. The filing fee is based on the rates provided under SEC's Memorandum Circular No. 3, Series of 2017[68] where the rates are based on the authorized capital stock for stock corporates and Php 2,000 for non-stock corporations.[69]

Within fifteen (15) days from filing, the petitioner must publish in a newspaper of general circulation the Petition for Revival.[70] The petitioner must submit, within fifteen (15) days from publication, an affidavit from the newspaper publication attesting to the fact of publication and an actual copy or newspaper cutout of the petition published in such newspaper. If the SEC finds the petition meritorious, the petition for revival will be granted and a Certificate of Revival of Corporate Existence shall be issued. However, the SEC may call for a clarificatory conference in case of opposition to the petition for revival. Any party in interest may file an opposition to the petition for revival within fifteen (15) days from the date of the publication of the petition for revival. If an expired corporation is issued a Certificate of Revival of Corporate Existence, all its rights, privileges, duties, debts, and liabilities are restored and revived. The Certificate of Revival also gives the revived corporation perpetual existence unless a specific corporate term was

[67] SEC MC No. 23, s. 2019, § 7.
[68] Securities and Exchange Commission, Consolidated Schedule of Fees and Charges, Memorandum Circular No. 3 Series of 2017 [SEC MC No. 3, s. 2017] (March 7, 2017).
[69] *Id.* at 2
[70] SEC MC No. 23, s. 2019, § 6 ¶ b.

provided for in the Petition for Revival. For the detailed procedure for the petition for revival, one may refer to Section 6 of the circular.

Banks, banking and quasi-banking institutions, preneed, insurance and trust companies, non-stock savings and loan associations (NSSLA), pawnshops, corporations engaged in money service business, and other financial intermediaries are required to secure a favorable recommendation of the appropriate government agency before any petition for revival can be approved by the SEC.[71]

The Circular recognizes the appraisal right of dissenting stockholders in petitions for revival of expired corporations. Moreover, the procedure for the petition for revival also provides for a period to oppose the petition by filing a verified opposition by any interested party. The Circular also states that the SEC may grant exemptions to expired corporations in the interest of justice and to best serve public interest on the application of the procedures and guidelines provided by the circular.

Revived Corporations are given two (2) years from the issuance of the Certificate of Revival to comply with the other provisions of the Revised Corporation Code. [72] This is provided by the SEC in order to extend to the revived corporations the time benefit given by the RCC[73] on existing corporations to comply with the new provisions of the new law.

As previously stated, the Circular implies that there could be activity within such corporation despite the fact that is has an expired status and cannot validly make corporate acts. Dean Cesar L. Villanueva opines that the Circular implies that an expired corporation would be able to do valid corporate actions when pursued in the process of revival, and such acts would not be considered as acts in pursuit of new business which are void actions for expired corporations.[74]

The RCC only has the best of intentions to promote pursuit of business in its introduction of the concept of perpetual existence of corporations and revival of expired corporations. However, on the matter of revival of expired corporations, the RCC may have implied that an expired corporation may still conduct matters and activities despite not having the legal personality to do so. While a corporation whose term expires maintain its legal personality for purposes of winding

[71] REVISED CORPORATION CODE, § 10, SEC MC No. 23, s 2019, § 8.
[72] SEC MC No. 23, s. 2019, § 9.
[73] REVISED CORPORATION CODE, § 185.
[74] VILLANUEVA, 12.

up its affairs, it cannot act for the purpose of continuing the business for which it was established.[75] There can now be a question of whether the revival of corporate existence under Section 11 of the RCC be considered as continuing the business for which the corporation was established.

A corporation whose certificate of registration has been suspended or revoked; or whose term has already expired does not have a personality by legal fiction to execute any act. Hence, how can there be any valid change in the composition of its stockholders or members from the period of its expired existence and the time it intends to revive? For stock corporations, in particular, how can there be a change in the composition of its stockholders? Can there be a valid sale, transfer, or conveyance of shares of stock of an expired corporation? Furthermore, how can there be valid resolutions made by the stockholders/members and its board pertaining to its revival? How can the appraisal rights of dissenting stockholders be properly exercised? Do the board of directors/trustees have the collective personality and authority to resolve the revival of the corporation, or are they acting in their mere personal capacity? These are among the questions that can possibly arise with the new concept of revival of corporate existence introduced by the Revised Corporation Code. The author believes that a good number of legal questions/issues may spring from the concept of revival of corporate existence which can be pursued for further discourse.

New Guidelines on Meetings

Notices of meetings (Stockholders/Members and Directors/Trustees)

In the Old Corporation Code,[76] written notice of regular stockholders' meetings shall be sent to all stockholders or members of record at least two (2) weeks prior to the meeting.[77] The RCC has not provided for a longer period of time within which the written notice must be sent to all stockholders or members. Now, written notices must be sent at least twenty-one (21) days prior to the date of meeting.[78] The RCC has also allowed the written notices to be sent through electronic

[75] REVISED CORPORATION CODE, § 139.
[76] CORPORATION CODE, *supra* (repealed 2019).
[77] *Id.*, § 50.
[78] REVISED CORPORATION CODE, § 49.

communication. The electronic means of sending the written notice may be through electronic mail or such other electronic means as may be provided by the by-laws of the corporation.[79]

The provision allowing the written notice of regular stockholders' or members' meetings through electronic communication is a welcome development in easing up the means of doing business for corporations. At present, electronic modes of communication such as e-mail and instant messaging services make communication between the stockholders and the corporation better, faster, and more reliable. It has also become the primary mode of communication among businesses and the inclusion of electronic modes of sending notice in the RCC makes it easier for corporations to conduct their course of business. Moreover, notice through electronic means give stockholders or members less reasons to miss out on the regular meetings held for their benefit.

To ensure proper implementation of this new provision in the Revised Corporation Code, the SEC issued Memorandum Circular No. 3, Series of 2020.[80] It summarized the regulations on the sending of notice of regular meetings of stockholders/members provided under the RCC, to wit:

> 1) Written notice of regular meetings shall be sent to all stockholders/members of record at least twenty-one (21) calendar days prior to the date of the meeting.
> 2) In case of postponement of stockholders'/members' regular meetings, written notice thereof and the reason therefor shall be sent to all stockholders/members of record at least two (2) weeks prior to the date of the meeting as originally scheduled. The stockholders/members of record shall be notified of the new schedule of the regular meeting in accordance with the immediately preceding paragraph.
> 3) The written notice must contain all information and deadlines relevant to the shareholders'/members' participation in the meeting and exercise of the right to vote remotely (*in absentia* or through a proxy).[81]

In the same circular, the SEC asserts that if the requirements on notice as stated above have been violated, they may impose administrative sanctions as provided for in Section 158 of the RCC,[82] ranging from the imposition of a fine to the dissolution of the corporation.

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[79] Securities and Exchange Commission, Guidelines on the Attendance and Participation of Directors, Trustees, Stockholders, Members, and other Persons of Corporations in Regular and Special Meetings Through Teleconferencing, Video Conferencing and other Remote or Electronic Means of Communication, SEC MC No. 6, s 2020, § 14 [hereinafter SEC MC No. 6, s. 2020].
[80] Securities and Exchange Commission, Notice of Regular Meetings of the Stockholders/Members, SEC MC No. 3, s. 2020.
[81] *Id.*
[82] REVISED CORPORATION CODE, § 158.

The Revised Corporation Code also provided for specific matters that should contain each notice of meeting. It is now required to indicate in the notice the following: a) the agenda for the meeting; b) a proxy form in case the stockholder/member elects to have a proxy for the meetings; c) the requirements and procedures to be followed in cases of participation by remote communication; and d) the requirements and procedure if the meeting is for the election of directors or trustees.[83] On the other hand, SEC Memorandum Circular No. 6, Series of 2020 which provides for guidelines on participation in regular or special meetings through remote or electronic means, provides for a more detailed enumeration of the contents of the notice. It states that the notice must be accompanied by other relevant matters such as:

a. The agenda of the meeting;
b. When attendance, participation, and voting by remote communication or in absentia, are authorized, the requirements and procedures to be followed when a stockholder or member elects either option;
c. Manner of casting of votes and the period during which vote by remote communication or in absentia will be accepted;
d. Contact information of the Secretary or office staff whom the stockholder or member may notify about his or her option;
e. When the meeting is for the election of directors or trustees, the requirements and procedure for nomination and election; and
f. The fact that there will be visual and audio recording of the meetings (for future reference).[84]

For meetings of the Board of Directors/Trustees, the RCC only requires that notice for a regular or special meeting shall state the date, time, and place of the meeting and sent to every director or trustee at least two (2) days prior to the scheduled meeting.[85] This requirement of a notice may be waived by a director/trustee. However, in Memorandum Circular No 6, Series of 2020, the SEC provides that notice for regular and special meetings shall include the following information:

a. The date, time and place of the meeting;
b. The agenda of the meeting;
c. All pertinent materials for discussion which shall be numbered and marked in such manner that the director or trustee can easily follow and participate in the meeting;
d. That a Director or trustee may participate via remote communication;

[83] *Id.*, § 50.
[84] SEC MC No. 6, s. 2020, § 14.
[85] REVISED CORPORATION CODE, § 52.

e. Contact information of the Corporate Secretary or office staff whom the director or trustee may communicate;
f. When the meeting is for the election of directors or trustees or officers, the requirements and procedure for nomination and election;
g. The fact that there will be a visual and/or audio recording of the meeting; and
h. Other instructions to facilitate participation in the meeting through remote communications.[86]

Virtual Meetings

Another development under the Revised Corporation Code that aims to make the conduct of business easier and more accessible is the recognition of the use of technology in conducting meetings both for the Board of Directors/Trustees and Stockholders/Members. Section 52 of the RCC provides that Directors or trustees who cannot physically attend or vote at board meetings can participate and vote through remote communication such as videoconferencing, teleconferencing, or other alternative modes of communication that allow them reasonable opportunities to participate.[87] Section 49 of the RCC recognizes that the right to vote of stockholders or members may be exercised through remote communication or *in absentia*.[88] In line with this development, the SEC has formulated the guidelines to be used in conducting meetings through remote or electronic means of communication in Memorandum Circular No. 6, series of 2020.

