VOLUME XLVII • 2017

THE FAR EASTERN LAW REVIEW

The Annual Publication of the Institute of Law

Ruling the Sovereign: Defining Sovereignty and Limiting Interference

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LAW REVIEW

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ARTICLES

THE FAR EASTERN
LAW REVIEW

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THE FAR EASTERN
LAW REVIEW

Republic of the Philippines
Senate
OFFICE OF SENATOR LEILA M. DE LIMA

Foreword[1]

My warmest greetings and congratulations to The Far Eastern Law Review for your 47th Volume entitled ["Ruling the Sovereign: Defining Sovereignty and Limiting Interference"].

I commend your publication for providing a venue to raise the level of public discourse and awareness on important social and legal, particularly on such important themes as rule of law and democracy. This is especially significant now that there has been blatant violations of human rights, gross disregard of human dignity, and a culture of impunity. To accomplish the perverse and selfish personal and political agenda of some high officials, the genuine interests and welfare of the Filipinos are being set aside, critics are silenced while criminals are acquitted, and fake news is peddled everywhere.

And that is the challenge to all of us: During these difficult times when lies are deliberately being manufactured and spread to deceive our people, we need to help enlighten our countrymen with the necessary knowledge and true information in order to choose the right path. We should not wait for the time when all our liberties are stripped from us. We must act now to defend our democratic principles and the Constitution.

As students and practitioners of law, it is our responsibility to speak up for what is right even if it is unpopular; we need to stand up for our principles amidst threats from social media trolls and abusive officials. A strong sense of service and responsibility to society brought you to where you are today, and I deeply hope that this stays with you as we strive to return to a just and humane society. I am confident that you will remain steadfast in carrying on with your noble mission of serving our beloved country and countrymen.

Again, congratulations. *Isang mapagpalayang araw sa ating lahat!*

LEILA M. DE LIMA

Custodial Center, Camp Crame
20 March 2018

[1] This is the encoded version of Sen. De Lima's message that had to be handwritten in accordance with the rules of Camp Crame's Custodial Center prohibiting its detainees to have any type of gadget. The handwritten message is provided for below.

Leila M. de Lima
Senator

3/20/18

My warmest greetings and congratulations to the Far Eastern Law Review for your 47th Volume entitled "Ruling the Sovereignty and Limiting Interference."

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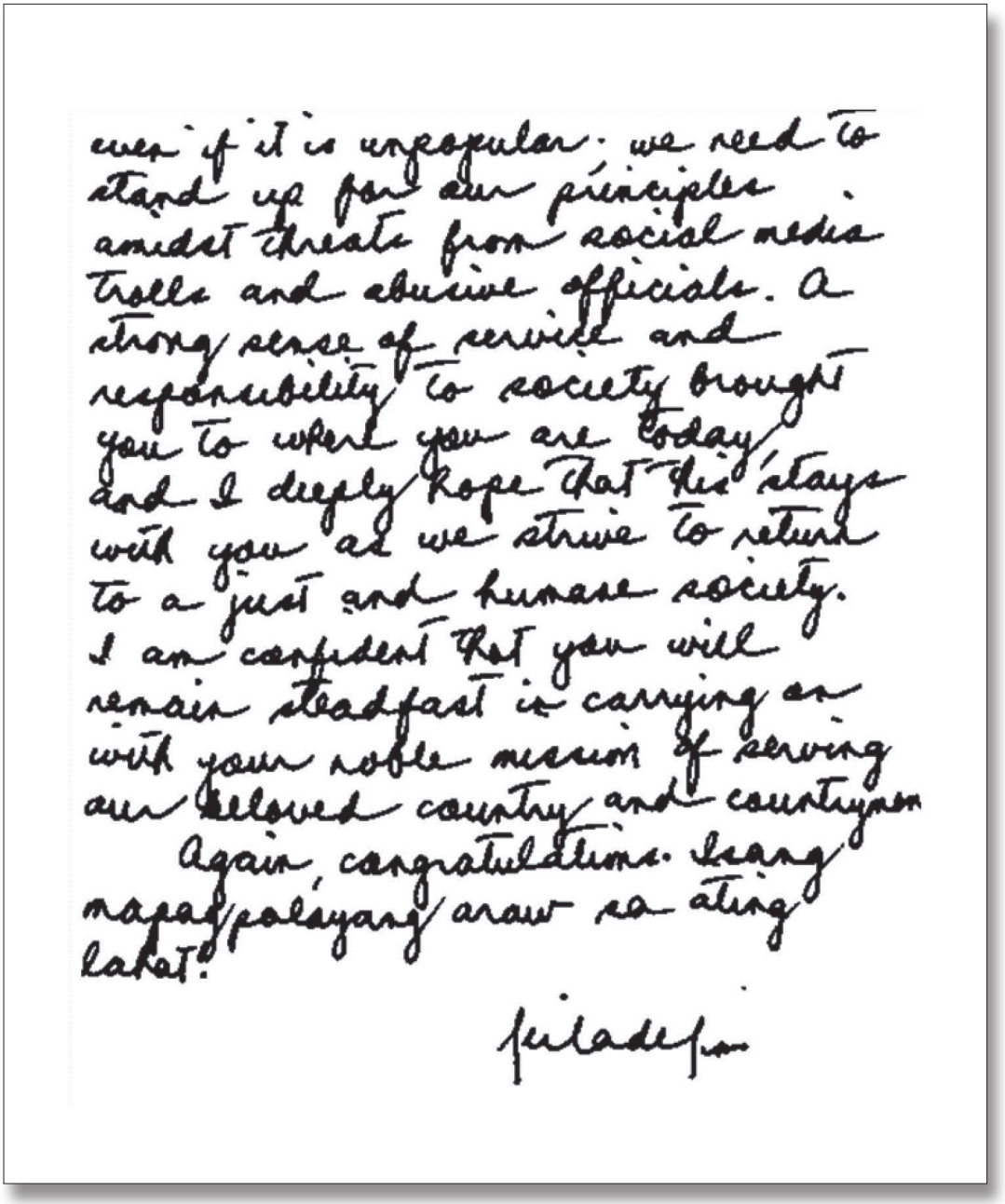
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I am confident that you will
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our beloved country and countrymen.

Again, congratulations. Isang
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bakat!

Filadelfo

Editor's Note

Ruling the Sovereign: Defining Sovereignty and Limiting Interference

"Sovereignty resides in the People and all government authority emanates from them." While populist politics seem to be making a comeback recently in different parts of the globe, the principle of non-interference has been thrown around as a template response by governments against international criticism.

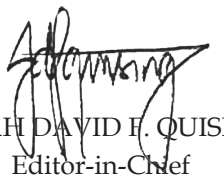
"Interference" is not limited to states interfering with the domestic matters of other states. It can also be seen in the national level when the government regulates or restricts private matters and rights. In many issues that allow government interference, our leaders can sometimes be seen to be either excessive or lackluster, abusive or apathetic. Balance can be found in the marriage of responsibility and limitation – where the government knows the purpose of its powers and the boundaries of their exercise.

2017 was a challenging year for the Filipino people. We saw how critics of the administration were silenced, how institutions were shaken, and how principles were questioned. We saw how one's loyalty to the Flag can be overshadowed by the colors of politics; how the rights granted by humanity be diminished into a privilege respected only when convenient.

Not everyone has the opportunity, the time, or the calling to be a student of the law, so it is the duty of those that are or will be in the legal profession to educate or inform others of what is right. They say that knowledge is power. Sharing the knowledge would be empowering others for silence never helped the oppressed.

The 2017 Publication of the Far Eastern Law Review had its own challenges. It is the product of each and every contributor's hard work. I would like to thank our former

Editor-in-Chief, Ms. Helen Frias, whom I worked with not just in the Law Review, but also in the Moot Court Council – from ANC Debates to FDI International Moot Court, for trusting and having confidence in the current Editorial Board. I would also like to thank our Executive Editor, Ms. Angelica Bailon, for her diligence and passion. The staff writers and contributors also deserve equal credit for fulfilling their commitments – especially the lawyers and alumni that took time out of their busy schedule. We would also like to express our deep gratitude to Senator Leila De Lima for agreeing to write this issue's Foreword, lighting it up with her fiery and encouraging words, and her staff (especially Ms. Raissa Sibolboro) for assisting and helping us to communicate with the Senator. Last but definitely not the least, we'd like to thank our Adviser and IL's Associate Dean, Atty. Viviana Paguirigan for her guidance, patience, and unmatched support for the Far Eastern Law Review.



JOSIAH DAVID F. QUISING
Editor-in-Chief

Message from the Adviser

I congratulate the Editorial Board for coming up with the 2017 issue of the Far Eastern Law Review.

This issue covers a wide range of topics on various legal issues on environment, foreign investments, free speech, and civil liability in criminal indictments which are all timely and relevant. The articles may well serve as rich sources of information on the matters discussed and may prove useful to both students and legal practitioners.

I sincerely commend the faculty and student contributors for the well-written articles, and the Editorial Board for their dedication and effort in ensuring that this issue is completed and published despite their frenzied and stressful schedule in law school.

Congratulations!

VIVIANA MARTIN-PAGUIRIGAN
Associate Dean / Adviser

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DEVELOPMENTS ON PHILIPPINE ANTITRUST AND UNFAIR COMPETITION LAW

Assoc. Dean Viviana M. Paguirigan[1]

INTRODUCTION

A nation's economic growth is dependent on how well the market thrives. It has been theorized that one factor which contributes to economic growth is competition between market players as competition stimulates productivity and enhances efficiency. Judge Learned Hand once observed that "Possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy…. Immunity from competition is a narcotic and rivalry a stimulant to industrial progress…."[2] While the need for a competitive market atmosphere may vary depending on the country's stage of development and structure of the economy, no one can dispute that competition if fairly exercised, fosters innovation and propels increased levels of productivity. Conversely, the lack of competition contributes to loss of incentive to improve since business firms and investors develop an attitude of complacency as they become assured of a considerable market share. Thus, a non-competitive market may inevitably result in stunted growth. Moreover, if the lack of competition is deliberately orchestrated by the firms and entities precisely to ensure the monopoly of the business or enterprise, the consumers are at the losing end. Monopoly per se may not be bad, but if monopoly is used as a means to manipulate or dictate market prices of goods and services, consumers will likely be compelled to patronize substandard products or services at unreasonably higher cost.

> Prior to the enactment of Republic Act No. 10667, there is no comprehensive competition law in the Philippines …

Competition policy and antitrust law is fundamentally a concern of economics. Even in this jurisdiction the national competition policy is intended to promote efficiency

[1] **Assoc. Dean Paguirigan** is Far Eastern Law Review's Adviser and FEU Institute of Law's Associate Dean. She is also a graduate of FEU Law. She teaches in the Far Eastern University, Institute of Law, University of the East Manila, and University of Santo Tomas. She also served as Philippine Christian University's Bar Review Director from May 2014- October 2015. She was also a Court Attorney at the Supreme Court and a State Prosecutor. She recently launched her own book – Notes and Cases on Succession.

[2] Damien J. Neven , Competition economics and antitrust in Europe citing United States v. Aluminum Co. of America,148 F.2d 416, 427 (2d Cir. 1945) available at: http://ec.europa.eu/dgs/competition/economist/economic_policy.pdf last accessed November 12, 2017

and market competitiveness as a mechanism for allocating goods and services, the enhancement of private investments and entrepreneurial spirit, and the acceleration of technological advancement and transfer.[3] However, part of the underlying policy of competition laws and those prohibiting unfair competition is to protect consumers by encouraging a healthy competition among market players which in turn impels businesses to operate efficiently leading to better quality of goods and services at competitive prices. This paper shall attempt to analyze the differences between unfair competition laws and the new Philippine Competition Law, their underlying policy and legal applications. A general discussion on the concept of unfair competition and competition law will be included as a reference point for a better understanding of these two interrelated legal domains.

SOURCES OF COMPETITION LAW AND UNFAIR COMPETITION

The Philippine legal system has its own segment of competition or antitrust laws and unfair competition laws. No less than the Philippine Constitution provides the foundation of the antitrust law which mandates that:

> 'The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.'[4]

In Tatad v. The Secretary of the Department of Energy[5] and *Edcel C. Lagman, et al. vs. Hon. Ruben Torres, et al.*,[6] the Supreme Court held that "Section 19, Article XII of our Constitution is anti-trust in history and in spirit. It espouses competition. The desirability of competition is the reason for the prohibition against restraint of trade, the reason for the interdiction of unfair competition, and the reason for regulation of unmitigated monopolies. Competition is thus the underlying principle of Section 19, Article XII of our Constitution…". The principle advocated by the Constitution is competition that is fighting and yet is fair. A competition requires the presence of not one, not just a few but several players because a market controlled by one or dominated only by a handful of players is hardly the market where honest to goodness competition will prevail.[7]

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[3] "An Act Providing for a National Competition Policy Prohibiting Anti-Competitive Agreements, Abuse of Dominant Position and Anti-Competitive Mergers and Acquisitions, Establishing the Philippine Competition Commission and Appropriating Funds Therefor" Republic Act No. 10667 § 2 (2015) hereafter, Philippine Competition Act

[4] 1987 Philippine Constitution, Art. XII, § 19

[5] G.R. No. 124360, November 5, 1997

[6] G.R. No. 127867, November 5, 1997

[7] Tatad v. The Secretary of the Department of Energy, Supra note 4

In addition to the Constitution, antitrust provisions in this jurisdiction can likewise be found in various industry-specific and consumer-oriented competition laws like the Consumer Act [8] , the Price Control Act [9], the Cooperative Code [10]; the Downstream Oil Industry Deregulation Act.[11] On the other hand, laws on unfair competition are contained in the Revised Penal Code,[12] the Civil Code,[13] and the Intellectual Property Code.[14] Unfortunately, existing antitrust laws and those prohibiting unfair competition appear to be rather archaic and the penalties for violation of the anti-competitive provisions were hardly even enforced or implemented.[15] With the enactment of Republic Act No. 10667, otherwise known as the Philippine Competition Act in July 2015, antitrust law in the Philippines has taken a new perspective. The foremost objective of this legislation is to regulate and prohibit monopolies and combinations in restraint of trade and to promote the holistic welfare of the consumers by providing them with a variety of choices of goods and/or services at the best obtainable prices.

CONCEPT AND RATIONALE OF UNFAIR COMPETITION

Unfair competition is a term which may be applied generally to all dishonest or fraudulent rivalry in trade and commerce, but is particularly applied to the practice of endeavoring to substitute one's own goods or products in the markets for those of another, by means of imitating or counterfeiting the name, title , size, shape, or distinctive peculiarities of the article, or the shape, color, label, wrapper, or general appearance of the package, or other such simulations, the imitation being carried far enough to mislead the general public or deceive an unwary purchaser, and yet not amounting to an absolute counterfeit or to the infringement of a trademark or trade name.[16]

Broadly, unfair competition includes any conduct the end and probable effect of which is to deceive the public or pass off the goods or business of one person as and for that of another. It consists in passing off or attempting to pass off upon the public the

[8] The Consumer Act of the Philippines Republic Act No. 7394 (1992)
[9] " An Act Providing Protection to Consumers by Stabilizing the Prices of Basic Necessities and Prime Commodities And by Prescribing Measures Against Undue Price Increases During Emergency Situations and Like Occasions" Republic Act No. 7581 [1992]
[10] An Act to Ordain a Cooperative Code of the Philippines Republic Act No. 6938 [1990]
[11] An Act Deregulating the Downstream Oil Industry And For Other Purposes Republic Act No. 8479 [1998]
[12] Article 186; See however, § 55 of The Philippine Competition Act, Republic Act No. 10667 which repealed Article 186 of the Revised Penal Code
[13] Art. 28. Unfair competition in agricultural, commercial or industrial enterprises or in labor through the use of force, intimidation, deceit, machination or any other unjust, oppressive or highhanded method shall give rise to a right of action by the person who thereby suffers damage.
[14] Republic Act No. 8293 § 168, 168.1, 168.2, 168.3
[15] Erlinda M. Medalla, Understanding the New Philippine Competition Act p. 2 available at: https://pidswebs.pids.gov.ph/CDN/PUBLICATIONS/pidsdps1714.pdf last accessed November 28, 2017
[16] Black's Law Dictionary, Fifth Edition, at 1371 (1979)

goods or business of one person as and for the goods or business of another. It comprises essentially in the conduct of a trade or business in such a manner that there is either an express or implied representation to that effect.[17] Passing off (or palming off) takes place where the defendant, by imitative devices on the general appearance of the goods, misleads prospective purchasers into buying his merchandise under the impression that they are buying that of his competitors. Thus, the defendant gives his goods the general appearance of the goods of his competitor with the intention of deceiving the public that the goods are those of his competitor.[18] However, it is not necessary to show that any person has been actually deceived by defendant's conduct and lead to purchase his goods in the belief that they are the goods of plaintiff. … [I]t is sufficient to show that such deception will be natural and probable result of defendant's acts. Either actual or probable deception and confusion must be shown, for if there is no probability of deception there is no unfair competition….[19]

Parenthetically, acts constituting unfair competition may be considered to come within the ambit of a tort since it causes an economic injury to a business through the fraudulent practice of misleading or deceiving the public.[20] Moreover, the modern-day view is to the effect that trademark infringement may be considered a form of unfair competition although the latter term is broader while the former is more specific. Some of the basic distinctions between suits for trademark infringement and unfair competition are: (a) the former is the unauthorized use of a trademark, whereas the latter is the passing off of one's goods as those of another; (b) fraudulent intent is unnecessary in the former, while it is essential in the latter; and (c) in the former, prior registration of the trademark is a pre-requisite to the action, while it is not necessary in the latter.[21] …The law of trademarks is a subcategory of the broader arena of unfair competition; therefore, trademark infringement actions fall within the umbrella of unfair competition…. [22]

However, the law on unfair competition does not cover …*every unfair act committed in the course of business;* it covers only acts characterized by "*deception* or any other means contrary to good faith" in the *passing off* of goods and services as those of another who has established goodwill in relation with these goods or services, or any other act calculated

[17] Alhambra Cigar and Cigarette Manufacturing Co., v. Mojica [G.R. No. 8937. March 21, 1914.] hereafter Alhambra
[18] Republic Gas Corporation v. Petron Corporation, G.R. No. 194062, June 17, 2013, 698 SCRA 666, 680-681; citations omitted; Co v. Yeung G.R. No. 212705 September 10, 2014
[19] Alhambra, Supra note 16
[20] Alhambra, Supra note 16
[21] Co v. Yeung G.R. No. 212705 September 10, 2014
[22] Tyler Hampy, Unfair Competition: How does it relate to trademark infringement? Available at: egalteamusa.net/tacticalip/2012/11/29/unfair-competition-how-does-it-relate-to-trademark-infringement/ last accessed November 9, 2017

to produce the same result… .[23] In Coca-Cola v. Gomez,[24] Coca-Cola applied for a search warrant against Pepsi alleging that the latter is guilty of unfair competition under Section 168.3 (c) of the Intellectual Property Code for hoarding Coke empty bottles in Pepsi's yard in Concepcion Grande, Naga City. Petitioner argued that Section 168.3(c) of the IP Code does not limit the scope of protection on the particular acts enumerated as it expands the meaning of unfair competition to include "other acts contrary to good faith of a nature calculated to discredit the goods, business or services of another." They added that one inherent element of unfair competition is fraud or deceit, and that hoarding of large quantities of a competitor's empty bottles is necessarily characterized by bad faith. Disputing petitioner's arguments, respondents maintained that the bottles came from various Pepsi retailers and wholesalers who included them in their return to make up for shortages of empty Pepsi bottles and they had no way of ascertaining beforehand the return of empty Coke bottles as they simply received what had been delivered. Further, the respondents argued that the presence of the bottles in their yard was not intentional nor deliberate. The issue raised before the Supreme Court is whether or not the hoarding of a competitor's product containers is punishable as unfair competition under the Intellectual Property Code[25] that would entitle the aggrieved party to a search warrant against the hoarder. The high court ruled that respondents' acts do not fall under the general "catch-all" phrase stated in Section 168.3 (c) of the Intellectual Property Code which provides that a person shall be guilty of unfair competition if he "shall commit any other act contrary to good faith of a nature calculated to discredit the goods, business or services of another." The act of hoarding petitioner's empty bottles if found to be done with the end in mind of withdrawing the bottles and thus impede the circulation of Coca-Cola's products may be an unfair act. However, there was no violation of the provision of law invoked because … the critical question is *not the intrinsic unfairness* of the act of hoarding; what is critical for purposes of Section 168.3 (c) is to determine if the hoarding, as charged, is of a nature calculated to discredit the goods, business or services of the petitioner…[26] Hoarding of the bottles does not relate to any patent, trademark, trade name or service mark that the respondents have invaded, intruded into or used without proper authority from the petitioner. Nor are the respondents alleged to be fraudulently "passing off" their products or services as those of the petitioner. Deception, passing off and fraud upon the public are still the key elements that must be present for unfair competition to exist.

[23] Coca-Cola Bottlers, Phils. Inc. v. Gomez and Galicia G.R. No. 154491 November 14, 2008 available at http://www.lawphil.net/judjuris/juri2008/nov2008/gr_154491_2008.html

[24] Id.

[25] AN ACT PRESCRIBING THE INTELLECTUAL PROPERTY CODE AND ESTABLISHING THE INTELLECTUAL PROPERTY OFFICE, PROVIDING FOR ITS POWERS AND FUNCTIONS, AND FOR OTHER PURPOSES Republic Act No. 8293 [1997]

[26] Supra note 22

The underlying principle in unfair competition is that no one has a right to disguise his goods or otherwise represent them in such a manner as to mislead a prospective purchaser and induce him to think he is buying the goods of another. Protection against unfair competition is not meant to establish or promote a monopoly and the courts should always be wary not to meddle with free and fair competition, but should restrict itself to thwarting fraud and imposition resulting from some real similitude in name or dress of goods. … Nothing less than conduct tending to pass off one man's goods or business as that of another will constitute unfair competition. Actual or probable deception and confusion on the part of customers by reason of defendant's practices must always appear… .[27] Undeniably, committing acts of unfair competition injures the good will of a business. Good will of a business or enterprise is considered a property right, albeit intangible, and like any other kind of property ought to be protected from invasion or unlawful appropriation by another. The deception employed by one who passes off his goods as that of another upon the consuming public causes injury to the owner of the business by diverting the customers of the latter and depriving him of the profits he would otherwise have made if it were not for the fraud employed by another.

According to McManis, the term … unfair competition is an unfortunate one because it misleadingly implies that palming off necessarily involves interference by a competitor… .[28] The reality is – that palming off claims are most of the times brought by manufacturers wanting to prevent merchant or traders engaged in retail or wholesale trade from damaging the relationship of the manufacturer with its consumers by the retailer's or wholesaler's act of palming off substandard quality goods as those of the manufacturer even if the retailer is not in direct competition with the manufacturer's customer or not.[29] To give an example, in the case of Co v. Yeung,[30] the Yeungs filed a complaint for trademark infringement and unfair competition against Lau and Co. Respondents alleged that the product Greenstone Medicated Oil Item No. 16 (Greenstone) is manufactured by Greenstone Pharmaceutical, a traditional Chinese medicine manufacturing firm based in Hong Kong and owned by Yeung, and is exclusively imported and distributed in the Philippines by Taka Trading owned by Yeung's wife. Petitioners allegedly conspired in selling counterfeit Greenstone products at Royal Chinese Drug Store owned by Lau. The Supreme Court upheld the trial court's finding that Co conspired with the Laus in the sale/distribution of counterfeit Greenstone products to the public, which were even packaged in bottles identical to that of the original, thereby giving rise to the presumption of fraudulent intent. However, although the Court held petitioners are liable for unfair competition, it exculpated them from the charge of trademark infringement considering

[27] Supra note 16
[28] Charles R. McManis, Intellectual Property and Unfair Competition In a Nutshell, Fifth Edition, at p. 7 (2004)
[29] Id.
[30] Supra note 20

that the registration of the trademark "Greenstone" – essential as it is in a trademark infringement case – was not proven to have existed during the time the acts complained of were committed.[31] Note that in this case, petitioners are not direct competitors of the manufacturer of Greenstone but their act of packaging the products they sold in identical bottles as the original has the probable effect of damaging the manufacturer's goodwill as the public may be misled that the inferior quality goods sold by the petitioners are those of the manufacturer.