The circular defined five (5) modes of virtual presence or modes of communication that may be used by directors/trustees in case they are unable to be physically present for meetings. Remote communication is defined as a transfer of data between two or more devices not located at the same site.[89] Based on this definition, remote communication may be conducted through text messaging, cellular call, e-mail, instant messaging, social media, or other modes of communication between two media that are in different locations. Teleconferencing is defined as communication through a conference between three or more participants remote from each other that are in two or more locations. Videoconferencing is the holding of a conference among people remote from each other that use audio and video signals.[90] Computer conferencing and audio conferencing are

[86] SEC MC No. 6, s. 2020, § 6.
[87] REVISED CORPORATION CODE, § 52, ¶ 5.
[88] *Id.*, § 49, last ¶.
[89] SEC MC No. 6, s. 2020, § 3 ¶ a
[90] *Id.*, § 13 ¶ c

essentially defined, respectively, as a conference supported by computer devices and audio communication between people at different locations through telephone or internet connection. With these definitions, the SEC is essentially allowing any mode of electronic or technological communication that can bring people together in the same virtual space.

In the circular, the SEC instructs corporations to formulate their internal procedures in conducting meetings through remote and electronic means. The circular serves as a guideline for the internal procedures of respective corporations. The internal procedures may provide for the following:

a. Mechanism to verify the identity of the stockholders or members and who among them have the right to vote during the meeting;
b. Measures to ensure that all stockholders or members have the opportunity to participate in the meeting including an opportunity to read or hear the discussion substantially;
c. Mechanism to enable stockholders or members to vote during the meeting including ensuring that the integrity and secrecy of the votes are protected;
d. Procedures for documenting the meeting and any process/motion which may be done afterwards; and
e. Mechanism in making the record of the meeting, either video or audio recording, available to the stockholders or members.
f. Other matters to address administrative, technical and logistical issues.[91]

Participation through remote or electronic communication is considered to be counted for purposes of attaining quorum.[92] Thus, regular meetings are now made to be more productive despite lack of physical presence as matters can be carried through even if members of the board are merely virtually present in the meetings. In order to participate through virtual means, he must notify in advance the Presiding Officer and the Corporate Secretary of such fact and the Secretary shall take note of it in the minutes of the meeting. The counting for purposes of quorum and the notification requirement for remote or virtual means apply for the respective meetings of both the stockholders/members and the directors/trustees.

In the conduct of a virtual meeting, the Presiding Officer and the Corporate Secretary shall be responsible in ensuring that the participating members are able to clearly hear and see the other attendees and that information are properly communicated and not lost through poor connectivity.

[91] *Id.*, § 13
[92] *Id.*, § 5

The corporation must also provide for means to ensure that information coursed through virtual means are properly accounted for and backed up where appropriate. Virtual meetings shall include a roll call at the start where participants are required to state their name, position, location, device used, and confirmation that 1) he received the notice of the meeting and 2) he can clearly hear and see the other attendees. For matters that require voting, the internal guidelines must provide for a manner in which voting will be conducted and properly recorded. The Corporate Secretary must note the vote of each director/trustee, which may be cast through e-mail, messaging services, or such other means as the corporation may determine in their internal procedures.[93] Furthermore, a visual and audio recording of the election or meeting should be secured, and the Secretary is duty-bound to safe-keep and perpetuate in an updated data storage equipment or facility the said recordings.[94]

The Corporate Secretary is given specific duties in the conduct of virtual meetings. The circular provides that the Secretary must:

> 1. Ensure that suitable equipment and facilities are available for the conduct of meeting by remote communication (i.e. reliable internet connection, high bandwidth availability capable of supporting numerous simultaneous connections, etc.);
> 2. Ensure that the attendees are able to hear and see the other participants clearly during the course of the meeting and that attendees should be able to communicate and understood by the other party;
> 3. Ensure that the visual and audio recordings of the meeting are secured;
> 4. Ensure that the visual and audio recordings of the election/meeting are current and on-going and that there is no stoppage or interruption. Should an interruption or stoppage occur, the recording shall restart from the point where it was stopped or interrupted with proper statement of points in time;
> 5. Ensure to safe-keep and perpetuate in updated data storage equipment or facility the visual and audio recordings; and
> 6. Require those who attended the meeting through remote communication, to sign the minutes of the meeting whenever the act of signing is practicable, on a reasonable time after the meeting.[95]

Aside, from that, the Secretary is also duty-bound to ensure that all pertinent materials for discussion shall be numbered and marked in such manner that the stockholder or member

[93] *Id.*, § 8.
[94] *Id.*, § 14.
[95] SEC MC No. 6, s. 2020, § 9.

participating through remote communication can easily follow and participate.[96] Thus, the Corporate Secretary is in charge of ensuring that the virtual meeting is conducted as smoothly as possible and ensure that the absence of physical presence does not hinder the proper conduct of the meeting.

Section 15 of SEC Memorandum Circular No. 6, Series of 2020 states that the presiding officer shall call and preside the regular or special stockholders'/members' meetings at the principal office of the corporation or in the city or municipality where the principal office the corporation is located. This section effectively contemplates that for stockholder's/members' meetings, the Presiding Officer must still conduct the meeting at least on the city/municipality where the principal office of the corporation is located. Thus, it can be said that a regular or special stockholders'/members' meeting may be conducted virtually as long as the Presiding Officer is either in the principal office or in the city/municipality where the principal office is located. In case of the Board of Directors/Trustees, they are authorized to conduct their meetings anywhere as long as the notice requirement is fulfilled. For virtual meetings, all they need is to confirm their location during the roll call.

The provision on the RCC allowing directors/trustees to participate in meetings through remote or electronic means may be construed to mean that some or most directors may participate virtually, and there is still a physical meeting organized by those who are able to do so. However, with the enforcement of the Enhanced Community Quarantine in the Luzon Island due to the spread of the 2019 Corona Virus Disease (COVID-19) in March 2020, the provision of the RCC along with SEC Memorandum Circular No. 6 now serve as basis to conduct board meetings entirely through electronic means. The electronic means more commonly used for these meetings is through Videoconferencing. The new provision of the RCC specifically allowing Board meetings through electronic means proved to be timely and beneficial as the global health pandemic of 2020 restricted movement of people. Hence, the conduct of meetings through electronic means may slowly become a new norm in the coming years. Thankfully, the Revised Corporation Code was timely enacted to address the possibly new norm in conducting the business affairs of corporations.

[96] *Id.*, § 14.

Conclusion

The Revised Corporation Code has effectively addressed the need of corporate law practice to cope with the trends and norms of business activity today. The SEC, on the other hand, has consistently provided with clarity the gaps that the new law may have incidentally introduced with the new provisions it contains. As with any change and development, there will be new issues that will arise corresponding to the new policies and requirements set forth by the RCC.

With the emergence of business practices brought about by advancement of technology and globalization; and the very recent concepts of setting the *new normal,* practice of *distancing,* and the challenge to humanity in continuing its pursuit to live because of the recent global pandemic, the due enactment of the Revised Corporation Code – in retrospect – shall help corporations to adjust to the ever-changing norms on the conduct of business.

ABOUT THE AUTHOR

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Emman is the current Co-Editor-in-Chief of The Far Eastern Law Review. He also served in the preceding Editorial Board of the FELR as the Layout Editor. Despite the irrelevance to law studies, Emman has learned a lot of Photoshop skills while in law school - mostly because of the Law Review.

As a die-hard Blue Eagle, Emman has found a home in the farm of Tamaraw Lawyers and is hoping to pursue a career in Corporate Law someday.

RED FLAG: INTERNATIONAL LAW IMPLICATIONS OF CHINA'S INACTION AMIDST COVID-19

Ma. Bianca Ysabelle C. Kit

Introduction

The 2019 coronavirus pandemic is a phenomenon which took the rest of the world by surprise, arguably owing largely to the fact that China had a hand in the exponential growth in the number of cases worldwide. Coronavirus disease 19 (COVID-19), which emerged in Wuhan. China is a highly transmittable and pathogenic viral infection caused by the severe acute respiratory syndrome coronavirus 2.[1] Initial suggestions on the origin of the disease were generally attributed to a wet market in Wuhan which sold or may have used infected animals as a source of food. However, it was later revealed that some of the first few cases in Wuhan had contracted the disease even without any record of ever having visited said market. Not long after the initial outbreak in Wuhan, COVID-19 had spread to many other neighboring countries without as much as a forewarning from China, forcing all other affected nations to quickly devise COVID-19 response efforts in a short amount of time. All political inclinations aside, may China be held accountable for its actions, or lack thereof, in response to the coronavirus outbreak?

China's Action and Inaction

The slow burn of this brewing pandemic gave China more than enough time to prepare an effective response, yet it chose to silence its whistleblowers, who attempted to warn them as early as December 2019. Beijing ordered its police in Wuhan to detain the doctors who spoke out about the 'Severe Acute Respiratory Syndrome (SARS)-like coronavirus' for allegedly "spreading false

[1] Muhammad Shereen, COVID-19 Infection: Origin, Transmission and Characteristics of Human Coronaviruses, Mar. 16, 2020, 24 Elsevier Journal of Advanced Research, 91-98 (2020).

rumors".[2] Despite notice to the World Health Organization (WHO) of several cases of SARS-like pneumonia, and claiming the same had no human-to-human transmission during the end of 2019, it was only in February 2020 when China informed the WHO that 1,700 healthcare workers were already infected. Its belated notification to the WHO of vital information regarding the virus is testament to the blatant disregard for its international responsibility amidst such a crisis. This attempt to cover up an outbreak is the very same strategy Beijing employed during the SARS outbreak almost two decades ago, which led the WHO to adopt new International Health Regulations in 2005. It seems as though the Red Flag has no regard for international medical protocols, seeing as it clearly had not learned from its previous experience with SARS.

It was on the last day of 2019 that China informed the WHO of several cases of pneumonia of an unknown etiology, and despite several requests for further information, it only informed the WHO of the nature of the virus a week later. In addition to this, it was only on January 12, 2020 that China released further details, such as the genome sequence in order to develop testing kits, and attributing the outbreak to a Wuhan seafood market.[3] It is arguable however that China has not been forthcoming about the nature of the virus, as studies suggest that upon its acknowledgement of the outbreak early January 2020, more than a third of its infected patients had no connection with the Wuhan seafood market.[4] Further, government records suggest that the outbreak's first case fell ill as early as November 17, 2019, almost an entire month before Wuhan health authorities reported such cases.[5] There is also the question of disease diplomacy at work, in light of WHO Director General Dr. Tedros Adhanom's speech on January 30, 2020, praising China's response to the outbreak. Indeed, it is questionable how one would classify China's actions as commendable, seeing as the outbreak was already classified as a Public Health Emergency of

[2] Verna Yu, 'Hero who told the truth': Chinese rage over coronavirus death of whistleblower doctor, THE GUARDIAN, Feb. 7, 2020, *available at* https://www.theguardian.com/global-development/2020/feb/07/coronavirus-chinese-rage-death-whistleblower-doctor-li-wenliang (last accessed April 12, 2020).

[3] World Health Organization, Novel Coronavirus Situation Report-1, Jan. 21, 2020, *available at* https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf (last accessed April 12, 2020).

[4] Chaolin Huang, Clinical Features of Patients Infected with 2019 Novel Coronavirus in Wuhan, China, 395 THE LANCET, 497, 506 (2020).

[5] Josephine Ma, Coronavirus: China's first confirmed Covid-19 case traced back to November 17, SOUTH CHINA MORNING POST, March 13 2020, *available at* https://www.scmp.com/news/china/society/article/3074991/coronavirus-chinas-first-confirmed-covid-19-case-traced-back (last accessed April 13, 2020).

International Concern at that point.[6] Regardless of political motivations behind China's response to the coronavirus, what remains is that studies suggest that a more timely and transparent approach would have led to exponentially fewer cases. What then could China be held accountable for, and under what authority?

China's Accountability under International Law

When faced with matters regarding State action during a pandemic, one may think to look into International Health Regulations (IHR) promulgated by the WHO in 2005, ironically as a response to the SARS outbreak. True enough, it seems as though there are sufficient teeth in the law by which China could be held accountable, seeing as it is a State Party to the same. Under Articles 6 and 7, a State has the obligation of timely notification and information sharing, upon coming across evidence of an unexpected or unusual public health event within its territory.[7]

Failure to comply with its obligation under the IHR may be seen from the fact that China's Center for Disease Control and Prevention made a statement mid-January 2020 that "the risk of human-to-human transmission is low", notwithstanding the fact that at the time there were already 1,700 medical workers infected with the virus.[8] In fact, this blatant disregard for its international obligation to timely notify and disclose relevant public health information to prevent further damage could be one of the grounds upon which China could be accosted on an international plane. However, it may be worthy to note that despite the existence of a dispute settlement mechanism in the IHR, such would only result in arbitration if China were to consent, which seems highly unlikely at this point.

Hope is not completely lost however, as there remains some international authority with jurisdiction under which China may be made answerable. The WHO Constitution provides that "Any question or dispute concerning the interpretation or application of this Constitution which is

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[6] World Health Organization, Novel Coronavirus Situation Report-10, Jan. 30, 2020, *available at* https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200130-sitrep-10-ncov.pdf?sfvrsn=d0b2e480_2 (last accessed April 12, 2020).

[7] International Health Regulations arts. 6-7, *entered into force* June 15, 2007, 2nd edition. Geneva: World Health Organization; 2008.

[8] Jeremy Page, How It All Started: China's Early Coronavirus Missteps, THE WALL STREET JOURNAL, March 6, 2020, available at https://www.wsj.com/articles/how-it-all-started-chinas-early-coronavirus-missteps-11583508932 (last accessed April 13, 2020).

not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice ….” Under Article 63 of the WHO Constitution, States are obligated to “communicate promptly to the Organization important laws, regulations, official reports and statistics pertaining to health which have been published in the State concerned.”[9] It is under this article that China may be held accountable, for withholding early reports of medical workers regarding the virus, and for the belated release of vital information about the coronavirus. A more proactive approach in informing the WHO of the true nature of the virus, in keeping with its international law obligations, would have led to exponentially lesser cases and ample time for other States to properly prepare for the forthcoming outbreak.

China may also be held accountable under the Articles on Responsibility of States for Internationally Wrongful Acts, which defines “wrongful acts” as “attributable to the state” and “constitute a breach of an international obligation.”[10] Said “international obligation” would be the WHO’s IHR, which China failed to properly observe when it failed to expeditiously and transparently share vital information with the WHO.

Further, it may be said that China is liable under Article 31, which dictates for States to be answerable for full reparations caused by their internationally wrongful acts.[11] This is supported by the Chorzow factory case wherein the Permanent Court of International Justice (PCIJ) held that a State owes reparations to the injured parties for the damage they suffered, upon a breach of an agreement in international law.[12] The case involved a dispute between Germany and Poland, with the former alleging a violation of the Geneva Convention by the latter, entitling it to a claim for damages against Poland. Dispute arose due to a post-World War I bipartite agreement between the two states, with Poland undertaking not to forfeit any of Germany’s property in exchange for Germany transferring control of Upper Silesia to it. In violation of their agreement however, Poland proceeded to forfeit two German factories situated therein. Accordingly, the PCIJ held that Poland conducted an unlawful measure, violating its undertaking through the Geneva Convention.

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[9] World Health Organization Constitution art. 63, 1946.. Bulletin of the World Health Organization, 80 (12), 983 - 984. World Health Organization.
[10] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, *available at* https://www.refworld.org/docid/3ddb8f804.html (last accessed 15 April 2020).
[11] *Id*. art. 31.
[12] Factory At Chorzów, (Germany v. Poland), Judgment, 1928 PCIJ Series A No 17, ICGJ 255 (PCIJ 1928), 13th September 1928.

It is a general principle of international law that every violation of an engagement involves a responsibility to make reparation adopted from municipal law.[13] Reparation was defined to "as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed." Further, the case held that if restitution has become impossible, the State must pay a sum equal to the value which a restitution in kind would bear.[14]

Conclusion

The volume of medical evidence to support the claim that China indeed failed to observe its international law obligations is indeed overwhelming. One could not help but wonder by how much the outbreak would have been suppressed had China acted more responsibly. However, it remains to be seen if said breach in China's international law obligations shall go sanctioned. It seems highly unlikely that China would even submit to an arbitration of sorts, nor would it claim responsibility for the outbreak, seeing as it only recently attempted to shift the blame onto the United States. Amidst the pandemic that has beleaguered the world seemingly beyond redress, China's actions, or lack thereof, serves as a grim reminder of how a single State's decisions create an inevitable ripple felt all throughout the international plane, and ultimately must not go unchecked.

ABOUT THE AUTHOR

Bianca Kit is a Business Economics graduate of the University of the Philippines – Diliman. She has always had a penchant for writing, and she has been consistently writing for school publications since high school. She is currently an Editorial Staff of the Far Eastern Law Review.

[13] Shaw, Malcolm. *International Law*. 8th ed. Cambridge: Cambridge University Press, 2008, 100.
[14] *Id*.

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JURISPRUDENCE

LINGUISTIC RIGHTS: A COMMENTARY ON COTESCUP VS. SECRETARY OF EDUCATION

Jezreel Y. Chan

Abstract: Following the ruling of the Court in COTESCUP vs. Secretary of Education, CHED Memorandum Order No. 20-2013, which implemented the K to 12 Program and the removal of the Filipino subject in the tertiary level, was held constitutional. The author scrutinized international treaties and documents that are binding and non-binding to the Philippines to show that even under international law, the removal of the Filipino language in the tertiary level of education is still valid. All pertinent treaties and documents to linguistic rights obligate state parties to respect the freedom of expression, and the right to usage and education of members of minorities to their language. However, there is no obligation under international treaty law that this must be implemented in all phases of education. Therefore, the Court ruled correctly in the case of COTESCUP vs. Secretary of Education. Nevertheless, the author recommended the further protection of the Filipino language, given the decline in the usage of the language in modern times and also the big difference of Filipino speakers to English speakers.

Introduction

The Commission on Higher Education (CHED) passed Memorandum Order No. 20 in 2013, which removed Filipino courses from the New General Education Curriculum.[1] The removal of the Filipino courses at the tertiary level was said to result in 10,000 Filipino course teachers losing their jobs.[2] However, the removal of such teachers was not only the issue of this landmark decision, but also on how the removal of Filipino and Panitikan courses in the general curriculum at the university level was alleged to be contrary to some constitutional provisions.[3]

Ethnologue, a compendium on world languages, stated that, of the 186 established languages in the Philippines, thirty (30) are in trouble, while eleven (11) are dying.[4] The *Komisyon*

[1] Commission in Higher Education, General Education Curriculum: Holistic Understandings, Intellectual and Civic Competencies, Memorandum Order No. 20 (June 28, 2013).
[2] Navallo, Mike, "Pag-alis ng Filipino at panitikan sa kolehiyo, inapela", *available at* https://news.abs-cbn.com/news/11/26/18/pag-alis-ng-filipino-at-panitikan-sa-kolehiyo-inapela (last accessed March 6, 2020).
[3] COTESCUP vs. Secretary of Education, G.R. No. 216930, *available at http://sc.judiciary.gov.ph/3527/* (last accessed March 6, 2020).
[4] Eberhard, David M., Gary F. Simons, and Charles D. Fennig (eds.), Ethnologue: Languages of the World. Dallas, Texas: SIL International. (23rd ed.).

sa Wikang Filipino, meanwhile, had identified fifty (50) endangered languages in 2019.[5] University professors have even noticed a decline in Filipino-language usage among university students in the country.[6] Despite Filipino being the national language of the Philippines, there is still a difference of 5,000,000 users with the other national language – English.[7] This shows a preference for a language that did not originate from the Philippines.

The Court, in its decision, ruled that the removal of the subject in the tertiary level was not contrary to the provisions of the Constitution and the pertinent laws relating to the Filipino language.[8] While it delved on international law as to the valid implementation of the K to 12 Program, the Court did not verify if the removal of Filipino as a subject in the tertiary level complied with the Philippines' obligations under international law.