In Yao v. People of the Philippines,[32] the accused were incorporators of Masagana Gas Corporation which is an entity engaged in the refilling, sale and distribution of LPG products. Upon complaint filed by Petron Corporation and Pilipinas Shell Corporation alleging that Masagana is actually producing, selling, offering for sale and/or distributing LPG products using steel cylinders owned by, and bearing the tradenames, trademarks, and devices of Petron and Pilipinas Shell, without authority and in violation of the rights of the said entities, the trial court issued search warrants against Masagana for violation of Section 155 of Republic Act No. 8293, otherwise known as the Intellectual Property Code of the Philippines. The Supreme Court held that the mere unauthorized use of a container bearing a registered trademark in connection with the sale, distribution or advertising of goods or services which is likely to cause confusion, mistake or deception among the buyers or consumers can be considered as trademark infringement. Note here that Masagana is not a direct competitor of the complainants Petron and Pilipinas Shell. Yet, as a merchant or trader engaged in retail trade, Masagana's act of using the steel cylinders bearing the trademark registered in the names of the complainants and refilling them without authority from the latter has the potential capacity of damaging the complainants' relationship with its consumers. The consumers are also likely to be deceived that the products are those of the complainants since the steel containers bear their trademarks or tradenames.

As previously mentioned, fraud is not an essential element in trademark infringement. It is sufficient that the unauthorized use of a registered mark will result in the likelihood of confusion on the part of the buying public. But if the unauthorized use of another's mark is done for the specific purpose of passing off one's goods as that of another, the infringement may be considered a form of unfair competition. Justice Moreland in the century-old case of Alhambra succinctly summarized what constitutes the test of unfair competition in a trademark infringement case, thus:

> "…As in the case of infringement by imitation of another's trademark, the true test of unfair competition is whether the acts of

[31] Supra note 20
[32] G.R. No. 168306 June 19, 2007

> defendant are such as are calculated to deceive the ordinary buyer making his purchases under the ordinary conditions which prevail in the particular trade to which the controversy relates. This has been said to include incautious, unwary or ignorant purchasers, but not careless purchasers who make no examination. The fact that careful buyers, who scrutinize closely, are not deceived, merely shows that the injury is less in degree. It does not show that there is no injury. The fact that careless purchasers are deceived simply by the use of ordinary and common forms of putting up goods does not show unfair competition. The class of purchasers who buy the particular kind of article manufactured, such as servants or children, upon the one hand, or persons skilled in the particular trade, upon the other, must be considered by determining the question of probable deception. Purchasers may be deceived and misled into purchasing the goods of another person whose goods of one person under the belief that they are purchasing the goods of another person whose goods they intended to buy although they do not know who the actual proprietor of the genuine goods is. They are so deceived when they have in mind to purchase goods coming from a definite, although unknown, source, with which goods are acquainted, although they neither know nor care who is the actual proprietor of such goods. The ultimate purchaser is the one in view and it is sufficient if he is liable to be deceived…."[33]

Unfair competition as defined in Philippine jurisprudence in relation with Republic Act No. 166[34] and Articles 188 and 189 of the Revised Penal Code, is now covered by Section 168 of the Intellectual Property Code as this Code has expressly repealed Republic Act No. 165[35] and Republic Act No. 166,[36] and Articles 188 and 189 of the Revised Penal Code. Based on our Intellectual Property Code, the term unfair competition covers not only acts that are meant to confuse consumers as to the source of the goods or products; but also any act contrary to good faith and calculated to discredit the goods, business or services of another. Both categories may be found under Section 168.2 and 168.3 of the Intellectual Property Code of the Philippines which provides:

> "Section 168.2. Any person who shall employ deception or any other means contrary to good faith by which he shall pass off the goods

[33] Supra note 16
[34] AN ACT TO PROVIDE FOR THE REGISTRATION AND PROTECTION OF TRADE-MARKS, TRADE-NAMES AND SERVICE-MARKS, DEFINING UNFAIR COMPETITION AND FALSE MARKING AND PROVIDING REMEDIES AGAINST THE SAME, AND FOR OTHER PURPOSES [1947]
[35] AN ACT CREATING A PATENT OFFICE, PRESCRIBING ITS POWERS AND DUTIES, REGULATING THE ISSUANCE OF PATENTS, AND APPROPRIATING FUNDS THEREFOR [1947]
[36] § 29-30

> manufactured by him or in which he deals, or his business, or services for those of the one having established such goodwill, or who shall commit any acts calculated to produce said result, shall be guilty of unfair competition, and shall be subject to an action therefor.
>
> 168.3. In particular, and without in any way limiting the scope of protection against unfair competition, the following shall be deemed guilty of unfair competition:
>
> (a) Any person, who is selling his goods and gives them the general appearance of goods of another manufacturer or dealer, either as to the goods themselves or in the wrapping of the packages in which they are contained, or the devices or words thereon, or in any other feature of their appearance, which would be likely to influence purchasers to believe that the goods offered are those of a manufacturer or dealer, other than the actual manufacturer or dealer, or who otherwise clothes the goods with such appearance as shall deceive the public and defraud another of his legitimate trade, or any subsequent vendor of such goods or any agent of any vendor engaged in selling such goods with a like purpose;
>
> (b) Any person who by any artifice, or device, or who employs any other means calculated to induce the false belief that such person is offering the services of another who has identified such services in the mind of the public; or
>
> (c) Any person who shall make any false statement in the course of trade or who shall commit any other act contrary to good faith of a nature calculated to discredit the goods, business or services of another."

Section 168.1 of the IP Code protects a person who has earned goodwill with respect to his goods and services even if he has or has no registered mark.[37] Section 168.2 gives the general definition of unfair competition, while Section 168.3 refers to specific instances or acts which constitute unfair competition within the purview of the statute.

Evidently, the above statutory definition of unfair competition does not encompass prohibition against monopolies and antitrust laws. Furthermore, the interpretation of

[37] §168.1 A person who has identified in the mind of the public the goods he manufactures or deals in, his business or services from those of others, whether or not a registered mark is employed, has a property right in the goodwill of the said goods, business or services so identified, which will be protected in the same manner as other property rights.

what constitutes an "unfair act" differs with the framework of the business and each case should be judged in accordance with the attendant peculiar facts. In the United States for instance, the most conventional examples of unfair competition are trademark infringement and misappropriation. … The latter involves the unauthorized use of an intangible assets not protected by trademark or copyright laws. Other practices that fall into the area of unfair competition include: false advertising, "bait and switch" selling tactics, unauthorized substitution of one brand of goods for another, use of confidential information by former employee to solicit customers, theft of trade secrets, breach of a restrictive covenant, trade libel, and false representation of products or services….[38]

Philippine law on unfair competition which has been drawn from general provisions in our civil and criminal codes as well as some industry-specific statutes that has evolved over the years. Nonetheless, it can be said to have its origin in the law of torts for the objective is to obtain redress for the economic damage or prejudice caused to the owner of the enterprise by reason of improper conduct by business entities that injures the good will of the business of another. Unfair competition is an actionable legal wrong for which the courts afford a remedy. Even common law precepts of … unfair competition affords businesses a private judicial remedy for various types of interference with trade relations. As such, it is but a part of a larger body of tort law concerned with protecting advantageous relations in general from harm… .[39]

CONTEXT OF PHILIPPINE COMPETITION LAW

Prior to the enactment of Republic Act No. 10667, there is no comprehensive competition law in the Philippines although there are various laws in its statute books which cover aspects of competition law such as monopolies and combinations in restraint of trade, restrictive business practices, laws promoting consumer welfare and protection as well as price restriction measures.[40] Broadly, competition law is one whose objective is … to control or eliminate restrictive agreements or arrangements among enterprises, or mergers and acquisitions or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development… .[41] Competition law includes legislation, judicial precedents, and regulatory measures that help support, promote, safeguard and boost market competition in the country. It includes enactments that facilitate or stimulate a more competitive market and provide for sanctions against unfair trade practices of market

[38] https://www.law.cornell.edu/wex/unfair_competition last accessed November 10, 2017

[39] Supra note 27
[40] Tristan Catindig, The Asean Competition Law Project: The Philippines Report , [2001]
[41] Id. Citations omitted

players that could have the potential effect of decreasing the possibility of competition. The ultimate goal of these laws was to protect consumers by promoting competition in the marketplace.

For more than two decades, attempts have been made to pass a competition bill in the Philippines, albeit unsuccessfully. During the incumbency of President Fidel V. Ramos there were various economic reforms introduced in the Philippines and many of these include measures intended to boost market competition. These reforms encompass substantial trade and investment liberalization, deregulation, and privatization. Despite the passage of several laws intended to promote competition, the existing legal and regulatory framework for enforcing competition in the Philippines is still inadequate. Thereafter, a number of anti-trust or competition bills were filed in Congress reflecting the growing recognition by political leaders of the importance of having a competition law.[42]

When Aquino took over the presidency in 2010, his administration has vowed early on that an antitrust law is one of its flagship bills.[43] With the globalization of trade and elimination of cross-border barriers across regions it becomes all the more imperative to have a piece of legislation that will thwart any attempt on the part of big business empires to engage in anti-competitive behavior and abuse of its dominant position to the prejudice of the consumers and also its business competitors. On 21 July 2015, Republic Act No. 10667, otherwise known as the Philippine Competition Act was signed into law. This piece of long-awaited legislation is expected to be a catalyst for influx of trade and investment by promoting competition and prohibiting anti-competitive behavior on the part of firms and businesses not only domestically but also on a regional level. The new Competition Act is a much needed reform, and while the law does not automatically guarantee a viable and complete economic advancement and growth, it is an essential feature of a more comprehensive amalgamation of policies that will promote a truly working competitive market environment.

RATIONALE OF COMPETITION LAW

The need for systematization of competition policy cannot be understated. The objective of competition law is … to 'safeguard, protect and promote competition and the competitive process… .'[44] The rationale is to enhance overall welfare by stimulating efficiency arising from sound supply allocation, obtaining the appropriate prices of

[42] Abad, Gonzales, Rosellon, Yap – Unfair Trade Practices in the Philippines Discussion Paper Series No. 2012-39 available at: http://www.dphu.org/uploads/attachements/books/books_3692_0.pdf last accessed November 15, 2017

[43] Medalla, Supra note 14

[44] Medalla, Supra note 14

goods and services, with greatest achievable quality and a wide assortment of available products. In a truly competitive state, businesses and enterprises have no market control or dominance. They have no power to command the selling price of their product by manipulating or controlling supply. Rather, individual firms and businesses would have to cope with the predominating price which the market would dictate given the same product quality which in turn will become the basis of firms in determining how much to produce given that price.[45]

In a truly competitive market, there is a considerable number of sellers and buyers of similar product who are all fully aware of the product's quality and attributes. A merchant, trader, or business enterprise who encounters competition will strive to outshine the rival firm to protect his market allocation and necessarily, his profit by mustering all his efforts in producing superior quality products at least cost and selling these products at a price which the market fixed. The steady risk of competition likewise motivates firms to make efficient use of their resources as they want to obtain the best possible returns in their investment. As a consequence, firms will attempt to continuously search for new ways to produce better goods or services at least possible cost both to them and to the consumer. It is in this light that competition or rivalry has been regarded to foster efficiency and innovation.

If competition already promotes these positive effects of efficiency and innovation, why then do we need a law to regulate competition? The answer is simple – in actuality, while markets function relatively well much of the time, operational competition is not perfunctory. At times, improper state policies, ineffectual laws, and anti-competitive behavior of firms and businesses can thwart effective competition. Also, real markets do not always behave in accordance with the archetype of perfect competition. … [S]ome markets require high capital entry costs so that only a handful of firms are able to serve them (e.g., oil exploration). In other markets, it is more pragmatic for just one or two firms to serve the consumers (e.g., energy transmission). Still in other instances, a large firm can be the sole owner of a production input/technology and accordingly be the sole provider of a product/service (e.g., pharmaceuticals). Thus, one will find that more often than not, industries are dominated by a few, relatively large firms (oligopolists), or, as usually the case of public utilities, by one firm (monopolist)… .[46] Market failure may result due to lack of competition within the industries aforementioned and unconstrained markets often result in substandard, unjust, or disruptive outcomes. Thus, state intervention by way of regulation is imperative in the event of market failures because the regulatory measures

[45] Medalla, Supra note 43

[46] SENATE ECONOMIC PLANNING OFFICE Policy Brief, August 2009 available at: https://www.senate.gov.ph/publications/PB%202009-04%20-%20Regulating%20competition.pdf last accessed November 14, 2017

would serve as an indirect means for the competitive process that the market fails to bring about.[47] Having a functioning market competition has its advantages because it creates inducement for businesses to secure client loyalty by producing or selling superior quality of goods and/or services at the best possible prices. However, increased levels of competition may also work to the detriment of the consuming public. Unrestricted or freer trade may entice firms and businesses to commit inappropriate acts and other unfair trade practices in order to protect their market share. When this happens, the consumers are at a losing end because highly competitive behavior on the part of firms if left unchecked, would produce results opposite to the objective of a competition law which is to promote fair competition for the protection of the consumers. An extremely competitive market environment may foster the proliferation of unfair business practices like misleading advertisement, unfair pricing, or discriminatory dealings. These acts are often resorted to by firms in order to protect their market share, or to gain a dominant market position without regard to the unfairness of the manner in which they achieve their objective.

APPLICATION AND KEY FEATURES OF THE PHILIPPINE COMPETITION LAW

The Philippine Competition Act is the first consolidated framework regulating competition in the Philippines. It is a response to the constitutional goals for the national economy to attain a more equitable distribution of opportunities, income, and wealth and the mandate for the State to regulate and prohibit monopolies and combinations in restraint of trade as well as unfair competition with the end in view of promoting overall consumer welfare by providing them a wide-range of choices of products and services at reasonable prices. Specifically, the law provides that the State shall:

> (a) Enhance economic efficiency and promote free and fair competition in trade, industry and all commercial economic activities, as well as establish a National Competition Policy to be implemented by the Government of the Republic of the Philippines and all of its agencies as a whole;
>
> (b) Prevent economic concentration which will control the production, distribution, trade, or industry that will unduly stifle competition, lessen, manipulate or constrict the discipline of free markets; and
>
> (c) Penalize all forms of anti-competitive agreements, abuse of dominant position and anti-competitive mergers and acquisitions, with the objective of protecting consumer welfare and advancing domestic and international trade and economic development.

[47] Id. Citations omitted

In general, the thrust of the Philippine Competition Act is to ensure that firms and businesses play fair. This means that in the competitive process, they should not resort to unfairly excluding other firms from playing so that they would not need to compete.[48]

Unfairly obtaining market power includes any act or behavior of firms or businesses of achieving dominant market rank by means other than being more efficient than existing or potential market players.[49] In other words, in their quest for obtaining market dominance, the firms engage in anti-competitive behavior of unethically creating obstacles to legitimate entry of other firms wanting to compete.

In an effort to curb unfair trade practices of firms the Philippine Competition Act prohibits anti-competitive agreements, abuse of dominant position and endeavors to prevent anti-competitive mergers and acquisitions by requiring compulsory notification to the Philippine Competition Commission in the execution of certain types of mergers and/or acquisitions which are perceived to lessen substantial competition or impede competition in the relevant market.[50]

OVERVIEW OF PROHIBITED ACTS

I. ANTI-COMPETITIVE AGREEMENTS

Anti-competitive agreements between or among competitors are divided into two: a) those that are prohibited per se; and b) agreements which have the object or effect of substantially preventing, restricting or lessening competition.[51] To the first group belong agreements which restrict competition as to price, components of price, or other terms of trade.[52] Price fixing at an auction or in any form of bidding, bid suppression and rotation, market allocation and other forms of bid manipulation are some of the prohibited acts.[53]

The other type of anti-competitive agreements include those made between competitors for the purpose of substantially preventing, restricting or lessening competition such as limiting or controlling production, markets and technical development or investment; and dividing or sharing the market by volume of sales or purchases, by type of goods or services, by territory, or any other means.[54] This kind of anti-competitive scheme pertain to arrangements or stratagems whereby competitors maintain their market share in a certain geographical area or territory by dividing the market based on volume

[48] Medalla, Supra note 14 p. 7
[49] Id.
[50] Philippine Competition Act, §14, 15, 16, 17
[51] Id. § 14
[52] Id. Par. (a)
[53] Id. Par (b)
[54] Id. Par (b)

or types of goods or services or other market factors within their control. For example, ABC Company and XYZ firm both produce the same product and they agree that ABC will cater to consumers of the Visayas, while XYZ will operate and distribute their products only in Mindanao. This agreement is sometimes resorted to in industries where the cost of penetrating the business is unusually high and is designed to stifle competition or prevent other firms from entering the industry. However, a similar agreement that is forged between an entity that controls or is controlled by another entity and may not therefore act independently of each other and have a common economic interest shall not be considered competitors for purposes of the prohibited acts under Section 14. Similarly, arrangement between firms to limit output or control production by fixing production levels are considered to fall within anti-competitive agreements.

II. ABUSE OF DOMINANT POSITION

The law further forbids an entity or group of entities that possess economic strength from abusing its dominant position. A firm or entity is dominant if it … enjoys a position of economic power that enables it to behave, to a large extent, independently of effective competition pressures….[55] Dominance, per se is not outlawed and a firm or entity that gains dominance through its efficiency or innovativeness is not penalized. Looking at it from a different perspective, prohibiting abuse of dominance is not about protecting inept competitors, rather it is about safeguarding the competitive process which is the very foundation of competition law. It is thus relevant to ask how an enterprise obtained its dominant stance. Abuse of dominance … refers to actions of a dominant player to exploit its dominant position in the relevant market, or to exclude competitors in a manner that harms the competition process… .[56]

In this jurisdiction, the presumption of dominance exists if the market share of an entity in the relevant market is at least fifty percent.[57] Single dominance is that which exist on the part of one entity, and collective dominance if there are two or more entities.[58] In other cases, the following dynamics may be considered in determining whether an entity has a market dominant position: the share of the entity in the relevant market and whether it is able to fix prices unilaterally or to restrict supply in the relevant market; the existence of barriers to entry and the elements which could alter those barriers and the supply from competitors; the existence and power of its competitors; market exit of actual competitors; the bargaining strength of its customers or their power to switch to other goods or services;

[55] https://www.lexisnexis.com/uk/lexispsl/competition/document/391329/55KB-7MK1-F187-53G2-00000-00/Abusing%20a%20dominant%20position%E2%80%93overview last accessed November 17, 2017

[56] Self-Study Module An Introduction to Competition Law http://phcc.gov.ph/self-study-module-no-1-introduction-competition-law/ last accessed November 17, 2017

[57] Philippine Competition Act, § 3

[58] Rules and Regulations to Implement the Provisions of Republic Act No. 10667 §1, Rule 8,

its ownership, possession or control of infrastructure which are not easily duplicated; its privileged access to capital markets; its economies of scale and its vertical integration.[59]

Abuse of dominance is a pernicious practice which injures competitors and may consist in exploitative behavior towards consumers and/or competitors like the excessive or unfair sales prices other unfair conditions such as bundled sale of unrelated products.[60] Bundled sale or pricing is … the act of placing several products or services together in a single package and selling for a lower price than would be charged if the items were sold separately. The package usually includes one big ticket product and at least one complementary good… .[61] This is a marketing technique usually used by retailers to sell goods which are high in supply.

Predatory pricing is another mode of abuse of dominance which takes place when the dominant player deliberately sustains losses by setting prices so low (sometimes below cost) that it forces one or more competitors out of the market as they are compelled to compete at an artificially low price. When the competitor is prevented from entering the market, the firm engaged in predatory behavior may eventually charge higher prices later on.[62] Predatory behavior, however, requires firms to sustain excess capacity over a prolonged period which could be very costly on their part.[63]

Firms may also abuse their dominance when they impose barriers to entry of other firms or commit acts that prevent competitors from growing within the market in an anti-competitive manner[64] or when they deliberately limit production, markets or technical development to the prejudice of consumers such as when they restrict access to, or use or development of a new technology.[65] Another obvious form of abuse is exclusionary behavior which occurs when firms refuse to deal with other firms for the purpose of controlling or influencing the market. In refusing to deal with some rival firms and choosing only specific parties who conspire with them in controlling the market, the rival firms are excluded or denied access to raw materials, facility or markets. This is sometimes referred to as vertical refusal to deal that would effectively increase the costs of the shunned rival firm and force it out of the market.[66]

[59] Id. §2 Rule 8
[60] Supra note 53
[61] http://www.businessdictionary.com/definition/bundled-pricing.html last accessed November 17, 2017.
[62] Supra note 53
[63] Medalla, Supra note 14 at p. 7
[64] Philippine Competition Act, §14 (b)
[65] Id. §14 (i)
[66] Supra note 14 at 7-8

MERGERS AND ACQUISITIONS

Mergers and acquisition by itself are benign and are not forbidden under the Philippine Competition Act even if one or both of the parties are major market players. If two or more firms come together to form a single entity, a merger occurs. Acquisition transpires when one firm is purchased by another. The prohibited mergers and acquisitions refer only to those agreements that substantially prevent, restrict or lessen competition in the relevant market or in the market for goods or services.[67] The Philippine Competition Commission will have to determine if the merger will negatively impact market concentration and whether the effects thereof may be counterbalanced by significant economic advantages.

To ensure that the merger between two or more firms is not made for the purpose of lessening competition or to significantly impede competition in the relevant market, the law provides that if the value of the transaction involving a merger or acquisition exceeds the amount of one billion pesos (P1, 000,000.00) the parties to the merger must notify the Philippine Competition Commission thirty (30) days before the consummation of the agreements. Any agreement consummated in violation of the notification requirement shall be considered void and shall render the parties liable to pay a minimum fine of one percent to a maximum of five (5%) of the value of the transaction.[68]

Notwithstanding the prohibited merger under Section 20 of the Act, the Philippine Competition Commission may nonetheless exempt the parties from the prohibition if they are able to establish that the concentration has brought or is likely to bring about gains in efficiencies that are greater than the effects on the limitation on competition that result or likely to result from the merger or acquisition agreement. Additionally, if a party to a merger or acquisition is faced with actual or imminent financial failure, and the merger is the least anti-competitive arrangement among the known alternative uses for the beleaguered entity's assets.[69]

CONCLUSION

Despite the differences in basic concept and governing law, it is undeniable the part of the objective of the laws on unfair competition and the new competition law is to protect the consuming public. However, unfair competition statutes focus more on the private interest of the firm or enterprise. The law on unfair competition endeavors to prevent economic injury to the business by prohibiting the fraudulent practice of passing

[67] Philippine Competition Act, §20
[68] Id. § 17
[69] Id. § 21

off one's goods as that of another to such an extent that it deprives the complaining entity of the possible economic gains it would have otherwise have obtained were it not for the deception employed by the offending firm upon the buying public.