The journal article has one main thesis: The ruling of the Court in COTESCUP vs. Secretary of Education was still correct if international law were to be analyzed. Hence, in this article, the author will divulge on international treaties and documents that involve linguistic rights to show that there is no obligation on the part of the Philippines to require the teaching of Filipino courses at the tertiary level.

1. COTESCUP vs. Secretary of Education

1.1 Contention of the Petitioners

The petitioners in this case alleged that the implementation of CMO No. 20 was unconstitutional as it violated certain provisions of the Constitution,[9] more particularly, Art. II, Secs. 17 and 18; Art. XIII, Sec. 3; and Art. XIV, Secs. 2, 3, 6, 14, 15, 16:

[5] Multilingual Philippines, "Our languages are in trouble, so what?", *available at* https://www.rappler.com/thought-leaders/239109-philippine-languages-in-trouble-so-what (last accessed March 6, 2020).
[6] Reyes, Therese, "Mind the Gap: In the Philippines, Language isn't About Words, It's about Class", *available at* https://coconuts.co/manila/features/mind-gap-philippines-language-isnt-words-class/ (last accessed March 6, 2020).
[7] *Supra*, note 4.
[8] COTESCUP, G.R. No. 216930.
[9] *Id.*

Art. II, Sec. 17. The State shall give priority to education, science and technology, arts, culture, and sports to foster patriotism and nationalism, accelerate social progress, and promote total human liberation and development.[10]

Art. II, Sec. 18. The State affirms labor as a primary social economic force. It shall protect the rights of workers and promote their welfare.[11]

…

Art. XIII, Sec. 3. The State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all.

It shall guarantee the rights of all workers to self-organization, collective bargaining and negotiations, and peaceful concerted activities, including the right to strike in accordance with law. They shall be entitled to security of tenure, humane conditions of work, and a living wage. They shall also participate in policy and decision-making processes affecting their rights and benefits as may be provided by law.

The State shall promote the principle of shared responsibility between workers and employers and the preferential use of voluntary modes in settling disputes, including conciliation, and shall enforce their mutual compliance therewith to foster industrial peace.

The State shall regulate the relations between workers and employers, recognizing the right of labor to its just share in the fruits of production and the right of enterprises to reasonable returns on investments, and to expansion and growth.[12]

…

Art. XIV, Sec. 2: The State shall:

(1) Establish, maintain, and support a complete, adequate, and integrated system of education relevant to the needs of the people and society;

(2) Establish and maintain a system of free public education in the elementary and high school levels. Without limiting the natural right of parents to rear their children, elementary education is compulsory for all children of school age;

(3) Establish and maintain a system of scholarship grants, student loan programs, subsidies, and other incentives which shall be available to deserving students in both public and private schools, especially to the underprivileged;

(4) Encourage non-formal, informal, and indigenous learning systems, as well as self-learning, independent, and out-of-school study programs particularly those that respond to community needs; and

(5) Provide adult citizens, the disabled, and out-of-school youth with training in civics, vocational efficiency, and other skills.[13]

Art. XIV, Sec. 3: (1) All educational institutions shall include the study of the Constitution as part of the curricula.

(2) They shall inculcate patriotism and nationalism, foster love of humanity, respect for human rights, appreciation of the role of national heroes in the historical development of the country, teach the rights and duties of citizenship, strengthen ethical and spiritual values, develop moral character and personal discipline, encourage critical and creative thinking, broaden scientific and technological knowledge, and promote vocational efficiency.

At the option expressed in writing by the parents or guardians, religion shall be allowed to be taught to their children or wards in public elementary and high schools within the regular class hours by instructors designated or approved by the religious authorities of the religion to which the children or wards belong, without additional cost to the Government.[14]

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[10] PHIL. CONST. art. II, §17.
[11] PHIL. CONST. art. II, §18.
[12] PHIL. CONST. art. XIII, §3.
[13] PHIL. CONST. art. XIV, §2.
[14] PHIL. CONST. art. XIV, §3.

> …
> Art. XIV, Sec. 6: The national language of the Philippines is Filipino. As it evolves, it shall be further developed and enriched on the basis of existing Philippine and other languages.
> Subject to provisions of law and as the Congress may deem appropriate, the Government shall take steps to initiate and sustain the use of Filipino as a medium official communication and as language of instruction in the educational system.[15]
> …
> Art. XIV, Sec. 14: The State shall foster the preservation, enrichment, and dynamic evolution of a Filipino national culture based on the principle of unity in diversity in a climate of free artistic and intellectual expression.[16]
>
> Art. XIV, Sec. 15: Arts and letters shall enjoy the patronage of the State. The State shall conserve, promote, and popularize the nation's historical and cultural heritage and resources, as well as artistic creations.[17]
>
> Art. XIV, Sec. 16: All the country's artistic and historic wealth constitutes the cultural treasure of the nation and shall be under the protection of the State which may regulate its disposition.[18]

The petitioners also alleged that the said memorandum violated three laws: Republic Act No. 7104 ("Commission on the Filipino Language Act"), Batas Pambansa Blg. 232 ("Education Act of 1982"), and Republic Act No. 7356 ("An Act Creating the National Commission for Culture and the Arts, Establishing National Endowment Fund for Culture and the Arts and For Other Purposes.")[19]

1.2 The Ruling of the Court

The Court ruled that CMO No. 20 was constitutional for various reasons.[20]

First, the provisions under Art. II, Art. XIII, Sec. 13, and Art. XIV, Sec. 2 are not self-executory, as held by the Supreme Court in previous cases.[21] Furthermore, the deliberations of the Constitutional Commission also confirm that Art. XIV, Sec. 6, is not a self-executing provision.[22]

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[15] PHIL. CONST. art. XIV, §6.
[16] PHIL. CONST. art. XIV, §14.
[17] PHIL. CONST. art. XIV, §15.
[18] PHIL. CONST. art. XIV, §16.
[19] COTESCUP, G.R. No. 216930.
[20] *Id.*
[21] See: Tanada vs. Angara, 227 SCRA 18 (1997), Kilosbayan Inc. vs. Morato, 246 SCRA 540 (1995), Basco vs. Philippine Amusements and Gaming Corporation, 197 SCRA 52 (1991), Tondo Medical Center Employees Association v. Court of Appeals, 527 SCRA 746 (2007), Tolentino vs. Secretary of Finance, 235 SCRA 630 (1994).
[22] 4 RECORD OF THE CONSTITUTIONAL COMMISSION, 498-499 (1986).

As they are not self-executory, they cannot be enforced in the courts without the legislature pursuing these policies into law.[23]

Second, the removal of Filipino as a subject in the GE component of all degree programs did not remove the subject in all cases. It was merely removed to "ensure that there would be no duplication of subjects in Grades 1 to 10, senior high school, and college."[24] The removal also did not limit academic freedom as the memorandum merely provided for the minimum standards.[25] Hence, if the universities wish to add the Filipino subject to their curriculum, they have the academic freedom to do so.

Lastly, it did not contravene with the constitutional provision on the protection of labor and security of tenure as the said provision is not self-executory.[26]

The Court also ruled that CMO No. 20 did not contravene with Republic Act No. 7104, Republic Act No. 7356, and BP Blg. 232. Nothing in these laws required their implementation at the tertiary level. Hence, given that Filipino and Panitikan have been included in other levels, these laws were not violated by the implementation of CMO No. 20.[27]

2. International Law on Linguistic Rights

Linguistic Rights find its basis on the Universal Declaration of Human Rights (UDHR),[28] the International Covenant on Economic, Social, and Cultural Rights (ICESCR),[29] the International Covenant on Civil and Political Rights (ICCPR),[30] and the Convention on the Rights of the Child (CRC). Other non-binding documents, such as the Universal Declaration on Linguistic Rights (UDLR), the UN Declaration on the Rights of the Persons Belonging to National or Ethnic, Religious and Language Minorities, and the Girona Manifesto, also delve on the subject of linguistic rights. Treaties that are not binding to the Philippines, but are binding in other regions,

[23] Espina vs. Zamora, 631 SCRA 17 (2010).
[24] COTESCUP, G.R. No. 216930.
[25] *Id*.
[26] Serrano vs. Gallant Maritime Services, Inc., 582 SCRA 254 (2009).
[27] COTESCUP, G.R. No. 216930.
[28] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), Preamble, art. 2 (Dec. 10, 1948).
[29] International Covenant on Economic, Social, and Cultural Rights Preamble, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).
[30] International Covenant on Civil and Political Rights art. 27, Dec. 16, 1966, 999 U.N.T.S. 171.

such as the Framework Convention for the Protection of Local Minorities, and the European Charter for Regional or Minority Languages, also emphasize on the protection and enforcement of linguistic rights. These documents may not contain a precise definition for linguistic rights, but these documents contain the basis and general idea surrounding linguistic rights.

2.1 Universal Declaration of Human Rights

The UDHR makes no mention of linguistic rights in the entire document. However, language is specified in the non-discriminatory clause.[31] Article 2 of the UDHR makes an obligation for State Parties to not discriminate against anyone based on language.

2.2 International Convention on Economic, Social, and Cultural Rights

Similar to the UDHR, the ICESCR only mentions language in the non-discrimination clause.[32]

2.3 International Covenant on Civil and Political Rights

The ICCPR, as compared to the other two aforementioned documents, contains a more specific designation on linguistic rights. Similar to the abovementioned documents, it also mentions language in the non-discrimination clause.[33] In General Comment No. 18, the Committee on Human Rights notes that discrimination can be made based on language.[34]

The ICCPR also mentions the rights of a person charged with a criminal offense to be informed of his offense in a language he understands[35] and to avail the assistance of an interpreter if he cannot speak the language of the court.[36] These rights were placed to ensure that the person charged with a criminal offense fully understands "the nature and cause of the charge brought

[31] Universal Declaration of Human Rights, *supra* note 28, art. 2.
[32] International Convention on Economic, Social, and Cultural Rights, *supra* note 29, art. 2.
[33] International Covenant on Civil and Political Rights, *supra* note 30, art. 2.
[34] UN Committee on Civil and Political Rights, *CCPR General Comment No. 18*, *Thirty-Seventh Session* (Nov. 10, 1989).
[35] International Covenant on Civil and Political Rights, *supra* note 30, art. 14 ¶ 3.
[36] *Id.*

against them"[37] and for the compliance of the "principles of fairness and equity of arms in criminal proceedings."[38] However, it is important to note that the latter cannot be availed by the accused should he or she know the official language enough to defend themselves properly.[39]

More importantly, the ICCPR recognizes the right of linguistic minorities to the usage of their language.[40] This coincides with the ability of the minority group to maintain their language.[41] Hence, the State may create positive measures to protect, develop, and maintain their language.[42]

2.4 Convention on the Rights of the Child

The CRC emphasizes the rights of the child and how the childhood of a person plays a role in his development to be" fully prepared to live an individual life in society."[43]

It also contains a non-discrimination clause, which includes that language must not be used to discriminate children.[44] It also recognizes that a child belonging to a minority may use his/her language,[45] similar to the ICCPR.[46] However, the CRC also provides that State Parties must ensure that:

> The education of the child shall be directed to… [t]he development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own.[47]

Article 29 of the CRC gives importance to emphasizing the right to education of children.[48] The UN Committee on the Rights of the Child recognizes that this article requires that State parties

[37] U.N. Human Rights Committee, *General Comment No. 32*, *Ninetieth Session*, at par. 31, CCPR/C/GC/32 (Aug. 23, 2007).
[38] *Id.,* par. 40.
[39] *Id*.
[40] International Covenant on Civil and Political Rights, *supra* note 30, art. 27.
[41] ICCPR General Comment No. 23, par. 6.2.
[42] *Id*.
[43] Convention on the Rights of the Child Preamble, Nov. 20, 1989, 1577 U.N.T.S. 3.
[44] *Id.,* art. 2.
[45] *Id.,* art. 30.
[46] See: International Covenant on Civil and Political Rights, *supra* note 29, art. 27.
[47] Convention on the Rights of the Child, *supra* note 43, art. 29.
[48] UN Committee on the Rights of Child, *General Comment No. 1* (2001)*, Twenty-Sixth Session*, at par. 8, CRC/GC/2001/1 (Apr. 27, 2001).

find a balanced approach to education and reconciling contrasting culture, cultural identities, language, and values.[49]

2.5 Universal Declaration on Linguistic Rights

The UDLR recognizes that the situation of every language is brought about by different factors, namely: "the convergence and interaction of a wide range of factors of a political and legal, ideological and historical, demographic and territorial, economic and social, cultural, linguistic and sociolinguistic, interlinguistic and subjective nature."[50]

However, language communities are threatened by "a lack of self-government, a limited population or one that is partially or wholly dispersed, a fragile economy, an uncodified language, or a cultural model opposed to the dominant one."[51] Hence, the Declaration was created to ensure that many languages survive and develop in the long run of globalization.

The Declaration requires State-parties to implement legislative measures to ensure that the obligations provided in the UDLR would be followed.[52] Among which is the obligation to maintain and develop the language by education.[53] The Declaration also provides that such language be the subject of study and research at the university level.[54] This shows an obligation for State-Parties to impose their mother tongue as a language to be taught at the university-level in the language community.

However, the Declaration is non-binding and was not ratified by the UN General Assembly, nor adopted by the UNESCO.[55]

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[49] *Id.*, par. 4.
[50] Universal Declaration of Linguistic Rights Follow-up Committee, Universal Declaration of Linguistic Rights at Preamble, *available at https://culturalrights.net/descargas/drets_culturals389.pdf* (last accessed Mar. 15, 2020).
[51] *Id.*
[52] *Id.,* Additional Dispositions.
[53] *Id.*, art. 23.
[54] *Id.*, art. 30.
[55] International PEN, "International PEN: UNESCO Culture Sector", *available at* http://portal.unesco.org/culture/en/ev.php-URL_ID=17398&URL_DO=DO_TOPIC&URL_SECTION=201.html (last accessed March 15, 2020).

2.6 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

Similar to the UDLR, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities was also inspired by treaties, such as the UDHR, ICCPR, and ICESCR.[56] It, however, concentrates on minorities and the emphasis of their rights as human persons.

Art. 2 provides for the rights of minorities to the use of their language. Art. 4 of the Declaration imposes the obligation of State-parties to do what it can to encourage knowledge of various important elements of the culture of the minority and, more particularly, of its language, in the field of education.[57]

However, similar to the UDLR, it is non-binding and cannot be used to require States to impose the obligations provided on the Declaration.[58]

2.7 Girona Manifesto

The Girona Manifesto was developed in 1996 to update the UDLR and emphasize on the ten important principles of the UDLR.[59]

The 6th Principle of the Girona Manifesto provides that "[s]chool instruction must contribute to the prestige of the language spoken by the linguistic community of the territory."[60] In a study done by the UNESCO, it has been emphasized that "the language of instruction as well as knowledge of languages play key roles in learning."[61]In line with this, UNESCO

[56] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, Preamble, U.N. Doc. A/RES/47/135 (Feb. 3, 1992).
[57] *Id*., art. 4.
[58] Global Health Rights, "Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities", *available at* https://www.globalhealthrights.org/instrument/declaration-on-the-rights-of-persons-belonging-to-national-or-ethnic-religious-and-linguistic-minorities/ (last accessed Mar. 16, 2020).
[59] Linguapax International, Defending Linguistic Rights, at 6, *available at http://www.linguapax.org/wp-content/uploads/2016/09/defensem_els_drets_ling_ENdef.pdf (*last accessed Mar. 25, 2020)
[60] PEN International, Girona Manifesto, *available at https://pen-international.org/app/uploads/Girona-Manifesto-ENGLISH.pdf* (last accessed Mar. 25, 2020).
[61] Ball, Jessica, Enhancing learning of children from diverse language backgrounds: mother tongue-based bilingual or multilingual education in the early years (A Review Published Online by UNESCO), *available at https://unesdoc.unesco.org/ark:/48223/pf0000212270* (last accessed March 25, 2020).

continues to advocate that "the goal of protecting children's first languages and preserving the world's linguistic diversity also requires intensive efforts to ensure that children have the right to learn in their mother tongue."[62] Such efforts must be made through political will and ongoing government support, especially as it would significantly contribute to the growth of the child and the preservation of his or her mother tongue.[63]

Given that this has been adopted from the UDLR, it is also non-binding as a document.[64]

2.8 Framework Convention for the Protection of National Minorities

The Framework Convention for the Protection of National Minorities is a multi-lateral treaty that was adopted by the Committee of Ministers of the Council of Europe in 1994 and was put into effect in 1998.[65] It binds State parties to protect the rights of persons belonging to minorities.[66]

The said treaty requires State parties to promote conditions to maintain and develop their culture and preserve its necessary elements, such as language.[67] Art. 2 of the Convention provides the obligation for state parties to ensure that the necessary conditions are present for the minority community to maintain and develop their culture, and also preserve their identity.[68]

The Convention also recognizes the freedom of expression, including the right to impart and receive information in their language[69] and to its usage.[70] Art. 9 expounds on the freedom of expression as provided under Art. 7 of the Convention.[71] Art. 10 enables a person belonging to a

[62] *Id.*
[63] *Id.*
[64] Linguapax International*, supra* note 59.
[65] Council of Europe, About the Framework Convention for the Protection of National Minorities, *available at https://www.coe.int/en/web/minorities/at-a-glance* (last accessed March 25, 2020).
[66] Council of Europe, FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES LEAFLET, *available at* https://www.coe.int/en/web/minorities/fcnm-leaflet (last accessed March 26, 2020).
[67] Framework Convention for the Protection of National Minorities art. 5, Nov. 10, 1994, ETS 157.
[68] Council of Europe, Explanatory Report to the Framework Convention for the Protection of National Minorities, par. 42, *available at https://rm.coe.int/16800cb5eb* (last accessed March 25, 2020).
[69] Framework Convention for the Protection of National Minorities, *supra* note 67, art. 9.
[70] *Id.,* art. 10.
[71] Explanatory Report to the Framework Convention for the Protection of National Minorities, *supra* note 68, par. 55.

minority community to assert and preserve their identity, and to exercise their freedom of expression.[72]

More importantly, in relation to education, it requires parties to "take measures in the field of education research, to foster knowledge of the language,"[73] and grant the right to let members of minorities learn his or her language.[74] Art. 12 was created to comply to "create a climate of tolerance and dialogue, as referred to in the preamble to the framework convention and Appendix II of the Vienna Declaration of the Heads of State and Government."[75] The right in Art. 14 has been described by the Council of Europe to have no exceptions.[76]

The treaty, however, is non-binding to the Philippines, as the Philippines is not a State party to this treaty.[77]

2.9 European Charter for Regional or Minority Languages

The Charter was adopted as a convention in 1992 by the Committee of Ministers of the Council of Europe and was entered into force in 1998.[78] Together with the Framework Convention, these two treaties serve to protect and promote the languages used by minorities in Europe.[79]

Unlike the above-mentioned treaties and documents, this convention provides an explicit obligation for State parties to make available classes at all appropriate levels in education (preschool to university) in the minority language.[80] The obligation to provide facilities and to arrange for its provision in these levels are also provided for in this convention.[81] The article provides for measures that State parties ought to implement depending on the situation of the minority language in their territory.[82] In line with these, the Committee took note that such

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[72] *Id.,* par. 63.
[73] Framework Convention for the Protection of National Minorities, *supra* note 67, art. 12.
[74] *Id.*, art. 14.
[75] Explanatory Report to the Framework Convention for the Protection of National Minorities, *supra* note 68, par. 71.
[76] *Id.*, par. 74.
[77] Council of Europe, State parties to the Framework Convention for the Protection of National Minorities, *available at https://www.coe.int/en/web/minorities/etats-partie* (last accessed March 25, 2020).
[78] Council of Europe, European Charter for Regional or Minority Languages, *available at https://www.coe.int/en/web/european-charter-regional-or-minority-languages* (last accessed March 25, 2020).
[79] *Id.*
[80] European Charter for Regional and Minority Languages, art. 8.
[81] *Id*.
[82] European Charter Explanatory Report, par. 81.

necessary measures must have available resources pertaining to finance, staff, and teaching aids, to which the State parties must ensure that they are available.[83]

Similar to the Framework Convention for the Protection of National Minorities, however, this treaty is not binding to the Philippines and is only binding to European countries that have become state-parties and ratified this treaty.[84]

Conclusion and Recommendation

Linguistic rights, while having no definition under different multi-lateral treaties, have been consistently mentioned through the history of human rights.