In contrast, the central purpose of competition law is to intensify competition among market players for the definitive benefit of the consumers. Competition law protects competition and not competitors, while unfair competition prioritizes protection of the goodwill of a business. Unfair competition does not prohibit competition but employment of deceit or fraud to the prejudice of the goodwill of the business, while competition law promotes freer trade, fosters market competition, and ensures that firms will not unfairly obtain market power by employing means other than being more efficient than its competitors.

In a developing country like the Philippines, institutions may sometimes function poorly, and the implementation of the new competition law certainly poses enormous challenges. The expected benefits from a prudent implementation of the competition law are likewise huge not merely because of its potential to thwart anti-competitive behavior on the part of firms and businesses but also for the advancement of various regulatory reforms which could ultimately lead to a better investment climate.

While the new competition law does by itself not guarantee a sustainable economic growth and development, it is certainly an essential ingredient and a desirable part of a broad range of policies intended to advance the objectives of freer and more competitive market for the ultimate benefit of the consumers.

THE CASE FOR THE FREEDOM TO CONTRACT AND THE RIGHT TO PROPERTY

Atty. Aliakhbar A. Jumrani[1]

I. Introduction

I was born in 1979 when the Philippines was under Martial Law. Two years later, Martial Law was lifted. Indeed, I was too young to remember the effects of Martial Law. I would only know about the human rights violations from my parents' stories, the books I read and the movies I watched. What complicated it for me was the equally compelling data about the state of development during the dictatorship. Thus, on the one hand, are the images of oppression. On the other hand, the face of progress. Ironic, eh?

When I became a lawyer in 2004, Martial Law was a thing of the past. State-sponsored human rights violations were not making headlines anymore. Was it a boring time to be a lawyer? Definitely not. Becoming a lawyer and a law professor had affirmed certain philosophies or principles in me. First was the principle of justice. Political Law, as well as Tort Law, taught me that you cannot have justice unless you adhere to the principles of justice, that you cannot do unjust things to people simply because you have a just goal in your mind. Call it "the end never justifies the means." Second, and perhaps the most important, is the rule of law. Legal Ethics taught me that "a lawyer shall uphold the Constitution, obey the laws of the land and promote respect for law and for legal processes." Even in time of peace and stability, lawyers should be the beacon of law and order, lest we regress to the age of absolute power.

It's 2018 and the topic of human rights is front and center again. It is fueled by the rising number of extrajudicial killings and the perceived absolutism in government. I have been invited a number of times to talk about the government's anti-drug program and the rights of the accused. Unfortunately, a simple discussion on human rights can turn into a debate on partisan politics. Opinions there are like swords in a sword fight. Think of the swords being drawn, of the blades clashing, and of sparks flying. At the end of the battle, however, no one really wins. People can agree to disagree on many things. But, there ought to be no disagreement when it comes to human rights because there are no two sides in human rights. There is only one side—the "right" side.

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Human rights are defined as those rights which are inherent in our nature and without which we cannot live as human beings. Human rights and fundamental freedoms allow us to develop our human qualities, intelligence, talents and conscience, and to satisfy our spiritual and other needs. The dignity of man and human life is inviolable. From the dignity of man is derived the right of every man to free development of his personality.[2]

"Human rights" is "justice" in action. It is giving everyone his due. These human rights are then protected and preserved through the rule of law. Thus, if a person defies the law, he violates the rights or freedoms for which reason the law has been promulgated to protect and preserve.

As a civil law professor, I see human rights in a different light. There are, after all, various aspects or areas of human rights. The essence of human rights is to be what and who you are, to forge your own path and to pursue your personal business without state interference. Human rights are not always political. Often times, the idea of human rights that an ordinary person understands or is more concerned with is the idea that human rights allow him to pursue a vocation, to enter into contracts, to own property or to dispose them. Truly, it is in the area of private relations and private ownership that a person should defend his beliefs, his choices, and his decisions.

In this article, I talk about two of the most important freedoms in civil law: the **freedom to contract** and the **right to property**. In simple terms, the former connotes the right to enter into contracts and to stipulate terms and conditions that are beneficial and convenient to the parties, while the latter refers to the right to own, use and dispose of one's property. These are called freedoms because the choice of the person is paramount, the provisions of the law and the interests of the state merely secondary and suppletory.

The 1987 Constitution protects these freedoms. When it comes to property, Section 1, Art. III, the Bill of Rights, provides that "no person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws." Meanwhile, when it comes to contracts, Section 10, Art. III states that "no law impairing the obligation of contracts shall be passed."

So, while everyone is mostly talking about rights of the accused or the freedoms of speech, of expression, or of the press, let us add to the discussion these two basic individual freedoms—freedom to contract and the right to property. These two freedoms, like any other right or freedom, should be preserved and protected, lest they fade into obscurity and rendered unimportant due to indifference.

[2] Coquia, Jorge R., Human Rights, An Introductory Course, 2000, p. 3.

II. Freedom to Contract

The late Arturo M. Tolentino, in his seminal book "Commentaries and Jurisprudence on the Civil Code of the Philippines", wrote:

> "The right to enter into lawful contracts constitutes one of the liberties of the people of the state. If the right be struck down or arbitrarily interfered with, there is a substantial impairment of the liberty of the people under the constitution. The legislature, under the constitution, is not permitted to prescribe the terms of a legal contract and thereby deprive the citizens of the state from entering freely into such contracts according to their own convenience and advantage, so long as the contracts entered into are not prohibited by law, public policy or morals. To enter into contracts freely and without restraints, is one of the liberties guaranteed to the people of the state. The policy of the law is that the freedom of persons to enter into contract should not be lightly interfered with, and courts should move with all the necessary caution and prudence in holding contracts void. Save in limited and exceptional situations provided by law itself, courts have no authority to prescribe the terms and conditions of a contract for the parties."

According to Art. 1306 of the Civil Code, "the contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order or public policy." There is no fixed template for contracts. While there are requisites that must be met to render the contract valid (e.g. consent, subject matter and cause), the parties are free to enter into stipulations that are mutually beneficial and convenient. These stipulations may even suppress certain provisions of the Civil Code.

The right to own property is considered one of the most important human rights.

Thus, in contracts of sale, the parties can stipulate that ownership shall transfer to the buyer only upon full payment of the purchase price (Art. 1478, Civil Code), instead of at the time of the delivery of the thing. They can also stipulate that the buyer shall bear the expenses for the execution and registration of the sale (Art. 1487, Civil Code). Finally, the parties can also stipulate that the thing sold is not covered by the warranties against eviction and hidden defects (Art. 1547, Civil Code)

This freedom to contract is apparent when a lawyer drafts the contract for his clients. Meticulous clients may insist on certain arrangements favorable to them. As a

lawyer, you apply your legal knowledge, employing legal draftsmanship. Of course, when examined by the other contracting party, certain objections may be raised. You will then have to revise and reword the contract to suit both parties.

I have a client who has a start-up ice cream pops business. His business was awarded best new idea in an entrepreneurial competition due mainly to the fact that his ice cream pops are sugar-free and gluten-free. With the diet and fitness trend, it became an instant hit. He then got distributors and resellers to sell his ice cream pops. Like all expansions, however, he was faced with many challenges. One of which was how to maintain food safety in the entire supply chain.

Republic Act 7394, the Consumer Act of the Philippines, and Republic Act 10611, the Food and Safety Act, have provisions that deal with consumer protection and food safety in the food business. But these provisions are too general and copying them into the contract was just plain lazy. Besides, the provisions of these laws did not completely cover the areas of concern of my client and his distributors.

Long story short, I sat down with the parties and listened to their concerns. It was clear that the supply chain was divided into two: the first part of the chain was within the control of the supplier and the second part of the chain was controlled by the distributor or reseller. It was also clear that they understood their liabilities under the law for spoiled and adulterated food. They knew that they would be solidarily liable for any resulting damage. With that in mind, the parties agreed to take quality control steps and strategies at their respective ends and assumed responsibility for their own acts or omissions. My client, the supplier, guaranteed the highest standards in the production, packaging and delivery of the ice cream pops. His distributors and resellers guaranteed the highest standards in the storage and handling of the products in their store. In the event of damage to third persons, and the injured third person sues any or both of them, they also agreed to a right of reimbursement or contribution.

So, you see, the stipulations of the parties in this case were not only not contrary to law, they were also consistent with law. The stipulations incorporated the laws on consumer protection and solidary liability. More importantly, it was an autonomous exercise of the freedom to contract.

The freedom to contract is not limited to the right to enter into contracts and the right to stipulate. It also includes the freedom from interference of other persons. Art. 1314 of the Civil Code states that "any third person who induces another to violate his contract shall be liable for damages to the other contracting party." This *tortious interference* has the following requisites:

1. Existence of a valid contract;

2. Knowledge on the part of the third person of the existence of the contract; and

3. Interference of the third person without legal justification or excuse.

Tort interferers are liable for damages, actual, moral or exemplary. In lieu of damages, the tort interferer may be enjoined by permanent injunction and the contracts which he entered in breach of existing ones may be nullified.[3]

Finally, the freedom to contract protects the parties from court interference. As explained by the Supreme Court in ***Norton Resources and Development Corporation vs. All Asia Bank:***[4]

> "The agreement or contract between the parties is the formal expression of the parties' rights, duties and obligations. It is the best evidence of the intention of the parties. Thus, when the terms of an agreement have been reduced to writing, it is considered as containing all the terms agreed upon and there can be no evidence of such terms other than the contents of the written agreement between the parties and their successors in interest. Time and again, we have stressed the rule that a contract is the law between the parties, and courts have no choice but to enforce such contract so long as it is not contrary to law, morals, good customs or public policy. Otherwise, courts would be interfering with the freedom of contract of the parties. Simply put, courts cannot stipulate for the parties or amend the latter's agreement, for to do so would be to alter the real intention of the contracting parties when the contrary function of courts is to give force and effect to the intention of the parties."

Only in rare instances will the courts interfere with the contract. If they will, in fact, interfere with the contract, it is solely to give force and effect to the intention of the parties. Thus, for example, in obligations with a period where no period has been fixed, or where the period depends upon the will of the debtor, the courts may fix the duration of the period and such period shall be determined according to the circumstances contemplated by the parties.[5]

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[3] *So Ping Bun vs. Court of Appeals*, G.R. No. 120554, September 21, 1999.
[4] G.R. No. 162523, November 25, 2009.
[5] Art. 1197, Civil Code.

Also, in the following examples, the court nullified the contract or the contractual stipulations of the parties:

1. A contract of agency for "following up papers in the different governments offices to which they were referred" (*Tee vs. Tacloban Electric*, L-11980, February 14, 1959)

2. A non-involvement clause, or that which indefinitely prohibits an employee from engaging in any business similar to that of his employee after the termination of his employment contract (*Tiu vs. Platinum Plans*, G.R. No. 163512, February 28, 2007)

3. A compromise agreement for the settlement of an obligation arising out of a void contract (*Osmeña vs. Commission on Audit*, G.R. No. 98355, March 2, 1994)

4. Any stipulation where the fixing of interest rate is the sole prerogative of the creditor/mortgagee (*Andal vs. Philippine National Bank*, G.R. No. 194201, November 27, 2013)

5. A loan obtained by the municipality for the purpose of funding the conversion of the public plaza (a property of public dominion) into a commercial center (*Land Bank vs. Cacayuran*, G.R. No. 191667, April 17, 2013)

The foregoing are just a few of the instances when the courts suppressed the parties' freedom to contract. While parties are free to enter into agreements and stipulate as to the terms and conditions of their contract, such freedom is not absolute. The contract itself or its stipulations must not be contrary to law, morals, good customs, public order, or public policy.

III. Right to Property

The right to own property is considered one of the most important human rights. Art. 17 of the Universal Declaration of Human Rights states that everyone has the right to own property alone as well as in association with others, and that no one shall be arbitrarily deprived of his property.

In the hierarchy of rights, however, the right to property is placed behind the right to liberty which, in turn, is second to the right to life. At any rate, the right to property is protected by the 1987 Constitution in Section 1, Art. III (supra), and in Section 9, of the same Art. III, which states that private property shall not be taken for public use without just compensation.

The concept of the right to property is not limited to ownership or possession of tangible property. A profession, trade of calling is a property right within the meaning of our constitutional guarantees. One cannot be deprived of the right to work and right to make a living because these rights are property rights, the arbitrary and unwarranted deprivation of which normally constitutes an actionable wrong.[6]

One's right to property is so established that an owner himself can assert and protect it against unlawful physical invasion or usurpation. Thus, under Art. 429 of the Civil Code, the owner or lawful possessor of a thing has the right to exclude any person from the enjoyment and disposal thereof. For this purpose, he may use such force as may be reasonably necessary to repel or prevent an actual or threatened unlawful physical invasion or usurpation of his property. This right is also called the doctrine of self-help.

Relatedly, one has the freedom to dispose of his property. Under Art. 428 of the Civil Code, the owner has the right to enjoy and dispose of a thing without other limitations than those established by law. The right to dispose includes the right to donate, to sell, to pledge or mortgage.[7] Inherent in this right is the power of the owner to alienate, encumber, transform and even destroy the thing owned.[8]

The limitations imposed on the right to property are undisputed.

The owner of a thing cannot make use thereof in such a manner as to injure the rights of a third person.[9] As long as the activity or the property has some relevance to the public welfare, its regulation under the police power is not only proper but necessary. The justification is found in the venerable Latin maxims, *Salus populi est suprema lex* and *Sic utere tuo ut alienum non laedas*, which call for the subordination of individual interests to the benefit of the greater number.[10]

The owner of a thing cannot also prohibit the interference of another with the same, if the interference is necessary to avert an imminent danger and the threatened damage, compared to the damage arising to the owner from the interference, is much greater.[11] This is the doctrine of incomplete privilege.

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[6] *JMM Promotion vs. Court of Appeals*, G.R. No. 120095, August 5, 1996.
[7] *Manlapat vs. Court of Appeals*, G.R. No. 125585, June 8, 2005.
[8] *Flancia vs. Court of Appeals*, G.R. No. 146997, April 26, 2005.
[9] Art. 431, Civil Code.
[10] *Ynot vs. Intermediate Appellate Court*, G.R. No. 74457, March 20, 1987.
[11] Art. 432, Civil Code.

Then there is the concept of nuisance. A nuisance is any act, omission, establishment, business, condition of property, or anything else which:

1. Injures or endangers the health or safety of others; or

2. Annoys or offends the senses; or

3. Shocks, defies or disregards decency or morality; or

4. Obstructs or interferes with the free passage of any public highway or street, or any body of water; or

5. Hinders or impairs the use of property.[12]

A nuisance can be stopped by criminal prosecution, civil action or abatement, without judicial proceedings.[13]

An owner's right to dispose of his properties is subject to at least three known limitations. First, he cannot sell or lease the property to a person who is under the incapacity provided under Art. 1491, Civil Code, namely:

1. The guardian, with respect to the property of the person or persons under his guardianship;

2. Agents, with respect to the property under their administration;

3. Executors and administrators, with respect to the property of the estate under his administration;

4. Public officers and employees with respect to the property of the State under his administration;

5. Justices, judges, prosecuting attorneys, lawyers and other officers of the court;

6. Other specifically disqualified by law, e.g. aliens, with respect to private lands.

Under Art. 739 of the Civil Code, the following donations are also void:

[12] Art. 694, Civil Code.
[13] Art. 699, 705, Civil Code.

1. Those made between who were guilty of adultery or concubinage at the time of the donation;

2. Those made between persons found guilty of the same criminal offense, in consideration thereof;

3. Those made to a public officer or his wife, descendants and ascendants, by reason of his office.

A person who is forbidden from receiving donations under Art. 739 cannot be named beneficiary of a life insurance policy by the person who cannot make any donation to him.[14] The prohibitions mentioned in Art. 739 apply also to testamentary provisions.[15] Thus, a person who cannot receive by donation cannot be named a voluntary heir in the will.

Finally, speaking of heirs, one who has compulsory heirs may dispose of his estate provided he does not contravene the law with regard to the legitime of said heirs.[16] Legitime is that part of the testator's property which he cannot dispose of because the law has reserved it for certain heirs who are, therefore, called compulsory heirs.[17]

True to the statement that "your rights end where my rights begin," the freedom to contract and the right to property are not without limitations. The exercise of these two freedoms are subject to reasonable regulation. These freedoms must be considered, for many purposes, not as absolute, unrestricted dominions but as an aggregation of qualified privileges, the limits of which are prescribed by the equality of rights, and the correlation of rights and obligations necessary for their highest enjoyment by the entire community.[18]

[14] Art. 2012, Civil Code; *Insular Life vs. Ebrado*, L-44059, October 28, 1977.
[15] Art. 1028, Civil Code.
[16] Art. 842, Civil Code.
[17] Art. 886, Civil Code.
[18] *United Coconut Planters Bank vs. Basco*, G.R. No. 142668, August 31, 2004.

FUSION AND CONFUSION:
Recovery of Civil Liability in Case of Acquittal

Atty. Manuel R. Riguera[1]

I. Introduction: A brief history of the law and jurisprudence on the accused's civil liability in case of acquittal

Both the Spanish Penal Code of 1880, which was in force in the Philippines until 31 December 1931, and subsequently the Revised Penal Code, provided that "[e]very person criminally liable is also civilly liable." This precept was the basis for the fusion of the civil action to recover civil liability arising from the offense charged with the criminal action to determine the accused's guilt. Under Articles 111 and 112 of the Law of Criminal Procedure of Spain which was extended to the Philippines, the civil remedy was instituted with the criminal action unless it had been waived by the offended party or had been expressly reserved by him.[2]

However, the Spanish Penal Code and the Law of Criminal Procedure, as well as the Revised Penal Code later on, were silent as to the effect of an acquittal on the accused's civil liability. The question was thus asked whether the acquittal of the accused would necessarily lead to the extinction of his civil liability. From this question began a legal safari through the law and jurisprudence on the accused's civil liability in case of acquittal. It is a journey whose destination has yet to loom in the horizon.

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[2] ANTONIO R. BAUTISTA, THE CONFUSING FUSION OF A CIVIL CLAIM IN A CRIMINAL PROCEEDING, 79 Phil. L.J. 640 (2004). Articles 111 and 112 are the progenitors of our present rule on fusion, Section 1(a), Rule 111 of the Rules of Criminal Procedure, which provides that "[w]hen a criminal action is instituted, the civil action for the recovery of civil liability arising from the offense charged shall be deemed instituted with the criminal action…." As used in this article, the term "civil liability *ex delicto*," is synonymous to "civil liability arising from the offense charged."

Almeida v. Abaroa (1907)

Our saga begins a hundred and ten years ago with the case of *Almeida v. Abaroa*,[3] one of the first significant cases dealing with the effect of acquittal upon an accused's civil liability.

In *Almeida*, the accused was charged with the crime of arson for allegedly having set fire to the private complainant's store and warehouse. The accused was acquitted on the ground that he was not the author of the crime. Subsequently the offended party filed a civil case for damages against the accused for the same act of arson for which he was acquitted. The Supreme Court ruled that:

> The defendant Abaroa having been acquitted of the charge against him as the supposed author of the crime of arson, cannot be made a defendant, nor can judgment be rendered against him, by reason of a civil action, for the payment of the amount of the loss and damages caused to the plaintiffs by said fire.[4]

The result reached and the above reasoning of the court is correct. The accused was found not to have been the author of the arson and hence could not have been held liable in damages for the burning of the store and warehouse.

Two kinds of acquittal

There are two kinds of acquittal in relation to their effect on the accused's civil liability. The first is when the prosecution's evidence merely failed to prove the accused's guilt beyond reasonable doubt. For purposes of this article, we can term this as a "relative acquittal." Such an acquittal does not rule out the imposition of civil liability *ex delicto* because the same needs to be proved only by preponderance of evidence.

The second is when the prosecution's evidence absolutely failed to prove the guilt of the accused. Otherwise put, the criminal court has made a categorical finding that no crime was committed or that if one was committed it was not the accused who did so. We may call this kind of acquittal an "absolute acquittal." Such an acquittal necessarily obliterates the accused's civil liability *ex delicto*.

[3] 8 Phil. 178 (1907).
[4] *Id*. at 180.

A litigator confronted with a judgment denying or not awarding civil liability in case of an absolute acquittal has two remedies. He may appeal from the civil aspect of the judgment and argue based on the considerations set forth in this article. He can also file a separate civil action

The acquittal handed down in *Almeida* was an absolute acquittal since the court found that the accused was not the author of the crime. Hence the accused's civil liability for the destruction of the property, which arose out of the crime of arson, was necessarily extinguished.

The Almeida Trojan Horse

However, problems arose from the sweeping statement in *Almeida* that "exemption from criminal responsibility carries with it exemption from civil liability also."[5] The result reached was correct but the overbroad statement of the ruling bred confusion. It led to the erroneous perception that extinction of the criminal liability necessarily led to extinction of the civil liability and to numerous cases where an accused who was acquitted was exonerated not only from criminal but from civil liability as well despite adequate proof of the latter.

First reform: Laying down the rule that extinction of the penal action does not carry with it extinction of the accused's civil liability

The problem was first sought to be addressed by Section 1(d), Rule 107 of the 1940 Rules of Court which provided that "[e]xtinction of the penal action does not carry with it extinction of the civil, unless the extinction proceeds from a declaration in a final judgment that the fact from which the civil might arise did not exist."[6]

Article 29, New Civil Code

A further effort to qualify and limit the broad *Almeida* doctrine was made with the passage of the New Civil Code in 1950. Article 29 thereof provides as follows:

> Art. 29. When the accused in a criminal prosecution is acquitted on the ground that his guilt has not been proved beyond reasonable doubt, a civil action for damages for the same act or omission may be instituted. Such action requires only a preponderance of evidence. xxx

[5] *Ibid*.

[6] In a slightly modified form, the rule embodied in Section 1(d), Rule 107 of the 1940 Rules has been retained in Section 2, Rule 120 of the present Rules of Criminal Procedure:
The extinction of the penal action does not carry with it extinction of the civil action. However, the civil action based on delict shall be deemed extinguished if there is a finding in a final judgment in the criminal action that the act or omission from which the civil liability may arise did not exist.

If in a criminal case the judgment of acquittal is based upon reasonable doubt, the court shall so declare. In the absence of any declaration to that effect, it may be inferred from the text of the decision whether or not the acquittal is due to that ground.[7]

The Code Commission gave the following reasons to justify the insertion of Article 29 in the Civil Code.