Its importance is highlighted as its practice involves the freedom of expression, a highlighted right under the UDHR[85] and the ICCPR.[86] Emphasized under linguistic rights is the right to the usage and education of languages. These rights have been reiterated in different documents, be it binding and non-binding.

The right to education, however, does not require State parties to implement it in all phases of education. It merely emphasizes the need for State parties to ensure that it is taught in school and that necessary facilities are provided to ensure that this cultural element is preserved, developed, and protected. Given such the case, the ruling in COTESCUP vs. Secretary of Education[87], where it ruled that the removal of teaching the Filipino language in the general curriculum for the tertiary level is constitutional, is valid, given that the Filipino language is taught from Grades 1 to 10. The Philippine Government is compliant with its obligations under treaty law that minority languages are taught in school and that its members of minority communities can use their languages without restraint.

Reality still shows a decline in the use of minority languages and a preference for using a language that did not originate from the Philippines. Hence, the Government must implement effective measures that would encourage the use and education of all Philippine languages, and

[83] *Id.,* par. 86.
[84] Council of Europe, Chart of Signatures and ratifications of Treaty 148, *available at* https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/148/signatures?p_auth=f7HBB3Pn (last accessed Mar. 26, 2020).
[85] Universal Declaration of Human Rights, *supra* note 28, art. 19.
[86] International Covenant on Civil and Political Rights, *supra* note 30*,* art. 19.
[87] COTESCUP, G.R. No. 216930.

not only Filipino. Otherwise, this would result in a rapid loss of a culture that took centuries to build.

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EXTENDING MARRIAGE RIGHTS TO SAME-SEX COUPLES: A COMMENTARY ON FALCIS VS. CIVIL REGISTRAR GENERAL

Emille Joyce R. Llorente

In September of 2019 came the promulgation of the Supreme Court on an openly gay lawyer's petition to nullify certain provisions of the Family Code. Much to the general public's dismay, the decision was held in the negative for purely procedural infirmities. It must be understood that the crux of the resolution on the long-standing discourse regarding gay marriage rests not on whether or not the guarantees of the constitution should be extended to same-sex couples but on who should be making that decision in today's democratic Philippines. Ultimately, the Supreme Court decided that it should be the Filipino—the sovereign collective—who must, through their validly appointed representatives, uphold this right. It cannot simply rest on 15 men appointed by the president who happen to be vested with the task of interpreting the law of the land.

Introduction: The Connection between Marriage and Liberty

The significance of marriage to humankind can be found, not only on the individual as one of the central purposes of life, but also on the collective as the foundation of a well-functioning society. Before human rights was even acknowledged, celebration of marriages was already honored since time immemorial – turning strangers into a family, and families into communities. At one point in history, Confucius even taught that "marriage lies at the foundation of government,"[1] pertaining to how the greatness of their ancient nation's government relied on the management of the royal family. Today, it can be said that the richness of the state is a combined effort of these small nuclei that make up its totality.

In 2003, the US case of *Lawrence vs. Texas*[2] signified the first decision repelling the intrusion of Government from the private intimate affairs of its citizens, specifically the liberty to decide one's sexual partner. Such freedom is said to be protected under the constitutional right to privacy. This American case has decided that sexual conduct between two consenting adults should be extended to same-sex couples, given their constitutional right to equal protection of the

[1] LI CHI, BOOK OF RITES 266 (C. Chai & W. Chai eds., J. Legge transl. 1967).
[2] Lawrence v. Texas, 539 U.S. 558 (2003).

law as granted by the 14th Amendment.[3] While far from the level of marriage, the author considers that this ruling is of huge importance as it sets the precedent that the government cannot intrude on its homosexual people's fundamental right to participate in familial and personal relationships.

Following this, the enduring importance of the said institution is also the point of contention in the US case of *Obergefell vs. Hodges*,[4] which sparked nationwide discussion and decided on the legal recognition of the union of same-sex couples. Respondents therein contended that the extension to two persons of the same sex of the lawfulness of marriages would result in demeaning the union, anchoring on its history and nature as one between a man and a woman.[5] Petitioners, on the other hand, insist that they do not mean to devalue its sanctity but instead their action is done out of their respect and need of the same, with the hopes of extending its entitlements to them as persons in good faith.[6] The fact that their sexuality was not their choice meant that the approval of same-sex marriage would be the only way for their rights to marry and to choose who to marry be enforced.

One of the four premises of the US Supreme Court's relevant precedents in the same case is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy.[7] Citing the case of *Loving vs. Virginia*, [8] it emphasized the connection between marriage and liberty, as they are precisely why interracial marriage bans have now been overturned under the Due Process Clause. The same should be applied to same-sex marriages. It is personal to a private person to make choices regarding love and marriage, regardless of their sexual orientation.

1. Other nations' views regarding homosexual marriage

1.1 Affirmative views on the right to gay marriage

[3] Contra: Bowers v. Hardwick 478 U.S. 186 (1986).
[4] Obergefell Et Al v. Hodges Director, Ohio Department of Health Et Al. US Supreme Court Decision on Marriage Equality 576 U.S. 644 (2015).
[5] *Id.*
[6] *Id*.
[7] *Id*.
[8] Loving v. Virginia, 388 U.S. 1 (1967).

Before any law anywhere even remotely considered same-sex marriage, the freedom of a person to be intimate with a partner indiscriminately of gender had to first be accepted. The first conversations regarding the law's recognition of homosexuals resulted to the upholding of the constitutionality of a Georgia law that penalized the act of engaging in intimate acts with persons of the same sex.[9] Following this precedent 10 years later, another US decision turned down the opportunity to recognize an amendment to the Constitution, seeking to foreclose any arm of the State from protecting persons against discriminations of their sexual orientation.[10] On a positive note, in 2003, the Court finally overruled Bowers, holding that laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons."[11]

Against this background of just same-sex intimacy, the legal question of same-sex marriage arose.

The Netherlands was the first country to allow marriage to same-sex couples, which came also with the rights to divorce and to adopt children.[12] Belgium, Spain, and Canada followed suit for the next five years.[13] The United States did not adopt the same recognition until 2015 when the US Supreme Court in *Obergefell vs. Hodges* decided on its legality, instantly making same-sex marriage legal across all 50 states. During the same year, Ireland became the first country to legalize it not by legislation or court decision but by way of popular vote.[14]

Quite recently, Taiwan became the first Asian country to put pressure on legislation and ultimately decide on same-sex marriage legalization.[15] Taiwanese president Tsai Ing-Wen promised that it would be done. In 2017, she issued an ultimatum to its parliament to legislate the same within two years; come 2019, it was already put in law.[16]

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[9] Bowers v. Hardwick, 478 U. S. 186 (1986).
[10] Romer v. Evans, 517 U. S. 620 (1996).
[11] Lawrence v. Texas, 539 U.S. 558, 575 (2003).
[12] "Netherlands Legalises Gay Marriage", *available at* http://news.bbc.co.uk/2/hi/europe/921505.stm (last accessed April 17, 2020).
[13] Ben Winsor, Dubravka Voloder, "Same-sex marriage around the world: How many countries have legalized it?" *available at* https://www.sbs.com.au/news/same-sex-marriage-around-the-world-how-many-countries-have-legalised-it (last accessed April 17, 2020).
[14] "Ireland says Yes to same-sex marriage" *available at* https://www.rte.ie/news/2015/0523/703205-referendum-byelection/ (last accessed April 17, 2020).
[15] "For Taiwan, a Year to Go to Legalize Same-Sex Marriage", *available at* https://www.hrw.org/news/2018/06/11/taiwan-year-go-legalize-same-sex-marriage (last accessed April 17, 2020).
[16] *Id.*

As of today, the countries adopting the same laws are still growing. Some of the notable countries include South Africa, Norway, Sweden, Portugal, Iceland, Argentina, Denmark, France, Brazil, Uruguay, New Zealand, United Kingdom, Luxemburg, Colombia, Greenland, Finland, Malta, Germany, Australia, Ecuador, and Austria.[17]

In the Philippines, it was not until 2018 that the lower house of the congress started discussing the possibility of legalizing same-sex partnerships by way of "civil partnership" that if implemented, will provide same-sex couples the same benefits being enjoyed by married opposite-sex couples. Principally authored by then House Speaker Pantaleon Alvarez, House Bill No. 6595[18] proposes "to allow couples to enter into a civil partnership, whether they are of the opposite or of the same sex." It should be noted, however, that the said bill will not consider the subject couple as married but will provide them with property rights and adoption rights such that no Filipino will be discriminated by law by reason of their gender.[19]

1.2 Negative views on a right to homosexual marriage

In 2016, the European Court of Human Rights (ECHR) confirmed that the right of same-sex partners to marry does not exist.[20]

This unanimous declaration was reached through a decision on a French case,[21] questioning the French courts' decision to annul the marriage between two men contracted in 2004, stating that the marriage is in violation of the French law. In effect, the ECHR unanimously recalled that the

[17] "Countries Where Gay Marriage Is Legal 2020", *available at* https://worldpopulationreview.com/countries/countries-where-gay-marriage-is-legal/ (last accessed April 17, 2020).
[18] An Act Recognizing the Civil Partnership of Couples, Providing for their Rights and Obligations, H.B. No. 6595, 17th Cong., 2nd Regular Session (2017).
[19] Joyce Ilas, "House tackles bill legalizing same sex, live-in partnerships", *available at* https://cnnphilippines.com/news/2018/01/31/house-tackles-bill-legalizing-same-sex-live-in-partnerships.html (last accessed April 17, 2020).
[20] Grégor Puppinck, "The ECHR Unanimously Confirms the Non-Existence of a Right to Gay Marriage", *available at* https://eclj.org/marriage/the-echr-unanimously-confirms-the-non-existence-of-a-right-to-gay-marriage (last accessed April 17, 2020).
[21] Decisions of the European Court of Human Rights: Affaire Chapin and Charpentier vs. France, Application No. 40183/07, (June 9, 2016).