> The old rule that the acquittal of the accused in a criminal case also releases him from civil liability is one of the most serious flaws in the Philippine legal system. It has given rise to numberless instances of miscarriage of justice, where the acquittal was due to a reasonable doubt in the mind of the court as to the guilt of the accused. The reasoning followed is that inasmuch as the civil responsibility is derived from the criminal offense, when the latter is not proved, civil liability cannot be demanded.
>
> This is one of those instances where confused thinking leads to unfortunate and deplorable consequences. Such reasoning fails to draw a clear line of demarcation between criminal liability and civil responsibility, and to determine the logical result of the distinction. The two liabilities are separate and distinct from each other. One affects the social order and the other, private rights. One is for the punishment or correction of the offender while the other is for reparation of damages suffered by the aggrieved party.[8]

The effect of Article 29 was to qualify and limit the scope of the *Almeida* doctrine, which was laid down in terms that were so broad and sweeping that it became susceptible to misapplication.[9]

De Guzman v. Alvia (1955)

The reforms that were laid down by Section 1(d), Rule 107 of the 1940 Rules of Court and Article 29 of the 1950 Civil Code found application in *De Guzman v. Alvia*.[10]

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[7] Article 29 repeats in a limited and, hence, unsatisfactory form the provisions of Section 1(d) of Rule 107 of the 1940 Rules of Court. (1 ARTURO M. TOLENTINO, CIVIL CODE OF THE PHILIPPINES 125 [1985]). This is because Article 29 mentions only a relative acquittal but not an absolute acquittal.

[8] Quoted in 1 ARTURO M. TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 126 (1985).

[9] *Ibid*.

[10] 96 Phil. 558 (1955).

In *De Guzman*, the plaintiffs Esteban de Guzman and his wife Maxima Laperal were engaged since 1931 in the sale of jewelry and had business relations with the defendant Roman Alvia and his wife Magdalena de Alvia who, especially Magdalena, used to receive pieces of jewelry from them for sale on commission. It was understood that Magdalena may in turn entrust the jewels to a third party to sell. In October 1946, Magdalena through her husband Roman Alvia received from plaintiffs for sale several pieces of jewelry, among them the jewel in question valued at ₱1,500. Said jewel was later entrusted by Magdalena to Eugenia Villarin for sale. Eugenia absconded with the jewel and failed to account for it to Magdalena.

Plaintiffs demanded from Magdalena and Roman the return of the jewel or its value but defendants were unable to comply with the demands. Thereafter, a criminal complaint for estafa was filed in the court of first instance against Roman Alvia because it was he who actually received the jewel from plaintiffs and signed the receipt. Roman was acquitted of the charges on the ground that he merely acted as agent of his wife Magdalena who was the person who had business dealings with the plaintiffs. Then a second complaint also for estafa was filed against Magdalena. She was also acquitted on the ground that there was no misappropriation on her part, as she had entrusted the jewel to Eugenia who was the one who actually made off with it. In his decision of acquittal, the judge stated that the liability of Magdalena was not criminal but civil.

Subsequently the plaintiffs filed with the municipal court a civil action to recover the jewel or its value from Magdalena. Judgment was rendered in favor of the plaintiffs but on appeal to the court of first instance, the judgment was reversed on the ground that the acquittal in the criminal case extinguished the liability of Magdalena.

The Supreme Court reversed the court of first instance and reinstated the judgment of the municipal court. The Court stated that the acquittal of Magdalena of the charge of estafa in the criminal case did not extinguish her civil liability. The reason was that the final judgment in the criminal case against Magdalena, although finding that there was no misappropriation or conversion on her part, did not contain any declaration that the fact from which civil liability might arise did not exist. On the contrary, the judgment found that she received the jewel under an agreement to return it if unsold and that therefore her responsibility was civil rather than criminal. It should be noted that the liability of Magdalena was sourced not from crime but from a contract.

View that Article 29 requires the recovery of civil liability in a separate civil action

However, while Section 1(d) of Rule 107 and Article 29 made it clear that acquittal of the accused would not extinguish the civil liability unless there is a finding that the

fact from which civil liability may arise did not exist, the prevailing view was that the recovery of such civil liability must be had in a separate civil action. This was because of the wordings of Article 29 which states that "a civil action for damages for the same act or omission *may be instituted*." (Italics supplied). This view was reflected in the 1955 case of *People v. Pantig*.

People v. Pantig (1955)

In *People v. Pantig*,[11] the accused was charged with estafa for fraudulently obtaining ₱1,200 from the offended party. The trial court acquitted the defendant, finding that money was received by the defendant as a loan. The trial court however ordered the defendant to pay the offended party the ₱1,200. On appeal, the Supreme Court reversed the award of civil indemnity, stating that the liability of the defendant for the return of the ₱1,200 arose from a civil contract and not a criminal act and hence may not be enforced in a criminal case but in a separate civil action.[12]

Second reform: Recovery of the civil liability arising from the offense charged in the same criminal action

The rule that the accused's civil liability had to be recovered in a separate civil action in case of acquittal was roundly criticized. It was argued that the rule led to multiplicity of suits, added to the congestion of court dockets, and resulted in duplication of proof and litigation. It was suggested instead that the recovery of civil liability may be obtained in the criminal action, provided that such liability is proved by a preponderance of evidence.[13]

Padilla v. Court of Appeals (1984)

Heeding these criticisms and suggestions, the Supreme Court *en banc* in the leading case of *Padilla v. Court of Appeals*[14] laid down the rule that in even in case of acquittal, the accused's civil liability may be recovered in the same criminal case.

In *Padilla*, the accused police officers, on order of accused Mayor Roy Padilla, forcibly opened and then demolished the stall of the offended party and carted away the goods found therein. At the time of the demolition and seizure, the offended party was not

[11] 97 Phil. 748 (1955).
[12] *Id*. at 750.
[13] See ALFREDO F. TADIAR, CRITICAL ANALYSES OF SUPREME COURT DECISIONS ON CRIMINAL PROCEDURE FROM 1983 UP TO MARCH 1990, p. 237 (1990).
[14] 129 SCRA 558 (1984).

in his market stall. The accused were charged with grave coercion and convicted by the trial court. On appeal the accused were acquitted on the ground that there was no grave coercion since the violence had been employed against the property and not the person of the offended party. The Court of Appeals however ordered the accused to pay damages to the offended party for the demolition of the stall and the seizure of the goods therein.

On appeal, the accused, citing *Pantig*, argued that the civil liability *ex delicto* may not be enforced in the criminal case but must be brought in a separate civil action.

The Supreme Court reiterated the rule that the extinction of the penal action does not carry with it that of the civil, unless the extinction proceeds from a declaration in a final judgment that the fact from which the civil might arise did not exist. Thus the Court stated that the civil liability is not extinguished by the acquittal *where the court expressly declares that the liability of the accused is not criminal but only civil in nature*.

The Court affirmed the Court of Appeals' judgment that the crime charged in the information, that is, grave coercion, had not been committed since the violence employed was not against persons but against property of the offended party.[15] Nonetheless, the fact from which the civil might arise, namely, the demolition of the stall and loss of the properties contained therein, existed and was not denied by the accused.

In a doctrinal ruling, the Court also held that the civil liability of the accused may be imposed in the same criminal action without the need to bring a separate civil action:

> There appear to be no sound reasons to require a separate civil action to still be filed considering that the facts to be proved in the civil case have already been established in the criminal proceedings where the accused was acquitted. Due process has been accorded the accused. He was, in fact, exonerated of the crime charged. The constitutional presumption of innocence called for more vigilant efforts on the part of prosecuting attorneys and defense counsel, a keener awareness by all witnesses of the serious implications of perjury, and a more studied consideration by the judge of the entire records and of applicable statutes and precedents. To require a separate civil action simply because the accused was acquitted would mean needless clogging of court dockets and unnecessary

[15] While the Court of Appeals characterized its acquittal as based on reasonable doubt, a careful reading shows that the basis for the acquittal was actually a definitive finding that the offense charged (grave coercion) could not have been committed by the accused since the violence was employed only upon things and not persons.

> duplication of litigation with all its attendant loss of time, effort, and money on the part of all concerned.[16]

The Court made short shrift of the purported mandate of Article 29 that the civil liability may be recovered only in a separate civil action:

> The only supposed obstacle is the provision of Article 29 of the Civil Code, earlier cited, that "when the accused in a criminal prosecution is acquitted on the ground that his guilt has not been proved beyond reasonable doubt, a civil action for damages for the same act or omission may be instituted." According to some scholars, this provision of substantive law calls for a separate civil action and cannot be modified by a rule of remedial law even in the interests of economy and simplicity and following the dictates of logic and common sense.
>
> …

We see no need to amend Article 29 of the Civil Code in order to allow a court to grant damages despite a judgment of acquittal based on reasonable doubt. What Article 29 clearly and expressly provides is a remedy for the plaintiff in case the defendant has been acquitted in a criminal prosecution on the ground that his guilt has not been proved beyond reasonable doubt. It merely emphasizes that a civil action for damages is not precluded by an acquittal for the same criminal act or omission. The Civil Code provision does not state that the remedy can be availed of only in a separate civil action. A separate civil case may be filed but there is no statement that such separate filing is the only and exclusive permissible mode of recovering damages.

There is nothing contrary to the Civil Code provision in the rendition of a judgment of acquittal and a judgment awarding damages in the same criminal action. The two can stand side by side. A judgment of acquittal operates to extinguish the criminal liability. It does not, however, extinguish the civil liability unless there is clear showing that the act from which civil liability might arise did not exist.

A different conclusion would be attributing to the Civil Code a trivial requirement, a provision which imposes an uncalled for burden before one who has already been the victim of a condemnable, yet non-criminal, act may be accorded the justice which he seeks.[17]

[16] Padilla v. Court of Appeals, *supra* note 13 at 567.
[17] *Id*. at 569-570.

Codification of Padilla doctrine in 1985 Rules of Criminal Procedure

The *Padilla* doctrine was subsequently codified in the last paragraph of Section 2, Rule 120 of the 1985 Rules of Criminal Procedure, which read as follows:

> In case of acquittal, unless there is a clear showing that the act from which the civil liability might arise did not exist, the judgment shall make a finding on the civil liability of the accused in favor of the offended party.

Retired Supreme Court Justice Jose Y. Feria commented on the purpose behind the amendment of Section 20 of Rule 120:

> An additional paragraph [to Sec. 20, Rule 120] has been added to the old Rule, pursuant to the ruling of the Supreme Court in the case of Roy Padilla vs. Court of Appeals (May 31, 1984, 129 SCRA 558), to the effect that even in case of acquittal, the court may adjudge the accused civilly liable to the offended party.[18]

One of the foremost authorities on remedial law annotated Section 20 of Rule 120 in this wise:

> [Section 20 of Rule 120] presupposes that the civil action *ex delicto* was impliedly instituted with the criminal action and contemplates the situation, *inter alia*, where the acquittal is based on reasonable doubt **or where the court finds that the liability of the accused is not criminal but only civil in nature**.[19]

Vizconde and Ligon cases

The *Padilla* doctrine was reiterated in the 1987 case of *Vizconde v. Intermediate Appelate Court* which involved an estafa case.[20] The accused-petitioner was the intermediary between the owner of an 8-karat diamond ring who wanted to sell it and her co-accused who was the commission agent. The petitioner signed a receipt guaranteeing payment by her co-accused. The petitioner was acquitted of estafa since she was a mere guarantor. Nevertheless, the Court, relying expressly upon *Padilla* held her liable under the contract

[18] JOSE Y. FERIA, 1985 RULES ON CRIMINAL PROCEDURE ANNO. 49, PHIL. LEGAL STUDIES, SERIES NO. 2 (1985).
[19] 2 FLORENZ D. REGALADO, REMEDIAL LAW COMPENDIUM 478 (9th rev. ed., 3rd printing, 2001). Emphasis ours.
[20] 149 SCRA 226 (10 April 1987).

of guaranty, a source of obligation other than delict.[21] It should be noted that the acquittal here was an absolute one, the court finding that there was no criminal but only civil liability *ex contractu*.

The *Padilla* doctrine was also reprised in *People v. Ligon*.[22] Gabat and Ligon were charged with the crime of robbery with homicide. The prosecution alleged that Ligon was driving a Volkswagen Kombi with Gabat as the passenger; that while the Kombi had stopped during a red light, Gabat beckoned the cigarette vendor Rosales to the window; that when the light turned green, Gabat grabbed the cigarette box of Rosales, who clung to the window to try to retrieve his box; and that Gabat pried loose the hands of Rosales who then fell to the road and suffered fatal injuries.

On the other hand, Gabat testified that as Rosales was engrossed trying to give change to Gabat, the light turned green and Ligon stepped on the gas pedal; that Rosales' cigarette box accidentally fell inside the Kombi, that Ligon continued driving despite Gabat's telling him to stop; that Rosales clung to the Kombi's window but lost his grip and fell to the pavement; and that he told Ligon to stop and help Rosales but Ligon drove off telling him that they should proceed to Las Piñas and tell Gabat's parents what had happened.

Only Gabat was arrested. Ligon became a fugitive and was never caught. After trial, Gabat was convicted of robbery with homicide and sentenced to *reclusion perpetua*. On appeal to the Supreme Court, Gabat was acquitted on the ground of reasonable doubt, the Court finding the prosecution witness's testimony not worthy of full credence. However the Court in the same judgment of acquittal found Gabat civilly liable in damages pursuant to Article 2176 of the Civil Code on the finding that there was negligence on his part which led to the death of Rosales.

The Court stated that while the accused was acquitted of the crime of robbery with homicide on the ground of reasonable doubt, the act or omission from which the civil liability may arise, that is, the negligence of Gabat, did exist. Gabat acted negligently in calling Rosales, failing to make his driver Ligon stop when Rosales was precariously clinging to the Kombi, and failing to come to Rosales' succor when he fell to the road. Hence Gabat was liable for damages pursuant to Article 2176 of the Civil Code regarding quasi-delict.

[21] *Id*. at 236. See also ALFREDO F. TADIAR, CRITICAL ANALYSES OF SUPREME COURT DECISIONS ON CRIMINAL PROCEDURE FROM 1983 UP TO MARCH 1990, pp. 340-342 (1990).
[22] 152 SCRA 419 (29 July 1987, e.b.).

It should be noted that the civil liability in *Vizconde* and *Ligon* were sourced not from delict but from contract and from quasi-delict, respectively. That there was no civil liability *ex delicto* did not preclude the recovery of civil liability in the criminal case.

Amendment of the last paragraph of Section 2 of Rule 120 in 2000

On 1 December 2000, the last paragraph of Section 2, Rule 120 of the Rules of Criminal Procedure was amended to read as follows:

> In case the judgment is of acquittal, it shall state whether the evidence of the prosecution absolutely failed to prove the guilt of the accused or merely failed to prove his guilt beyond reasonable doubt. In either case, the judgment shall determine if the act or omission from which the civil liability might arise did not exist.[23]

The amendment is basically one of style rather than substance and did not make any change or deviation from the prevailing rules under the old Section 2 of Rule 120. If anything, the amendment, by using the phrase "in either case," further emphasized the duty of the criminal court to make a determination of civil liability even in case of an absolute acquittal. Evidently such civil liability could not have been sourced from crime but from something else such as from contract.

II. Dy v. People (2016): Rolling back the 1985 reform

Dy v. People (2016): Rolling back the 1985 reform

The rules on recovery of civil liability appeared to have acquired a measure of stability. However on 10 August 2016, the Supreme Court promulgated its decision in *Dy v. People*,[24] which in effect reverted to the rule prior to *Padilla*.

The facts of *Dy* are as follows: The accused Dy was the general manager of MCC Inc. (MCCI) In 2002, Mandy, the President of MCCI, charged Dy with estafa claiming that he (Mandy) entrusted checks payable to cash with a total face value of ₱21 million to Dy for the latter to encash and then to pay the proceeds to MCCI's creditor bank; however Dy instead of paying the bank, pocketed the proceeds. The RTC rendered judgment acquitting Dy for failure of the prosecution to prove her guilt beyond reasonable doubt. In its decision, the RTC found that the understanding between Mandy and Dy was that the

[23] Emphasis supplied.
[24] 800 SCRA 39 (2016), 3rd Division.

latter was entitled to the proceeds of the checks, albeit with the obligation on her part of paying MCCI's bank loan using her own checks. The RTC thus found that the transaction between Mandy and Dy was actually a loan. Although it acquitted Dy, the RTC in its decision ordered her to pay Mandy ₱21 million. The Court of Appeals affirmed on appeal.

On petition for review on certiorari, the Supreme Court reversed the Court of Appeal's decision and set aside the award of ₱21 million, without prejudice to any civil action that may be filed to recover the same. The Court held that in case of an absolute acquittal, the criminal court cannot impose civil liability *ex contractu* upon the accused and that such liability must be recovered in a separate civil action:

The lower courts erred when they ordered petitioner to pay her civil obligation arising from a contract of loan in the same criminal case where she was acquitted on the ground that there was no crime. Any contractual obligation she may have must be litigated in a separate civil action involving the contract of loan. We clarify that in cases where the accused is acquitted on the ground that there is no crime, the civil action deemed instituted with the criminal case cannot prosper precisely because there is no delict from which any civil obligation may be sourced. The peculiarity of this case is the finding that petitioner, in fact, has an obligation arising from a contract. This civil action arising from the contract is not necessarily extinguished. It can be instituted in the proper court through the proper civil action.[25]

Analysis of the controlling case law and the Rules of Criminal Procedure lead to the conclusion that in case of ***acquittal****, the court is not confined to imposing civil liability ex delicto but may impose civil liability arising from sources other than crime*

The first thing to do in determining whether the criminal court may award civil liability arising from sources other than crime, such as civil liability *ex contractu*, in case of an acquittal is to look at the text of the applicable provision of the Rules of Criminal Procedure. The second paragraph of Section 2, Rule 120 of the Rules of Criminal Procedure provides as follows:

Section 2. *Contents of the judgment.* — If the judgment is of conviction, it shall state….

In case the judgment is of acquittal, it shall state whether the evidence of the prosecution absolutely failed to prove the guilt of the accused or merely failed to prove his guilt beyond reasonable doubt. **In either case**, the judgment shall determine if the act or omission from which the civil liability might arise did not exist.[26]

[25] *Id*. at 62-63.
[26] Emphasis supplied.

Note that "the judgment shall determine if the act or omission from which the civil liability might arise did not exist," whether the acquittal is relative or absolute. This can be gleaned from the phrase, "in either case." The evident purpose of such determination is that in case of a finding that the act or omission from which the civil liability might arise did exist, the court must impose civil liability. Clearly such civil liability is not *ex delicto* but may be *ex contractu (Vizconde)* or *ex culpa aquiliana (Ligon)*.

Otherwise put, even if there is a finding by the criminal court that no crime was committed at all, it may allow the recovery of civil liability *ex contractu* if warranted by the evidence, contrary to the holding in *Dy*.

Comparative analysis of cases

In arriving at its conclusion, *Dy* also undertook a comparative analysis of jurisprudence dealing with recovery of civil liability in estafa cases in case of acquittal.

Dy first cited the 1955 *Pantig* case where to recall the accused was acquitted of estafa on the ground that there was only a contract of loan. The Court in *Pantig* however stated that the civil liability of the accused for loan may be enforced only in a separate civil action and not in the criminal case itself.

The Court then went on to cite the 1992 case of *People v. Singson*.[27] In *Singson* the accused issued several checks to the offended party as payment for the purchase of sugar. The checks bounced and the accused was later charged in court with estafa through the issuance of bouncing checks. The trial court convicted the accused and sentenced her to imprisonment. It also ordered the accused to pay ₱163,000 to the offended party, representing the unpaid value of the checks issued.

On appeal, the Supreme Court acquitted the accused on the ground of the prosecution's failure to prove beyond reasonable doubt the element of fraud or deceit. Surprisingly, the Court also set aside the award of civil indemnity stating thus:

> Although the established facts may prove the civil liability of the accused to pay the balance of the purchase price of the sugar (a liability which incidentally she has never denied), considering the above, Our mind cannot "rest easy on the certainty of guilt". We are not convinced that the evidence in this case has proven beyond reasonable doubt that the accused was guilty of fraud or deceit when she issued the checks in question. It

[27] 215 SCRA 534 (1992).

> therefore follows that she cannot be convicted of estafa as charged. All the other issues raised by the parties become irrelevant in the face of this reasonable doubt as to the guilt of the accused, and need not therefore be considered by this Court.
>
> WHEREFORE, the decision of the lower court is hereby REVERSED and SET ASIDE and the accused is hereby ACQUITTED of the charge of estafa on the ground that her guilt has not been proven beyond a reasonable doubt, **without prejudice to any civil liability which may be established in a civil case against her**.[28]

After citing *Pantig* and *Singson*, *Dy* went on to state thus: "However, our jurisprudence on the matter *appears* to have changed *in later years*." (Emphases supplied). The Court then mentioned *People v. Cuyugan* (2002) and *Eusebio-Calderon v. People* (2004), giving the impression that the "divergence" occurred only in 2002 and 2004. In both *Cuyugan* and *Eusebio-Calderon*, the accused while being acquitted of estafa on the ground that the relevant transactions were simply loans were nonetheless ordered in the criminal cases to pay the money they had borrowed.

It is not altogether precise to characterize that the "divergence" from the 1955 *Pantig* ruling took place only in 2002 and 2004. The "divergence" took place much earlier in 1984 with the Court's full-court ruling in *Padilla*. In fact even if we were to narrow down the survey to *estafa* cases, there was the much earlier 1987 case of *Vizconde*. *Padilla* and *Vizconde* pre-date the 1992 *Singson* case.

In fact it is not altogether precise to call this as a divergence. The full-court *Padilla* ruling superseded or obliterated the *Pantig* ruling. The last nail on the coffin of *Pantig* was the issuance of Section 2, Rule 120 of the 1985 Rules of Criminal Procedure which made it clear that the court may award civil damages even in case of an absolute acquittal.

Dy held as follows:

> We hold that the better rule in ascertaining civil liability in estafa cases is that pronounced in *Pantig* and *Singson*. The rulings in these cases are more

[28] *Id.* at 539 (emphasis supplied). The Court's statements appear to be somewhat cryptic, to say the least, and appear to have been driven more by psychological rather than legal considerations. It is quite puzzling why the Court's unease about the accused's guilt should carry over to a similar unease about determining her civil liability considering, as the Court itself puts, that "the established facts may prove the civil liability of the accused to pay the balance of the purchase price of the sugar (a liability which incidentally she has never denied)."

> in accord with the relevant provisions of the Civil Code, and the Rules of Court. They are also logically consistent with this Court's pronouncement in *Manantan*.[29]

The way the court framed the debate, it was *Pantig* and *Singson* on one hand versus *Cuyugan* and *Eusebio-Calderon*, on the other. As earlier discussed, *Pantig* and *Singson* should have been matched up against Padilla, *Vizconde*, *Ligon*, and Section 2, Rule 120 of the 1985 Rules of Criminal Procedure. The odds would then have been clearly in favor of Team *Padilla*.

Moreover, *Pantig* and *Singson* can hardly be held out as poster children for the proposition that civil liability *ex contractu* cannot be awarded in case of acquittal. *Pantig* was decided in 1955. As we have previously discussed, the prevailing law and jurisprudence then was that damages arising out of civil liability may be recovered only in a separate civil action. However *Pantig* no longer represented the controlling case law after the promulgation of the *Padilla* ruling and the passage of Section 2 of Rule 120 of the 1985 Rules of Criminal Procedure.

As to *Singson*, the less than tight reasoning emplo[yed therein is an argument for treating the ruling as *pro hac vice* rather than as a precedent. The setting aside of the award of civil liability, which the decision concedes may very well have been proved by the evidence and which was in fact not disputed by the accused, on a feeling of queasiness or unease ("our mind cannot rest easy on the certainty of guilt") would militate against considering *Singson* as a doctrinal ruling.[30] Moreover a further weakness of *Singson* is that a careful reading of the case would reveal that the acquittal therein was actually relative or based on reasonable doubt. In such a case the court should have inquired on whether there was a preponderance of evidence to prove civil liability *ex delicto* instead of aborting the inquiry due to its unease regarding the accused's guilt.