European Convention on Human Rights did not include the right to gay marriage,[22] neither under the right to respect for private and family life,[23] nor the right to marry and to found a family.[24]

To highlight, the decision noted that same-sex marriage is "subject to the national laws of the Contracting States."[25] It clarified that in Article 8 of the European Convention on Human Rights, which provides for the right to respect privacy and family life and for respect for private life protects personal freedoms, "States are still free [...] to restrict access to marriage to different-sex couples."[26] The same State-imposed restriction can be said about in Article 14 of the Convention, which tackles the principle of non-discrimination. Article 12 of the European Convention on Human Rights, which provides that its subjects have the right to marry who they want to, and to start a family, refers only to the traditional concept of marriage, which is the union between a man and a woman.[27] It follows that the said article cannot be viewed as imposing an obligation on governments of contracting states to grant same-sex couples access to marriage.[28] In the case of Hamalainen v. Finland, the same interpretation of the law was affirmed as the courts found no violation in the refusal to give a transgender woman her female identity number unless her marriage to her wife was transformed from a marriage to a civil partnership.[29]

On the other hand, the European Center for Law and Justice (ECLJ) also said that these decisions do not completely rule out a possible overturning of the decision in favor of one more inclined towards acceptance of a right to same-marriage.[30] But as far as the Convention is concerned, the ECHR cannot further challenge its interpretation. Changing its intent is not possible as its wording is clear in stating its position regarding the issue.

2. The Case

2.1 Petitioner's contentions

[22] *Supra,* note 17.
[23] European Convention on Human Rights, Nov. 4, 1950, Art. 8 [hereinafter ECHR].
[24] European Convention on Human Rights, Nov. 4, 1950, Art. 12
[25] Affaire Chapin and Charpentier vs. France, Application No. 40183/07
[26] Grégor Puppinck, "Chapin and Charpentier v. France", *available at* https://eclj.org/marriage/the-echr-unanimously-confirms-the-non-existence-of-a-right-to-gay-marriage (last accessed Apr. 18, 2020).
[27] See: Valerie Gas and Nathalie Dubois vs. France, Application No. 25951/07, ECHR 444, (March 11, 2011).
[28] See also: Hämäläinen vs. Finland, Application No. 37359/09, (July 16, 2014).
[29] *Id.*
[30] *Supra*, note 22.

Jesus Nicardo Falcis III, an openly gay lawyer, sought to declare Articles 1[31] and 2[32] of the Family Code unconstitutional. Consequentially, this shall also nullify Articles 46(4)[33] and 55(6)[34] therein. The petition in *Falcis vs. Civil Registrar General* seeks to strike down the prohibitions against same-sex marriage under the Family Code.

2.2 Respondent's contentions

The Supreme Court ordered Fernando Perito, the Civil Registrar General to comment on the petition. Among other arguments, the Civil Registrar General contended that Falcis is estopped from questioning the Family Code, it being effective since 1987.[35] Perito also argued that Falcis did not present any evidence of systematic discrimination against the Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex (LGBTQI+) community, as well as any specific injury to him as petitioner of any denial of a marriage license or marriage celebration by any authorized solemnizing officer.[36]

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[31] The Family Code of the Philippines (As Amended) [FAMILY CODE], Executive Order No. 209, art. 1 (1987), provides:

> Article 1. Marriage is a special contract of permanent union between a man and a woman entered into in accordance with law for the establishment of conjugal and family life. It is the foundation of the family and an inviolable social institution whose nature, consequences, and incidents are governed by law and not subject to stipulation, except that marriage settlements may fix the property relations during the marriage within the limits provided by this Code.

[32] FAMILY CODE, art. 2 provides:

> Art. 2. No marriage shall be valid, unless these essential requisites are present:
> (1) Legal capacity of the contracting parties who must be a male and a female; and
> (2) Consent freely given in the presence of the solemnizing officer.

[33] FAMILY CODE, art. 46 ¶ 4 provides:

> Art. 46. Any of the following circumstances shall constitute fraud referred to in Number 3 of the preceding Article:
> (4) Concealment of drug addiction, habitual alcoholism or homosexuality or lesbianism existing at the time of the marriage;

[34] FAMILY CODE, art. 55 ¶ 6 provides:

> Art. 55. A petition for legal separation may be filed on any of the following grounds: (6) Lesbianism or homosexuality of the respondent;

[35] Falcis III v. Civil Registrar General, G.R. No. 217910, Sept. 3, 2019.

[36] *Id.*

2.3 Ruling of the Court on Procedural Issues

The bulk of the decision focused on determining first the justiciability of the case, the important issues being the following:

2.3.1 On whether mere passage of the Family Code creates an actual case of controversy

The Court found that there is no actual case subject to judicial review. Nevertheless, the court acknowledged that per the 1987 Constitution, marriage is not limited on the basis of sex.[37] Neither is it on the basis of gender,[38] sexual orientation,[39] or gender identity or expression.[40] The aforementioned concepts are different and not to be confused with the biologically and politically correct definition of "sex".

To cite the Constitution, Article XV, Section 2 thereof only assures that its inviolability is upheld by the laws of the land:

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[37] 70 AMERICAN PSYCHOLOGIST, GUIDELINES FOR PSYCHOLOGICAL PRACTICE WITH TRANSGENDER AND GENDER NONCONFORMING PEOPLE 832, 862 (2015) *available at* https://www.apa.org/practice/guidelines/transgender.pdf (last visited on September 2, 2019), provides:

> [S]ex is typically assigned at birth (or before during ultrasound) based on the appearance of external genitalia. When the external genitalia are ambiguous, other indicators (e.g., internal genitalia, chromosomal and hormonal sex) are considered to assign a sex, with the aim of assigning a sex that is most likely to be congruent with the child's gender identity. For most people, gender identity is congruent with sex assigned at birth ([known as] "cisgender"); for [transgender and gender non-conforming] individuals, gender identity differs in varying degrees from sex assigned at birth.

[38] An Act Defining Gender-Based Sexual Harassment in Streets, Public Spaces, Online, Workplaces, and Educational or Training Institutions, Providing Protective Measures and Prescribing Penalties Therefor [Safe Spaces Act], Republic Act No. 11313, § 3(d) (2019) defines gender, as follows:

> SECTION 3. *Definition of Terms.* - As used in this Act:
> (d) *Gender* refers to a set of socially ascribed characteristics, norms, roles, attitudes, values and expectations identifying the social behavior ofmen and women, and the relations between them[.]

[39] *Supra* note 30, at 862 provides:

> Sexual orientation: a component of identity that includes a person's sexual and emotional attraction to another person and the behavior and/or social affiliation that may result from this attraction. A person may be attracted to men, women, both, neither, or to people who are genderqueer, androgynous, or have other gender identities. Individuals may identify as lesbian, gay, heterosexual, bisexual, queer, pansexual, or asexual, among others.

[40] Safe Spaces Act of 2019, § 3(f) defines gender identity and /or expression, as follows:

> SECTION3. *Definition of Terms.*-As used in this Act:
> t) *Gender identity and/or expression* refers to the personal sense of identity as characterized, among others, by manner of clothing, inclinations, and behavior in relation to masculine or feminine conventions. A person may have a male or female identity with physiological characteristics of the opposite sex, in which case this person is considered transgender.

> SECTION 2. Marriage, as an inviolable social institution, is the foundation of the family and shall be protected by the State.[41]

Notably, the Supreme Court acknowledged that the 1987 Constitution accommodates the varying and evolving sexual orientation, gender identity, and expression (SOGIE) of individuals in today's society.[42] The ever-changing economic landscape shaped by politics and new emerging ideologies are the factors that define the concept of family and its role as a social institution. Thus, the concept of family cannot be grounded on the complementarity of the sexes as it would perpetuate the discrimination faced by couples, opposite sex or same sex alike that do not fit that mold.[43]

Again, the provisions that the petition claims to be a facial challenge of are Articles 1, 2, 46(4), and 55(6) of the Family Code. The Court defined facial challenge as "an examination of the entire law, pinpointing its flaws and defects, not only on the basis of its actual operation to the parties, but also on the assumption or prediction that its very existence may cause others not before the court to refrain from constitutionally protected speech or activities."[44] Given this, it was held that the petitioners were not able to show how freedom of expression of the general public are being curtailed exactly. There are no legally demandable rights demonstrated.

2.3.2 On whether the self-identification of petitioner as member of the LGBTQI+ community gives him standing

The Court held that simply self-identifying as part of the LGBTQI+ community does not give the petitioner legal standing to sue.[45] Justice Marvic Leonen discussed that the Courts are not duty-bound to answer life's questions regardless of how interesting or compelling without the legal requisite of an "actual and antagonistic assertion of rights by one party against the other in a

[41] PHIL. CONST. art. XV, §2.
[42] *Falcis III,* at 15.
[43] *Id*. at 22.
[44] Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*,* 646 Phil. 452,489 (2010) [Per J. Carpio Morales, En Banc]
[45] *Falcis III.*

controversy wherein judicial intervention is unavoidable", and labeled this ultimate question herein as merely theoretical.[46]

Another function of the courts that is elementary to students of the law is the mandate to determine whether or not there has been grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government. Here, no action by the defendant could be adjudged as "grave abuse of discretion" being no interaction occurred between the two parties. Otherwise stated, determining that a rule ought not exist would be likened to the judicial branch positioning itself as having a rule-making prerogative.[47]

The Court highlighted that the respondent in this case, the Civil Registrar General, was not even involved in the writing nor enactment of the Family Code, nor did it influence the same in limiting the validity of marriage to that of a male and female only.[48] Because the main contention of the petitioner is the constitutionality of Articles 1 and 2 of the said law, no factual antecedents could be presented that respondent herein was involved, as the passage of the law in question was done by the only branch which has the power to do it, the Congress. The petitioner in choosing the Civil Registrar General as the respondent is, thus, misguided. To illustrate, petitioner never came in contact with the respondent's office, nor applied for a marriage license, nor met anyone acting under its authority.[49] Simply put, there is nothing to show that the respondent and his office have given any kind of discretion that must have been lacking or excessive, let alone "grave."