Manantan pronouncement is only an obiter

Dy also stated that the rulings in *Pantig* and *Singson* are logically consistent with the pronouncement in *Manantan v. Court of Appeals*.[31] The pronouncement is that "[if there is] no *delict*, civil liability *ex delicto* is out of the question, and the civil action, if any, which may be instituted must be based on grounds other than the *delict* complained of."[32] This

[29] Dy v. People, *supra* note 23 at 56-57.
[30] *See* note 27.
[31] 350 SCRA 387 (2001).
[32] *Id*. at 397.

pronouncement was interpreted by *Dy* as holding that the recovery of civil liability may be obtained only in a separate civil action in case of an absolute acquittal.

However, such a pronouncement, aside from being contrary to the prevailing case law and to Section 2 of Rule 120, is merely an *obiter* since the acquittal in *Manantan* was relative and not absolute.[33] In fact in *Manantan*, the Supreme Court upheld the award of civil damages in the criminal case. Furthermore, the statement while providing that the civil action may be instituted in a separate case did not categorically rule out the recovery of the civil liability in the criminal case.

Critical analysis of Dy

Dy first cited the rule that in a criminal action, the action which is fused or deemed instituted with the criminal case is the civil action "for the recovery of civil liability arising from the offense charged" or in other words for the recovery of civil liability *ex delicto*. Hence the Court stated that the civil liability *ex delicto* was extinguished since the acquittal was absolute.

Clearly, there is no crime of *estafa*. There is no proof of the presence of any act or omission constituting criminal fraud. Thus, civil liability *ex delicto* cannot be awarded because there is no act or omission punished by law which can serve as the source of obligation.[34]

However, from this rule, the Court proceeded to extrapolate a holding that "[w]here the civil liability is *ex contractu*, the court hearing the criminal case has no authority to award damages."[35]

There is no cavil that civil liability ***ex delicto*** cannot be awarded in case of an absolute acquittal. However, the holding that the criminal court has no authority to award damages if the civil liability is *ex contractu* is arguable. This holding is clearly at war with the doctrine laid down by the Supreme Court *en banc* in *Padilla* and *Ligon*, and by the First Division in *Vizconde*, not to mention the last paragraph of Section 2, Rule 120 of the Rules of Criminal Procedure.

The Court's reasoning may be restated as follows: The Rules of Court **limits** the mandatory fusion to the civil action for the recovery of civil liability ***ex delicto***. Ergo, in

[33] *Id*. at 399.
[34] Dy v. People, *supra* note 23 at 58.
[35] *Id*. at 42.

case of an absolute acquittal, there can be no recovery of civil liability in the same criminal case because the civil liability *ex delicto* was extinguished while the action to recover civil liability *ex contractu* was not deemed instituted with the criminal action and hence must be recovered in a separate civil action.[36]

While persuasive, the Court's rationale overlooks or disregards the second paragraph of Section 2 of Rule 120. It is a canon of statutory construction that the law must not be read in truncated parts but in relation to the whole law.[37] Section 1(a) of Rule 111, the rule on mandatory fusion, should not be read in isolation but in conjunction with the second paragraph of Section 2 of Rule 120 which provides that even in an absolute acquittal, the court shall make a determination of civil liability in its judgment. As previously pointed out, such civil liability is necessarily based not from crime but from another source, such as contract.

Otherwise put, while the Rules of Criminal Procedure limit the mandatory fusion to an action to recover civil liability *ex delicto*, there is no such limitation with respect to the civil liability that may be awarded by the court in case of an acquittal.

Due process issues

Dy also stated that there was a violation of due process when the civil liability *ex contractu* was awarded in the fused civil action for recovery of civil liability arising from the offense charged. The Court stated that "[a]ctions focused on proving *estafa* is not the proper vehicle to thresh out civil liability arising from a contract" and that "[t]he Due Process Clause of the Constitution dictates that a civil liability arising from a contract must be litigated in a separate civil action."[38]

The Court expounded on the due process issue in this wise:

> In a situation where a court (in a fused action for the enforcement of criminal and civil liability) may validly order an accused-respondent to pay an obligation arising from a contract, a person's right to be notified of the complaint, and the right to have the complaint dismissed if there is no cause of action, are completely defeated. In this event, the accused-respondent is completely unaware of the nature of the liability claimed against him or her at the onset of the case. The accused-respondent will

[36] *Id*. at 39.
[37] Philippine International Trading Corp. v. Commission on Audit, 621 SCRA 461, 469 (2010).
[38] Dy v. People, *supra* note 23 at 59.

> not have read any complaint stating the cause of action of an obligation arising from a contract. **All throughout the trial, the accused-respondent is made to believe that should there be any civil liability awarded against him or her, this liability is rooted from the act or omission constituting the crime**. The accused-respondent is also deprived of the remedy of having the complaint dismissed through a motion to dismiss before trial. In a fused action, the accused-respondent could not have availed of this remedy because he or she was not even given an opportunity to ascertain what cause of action to look for in the initiatory pleading. In such a case, the accused-respondent is blindsided. He or she could not even have prepared the appropriate defenses and evidence to protect his or her interest. This is not the concept of fair play embodied in the Due Process Clause. It is a clear violation of a person's right to due process.[39]

Admittedly the recovery in a criminal case of civil liability ***ex contractu*** when the civil action deemed instituted is one for the recovery of civil liability ***ex delicto*** implicates the due process clause. However it would be another thing to say that it violates the due process clause.

Dy stated thus: "All throughout the trial, the accused-respondent is made to believe that should there be any civil liability awarded against him or her, this liability is rooted from the act or omission constituting the crime."[40] This is not altogether precise. As previously expounded, jurisprudence and the rules provide that in case of *acquittal*, civil liability may be awarded against the accused even if it is derived from an act or omission *not* constituting a crime. As pointed out before, this rule has been ensconced in our remedial law and jurisprudence. An accused who mistakenly believes otherwise has no one to blame but his counsel for misadvising him about the law.

The claimed violation of the due process clause was addressed as early as the *Padilla* case:

> There appear to be no sound reasons to require a separate civil action to still be filed considering that the facts to be proved in the civil case have already been established in the criminal proceedings where the accused was acquitted. **Due process has been accorded the accused**. He was, in fact, exonerated of the crime charged. The constitutional presumption of innocence called for more vigilant efforts on the part of prosecuting

[39] *Id*. at 60-61 (emphasis supplied).
[40] *Ibid*.

> attorneys and defense counsel, a keener awareness by all witnesses of the serious implications of perjury, and a more studied consideration by the judge of the entire records and of applicable statutes and precedents. To require a separate civil action simply because the accused was acquitted would mean needless clogging of court dockets and unnecessary duplication of litigation with all its attendant loss of time, effort, and money on the part of all concerned.[41]

No unfair surprise where the facts from which civil liability is based are logically connected to the offense charged

Certainly, in the civil action for the recovery of civil liability arising from the offense charged, the accused-defendant would be left without certain procedural devices, e.g. a motion to dismiss, which he would have had in an ordinary civil action. But it would not necessarily mean that his right to due process would thereby be violated. It would simply mean that the accused would not have recourse to a procedural device to abort the civil action at the outset but it would not deprive the accused of the opportunity to present countervailing evidence and arguments to negate or defeat the offended party's action to recover civil liability.[42]

Dy states that the accused would be "blindsided" and that "he could not even have prepared the appropriate defenses and evidence to protect his or her interest."[43] This is arguable. There should be no unfair surprise to the accused where there is a logical connection between the fact or facts proved and the offense charged. Such logical connection is established where the fact proved is an element of or forms part of the series of events leading to the commission of the offense charged.[44]

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[41] Padilla v. Court of Appeals, *supra* note 13 at 567 (emphasis supplied).

[42] In fact several procedural rules, e.g., Rule on Summary Procedure, Rule 67 and Rule 70 of the Rules of Court, etc., prohibit the filing of a motion to dismiss.

[43] Dy v. Court of Appeals, *supra* note 23 at 61.

[44] An illustration of when there is no logical connection between the fact proved and the offense charged is *U.S. v. Dionisio*, 35 Phil. 141 (1916), where the accused was charged with *estafa* for not returning a bicycle which he had rented from the offended party. Not only was the accused convicted and ordered to return the bike, he was also ordered to pay the unpaid rental fee to the offended party. The Court set aside the award of unpaid rental fee, stating that "the indebtedness under the rental contract was and is a thing wholly apart from and independent of the crime of estafa committed by the accused." There was no logical connection between the payment of rental to the crime of estafa, since the crime would have been committed whether or not the accused paid the rental, the important fact being the receipt of the bicycle. In such a case, it could well be said that the award of unpaid rental would infringe upon the accused's due process right.
In *Padilla*, while the crime charged was grave coercion, the demolition of the stall and the furniture therein and the carting away of the goods were alleged in the information, thus putting the accused on notice of such facts.

In *Dy*, the receipt of the money by the accused from the offended party is an element of or forms part of the series of events leading to the commission of estafa through misappropriation. There would have been no issue on estafa if the accused did not receive the checks from the offended party Mandy. The accused was surely put on notice that such receipt was an issue which would be tried and determined by the criminal court. In fact the accused admitted that she received the checks but contended that she returned the proceeds to Mandy after cashing the checks. Clearly there was a joinder on this particular issue and thus it would not be quite correct to say that the accused was "blindsided" or that she was "completely unaware of the nature of the liability claimed against … her at the onset of the case."

Padilla, Ligon, & Vizconde still embody the ruling case law

A reading of *Dy* leaves no doubt regarding its intention to expressly overrule or supersede prior doctrine that civil liability not arising from crime may be awarded in the same criminal case in the event of an accused's acquittal.[45]

The doctrinal force of *Dy* (which was promulgated by a division), however would come up against a constitutional roadblock. Section 4(3), Article VIII of the Constitution provides "[t]hat no doctrine or principle of law laid down by the Court in a decision rendered *en banc* or in division may be modified or reversed except by the Court sitting *en banc*." By command of the Constitution, cases where the Supreme Court modifies or reverses a doctrine or principle of law previously laid down either *en banc* or in division must be heard *en banc*.[46]

It is opined that the *Padilla* doctrine, which was reiterated in *Ligon* and *Vizconde*, cannot be reversed or modified except by the Court *en banc*.

III. Conclusion

Dy would roll back the reform instituted by *Padilla* and the 1985 Rules of Criminal Procedure and revert to the previous rule that in case of an absolute acquittal, the civil liability would have to be recovered by the offended party in a separate civil action. The adverse effects of the reversion to the pre-*Padilla* regime are not hard to imagine. Congestion of court dockets would worsen and the glacial pace of litigation would become even slower since offended parties would have to go back to litigate anew to recover the

[45] For instance, *Dy* states that it shall serve as a lodestar to litigants regarding their course of action in recovering civil liability in criminal cases (Dy v. People, *supra* note 23 at 64).

[46] JOAQUIN G. BERNAS, THE 1987 PHILIPPINE CONSTITUTION: A COMPREHENSIVE REVIEWER 334 (2011 ed.).

civil liability. The cost of litigation would increase since facts which may have already have been established by evidence or by admissions have to be proved again by the private complainants.

Dy's holding is contrary to the provisions of the second paragraph of Section 2, Rule 120 of the Rules of Criminal Procedure which expressly allow the recovery of civil liability even if the accused's acquittal was on a finding that "the evidence of the prosecution absolutely failed to prove the guilt of the accused." As we have discussed, such civil liability is necessarily one which does not arise from the offense charged.

Dy insofar as it reverses or modifies previous doctrines laid down by the Supreme Court *en banc* or in division may be challenged on the ground that it is not in accord with Section 4(3), Article VIII of the Constitution. Hopefully soon, the Supreme Court would have the opportunity to render a decision either following or superseding the *Dy* holding, thus ending the uncertainty on this important issue.

A litigator confronted with a judgment denying or not awarding civil liability in case of an absolute acquittal has two remedies. He may appeal from the civil aspect of the judgment and argue based on the considerations set forth in this article. He can also file a separate civil action. These remedies may be availed of simultaneously since the action to enforce civil liability not arising from the crime is an independent civil action.[47] The litigator however has to take into account the statute of limitations in filing the civil action. The reason is that Section 2, Rule 111 of the Rules of Criminal Procedure which provides for the tolling of the prescriptive period is not applicable to an independent civil action.

[47] *See* Article 31, Civil Code. In the 1964 Rules, Article 31 was included in the enumeration of independent civil actions. The deletion of Article 31 from Section 3, Rule 111 of the 1985 Rules of Criminal Procedure did not mean that it is no longer independent of the criminal action. Such deletion was simply because of the semantic consideration that Article 31 does not refer to civil liability *ex delicto* and thus strictly speaking should not have been included in Rule 111 which in the main refers to a civil action to recover civil liability *ex delicto*.

PROTECTING WHAT PROTECTS US:
30 Years of Montreal Protocol on Substances that Deplete the Ozone Layer

Atty. Manuel A. Rodriguez II[1]

"… perhaps the single most successful international "agreement to date has been the Montreal Protocol

-- Kofi Annan, 7th UN Secretary General

THE PROTOCOL

The Montreal Protocol on Substances that Deplete the Ozone Layer (a protocol to the Vienna Convention for the Protection of the Ozone Layer) is an international treaty designed to protect the ozone layer by phasing out the production of numerous substances that are responsible for ozone depletion. It was agreed on 16 September 1987, and entered into force on 1 January 1989, followed by a first meeting in Helsinki, May 1989. Since then, it has undergone eight revisions, namely:

The Protocol stands as one of the most triumphant examples of worldwide collaboration to deal with a foremost international ecological peril.

- 1990 (London)
- 1991 (Nairobi)
- 1992 (Copenhagen)
- 1993 (Bangkok)
- 1995 (Vienna)
- 1997 (Montreal)
- 1998 (Australia)
- 1999 (Beijing), and
- 2016 (Kigali) [adopted but not yet in force][2]

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[2] McGrath, Matt (2016). "Climate Change: Monumental deal to cut HFCs, fastest growing greenhouse gases." bbc.com. October 15, 2016. Available at *http://www.bbc.com/news/science-environment-37665529*

The Protocol includes a unique adjustment provision that enables the Parties to respond quickly to new scientific information and agree to accelerate the reductions required on chemicals already covered by the Protocol. These adjustments are then automatically applicable to all countries that ratified the Protocol. Since its initial adoption, the Montreal Protocol has been adjusted six times. Specifically, the Second, Fourth, Seventh, Ninth, eleventh, and Nineteenth Meetings of the Parties to the Montreal Protocol adopted, in accordance with the procedure laid down in paragraph 9 of Article 2 of the Montreal Protocol, certain adjustments and reductions of production and consumption of the controlled substances listed in the Annexes of the Protocol. These adjustments entered into force, for all the Parties, on 7 March 1991, 23 September 1993, 5 August 1996, 5 June 1998, 28 July 2000, and 14 May 2008 respectively.

The Protocol was ratified by 196 countries including the Philippines who signed in 1998 and ratified it on March 21, 1991. The Montreal Protocol is a legally binding international agreement to gradually reduce and eliminate consumption of ozone depleting substances (ODS).

In addition to adjustments and amendments to the Montreal Protocol, the Parties to the Protocol meet annually and take a variety of decisions aimed at enabling effective implementation of this important legal instrument. Through the 22nd Meeting of the Parties to the Montreal Protocol, the Parties have taken over 720 decisions.[3]

History

In 1973, the chemists Frank Sherwood Rowland and Mario Molina, who were then at the University of California, Irvine, began studying the impacts of CFCs in the Earth's atmosphere. They discovered that CFC molecules were stable enough to remain in the atmosphere until they got up into the middle of the stratosphere where they would finally (after an average of 50–100 years) be broken down by ultraviolet radiation releasing a chlorine atom. Rowland and Molina then proposed that these chlorine atoms might be expected to cause the breakdown of large amounts of ozone (O3) in the stratosphere.[4]

After publishing their pivotal paper in June 1974, Rowland and Molina testified at a hearing before the U.S. House of Representatives in December 1974. As a result, significant funding was made available to study various aspects of the problem and to confirm the

[3] *The Montreal Protocol on Substances that Deplete the Ozone Layer*, Ozone Secretariat, http://ozone.unep.org/en/treaties-and-decisions/montreal-protocol-substances-deplete-ozone-layer?sec_id=343

[4] Roan, Sharon (1989). *Ozone Crisis: The 15-Year Evolution of a Sudden Global Emergency*. New York, John Wiley and Sons

initial findings. In 1976, the U.S. National Academy of Sciences (NAS) released a report that confirmed the scientific credibility of the ozone depletion hypothesis.[5]

Then, in 1985, British Antarctic Survey scientists Joe Farman, Brian Gardiner and Jonathan Shanklin published results of abnormally low ozone concentrations above Halley Bay near the South Pole. They speculated that this was connected to increased levels of CFCs in the atmosphere. It took several other attempts to establish the Antarctic losses as real and significant, especially after NASA had retrieved matching data from its satellite recordings. The impact of these studies, the metaphor 'ozone hole', and the colourful visual representation in a time lapse animation proved shocking enough for negotiators in Montreal to take the issue seriously.[6]

Also in 1985, 20 nations, including most of the major CFC producers, signed the Vienna Convention, which established a framework for negotiating international regulations on ozone-depleting substances. After the discovery of the ozone hole it only took 18 months to reach a binding agreement in Montreal.[7]

The 1985 Vienna Convention for the Protection of the Ozone Layer was the first framework for co-operative activities to protect the ozone layer. Here, parties agreed to co-operate with each other in scientific research to improve the understanding of the atmospheric processes, to share information on ODS production and emissions and to implement preventive measures to control ODS emissions. The Vienna Convention, adopted in March 1985 and signed by 21 states, does not contain legally binding controls or targets.

Upon the discovery of the seasonal "ozone hole" in Antarctica in the 1985, governments recognized the need for stronger measures to respond to the problem of ozone depletion. Thus, the Montreal Protocol on Substances the Deplete the Ozone Layer was signed on September 16, 1987 and entered into force on January 1, 1989. In this international agreement, signed by 188 developed and developing countries to date, committed to phase-out or gradually stop their production and consumption of ozone depleting substances like chlorofluorocarbons or CFCs (CFC-11, 12, 113, 114, and 115) and Halons (1211, 1301, 2402).

[5] Panel on Athmospheric Chemistry of the Committee on Impacts of Stratospheric Change (1976). "Halocarbons: Affects on Stratospheric Ozone.", Washington DC, National Academy of Sciences

[6] Grundmann, Reiner (2001). "Transnational Environmental Policy: Reconstructing Ozone" London, Routledge Studeis in Science, Technology and Society

[7] *Doyle, Jack (October 1991). "DuPont's Disgraceful Deeds: The Environmental Record of E.I. DuPont de Nemour" The Multinational Monitor Vol. 12, Num. 10*

The Montreal Protocol is dynamic; it had several amendments and adjustments. The Protocol was adjusted to accelerate the phase-out schedules in London in 1990, Copenhagen in 1992, Vienna in 1995, Montreal in 1997 and Beijing in 1999. It has been amended to introduce other kinds of control measures and to add new controlled substances to the list:

- 1990 London Amendment included additional CFCs (CFC-13, 111, 112, 211, 212, 213, 214, 215, 216, 217) and two solvents (carbon tetrachloride and methyl chloroform)
- 1992 Copenhagen Amendment added methyl bromide, HBFCs and HCFCs
- 1997 Montreal Amendment finalized the schedules for phasing out methyl bromide
- 1999 Beijing Amendment included bromochloromethane in the list of ODS for phaseout and introduced production controls on HCFCs and controls on trade with non-Parties

Developing countries have a grace period of ten (10) years before they must start their phase-out schedules. The phase-out schedules cover both the production and consumption of the target substances.[8]

Salient Features

The Preamble of the Convention provides that the Parties to the protocol are "to protect the ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it, with the ultimate objective of their elimination on the basis of developments in scientific knowledge, taking into account technical and economic considerations and bearing in mind the developmental need of developing countries…"[9]

Article 2 of the Montreal Protocol provides for the control measures to achieve the objectives of the Montreal Protocol. The Annexes of the Protocol provide for a list of controlled substances and products that contain the said controlled substances. The Montreal Protocol controls the production and consumption of specific chemicals, none of which occur naturally: CFCs, halons, fully Halogenated CFCs (HCFCs), methyl bromide, and similar chemicals, and sets specific targets and a timetable for reduction.[10]

[8] *Phase-out schedules*, Philippine Ozone Desk, Environmental Management Bureau, http://pod.emb.gov.ph/?page_id=87
[9] Preamble, Montreal Protocol
[10] La Vina, Antonio G.M. (2012). "Philippine Law and Ecology Volume I: National Laws and Policies" Quezon City, University of the Philippines

The Protocol originally required parties other than developing countries to freeze consumption and production of CFCs at 1986 levels (the base year), to reduce them by 20% and the an additional 30% by 1999, and to freeze consumption of halons at 1986 levels.[11]

The phasing out of ODS, as provided for in the Montreal Protocol, is meant to protect human health and the environment from the damaging effects of ozone layer depletion. The phase out of ODS takes into account the special situation of developing countries, such as the Philippines.[12]

Article 5 of the Montreal Protocol States that:

> Any party that is a developing country and whose annual calculated level of consumption of the controlled substances in Annex A is less than 0.3 kilograms per capita on the date of the entry into force of the Protocol for it, or any time thereafter until 1 January 1999, shall, in order to meet its basic domestic needs, be entitled to delay for ten years its compliance with the control measures set out in Articles 2A to 2E, provided that any further amendments to the adjustments or Amendment adopted at the Second Meeting of the Parties in London, 29 June 1990, shall apply to the Parties operating under this paragraph after the review provided for in Paragraph 8 of this Article has taken place and shall be based on the conclusions of that review.

MULTILATERAL FUND

The Multilateral Fund for the Implementation of the Montreal Protocol provides funds to help developing countries comply with their obligations under the Protocol to phase out the use of ozone-depleting substances (ODS) at an agreed schedule. ODS are used in refrigeration, foam extrusion, industrial cleaning, fire extinguishing and fumigation. Countries eligible for this assistance are those with an annual per capita consumption of ODS of less than 0.3 kg a year, as defined in Article 5 of the Protocol. They are referred to as Article 5 countries.

The Montreal Protocol was agreed in 1987 after scientists showed that certain man-made substances were contributing to the depletion of the Earth's ozone layer which protects life below from damaging ultraviolet radiation. The Multilateral Fund was established by the London Amendment to the Protocol in 1990.

[11] Id.
[12] Id.

The phase-out of ODS will enable the ozone layer to repair itself.

The Fund was the first financial mechanism to be borne from an international treaty. It embodies the principle agreed at the United Nations Conference on Environment and Development in 1992 that countries have a common but differentiated responsibility to protect and manage the global commons.

In 1986, industrialized countries consumed 86 per cent of the most important ODS, the chlorofluorocarbons (CFCs). They agreed to contribute to the Fund in order to help Article 5 countries achieve the Protocol's goals. Article 5 countries committed themselves to joining the global effort to restore the depleted ozone layer. This global consensus forms the basis of the operation of the Multilateral Fund that confines the liability of the Fund to costs essential to the elimination of the use and production of ODSs. An important aspect of the Fund is that it funds only the additional (the so-called 'incremental') costs incurred in converting to non-ODS technologies.

The Fund is managed by an Executive Committee with an equal representation of seven industrialized and seven Article 5 countries which are elected annually by a Meeting of the Parties. The Committee reports annually to the Meeting of the Parties on its operations.

Financial and technical assistance is provided in the form of grants or concessional loans and is delivered primarily through four 'implementing agencies':

- United Nation Environment Programme (UNEP)
- United Nations Development Programme (UNDP)
- United Nations Industrial Development Organization (UNIDO)
- World Bank

Up to 20 per cent of the contributions of contributing Parties can also be delivered through their bilateral agencies in the form of eligible projects and activities.

The Fund is replenished on a three-year basis by the donors. It Fund provides finance for activities including the closure of ODS production plants and industrial conversion, technical assistance, information dissemination, training and capacity building aimed at phasing out the ODS used in a broad range of sectors.

The Fund Secretariat is based in Montreal, Canada, and comprises a small number of professional and support staff.[13]

STRUCTURE OF THE FUND

The institutional structure of the Multilateral Fund was established at the 1990 Meeting of the Parties to the Montreal Protocol in London. Established as an interim mechanism in 1991, and on a permanent basis in 1993, its structure has not been changed in any important respect since.

- The Multilateral Fund (MLF) operates under the authority of the Parties to the Montreal Protocol.
- An Executive Committee comprising seven developed and seven developing countries oversees Multilateral Fund operations.
- The Fund Secretariat assists the Executive Committee and carries out day to day operations.
- In delivering financial and technical assistance, the MLF works together with implementing agencies: UNDP, UNEP, UNIDO, the World Bank and a number of bilateral agencies.
- The Fund Treasurer is responsible for receiving and administering pledged contributions (cash, promissory notes or bilateral assistance), and disbursing funds to the Fund Secretariat and the implementing agencies based on the directives of the Executive Committee.[14]

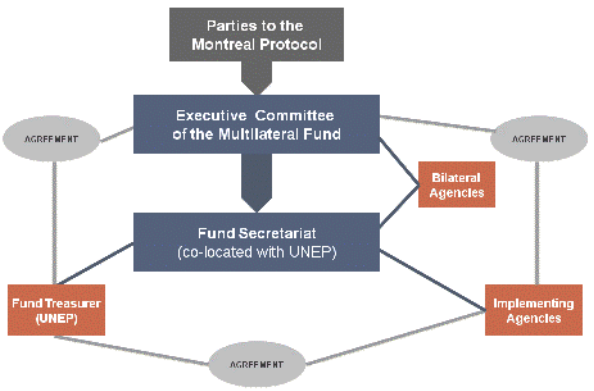

Figure 1

[13] *About the Multilateral Fund, Overview*, Multilateral Fund for the Implementation of the Montreal Protocol, http://www.multilateralfund.org/aboutMLF/default.aspx

[14] Ibid.

THE PHILIPPINE IMPLEMENTATION

The Department of Environment and Natural Resources (DENR), through the Philippine Ozone Desk (POD) of the Environmental Management Bureau (EMB), is the national coordinator for the implementation of the Montreal Protocol in the Philippines.

Through the Multilateral Fund (MLF) and other implementing agencies, the Philippines has been a beneficiary of over US$36 million in investment and non-investment projects in the country since 1991. About 81 per cent of the funding for investment projects was used to purchase consumable equipment and tools that were distributed to manufacturing companies, training, and service institutions, particularly those involved in refrigeration and air conditioning systems. Other industries involve aerosols, fire extinguishers, rigid and flexible foam, and cigarettes.

One particular system used to phase out ODS, as implemented by the DENR's National CFC Phase-out Plan (NCPP) Project, was the voucher system, where qualified refrigeration and air conditioning (particularly mobile) service shops were given fund assistance to acquire equipment they could use for recovering refrigerants. In turn, the recovered refrigerants were turned over to a Collection, Transport and Storage (CTS) facility.

Established in September 2010, the CTS facility's administrators were provided different equipment to identify, collect, store and reclaim refrigerants.

Non-investment projects are focused on the conduct of training, capability building, information campaigns, and technical assistance nationwide.

Simultaneously, the POD continuously conducted information campaign and other activities to drum up awareness on the protection of the ozone layer. Among these are the conduct of lectures in schools, publication of information materials, and free testing of mobile air conditioners (MAC). In 2010, the Philippine Postal Corporation also released a series of postal stamps depicting the Montreal Protection and the ozone layer.

With all these efforts, the Philippines has been able to phase out thousands of ozone depleting potential (ODP) tons in the manufacturing and servicing sectors.[15]

[15] Caparas, Yasmin Roselle O. (2012). "The Philippines and the Montreal Protocol: Protecting our Athmosphere for Generations to Come" denr.gov.ph. October 15, 2012 Available at *http://www.denr.gov.ph/news-and-features/features/997-the-philippines-and-the-montreal-protocol-protecting-the-atmosphere-for-future-generations.htmlLast accessed September 29, 2017*

Philippine Ozone Desk

The Philippine Ozone Desk (POD) of the Department of Environment and Natural Resources (DENR) – Environmental Management Bureau (EMB) is the national coordinator of programs for the implementation of the Montreal Protocol. It is also known as the country's National Ozone Unit (NOU).

The mission of POD is to ensure the country's compliance to the Montreal Protocol and promote the protection of the ozone layer among Filipinos. POD is a government project under the DENR-EMB funded by the Multilateral Fund. There are currently three projects under the POD which are all implemented by the World Bank: the Institutional Strengthening Project (ISP), the National Chlorofluorocarbon Phase-out Project (NCPP), and the National Methyl Bromide Phase-out Strategy (NMBPS). The NMBPS is co-supervised by the Fertilizer and Pesticide Authority (FPA) of the Department of Agriculture.[16]

Republic Act 6969

R.A. 6969 expressly enumerates the functions, powers, and responsibilities of the DENR in relation to the regulation and control of hazardous substances and wastes. Pursuant to one of the Act's general objectives, first among DENR's responsibilities is to keep an updated inventory of chemicals that are presently being manufactured or used, indicating, among others, their existing and possible uses, quality, test, data, names of firms manufacturing or using them, and such other information as the Secretary may consider relevant to the protection of health and the environment. Such responsibility is in consonance with one of the fundamental aims of the law, which is to identify the respective liabilities of persons and entities who shall act in violation of its provisions and to impose upon them specific obligations relative to the management and control of hazardous substances and wastes. Moreover, it shall be within the powers of the DENR to require chemical substances and mixtures that present unreasonable risk or injury to health or to the environment to be tested before they are manufactured or imported for the first time, as well as chemical substances that are already being manufactured, and to evaluate the characteristics of such chemicals after they are tested to determine their toxicity and the extent of their implications on health and the environment.[17]

It shall also be the function of the DENR to conduct inspection of any establishment in which chemicals are manufactured, processed, stored or held before or after their

[16] *Supra* note 8

[17] La Vina, Antonio G.M. (2012). "Philippine Law and Ecology Volume II: International Law and Rules of Procedure" Quezon City, University of the Philippines

commercial distribution and to make recommendations to the proper authorities concerned, upon finding of particular irregularities in the course of the activities in which these establishments are usually engaged. Another power vested in the DENR by the Act is the authority to enter into contracts and make grants for research, development, and monitoring of chemical substances and mixtures, in pursuance of the Act's long-term objective, which is to be able to achieve advancements in research and study for the purpose of saving the environment from possible destruction and to protect the people's health and general welfare. It shall also be well within the DENR's authority to confiscate or impound chemicals found not falling within said acts cannot be enjoined except after the chemicals have been impounded and to monitor and prevent the entry, even in transit, of hazardous wastes and their disposal into the country. Furthermore, it shall be the corollary duty of the DENR to disseminate information and conduct educational awareness campaigns on the effects of chemical substances, mixtures and wastes on health and environment, which is once again in accordance with one of the Act's general objectives, which is to educate the public about the hazards and risks brought by toxic substances.[18]

DENR Administrative Order 8 series of 2004 and Memorandum Circular 2005 – 23

The DENR Administrative Order 8 series of 2004 promulgates the revised Chemical Control Order for Ozone Depleting Substances (ODS). It is the Department's compliance to the policy of the State consistent with the aims of the Protocol. It states in its Section 1:

> It is the policy of the State to regulate, control, restrict or prohibit the import, export, use, manufacture, distribution, processing, storage, possession and sale of Ozone Depleting Substances to abate or minimize their risks and hazards to the stratospheric ozone, public health, and the environment.

On the other hand, Memorandum Circular 2005-23 was issued to implement Registration of Dealers, Re-sellers and Retailers of ODS as mandated by the Administrative Order.

END NOTE

The Earth's ozone layer would have collapsed by 2050 with catastrophic consequences without the Montreal Protocol, studies have shown. There would have been an additional 280 million cases of skin cancer, 1.5 million skin cancer deaths, and 45

[18] Id.

million cataracts in the United States Alone, according to the United States Environmental Protection Agency (EPA).

Further, climate change would have been far worse by mid-century because the chemicals that "eat" ozone are also super-greenhouse gases, thousands of times more potent than CO2. And that would have meant the potential intensity of hurricanes and cyclones would have increased three times, another study found.

The combined impacts of Ultra Violet (UV) levels that could literally burn skin in five minutes and hotter, stormier weather is something no one would want to live in or wish for their grandchildren, said Rolando Garcia, a senior scientist at the National Center for Atmospheric Research (NCAR) in Boulder, Colorado.[19]

The Protocol stands as one of the most triumphant examples of worldwide collaboration to deal with a foremost international ecological peril. Since its negotiation stage in 1987, the State Parties were persistent to adapt the arrangement they established in reaction to scientific evidence and technological developments. The production and consumption of entire groups of harmful ozone-depleting chemicals has been successfully phased out in developed countries, and the same process is now well under way in developing countries.

[19] Leahy, Stephen (2017). "Without the Ozone Treaty You'd Get Sunburned in 5 Minutes." Nationalgeographic.com. September 25, 2017. Available at *http://news.nationalgeographic.com/2017/09/montreal-protocol-ozone-treaty-30-climate-change-hcfs-hfcs/*. Last accessed September 27, 2017

THE FREEDOM TO DISSENT:
Exploring the Value of Opposition Through the Exercise of Free Speech

Josiah David F. Quising[1]

I. INTRODUCTION

Cogitationis poenam nemo meretur. Nobody deserves punishment for his thoughts. The freedom to speak, as much as it to applaud the powerful, is also the freedom to disagree.

The Philippine Constitution prohibits the passing of any law abridging the freedom of speech and expression[2]. However, it does not have to take an act of Congress to curtail its lawful exercise. The Government's unusual sensitivity to criticism can all too well hamper free speech by sowing fear in the ranks of the opposing voices.

To quote U.S. Justice Cardozo in the case of *Palko v. Connecticut*, "[freedom of speech and expression] is the matrix, the indispensable condition, of nearly every other form of freedom.[3]". Muzzling the freedom of speech would be licensing the violations of the other inherent rights of the people. It would be akin to forcing acquiescence.

Voicing out dissent against the government should not be treated as a plea, but rather as an act of sovereignty – from the people to the servants of the people.

II. PROHIBITIONS OF FREE SPEECH

The freedom of speech and expression comes with the prohibition on prior restraint and subsequent punishment; both of which makes sure that the government would not or cannot use its powers to unduly limit the right to speak.

The freedom of speech does not belong to any political color – it belongs to the people by whom the Constitution was written and for whom the right was granted.

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[2] PH. CONST. art.2, §4

[3] Palko v. Connecticut, 302 U.S. 319 (1937)

A. Prior Restraint

Prior restraint refers to official governmental restrictions on the press or other forms of expression in advance of actual publication[4]. The prohibition on prior restraint basically disallows the government from whatever form of censorship or law that requires some form of permission to be had before publication can be made – including licensing or permits, license taxes for the privilege to publish injunctions against publication, and even the closure of the business and printing offices of certain newspapers.[5]

The prohibition on prior restraint is not absolute – at some point, it may be allowed, depending on what it regulates or restraints – whether its *content-neutral* or *content-based*[6]. Content-neutral regulations merely controls the time, place, or manner under well-defined standards; while content-based restraints are based on the subject matter of the speech.[7]

Content-neutral regulations are allowed when there is a "substantial governmental interest", which has a lesser requirement than that which is demanded for content-based restraints to be valid. Content-based regulations are only authorized upon showing, under the strictest scrutiny, that there is a "clear and present danger.[8]"

B. Subsequent Punishment

The law also prohibits restraining the freedom of speech and expression by punishing people after lawfully exercising their right.

The prohibition on subsequent punishment or the freedom from liability subsequent to publication precludes liability for completed publications of views traditionally held innocent[9]. Views are considered "innocent" if they are "truthful, must concern something in which people in general take a healthy interest, and must not endanger some important social end that the government by law protects"[10].

C. Harassment of the Free Press and the Right of Fair Comment

Unjustly curtailing free speech does not have to be through restraints and punishments directly imposed by the government. It can be through actions which

[4] Chavez v. Gonzales, G.R. No. 168338 (2008)
[5] *Id*.
[6] *Supra* note 4
[7] *Id*.
[8] *Supra* note 4
[9] *Id*. at n.53 citing Joaquin G. Bernas, S.J. The 1987 Constitution of the Republic of the Philippines: A Commentary, 225 (2003 ed.).
[10] *Id*.

would otherwise be acceptable if not for the supervening circumstances, resulting into the unlawful harassment of the media – resembling the effects of both prior restraint and subsequent punishment.

In *Babst v. National Intelligence Board*, the petitioner-journalists sought relief from the Court for the actions of the respondent which are, in effect, a form of harassment that amount to "subsequent punishment for lawful publications" and a "system of censorship[11]". In that case, NIB sent letters of invitation to the petitioners for interrogation and proceeded to file libel suits against them[12].

Although the Main Opinion in the case of *Babst* declined to categorically address the actions of NIB for being moot and academic because NIB took back the letters of invitation and cancelled the interrogations[13], the Separate Opinions of the other justices provide guidance as to how the government should be expected to treat the media, especially those critical of its administration.

i. Intimidation through Invitations and Interrogations

Justice Teehankee in his Dissenting Opinion stated that "the 'invitations' and interrogations were violative of the freedoms of speech [and] press…" and that the Court should have the Solicitor General's assurance on record and "commitment" that no further interrogations of journalists would take place, nor any other committee be created for that purpose[14].

Commenting as well on the propriety of the invitations, Justice Abad Santos, in his Dissenting Opinion, stated that such invitations and interrogations by the National Intelligence Board "abridged the freedom to speak and the freedom to publish by intimidation and veiled threats". These actions had "chilling effects" as they were "cloaked by a mantle of pseudo-legality"[15].

In an ordinary setting, invitations and interrogations would have been acceptable. However, considering the overall circumstances such as the place of the interrogation, the position or power of the people inviting, and/or the subject matter being inquired of, actions otherwise innocent can or should be considered as violations of the constitutional right of free speech, if seen as a form of intimidation.

[11] Babst v. National Intelligence Board, G.R. No. L-62992 (1984)
[12] *Id.*
[13] *Supra* note 11
[14] *Id.* (Teehankee, J., dissenting)
[15] *Supra* note 11 (Abad Santos, J., dissenting)

ii. Right of Fair Comment

As for the libel charges, Justice Teehankee cites the 1918 landmark case of *U.S. v. Bustos* where the Philippine Supreme Court, then under U.S. control, affirmed the protected right of fair comment[16]. "Full discussion of public affairs" is necessary for the maintenance of good government and the interest of society[17], regardless of whether such may or may not offend government officials. Public policy, the welfare of society, and the orderly administration of government demands the protection of public opinion[18]. Persons in public office should not be too "thin-skinned" especially on criticisms regarding his official acts[19]. Journalists should be able to write and report freely, without having to be cautious as to the powers of the people they may offend.

Not all speech is protected. Criticisms, though allowed, should not constitute defamation[20]. However, while defamatory imputations are presumed to be malicious, regardless of whether or not it's true[21], an exemption is provided in the Revised Penal Code for "fair and true report[s], made in good faith, without any comments or remarks, of any judicial, legislative or other official proceedings which are not of confidential nature, or of any statement, report or speech delivered in said proceedings, or of any other act performed by public officers in the exercise of their functions"[22]. Criticisms must be done for the common good[23], and should they be done for such, the government is expected to respect the legitimate exercise of the rights of its constituents.

The government should be careful not to respond to opinions that contest the actions of the government with such antagonism that in effect arbitrarily restraints the expression of opinions itself[24]. To quote Justice Holmes in his Dissenting Opinion in Abrams v. U.S. –

> **[T]he ultimate good desired is better reached by free trade in ideas** -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out[25]. (Emphasis supplied)

[16] *Supra* note 14 citing U.S. v. Bustos, 37 Phil. 731
[17] U.S. v. Bustos, 37 Phil. 731
[18] *Id.*
[19] *Supra* note 17
[20] *Id.*
[21] Revised Penal Code, art. 354, ¶2
[22] *Id.*
[23] *Supra* note 17
[24] *See* Abrams v. U.S. 250 U.S. 616, 630 (Holmes, J., dissenting)
[25] *Id.*

The government must refrain from exhibiting actions that create a chilling effect, indirectly silencing lawful communication of dissent. The freedom of speech was granted not as a means to praise those in power, but to give voice to those who are oppressed.

III. DISSENT V. DESTABILIZATION

If airing criticisms against the Government is "destabilization"[26], then the same is well-provided for in our Constitution. Alongside the freedom of speech is the right to peaceably assemble and petition the government for redress of grievances[27]. Nevertheless, the Supreme Court already made the distinction.

In *People v. Perez*, the Court held that "criticisms, no matter how severe … [are] within the range of the liberty of speech, *unless the intention and effect be seditious.*[28]" *(Emphasis supplied)*

The Revised Penal Code provides for the crime of Sedition as:

> Article 139. Sedition; How committed. - The crime of sedition is committed by persons who rise publicly and tumultuously in order to attain by force, intimidation, or by other means outside of legal methods, any of the following objects:
>
> 1. To prevent the promulgation or execution of any law or the holding of any popular election;
> 2. To prevent the National Government, or any provincial or municipal government or any public officer thereof from freely exercising its or his functions, or prevent the execution of any administrative order;
> 3. To inflict any act of hate or revenge upon the person or property of any public officer or employee;
> 4. To commit, for any political or social end, any act of hate or revenge against private persons or any social class; and
> 5. To despoil, for any political or social end, any person, municipality or province, or the National Government (or the Government of the United States), of all its property or any part thereof.

[26] *See Dissent, destabilization are the same*, Philippine Star (October 11, 2017), https://beta.philstar.com/headlines/2017/10/11/1747726/dissent-destabilization-are-same-citizen-national-guard
[27] *Supra* note 2
[28] People v. Perez, 45 Phil. 599 (1923)

While the crime of "inciting to sedition", found in Art.142 of the same Code, can be committed by:

> [A]ny person who should incite others to the accomplishment of any of the acts which constitute sedition by means of speeches…or uttering seditious words… or circulating or publishing scurrilous libels against the Government, or which tend to instigate others to cabal and meet together for unlawful purposes, or which suggest or incite rebellious conspiracies or riots, or which lead or tend to stir up the people against the lawful authorities or to disturb the peace of the community, the safety of the Government, or who shall knowingly conceal such evil practices[29].

Unless the opposition commits these acts in voicing their concerns against the administration, criticisms should not be labeled as "destabilization".

In *Perez*, the Court found the respondent guilty of sedition because the words he used produced a "state of feeling incompatible with a disposition to remain loyal to the Government and obedient to the laws"[30]. It should follow that speaking up against the President's tirades against human rights[31] while empowering the police to "shoot to kill" criminals and encouraging private citizens to "do it [themselves], if [they] have a gun"[32], falls well-within the rights granted by the Constitution.

Political discussions opposed to the present administration are protected by the freedom of speech and expression and should not be deemed as subversive activities or as evidence of membership in a subversive organization[33].

IV. SILENCING THE OPPOSITION

The powers of the government were separated and distributed into three independent and equal branches – the executive, legislative, and judiciary, in an effort to form a system of "check and balances" and a "government of laws, not of men"[34]. Simply put, the Legislative was to create laws, the Judiciary to interpret them, and the Executive

[29] Revised Penal Code, art. 142
[30] *Supra* note 28
[31] *Philippines: Duterte Threatens Human Rights Community*, Human Rights Watch, (August 17, 2017) https://www.hrw.org/news/2017/08/17/philippines-duterte-threatens-human-rights-community
[32] Katerina Francisco, *Shoot to kill? Duterte's statements on killing drug users*, Rappler (October 5, 2016), https://www.rappler.com/newsbreak/iq/148295-philippines-president-rodrigo-duterte-statements-shoot-to-kill-drug-war
[33] Salonga v. Hon. Paño, G.R. 59524 (1985)
[34] The Government of the Philippine Islands v. Spinger, G.R. No. 26979 (1927), (Johnson, J., concurring)

to implement them. These limitations to the powers of each branch of government are essential in establishing a democratic government[35]. However, lines start to blur when politics come into place.

A. Closing Congress

Political persecution of government critics and anti-administration parties or groups is not new, nor is it endemic to Philippine politics. At the other side of the globe, the Venezuelan Supreme Court, which allegedly remains to be loyal to the government[36], ruled to dissolve the opposition-led National Parliament, citing "irregularities" with the elections as justification[37] and that the legislative body was "in contempt of its rulings"[38]. The historic decision by Venezuela's top judicial body came co-incidentally after the National Parliament went on with a series of clashes with the President[39], which included rejecting President Maduro's emergency powers and blocking the president from pursuing oil ventures without the Parliament's approval, both of which were eventually reversed by the Supreme Court.[40]

Shutting down the Legislature in pursuit of rallying political policies is not unheard of back in our own shores. Back in 1972, the Philippine Congress was closed – padlocked, even – shortly after the declaration of Martial Law[41]. The power to direct the operation of the entire Government was then transferred by President Marcos to himself through General Order No. 1[42]. The Marcos Administration then began to arrest its political opponents and critics.[43]

Although not intended to silence the opposition, it is to be noted that under the Freedom Constitution[44], President Corazon Aquino also abolished then Batasang

[35] *See id*, quoting George Washington
[36] Rafael Romo, *Venezuela's high court dissolves National Assembly* , CNN (March 30, 2017), http://edition.cnn.com/2017/03/30/americas/venezuela-dissolves-national-assembly/
[37] Nicholas Casey & Patricia Torres, *Venezuela Muzzles Legislature, Moving Closer to One-Man Rule* (March 30, 2017), https://www.nytimes.com/2017/03/30/world/americas/venezuelas-supreme-court-takes-power-from-legislature.html
[38] Aria Bendix, U.S. Sanctions Venezuela's Supreme Court, The Atlantic (May 19 , 2017) https://www.theatlantic.com/news/archive/2017/05/us-sanctions-venezuelas-supreme-court-judges/527358/
[39] *Supra* note 37
[40] *Id*
[41] *The History of the Senate of the Philippines*, Official Gazette, http://www.officialgazette.gov.ph/featured/the-history-of-the-senate-of-the-philippines/
[42] Gen. Order No. 1 (1972) available at http://www.officialgazette.gov.ph/1972/09/22/general-order-no-1-s-1972/
[43] *Supra* note 41
[44] Proclamation No. 3 (1986), available at http://www.officialgazette.gov.ph/1986/03/25/proclamation-no-3-s-1986-2/

Pambansa (National Legislature) under a "revolutionary government[45]", which gave the President legislative powers until a new Constitution was established.