The Court also opined that a substantive portion of the petition heavily relied on and simply block-quoted arguments made by Chief Justice Puno,[50] in the case of *Ang Ladlad LGBT Party vs. Commission on Elections,* which talked primarily about the concept of suspect classifications without stating clearly how said arguments could apply and govern in this case.[51]

Additional to the fact that the respondent is misplaced in this case, the petitioner himself has no legal standing to file his petition, having suffered no direct personal injury or not being in danger of suffering it. The Court said that his sexuality by itself and his supposed "personal stake in the outcome of this case" cannot be considered a direct injury that would clothe himself with

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[46] *Id.*
[47] *Id.* at 22.
[48] *Id*. at 48.
[49] *Id*. at 49.
[50] Ang Ladlad LGBT Party v. Commission on Elections**,** G.R. No. 190582, April 8, 2010 **[**Separate Concurring Opinion, CJ. Puno**]**
[51] *Falcis III,* at 47.

standing.[52] The Court ruled out the following assertions as not acceptable as legally demandable rights in need of judicial enforcement: the "law's normative impact," "impairment" of his "ability to find and enter into long-term monogamous same-sex relationships", injury to his "plans to settle down and have a companion for life in his beloved country", and influence over his "decision to stay or migrate to a more LGBT-friendly country".[53]

2.3.3 On whether the petition-in-intervention cures the procedural defects

The Court noted that both the main petition and petition-in-intervention named the Civil Registrar General as the respondent which the court has earlier already stated as invalid.

2.3.4 On whether the application of the doctrine of transcendental importance is warranted

The Supreme Court stated that the petitioner's invocation of transcendental importance lacks the proof it needed and commented that transcendental importance is "not a life buoy designed to save unprepared petitioners from their own mistakes and missteps."[54]

Outside of these issues, the Supreme Court also pointed out that it is crucial for the petitioner to identify in his pleadings and oral arguments those legal benefits to marriage which he has been fighting for.[55] Together with this, he must also provide proof that he has obtained consent from the community he claims to represent regarding their willingness to conform to the State's present construct of marriage or their approval to limit the petition in the prayer to nullify only Articles 1 and 2 of the Family Code and consequently, Articles 46(4) and 55(6). The petitioner failed to present both. The Court explained the petitioner should have mentioned all areas of law that the state intrudes in marriage,[56] as it cannot impliedly amend all such laws through a mere declaration of unconstitutionality of the two aforesaid articles in a single statute. As a result, the Supreme Court would be violating the principle of separation of powers by also changing the laws on other subjects of the law.

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[52] *Id*. at 84.
[53] *Id*. at 85.
[54] *Id*. at 101.
[55] *Id.*
[56] *Id*. at 78.

In ruling on the reinterpretation of the law or the nullification of the said articles, the Courts is taking caution on the inclusivity in the country's marriage laws by paying attention to "who and what is actualized when the LGBT subject is given a voice" and the "range of identities and policies that have refused to conform to state-endorsed normative homo- or heterosexuality."[57]

2.4 Ruling of the Court on Substantive Issues

The Supreme Court laid down the following substantive issues to be addressed after the petition sufficiently shows that they are appropriate subjects of judicial review:

> *2.4.1 Whether the right to marry and the right to choose whom to marry are cognates of the right to life and liberty;*
> *2.4.2 Whether the limitation of civil marriage to opposite-sex couples is a valid exercise of police power;*
> *2.4.3 Whether limiting civil marriages to opposite-sex couples violates the equal protection clause;*
> *2.4.4 Whether denying same-sex couples the right to marry amounts to a denial of their right to life and or liberty without due process of law;*
> *2.4.5 Whether sex-based conceptions of marriage violate religious freedom;*
> *2.4.6 Whether a determination that articles 1&2 of the family code are unconstitutional must carry the conclusion that 46(4) and 55(6) of the fam code on homosexuality and lesbianism as grounds for annulment and legal separation are also unconstitutional.*[58]

The Supreme Court did not rule on any of the above-listed substantive issues of the petition for the reason that the Falcis and the petitioners-in-intervention were not able to prove themselves

[57] Katherine Franke, *Dating the State: The Moral Hazards of Winning Gay Rights,* 44 COLUM. HUM. RTS. L. REV. 1, 38 (2012).
[58] *Falcis III,* at 13.

first as having legal standing to file the same. Instead, it lengthily dwelled on technical grounds as the petitioners failed to raise an actual case or controversy.

Associate Justice Lucas Bersamin, during the oral arguments, claimed that Falcis is asking the court to rule on a hypothetical situation, which is not allowed.[59]

In its discussion of the procedural issues, it noted that it has previously acknowledged in *Ang Ladlad LGBT Party v. Commission on Elections*[60] that that the LGBTQI+ community has historically "borne the brunt of societal disapproval." The Court noted that it does not align itself with the traditional view that the community's confused concept of freedom relies merely on feelings, wants, and temporary desires; instead, it agrees that same-sex conduct is a natural phenomenon,[61] which is precisely the reason why it is taking careful pronouncement as to not cheapen the movement.[62] It explained that it is the "basic requirement of actual case or controversy [that] allows this Court to make grounded declarations with clear and practical consequences."

Again, the Court emphasized that this cannot be achieved given the petitioners' violation of the doctrine of hierarchy of courts, stating that they "wagered in litigation no less than the future of a marginalized and disadvantaged minority group."

Conclusion

"[T]he time for a definitive judicial fiat may not yet be here," says the Supreme Court.[63] To that, the author is not of the same mind. The social relevance of the issue is begging to be addressed now more than ever, given the rapidly changing culture, acceptance, and relevance of the interests of the community.

In this case, the Court repeatedly mentioned how it sympathizes with the petitioner and the desire of same-sex couples to seek recognition by the law of their genuine selves and the choices

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59 ABS-CBN News, "Bersamin: Ruling on same-sex marriage plea means deciding a 'hypothetical' situation", available at https://news.abs-cbn.com/news/06/19/18/bersamin-ruling-on-same-sex-marriage-plea-means-deciding-a-hypothetical-situation (last accessed April 18, 2020).
60 *Ang Ladlad LGBT Party*, 632 Phil. 32
61 KIMBERLE WILLIAMS CRENSHAW, DEMARGINALIZING THE INTERSECTION OF RACE AND SEX: A BLACK FEMINIST CRITIQUE OF ANTIDISCRIMINATION DOCTRINE, FEMINIST THEORY AND ANTIRACIST POLITICS, 140 (University Of Chicago Legal Forum. 1989).
62 *Falcis III,* at 46.
63 *Id*. at 107.

they make in consequence of this; that it is not just a matter of wanting to obtain a moral judgement based on discrimination from the laws. While this cannot be the case that presents the best factual backdrop, given that there were no actual facts to begin with, the Constitution still requires a well-reasoned judgement on the substantial issues presented. It is a wasted moment that the Court, or at least the *ponente*, gave clues on their affirmative stand regarding the subject but nevertheless did not give these views the opportunity to change the legal landscape.

At the same time, the Supreme Court agreed that petitioner Falcis' future plan to settle down in the country and get married to another man could not be recognized as sufficient interest as these are not "legally demandable rights that require judicial enforcement."[64] Better explained by the *ponente* himself, the "interest" at stake here should be defined as not mere interest in the question or interest in the amendments brought about its answer but a "material interest" in seeking a concrete outcome or relief.[65]

The procedures of the law must always be followed in bringing about a change in the backdrop of society as crucial as this. Besides, it is a well-settled principle that rules of procedure should promote, not defeat, substantial justice.

Recommendation

Legislation, instead of adjudication, will remain to be the better platform for extending marriage rights to the lesser-recognized communities in society. Of course, the democratically elected representatives in the Congress, acting as the brains or voices of the nation, should be in better position to act in addressing the predicament of the people who cannot help choosing to love differently, albeit no less genuinely. It is unfortunate, though also understandably unquestionable, that the Courts must refuse to decide on the substantial issues, which is what matters as it is a pressing social issue best discussed by the best minds in the legal domain.

It is then recommended by the author that, persons who have legal standing should be the ones to step up and file the petition in court, bearing in mind the infirmities pointed out by the Court and cure said defects. Some Filipinos already hope that a similar case could be filed in the

[64] *Id*.
[65] *Id*. at 83.

future.[66] As the court ruled in the Falcis case, jurisprudence on justiciability in constitutional adjudication has been clear on the requirement of actual cases and controversies. It is then the parties' duty to demonstrate actual cases or controversies worthy of judicial resolution. It is necessary to give this long-standing issue a platform for a proper petitioner to argue the existence and interpretation of fundamental freedoms. Truly, it could be more comprehensive to wait for legislation that allows and considers not just the petitioner but also his community and allies to be included in the discussion. However, a well-determined interpretation by the Courts of Philippine laws to extend its benefits within the boundaries of the Constitution works just as well for our LGBTQ+ fellowmen.

It is sensible to look at the success of other countries in the longing to have the Filipino enjoy the same rights. For one, United States activists followed the hierarchy of courts before reaching the high court, where they won the same-sex marriage case. Such examples, when taken together with the lessons of the Falcis case, provide for a formula or pathway which Filipino activists can take and follow suit.

In a country currently tolerant than it is fully accepting, it is not puzzling to understand the difficulty of putting forward this right, regardless of the platform. Nevertheless, it should be done on the correct one. The author adheres to the conservative view of a limited government, one that must not intrude, on a great extent, in the liberties of its citizens. After all, the favorableness and satisfaction of people on the concept of marriage and family building is detrimental to the overall orderliness of society in general. If a significant percent of the population finds that the stronghold of marriage rests on building it with a partner of the same sex, then the state must allow it to be so, by all correct means.

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[66] Catalina Ricci Madarang, "Reasons why the Supreme Court dismissed Falcis' same-sex marriage case", *available at* https://www.interaksyon.com/politics-issues/2020/01/16/159931/reasons-why-the-supreme-court-dismissed-falcis-same-sex-marriage-case/ (last accessed April 18, 2020).

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