In recent events, President Duterte also threatened to close Congress to establish a revolutionary government, even before he won the 2016 Presidential Elections, as the "only way" to "fix the government" and "stop criminality and corruption", citing former President Cory Aquino as an example[46]. Threats to dissolve Congress continued to be the President's answer to an "abusive" Constitutional Assembly (if the drafting of the Federalist Constitution was done "improperly"[47]) and even to threats of impeachment[48].

Meanwhile, back in the House of Representatives, the Lower House seems to sing in a similar tune when confronting opposition.

B. Judicial Independence and Free Speech

The power of the Court to rule on actions of the other branches of the government was granted primarily to check on such actions[49]. The Court was not created to function as a glorified rubber stamp. Consequently, at times, it gains the ire of those in power when it reminds them that it's not. However, differences or disagreements in opinion should not be used as an excuse to harass the Judiciary.

i. From Limiting Judicial Reach to Dissolving Courts

"Respect for the judiciary cannot be had if persons are privileged to scorn a resolution of the court adopted for good purposes …."[50] Although the freedom of speech is a constitutionally protected right, the independence of the judiciary should not be sacrificed in its exercise.

The freedom of speech is expected to work hand in hand with an independent judiciary. Free speech presupposes an independent judiciary while, likewise, the

[45] *Philippine Congress History*, House of Representatives, http://www.congress.gov.ph/about/?about=history

[46] Niña P. Calleja, *Duterte eyes revolutionary government*, Philippine Daily Inquirer (August 27, 2015), http://newsinfo.inquirer.net/716664/duterte-eyes-revolutionary-government; *But cf.* In Re Letter of Associate Justice Puno, 210 SCRA 589, 598, the Court emphasized that the revolutionary government of former President Corazon Aquino was an exercise of the people's "inherent right to revolution".

[47] Pia Ranada, *Duterte: I'll close Congress if Con-Ass ruins Charter*, Rappler (August 4, 2016), https://www.rappler.com/nation/141913-duterte-close-down-congress-con-ass

[48] Doris Bigornia, *Duterte to shut down Congress if threatened with impeachment*, ABS-CBN (April 26,, 2016), http://news.abs-cbn.com/halalan2016/nation/04/29/16/duterte-to-shut-down-congress-if-threatened-with-impeachment

[49] *See* PH CONST. art. VIII,

[50] *Supra* note 54

independence of the judiciary is assured by free speech.[51]

Judicial independence is the principle that judges "can freely exercise their mandate to resolve justiciable disputes", and that the judicial branch, as a whole, is "free of restraints and influence from the other branches", save those imposed by the Constitution[52]. An independent judiciary secures that the right to free speech will be "vindicated" should it be necessary[53]. Nevertheless, such a right must be exercised in a way that respect for the judiciary will remain[54]. After all, free speech and judicial independence are of equal footing; both are "indispensable to a free society"[55].

President Benigno Aquino III holds the infamy of being the first "sitting President [who] has publicly attacked a unanimous decision of the Supreme Court as legally wrong"[56]. When the Supreme Court ruled to declare the Disbursement Acceleration Program (DAP) as unconstitutional, former President Aquino not only then assailed the decision but went on to state that judicial reach should "*perhaps*" be limited[57]. Setting up a rather strong precedent, the current administration seems to take a lot from this incident.

Against a lower court, but apparently with more vigor, Davao del Norte 1st District Representative and current Speaker of the House Pantaleon Alvarez described the Court of Appeals in an interview as "*idiot*", "*rotten*", and "*crazy*" when the appellate court dared to order the provisional release of the Ilocos Norte officials detained by the Lower House[58]. The House Committee on Good Government and Public Accountability, in rejecting the order of the appellate court, also then responded with a show-cause order, directing the justices to explain why they should not be cited in contempt[59]. Speaker Alvarez also then proceeded to threaten the dissolution of the Court of Appeals, being merely a "creation of Congress"[60].

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[51] *See* In Re: Emiliano Jurado, A. M. No. 93-2-037 SC, citing Pennekamp v. Florida, 328 U.S. 331 at 354-356 (1946) (Frankfurter, J., concurring)

[52] Re: COA Opinion on the Computation of the Appraised Value of the Properties Purchased by the Retired Chief/Associate Justices of the Supreme Court, A.M. No. 11-7-10-SC (2012)

[53] *Supra* note 51

[54] *Cf.* In Re Severino Lozano and Anastacio Quevedo, 54 Phil. 801 at 807 [1930]

[55] *Id.*

[56] Aries Rufo, *Aquino's tirade vs SC seen to backfire*, Rappler (July 17, 2014), https://www.rappler.com/newsbreak/63532-aquino-tirade-sc-backfire

[57] Kristine Angeli Sabillo, *Aquino says SC too meddlesome*, Philippine Daily Inquirer (August 28, 2014) http://newsinfo.inquirer.net/633390/aquino-says-sc-too-meddlesome

[58] DJ Yap, *Speaker Alvarez threatens to dissolve Court of Appeals*, Philippine Daily Inquirer (June 16, 2017), http://newsinfo.inquirer.net/906088/speaker-alvarez-threatens-to-dissolve-court-of-appeals

[59] Llanesca T. Panti, *House to CA: Explain 'Ilocos 6' release order*, The Manila Times (June 22, 2017), http://www.manilatimes.net/house-ca-explain-ilocos-6-release-order/334307/

[60] *Supra* note 58

The behavior of Speaker Alvarez seemingly harks back to a relatively similar incident when the late Senator Miriam Defensor-Santiago called the Supreme Court a "Supreme Court of idiots" and that "[she] spit[s] on the face of Chief Justice Artemio Panganiban and his cohorts …"[61]. The Court, in considering that Senator Santiago was delivering her privileged speech and therefore under parliamentary immunity, dismissed the complaint for her disbarment$_{62}$. Nevertheless, the Court had to reiterate that "parliamentary immunity must not be allowed to be used as a vehicle to ridicule, demean, and destroy the reputation of the Court and its magistrates …." and that as a member of the bar, she was "duty-bound to uphold the dignity and authority of [the] Court and to maintain respect due its members"[63].

It must be noted, however, that in the clash between the Lower House and the Court of Appeals, the Speaker, who is also a Member of the Bar, was not speaking under parliamentary immunity when he called the justices said insults and when he threatened its dissolution, which he claims can be done "anytime"[64].

The Court of Appeals, just like the Supreme Court and any other court of justice, should be able to exercise its duties free from threats of arrest[65] or dissolution. The law provides legal remedies that everyone can avail of, should they find the decision of any court be contrary to their opinion. Public officers should not be seen as to hammer down heavily against disagreeing judges and their judicial decisions.

Unfortunately, a magistrate's opinion is not on the same pedestal when such is voiced outside the court.

ii. Judicial Free Speech

Like any other citizen of the country, members of the judiciary are entitled to the freedom of speech and expression. Such was affirmed by the *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders[66], as well as the New Code of Judicial

[61] Pobre v. Sen. Santiago, A.C. No. 7399 (2009)
[62] *Id*
[63] *Id*
[64] *Supra* note 58
[65] *See* Marc Jayson Cayabyab, *House won't hesitate to order arrest of 3 CA justices over Ilocos Six issue,* Philippine Daily Inquirer (July 2, 2017), http://newsinfo.inquirer.net/910385/house-wont-hesitate-to-order-arrest-of-3-ca-justices-over-ilocos-six-issue
[66] *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1985) and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, ¶8

Conduct[67]. This freedom, of course, is expected to be exercised with propriety, in accordance with the Code of Judicial Conduct.

Among other accusations, the Chief Justice is currently being impeached over several of her public statements[68], allegedly for betrayal of public trust, namely:

a. For her "strongly-worded but misplaced reply" to the President regarding the judges named on Duterte's drug list[69].

b. For her commencement address "attacking" the imposition of Martial Law during the Marcos Regime while the case concerning the Martial Law in Mindanao imposed by President Duterte was still being heard by the Supreme Court[70].

c. For the issuance of a Joint Statement with the Presiding Justice of the Court of Appeals, Hon. Andres Reyes, reminding the House of Representatives that, instead of citing the justices in contempt, the House, should it disagree with the Court of Appeals, had other speedy, legal remedies, such as an appeal, which are consistent with the separation of powers[71].

"Betrayal of public trust" was added as a new ground for impeachment in the 1987 Constitution and was subsequently defined by the Commission as "acts which are just short of being criminal but constitute gross faithlessness against public trust, tyrannical abuse of power, inexcusable negligence of duty, favoritism, and gross exercise of discretionary powers"[72].

The New Code of Judicial Conduct expressly allows judges to exercise their freedom of expression under the condition that such exercise be "in a manner of as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary"[73].

[67] New Code of Judicial Conduct for the Philippine Judiciary, Canon 4, §6
[68] In the Matter of the Impeachment of Maria Lourdes P. A. Sereno as Chief Justice of the Supreme Court of the Philippines available at http://media.interaksyon.com/wp-content/uploads/2017/08/IMP4.pdf
[69] *Id* at ¶7.2
[70] *Supra* note 68 at ¶7.4
[71] *Id* at ¶7.5; *See* JV Arcena, *SC, CA chiefs urge House to take back show-cause order vs justices* (June 21, 2017), http://www.interaksyon.com/sc-ca-chiefs-urge-house-to-take-back-show-cause-order-vs-justices/
[72] *Gonzales v. Office of the President*, G.R. No. 196231 (2012) citing Records of the 1986 Constitutional Commission, Vol. II, 286
[73] *Supra* note 67

Public statements by judges and justices, though they may be conflicting with the interests of the current administration, should not be quickly viewed as a "betrayal of public trust" unless the same goes against their duties.

The statements made by the Chief Justice should not be deemed as a betrayal of public trust as they fall well-within the bounds of the law.

The "narco-list" bearing names of judges can be indeed detrimental to the functions of the judiciary, especially because a judge's reputation is a crucial factor considered by the public when decisions are issued from his bench[74]; adding the fact that the country has been suffering from cases of extra-judicial killings where the President himself calls for the death of those involved in drug trade in the hands of the masses[75]. The letter nevertheless requested that a report, even an informal one, be submitted to the Supreme Court as it has the duty to administer supervision and discipline over its members[76].

The speech condemning former President Marcos' Martial Law should also not be seen as "partiality" or an act "influencing the outcome of litigation". The speech focuses primarily on the late dictator's 1972 Martial Law and the human rights violations of that regime while emphasizing that the outcome and nature of the 2017 Martial Law in Mindanao will depend on the collective actions of all the branches of government and their departments, including that of Congress and the Supreme Court[77].

The statement issued in defense of the Court of Appeals Justices should also not be considered as a "betrayal of public trust". Judges are expected to uphold the independence of the judiciary as it is a "prerequisite to the rule of law and the fundamental guarantee of a fair trial"[78] and is tasked to "encourage and uphold safeguards for the discharge of judicial duties[79]".

Comparatively, the propriety of the protest of 10 Supreme Court Justices alongside members of the Philippine Judges Association against Chief Justice Sereno

[74] *See* Tom Ginsburg & Nuno Garoupa, "Reputation, Information and the Organization of the Judiciary," 4 Journal of Comparative Law 228 (2009)

[75] Sara Isabelle Pacia, *Story in numbers war on drugs*, Philippine Daily Inquirer (October 16, 2016), http://newsinfo.inquirer.net/825678/story-in-numbers-war-on-drugs

[76] *FULL TEXT: Sereno's letter to President Duterte*, Rappler (August 8. 2016), https://www.rappler.com/nation/142329-full-text-sereno-letter-duterte-judges; See PH. CONSTI. art. VIII, §6, §11

[77] *FULL TEXT: CJ SerenoL 'These are times when everything that can be shaken is being shaken'*, Philippine Daily Inquirer (May 26, 2017), http://newsinfo.inquirer.net/899852/full-text-cj-sereno-these-are-times-when-everything-that-can-be-shaken-is-being-shaken

[78] *Supra* note 67 at Canon 1

[79] *Id* at §7

should be questioned[80]. The New Code of Judicial Conduct explicitly states that "[j]udges shall refrain from influencing in any manner the outcome of litigation or dispute pending before another court[81]" and that they "shall not knowingly, while a proceeding is before them make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process" nor make "any comment in public or otherwise that might affect the fair trial of any person." Considering that there is a *quo warranto* petition filed at the Supreme Court against the Chief Justice[82] and an impending impeachment trial in the Senate[83], the participation of the justices and judges in said rally goes squarely against required judicial conduct, specifically that of independence and impartiality.

The Court has neither the sword nor the purse. To quote U.S. Founding Father Alexander Hamilton – "the judiciary … [has] neither force nor will, but merely judgment"[84]. The weakest branch of the government should not be unduly "picked on" for exercising its constitutional duties, regardless of who it favors in its judgments and opinions in and out of court as long as it is within bounds of the law.

C. Opposing a Supermajority

When the winds changed, coats turned in the Philippine political jungle. The house of cards built by then ruling Liberal Party crumbled with the loss of its flagship presidential candidate. Lawmakers scrambled to switch to the President's political party – Partido Demokratiko Pilipino-Lakas ng Bayan ("PDP-Laban") or form coalitions with such, creating what would be called a "supermajority"[85].

Primal instincts for survival and Machiavellian ambitions of power seemed to pull the strings of our lawmen in Congress. Offices and Committee Chairmanships are more than enough leverage to swing political aspirants into a new a color. Of course, everything comes with a price.

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[80] Marlon Ramos, *10 SC justices join court employees in red protest vs Sereno*, Philippine Daily Inquirer (March 6, 2018), http://newsinfo.inquirer.net/973083/10-sc-justices-join-court-employees-in-red-protest-vs-sereno

[81] *Supra* note 67 at Canon 1, §3; Canon 3, §4.

[82] *READ: Solgen quo warranto petition vs Chief Justice Sereno*, ABS-CBN (March 6, 2018), http://news.abs-cbn.com/focus/03/06/18/read-solgen-quo-warranto-petition-vs-chief-justice-sereno

[83] *Sereno goes on leave, gets ready for impeachment trial*, Philippine Daily Inquirer (February 28, 2018), http://newsinfo.inquirer.net/971863/sereno-goes-on-leave-gets-ready-for-impeachment-trial

[84] Alexander Hamilton, '*The Federalist: No. 78*', http://avalon.law.yale.edu/18th_century/fed78.asp

[85] Gil C. Cabacungan, *From 3 to 300, PDP-Laban forms 'supermajority' in House*, Philippine Daily Inquirer (May 26, 2016), http://newsinfo.inquirer.net/787547/from-3-to-300-pdp-laban-forms-supermajority-in-house

The Rules of the House of Representatives, as adopted by the 17th Congress, allows any office or committee chairmanship to be declared "vacant" by a majority vote of the Members in case of vacancy for officers[86] and an affirmation of a motion by the Majority or Minority Leader in cases of vacancies in committees[87] and that is without any specific qualification or consideration. Such leniency in the Rules allows officers to be replaced at whim.

Opposing the will of the Speaker of the House from the ruling party proved to be a difficult feat when the controversial Death Penalty bill went into voting. Leaders of the House of Representatives that exercised their prerogative when they rejected the bill were quickly removed from their offices and chairmanships[88]. Although vacancy was affirmed by the majority of the Members of Congress, it is to be noted that the removal from leadership positions were, more or less, "promised" by the Speaker for those that would reject the bill even before it was put into voting[89].

The power and influence of PDP-Laban in Congress against those that are critical of the administration also shone in the drafting of the General Appropriations Act for 2018. As early as August 7, 2017, during the budget briefing for Commission on Human Rights (CHR), Speaker Alvarez already expressed plans to defund the Commission that has been one of the targets of the President's tirades[90]. Rallying in support of the President in a seeming act of vindictiveness against one of his loud critics, the House voted 199-32 in favor of slashing CHR's budget down to one-thousand pesos. In his August 7 statement during the budget briefing, Speaker Alvarez himself stated that he does not see any reason fund the Commission as it was "always" critical of the State[91].

The Commission on Human Rights is an independent office created by no less than the Constitution itself[92] and put into effectivity by EO No. 163 by former President Corazon Aquino[93]. One of its primary functions is to investigate all forms of human rights

[86] Rules of the House of Representatives, *16th Congress, as adopted by the 17th Congress*, Rule III, §13
[87] *Id* at Rule IX, §31
[88] Keith A. Calayag, *Arroyo, 10 House leaders who opposed death penalty face ax*, Sun Star (March 15, 2017), http://www.sunstar.com.ph/manila/local-news/2017/03/15/arroyo-10-house-leaders-who-opposed-death-penalty-face-ax-531139
[89] *House Speaker warned against punishing lawmakers who opposed death penalty*, ABS-CBN News (March 14, 2017), http://news.abs-cbn.com/news/03/13/17/house-speaker-warned-against-punishing-lawmakers-who-opposed-death-penalty
[90] Jodesz Gavilan, *Want bigger CHR budget? Alvarez says Gascon should resign*, Rappler (September 12, 2017), https://www.rappler.com/newsbreak/inside-track/181966-chr-bigger-2018-budget-chito-gascon-resign-pantaleon-alvarez
[91] *Id*
[92] PH. CONST. art. XIII, §17
[93] Exec. Order No. 163 (1987)

violations involving civil and political rights[94], specifically those committed by "officers or agents of the national government or persons acting in their place or stead or under their orders, express or implied"[95]. Naturally, the Commission will voice out its concern against speeches of the President that embolden human rights violations and the continuing increase in extrajudicial killings[96]. The President did not take lightly the efforts of the CHR to fulfill its duty as part of the system of check and balance in governance and proceeded to attack CHR Chairperson Gascon in a series of tirades[97]. Speaker Alvarez, in support of the President, then held CHR's budget hostage, stating that the House will restore the Commission's budget into the proper amount if Gascon resigns[98]. Thankfully, the House restored the budget to its proposed amount after heavily criticized by the masses and after Gascon held a meeting with Alvarez[99].

The Lower House acting as an effectively unanimous body, repeatedly echoing the Speaker and the President is detrimental to Philippine democracy. The House of Representatives represent the Filipino people and should act accordingly – not as agents of the Speaker but as an independent, individual voice of the region or people group that voted for them. Likewise, the President is not the avatar of the Filipino people; consequently, members of the Congress should look at the interests of all the Filipinos they represent, rather than the will of one Filipino that happens to sit in Malacañang.

Opposition should not be treated as a hurdle but rather as a stepping stone, raising the discourse for the interest of all Filipinos to find the common and greater good – to achieve an effective democracy. No branch of government, political party, or office holds the monopoly of power even under the guise of national interest or prosperity. Check and balances were embedded in our Constitution to prevent abuse for even the purest of motives can be corrupted if left uncontested.

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[94] *Id* at §3(1)

[95] Exec. Order No. 8, §4(a) (1986); *see generally* note 93 at §4, ¶1

[96] Jaymee T. Gamil, *Whether it's PDEA or PNP, impunity still worries CHR*, Philippine Daily Inquirer (November 25, 2017), http://newsinfo.inquirer.net/947485/philippine-news-updates-war-on-drugs-commission-on-human-rights-philippine-drug-enforcement-agence-pdea; *see also CHR concerned over President Duterte's Remarks Against UN Special Rapporteur, Human Rights Defenders (August 31, 2017)* http://chr.gov.ph/chr-concerned-over-president-dutertes-remarks-against-un-special-rapporteur-human-rights-defenders/

[97] Trisha Macas, *Duterte to CHR chair Gascon: 'Di ko alam kung bakla ka … sampalin talaga kita'*, GMA News (November 21, 2017) http://www.gmanetwork.com/news/news/nation/634002/duterte-to-chr-chair-gascon-di-ko-alam-kung-bakla-ka-sampalin-talaga-kita/story/

[98] *Supra* note 90

[99] Bea Cupin, *CHR thanks House for 'open minds, hearts' after budget restored*, Rappler (September 20, 2017), https://www.rappler.com/nation/182837-gascon-reaction-chr-budget-2018-restoration-house

V. HOW FREE IS PHILIPPINE PRESS FREEDOM?

Press freedom is a preferred right, and so by such, all forms of media are afforded special protection.[100] It is the liberty to discuss any matter of public interest publicly and truthfully without censorship and punishment[101].

U.S. Senator John McCain once said that dictators "get started by suppressing free press"[102]. This speaks truth for Philippine history where President Marcos, through Letter of Instruction No. 1, seized the assets of ABS-CBN, Channel 5, and various radio stations one week into declaring Martial Law.[103]

Recently, the President seems to echo the late dictator in dealing with media critical of his administration, even without the imposition of Martial Law. He warned them of "karma" should they continue their "unfair reporting"[104].

A. Indirect Harassment of the Press

Harassment of the free press comes in different shapes and sizes. In the case of *Babst v. National Intelligence Board*, this was seen in "invitations" and interrogations and nuisance libel suits against journalists[105]. Politicians since then became more subtle and creative.

Rappler, a news website known to be a strong critic of the President, lost its license to do business when the Securities and Exchange Commission found them not compliant with the 100% Filipino ownership required by the Constitution for media franchises[106]. Although the issue may be deemed as that of foreign ownership rather than press freedom, the coincidence is unsettling as the President accused Rappler of being "fully owned by Americans[107]" months before any investigation has taken place. The Solicitor General was also the one that prompted the SEC to look into "any possible contravention of the strict

[100] *Supra* note 11 (Fernando, J., concurring)
[101] Gonzales v. COMELEC, 27 SCRA 835
[102] Reuters Staff, *Suppressing free press is 'how dictators get started': Senator McCain*, Reuters (February 19. 2017), https://www.reuters.com/article/us-usa-trump-mccain/suppressing-free-press-is-how-dictators-get-started-senator-mccain-idUSKBN15Y07R
[103] *Breaking the News: Silencing the Media Under Martial Law*, Martial Law Museum, https://martiallawmuseum.ph/magaral/breaking-the-news-silencing-the-media-under-martial-law/
[104] Pia Ranada, *Duterte tells 'rude' media: Beware 'karma'*, Rappler (March 30, 2017), https://www.rappler.com/nation/165663-duterte-media-inquirer-abs-cbn-karma
[105] *Supra* note 14
[106] CNN Philippines Staff, *SEC cancels Rappler's license to do business*, CNN Philippines (January 16, 2018), http://cnnphilippines.com/news/2018/01/15/sec-revokes-rappler-license-to-operate.html
[107] Pia Ranada, *Duterte claims Rappler 'fully owned by Americans'*, Rappler (July 24, 2017), https://www.rappler.com/nation/176565-sona-2017-duterte-rappler-ownership

requirements of the 1987 Constitution"[108]. The President continued to accuse the news company of "peddling" fake news[109] and accepting funds from the CIA[110]. These random accusations of the President may make sense when taken into consideration with his own statement that he planted evidence and intrigues when he was a prosecutor [111].

Even the decades-old Philippine Daily Inquirer (PDI) did not escape the tirades of the President. The newspaper company also happened to be critical of the administration[112], and was famous for the "*Pieta*-like" front page photo of a woman cradling her husband extra-judicially killed by vigilantes[113]. The President then proceeded to accuse PDI of "owing" the government PHP8 Billion in taxes and threatened to ask people to "occupy" a property owned by a company controlled by the Rufinos and Prietos – then owners of PDI[114] and to sue them for "economic sabotage"[115]. The battle ended with the Prietos selling their majority shares of stock to Ramon Ang[116] – Duterte's good friend and political financier[117].

B. The Limited Freedom of the Broadcast Media

ABS-CBN also caught the ire of the President for "unfair coverage"[118] and for allegedly failing to air one of his political campaign ads[119]. The President then threatened

[108] Trisha Macas, *SolGen prompted probe of Rappler's alleged violations of constitution on foreign ownership – SEC*, GMA News (January 15, 2018), http://www.gmanetwork.com/news/news/nation/639734/solgen-prompted-probe-of-rappler-s-alleged-violations-of-constitution-on-foreign-ownership-sec/story/

[109] Dharel Placido, *Duterte slams Rappler anew, says it peddles fake news*, ABS-CBN News (January 16, 2018), http://news.abs-cbn.com/news/01/16/18/duterte-slams-rappler-anew-says-it-peddles-fake-news

[110] Reuters Staff, Philippines' *Duterte suggests news site rappler linked to U.S. spies*, Reuters (February 22, 2018), https://www.reuters.com/article/us-philippines-media/philippines-duterte-suggests-news-site-rappler-linked-to-u-s-spies-idUSKCN1G61C1

[111] John Nery, Duterte: '*We planted evidence… (and) the intrigues*', Philippine Daily Inquirer (August 21, 2016), http://newsinfo.inquirer.net/808126/duterte-we-planted-evidence-we-first-planted-the-intrigues

[112] Leila B. Salaverria, *Inquirer reacts to Duterte's accusation of 'slanted' reports*, Philippine Daily Inquirer (March 30, 2017), http://newsinfo.inquirer.net/885141/inquirer-reacts-to-dutertes-accusation-of-slanted-reports

[113] Marc Jayson Cayabyab, *Duterte hits 'melodramatic' Inquirer front page photo*, Philippine Daily Inquirer (July 25, 2016), http://newsinfo.inquirer.net/799260/duterte-on-photo-of-wife-cradling-slain-drug-pusher-nagda-dramahan-tayo

[114] Bea Cupin, *Duterte threatens 'expose' vs Inquirer,* Rappler (July 1, 2017), https://www.rappler.com/nation/174445-duterte-prieto-inquirer-mile-long

[115] Pia Ranada, *Duterte wants to sue Prietos, Rufinos for 'economic sabotage'*, Rappler (August 2, 2017), https://www.rappler.com/nation/177527-duterte-wants-sue-prietos-rufinos-economic-sabotage

[116] *Ramon Ang to buy majority stake in Inquirer*, ABS-CBN News, http://news.abs-cbn.com/business/07/17/17/ramon-ang-to-buy-majority-stake-in-inquirer

[117] Nestor Corrales, *Duterte admits Ramon Ang was one o his campaign finaciers*, Philippine Daily Inquirer (December 21, 2016), http://newsinfo.inquirer.net/855434/duterte-admits-ramon-ang-was-one-of-his-campaign-financiers

[118] Audrey Moralla, *Duterte blasts media organizations for 'unfair, twisted' coverage*, Philippine Star (March 30, 2017), https://www.philstar.com/headlines/2017/03/30/1684331/duterte-blasts-media-organizations-unfair-twisted-coverage

[119] Duterte says will block ABS-CBN franchise renewal, http://news.abs-cbn.com/news/04/27/17/duterte-says-will-block-abs-cbn-franchise-renewal

to block the renewal of the network's franchise license[120] and file multiple estafa charges against it[121].

While broadcasting networks are afforded "lesser freedom" than its counterparts in newspaper and print[122], they nevertheless deserve special protection[123].

The Supreme Court justifies the limitations in broadcast media by distinguishing the same from print – (a) the scarcity of frequencies (airwaves); (b) the "pervasiveness" of broadcasting as a medium; (c) and its unique accessibility children[124].

Nevertheless, the Court emphasized that the "clear and present danger" test still applies for "content-based" regulations on broadcast media[125]. In the case of *Eastern Broadcasting v. Dans, Jr.* the Court held that the primary requirements in administrative proceedings should be followed before a broadcast station be closed or its operations curtailed[126].

Unlike other forms of media, broadcasting networks need to apply for a license. The Court explained that airwave frequencies have to be allocated among qualified users[127] and must be regulated to avoid rival broadcasters in sabotaging the use by others of the airwaves[128]. The requirement is provided for in R.A. 3846 or "An Act Providing for the Regulation of Radio Stations and Radio Communications in the Philippine Islands, and For Other Purposes" or the "Radio Control Act of 1931". The law requires that commercial broadcasting corporations secure a legislative franchise for them to operate[129]. However,

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[120] *Id*.

[121] Pia Ranada, *Duterte to file multiple estafa charges vs ABS-CBN*, Rappler (May 18, 2017) https://www.rappler.com/nation/170367-duterte-file-multiple-estafa-abs-cbn

[122] *Eastern Broadcasting Corporation v. Dans, Jr.*, G.R. No. L-59329 (1985)

[123] *Id*.

[124] *Supra* note 4

[125] *Id*.

[126] *Supra* note 122; The requirements are: (1) the right to a hearing, which includes the right to present one's case and submit evidence in support thereof; (2) the tribunal must consider the evidence presented; (3) the decision must have something to support itself; (4) the evidence must be substantial. Substantial evidence means such reasonable evidence as a reasonable mind might accept as adequate to support a conclusion; (5) the decision must be based on the evidence presented at the hearing, or at least contained in the record and disclosed to the parties affected; (6) the tribunal or body or any of its judges must act on its or his own independent consideration of the law and facts of the controversy and not simply accept the views of a subordinate; (7) the board or body should, in all controversial questions, render its decision in such a manner that the parties to the proceeding can know the various issues involved, and the reasons for the decision rendered.

[127] *Id*.

[128] *Divinagarcia v. Carpio Morales*, G.R. 162272, (2009)

[129] R.A. 3846, *An Act Providing for the Regulation of Radio Stations and Radio Communications in the Philippine Islands, and For Other Purposes*, §1

this allows Congress to have some degree of control over the press. It is true that licensing is necessary to regulate the use of airwaves, but the same need not be political.

In the United States, broadcast media is regulated by an independent federal agency – the Federal Communications Commission[130]. The FCC is responsible for the managing and licensing of airwave frequencies for both commercial and non-commercial users, including the State and local governments[131]. There is no need to secure a license or a legislative franchise from the U.S. Congress[132].

Although the Radio Control Act of 1931 was affirmed by the Court in the cases of *Associated Communications & Wireless Services v. NTC*[133] *and Divinagarcia v. Morales*[134], the law needs to be revisited.

As a preferred right, the freedom of expression stands on a higher level than substantive economic or other liberties[135]. It should then follow that if the primary consideration for limiting the freedom of broadcast media is the scarcity of airwaves, the same should be held of lesser concern than the freedom of the press.

Protection is especially mandated for political discussions, the latter being essential for the ascertainment of political truth[136]. The power of the politicians in Congress to grant or renew franchises for broadcast media dries the throat of dissenting broadcasters. Airwave frequencies of broadcasting networks and the content of its discussions can still be regulated by an independent body, free from the grasps of politicians and their interests. The leash may be a necessity, but it does not have to be held by the people the watchdog watches over.

The cases of Rappler, Inquirer, and ABS-CBN are somehow analogous to the *Babst* case. Separately, the actions may be legal but when taken as a whole and in consideration of the circumstances, they may have the effect of unduly crippling the freedom of the press. The press serves the governed not the governors[137]. Only a free press can expose deception in the government[138].

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[130] 47 U.S. Code §151, available at https://transition.fcc.gov/Reports/1934new.pdf
[131] *Id.*; *see* Federal Communications Commission, Licensing, https://www.fcc.gov/licensing-databases/licensing
[132] *Supra* note 128
[133] *Associated Communications & Wireless Services v. NTC*, 445 Phil. 621 (2003)
[134] *Supra* note 128
[135] *Supra* note 33
[136] *Id.*
[137] New York Times Co. v. United States, 403 U.S. 713, 717 (1971)
[138] *Id.*

VI. CONCLUSION

Free speech is not measured by how often you can nod your head, but by how loud you can say no. To quote Chief Justice Fernando (then Associate Justice) in Gonzales v. Comelec,

> "Freedom of speech and the press thus means something more than the right to approve existing political beliefs or economic arrangements, to lend support to official measures, to take refuge in the existing climate of opinion on any matter of public consequence. So atrophied, the right becomes meaningless. The right belongs as well, if not more, for those who question, who do not conform, who differ. To paraphrase Justice Holmes, **it is freedom for the thought that we hate, no less than for the thought that agrees with us**.[139]" (Emphasis supplied)

The President is not the Government; nor is he our sovereign. The authority that comes with his office was merely loaned to him by the Filipino people[140] for him to play a specific part in the governance of a democratic country. Should he deviate from his duties, the public has the right to voice out their concerns – after all, public opinion should be the constant source of liberty and democracy[141].

The freedom of speech does not belong to any political color – it belongs to the people by whom the Constitution was written and for whom the right was granted.

[139] *Supra* note 101 at 856-858
[140] *See* PH CONSTI. Art. II, Sec. 1
[141] *Supra* note 17

PHILIPPINE MENTAL HEALTH LAW:
Toward a Mind-Strong and Psychologically Competent Filipino Nation

Angelica Joy Quinto Bailon[1]

INTRODUCTION

The 1987 Constitution provides that *the State shall protect and promote the right to health of the people and instill health consciousness among them*.[2] Clearly, the right to health is imbedded in the life of every Filipino no matter what social, economical and medical condition he/she may have.

Health as defined by the World Health Organization (WHO) is a *state of complete physical, mental and social well-being and not merely the absence of disease or infirmity*.[3] While the physical aspect has been addressed by the government thru implementation of the Accessibility Law[4] as well as the Magna Carta for Disabled Persons[5], mental health as an aspect of health was not given much attention.

According to the WHO, Mental Health is a *state of well-being in which the individual realizes his or her own abilities, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to his or her community*.[6] Mental Illness, on the other hand, *is generally characterized by some combination of abnormal thoughts, emotions, behaviors and relationships with others*.[7] Most common forms of mental illness are Depression, Bipolar Affective Disorder, Schizophrenia, Dementia and Developmental Disorders.

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[2] Phil. Const. art. VI, § 15

[3] Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States and entered into force on 7 April 1948

[4] 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 Blg. 344 (1982).

[5] An Act Providing for the Rehabilitation, Self-Development and Self-Reliance of Disabled Person and their Integration into the Mainstream of Society and for other Purposes [Magna Carta for Disabled Persons], Republic Act No. 7277 (2010).

[6] World Health Organization, *Mental health: A state of well-being, available at* http://www.who.int/features/factfiles/mental_health/en/ (last accessed Sept. 22, 2017)

[7] World Health Organization, Mental Disorders, available at http://www.who.int/mental_health/management/en/ (last accessed Sept. 21, 2017)

Based on the latest census, there are more than 100.98 million Filipinos in the world.[8] While it is impossible to measure the exact number of people afflicted with mental illness, an estimation of 88 cases per 100,000 Filipinos was reported to be suffering from such illness.[9] This is supported by the Social Weather Stations (SWS) Survey, which reported that 0.7% of total households have a family member with mental disability.[10] Sadly and unfortunately, about two thirds (2/3) of Filipinos with mental illness do not obtain help from health professionals due to lack of resources, stigma, discrimination, neglect or simply ignorance.

Alarmingly, a survey conducted by the National Statistics Office (NSO) in 2000 revealed that mental illness is the third most common form of disability among Filipinos next to visual and hearing impairments.[11] According to the 2010 National Census, fourteen percent (14%) or two hundred thousand (200,000) Filipinos are estimated to have mental disorder. Of the wide ranges of mental illness, depression is one of the most prevalent affecting over 4.5 million Filipinos in 2004.[12] In fact, WHO named the Philippines as the country with the highest incidence of depression in Southeast Asia.[13] In relation, the Philippine Statistics Authority revealed that suicide rate in the country continues to increase over the years. In 2012, for example, a total of 2,558 Filipinos was reported to have committed suicide and definitely, this number does not manifest the overall suicide data because statistics regarding suicide are susceptible to under-reporting due to stigma.[14]

Despite these alarming facts, the Philippines lacks a sufficient and holistic mental health legislation that caters to the need of the Filipinos. The primary objective of mental health legislation is to protect, promote and improve the lives and mental well-being of citizens[15]. While rigorous efforts have been exerted by advocates and legislators alike in proposing a mental health bill, there is still no mental health law in the Philippines. Thus,

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[8] Philippine Statistics Authority, Population (As of August 2015), *available at* https://psa.gov.ph/ (last accessed Sept. 21, 2017).

[9] World Health Organization, *WHO-AIMS Report on Mental Health System in The Philippines (2006)*

[10] Social Weather Station. *SWS Surveys on Health* (2004)

[11] Philippine Statistics Office, Persons with Disability Comprised 1.23 Percent of the Total Population, *available at* https://psa.gov.ph/content/persons-disability-comprised-123-percent-total-population (last accessed Sept. 22, 2017).

[12] Department of Health, Woeful Suicide, *available at* http://portal.doh.gov.ph/content/woeful-suicide.html (last accessed Sept. 22, 2017).

[13] Carmela G. Lapeña, *SPECIAL REPORT: Suicide and Pinoy Youth*, Gma News, July 17, 2015, *available at* http://www.gmanetwork.com/news/lifestyle/healthandwellness/524070/special-report-suicide-and-the-pinoy-youth/story/ (last accessed Sept. 22, 2017).

[14] Lila Ramos Shahani, *Suicide and the Need for a Mental Health Law*. Phil. Star, August 3, 2015, *available at* http://www.philstar.com/opinion/2015/08/03/1483998/suicide-and-need-mental-health-law (last accessed Sept. 21, 2017)

[15] World Health Organization. WHO Resource Book on Mental Health, Human Rights and Legislation, *available at https://ec.europa.eu/health/sites/health/files/mental_health/docs/who_resource_book_en.pdf* (last accessed Nov. 1, 2017).

this paper aims to show the importance of instituting a national mental health law and the legal impediments that obstruct the implementation of proposed bills regarding mental health.

GLOBAL STATUS OF MENTAL HEALTH LEGISLATION

The lack of understanding of the importance of mental health among Filipinos can be attributed to the fact that mental health is not given any priority at all. Sadly, this is the hard truth not only here in the Philippines but also in most countries around the world. In fact, as of 2014, only fifty one percent (51%) of the WHO member countries worldwide have a stand-alone mental health law. Of these, only thirty one percent (31%) affirmed the full implementation of their mental health law. Ten percent (10%) admitted to have available legislation but not acted upon, while sixteen percent (16%) said that their mental health legislation is not yet developed.[16]

Indeed, passage of mental health law remains elusive in many parts of the world, including the Philippines. Everyday, horrible acts happen to people with disability, including mental health patients. This maltreatment and ignorance has something to do with the common view that they are nuisances of the society. As a response, a lot of stakeholders have recognized the need to change this discriminating perception and to ensure that all people, whether with mental illness or none, must be provided with the opportunities to their fullest potential. On December 17, 1991, through its Resolution 46/119, the UN General Assembly adopted 25 Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care[17]. Basically, it aims to promote the right to sound mental health treatment of all people.

> For the longest time, psychiatry was marred by government neglect and public apathy.

In May 3, 2013, all Ministers of Health of the WHO Member States convene during the 66th World Health Assembly (WHA) to adopt the Comprehensive Mental Health Action Plan 2013-2020. Primarily, this Action Plan recognizes the essence of mental health through its four objectives: (1) more effective leadership and governance for mental health;

[16] World Health Organization, Mental Health Atlas 2014, available at http://apps.who.int/iris/bitstream/10665/178879/1/9789241565011_eng.pdf (last accessed Sept. 21, 2017).

[17] (1) Fundamental Freedoms and Basic Rights, (2) Protection of Minors, (3) Life in the Community, (4) Determination of Mental Illness, (5) Medical Examination, (6) Confidentiality, (7) Role of Community and Culture, (8) Standards of Care, (9) Treatment, (10) Medication, (11) Consent to Treatment, (12) Notice of Rights, (13) Rights and Conditions in Mental Health Facilities, (14) Resources for Mental Health Facilities, (15) Admission Principles, (16) Involuntary Admission, (17) Review Body, (18) Procedural Safeguards, (19) Access to Information, (20) Criminal Offenders, (21) Complaints, (22) Monitoring and Remedies, (23) Implementation, (24) Scope of Principles relating to Mental Health Facilities, (25) Saving of Existing Rights

(2) the provision of comprehensive, integrated mental health and social care services in community-based settings; (3) implementation of strategies for promotion and prevention; and (4) strengthened information systems, evidence and research.[18] It recommended that national and social sectors must utilize a holistic and coordinated approach to reduce the global burden of mental illness.

The above circumstances also impelled the WHO to develop the World Health Organization Assessment Instrument for Mental Health Systems (WHO-AIMS), intended to evaluate the countries' national mental health policy and encourage them to push for an effective implementation of a mental health law. In relation to this, the WHO published a Checklist on Mental Health Legislation to help countries to review and assess the comprehensiveness and adequacy of their respective existing laws. A lot of countries have recognized this as a major platform and standard to revolutionize the legislative condition of mental health law in their respective countries. Currently, there are less than seventy percent (70%) of countries around the world which decided to heed to the call of mental health reformation.[19]

In developing a holistic mental health care program, the following issues must be addressed: (1) the need for Mental Health Legislation; (2) the need to integrate mental health care into general health services; (3) the need to integrate mental health care into general health services; (4) the need to review and strengthen financing strategies; (5) the need for equity; (6) the need to structure programs and integrate resources of all stakeholders; (7) the need for an internationally accepted unified national standards, protocol and guidelines in the delivery of mental health care; (8) the need to make available the essential psychotropic drugs in all levels of health care; and (9) the need to build up capacity for research.[20]

The imperativeness for the Philippines to comply with the recommendations set by WHO is best understood by the membership of the Philippines to the United Nations as well as its being a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR), and UN Convention on the Rights of Persons with Disabilities. Thus, the Philippines has the obligation to ensure the full realization of every person's rights to health, including mental health.

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[18] World Health Organization. Mental Health Action Plan 2013-2020, *available at* http://www.who.int/mental_health/publications/action_plan/en/ (last accessed November 1, 2017).

[19] World Health Organization, Mental Health Atlas 2014, available at http://apps.who.int/iris/bitstream/10665/178879/1/9789241565011_eng.pdf (last accessed Sept. 21, 2017).

[20] Department of Health. *Scaling Up the Mental Health Program*, Health Policy Notes, November 2008, at 4-6, *available at* http://www.doh.gov.ph/sites/default/files/publications/Vol3Issue5November2008.pdf (last accessed Sept. 21, 2017).

DOMESTIC STATUS OF MENTAL HEALTH LEGISLATION

The current status of Philippine mental health system manifests the slow and exhausting process it has undergone for decades. Before the enactment of Public Work Act 3258, which instituted the Insular Psychopathic Hospital, now known as the National Center for Mental Health (NCMH), the mental health program in the Philippines was centered inside the hospitals. After its enactment, the care and treatment of the mentally ill was centralized in this insane asylum. The problem with this set-up was that the mental health services became localized resulting to the neglect of the people in other areas. During these times, no structured program for mental health care in the country is instituted. There was an attempt in the 1990s to integrate mental health services in community settings, unfortunately when the administration changed, the program was not sustained.

For the longest time, psychiatry was marred by government neglect and public apathy. The first ever decree[21] that recognizes the importance of Mental Health was issued on August 12, 1957 by former President Carlos P. Garcia declaring every third week of January as National Mental Health Week. This, however, was superseded by Proclamation No. 452 to synchronize the Philippine celebration with the World Mental Health Day during second week of October.[22] But came 1987, after the Martial Law regime, former President Corazon Aquino pushed for a reorganization of the Ministry of Health and its attached agencies thru Executive Order 119. It tried and succeeded in restoring the National Center for Mental Health. In effect, this reorganization classified the National Center for Mental Health along with the Philippine Heart Center, Lung Center of the Philippines, National Orthopedic Hospital, Research Institute for Tropical Medicine, National Kidney Institute and the Philippine Children's Medical Center, as part of the Special Research Centers and Hospitals under the National Health Facilities. Basically, they are recognized as special health facilities which services and activities accrue to the whole country's health care and infrastructure.[23]

Former President Corazon Aquino also tried to address the overlooked issue on mental health by formulating a multi-sectoral organization named Project Team on Mental Health under the management of the DOH. The Project Team's initiative was to formulate mental health laws that will cater to the mental health needs of the Filipinos. It was

[21] Office of the President, Declaring the Third Week of January of Every Year as National Mental Health Week, Proclamation No. 432 [Proc. No. 432] (August 12, 1957).
[22] Proclamation No. 452 was issued by former President Fidel V. Ramos on February 24, 1994.
[23] Office of the President, Reorganizing the Ministry of Health, Its Attached Agencies and For Other Purposes, Executive Order No. 119 [E.O. No. 119] (January 30, 1987).

instrumental in introducing the first two mental health bills in 1989, which unfortunately was not promulgated.[24]

Fortunately, there have been continuing moves to address this concern. As early as mid 1990's, there was an effort by the National Health Program to integrate mental health services in community settings, however it was not sustained. In 1998, former President Fidel Ramos issued Executive Order 470 creating the Philippine Council for Mental Health which provides for the policy-making and advisory body on all government programs on mental health. Unfortunately, the Council has not convened, thus no council exists today.[25]

In 2001, to comply with the National Objectives for Health (NOH), which basically provides the blueprint of strategies, indicators and targets in shaping the country's health system, then DOH Secretary Manuel Dayrit drafted the first ever Philippine Mental Health Policy. Aside from outlining the goals and objective, the mental health plan formulated strategies to reform the system from an institutionally based system to that of holistic approach of integrating both the individual and the community for support.

In response, the DOH formed the National Mental Health Program[26] which incorporates mental health stakeholders, composed of mental health advocates and experts from different sectors, into management committee tasks to oversee the development, management and implementation of mental health measures. Even without a legal framework, the stakeholders, partners and beneficiaries work together to actualize the plan. It was constantly being revised to comply with the NOH 2005-2010.

Since 1989, a number of bills have been introduced to the Congress with mental health as primary focus but none seems to prosper. But came 2012, the Philippine Psychology Act of 2009[27] was enacted by the Congress, a silver lining in the midst of the neglectful and apathetic view of mental health. Basically, this Act seeks to regulate and fortify the practice of Psychology in the Philippines by instituting a licensure exam for would-be

[24] Ma. Rubinia Torres-Yap. Through the Years: History of Philippine Psychiatry. *available at* http://www.philpsych.ph/about-us/ppa-history (last accessed Sept. 25, 2017).

[25] Fritzie Rodriguez, *Why do Filipinos need a Mental Health Law?*, Rappler.,Oct. 30, 2015, *available at* http://www.rappler.com/move-ph/111100-filipinos-need-mental-health-act (last accessed Sept. 21, 2017).

[26] Department of Health. National Mental Health Program, available at http://www.doh.gov.ph/national-mental-health-program (last accessed Sep. 25, 2017).

[27] An Act To Regulate the Practice of Psychology Creating for this Purpose a Professional Regulatory Board of Psychology, Appropriating Funds Therefor and For Other Pursposes [Philippine Psychology Act of 2009], Republic Act No. 10029 (2009).

psychometricians[28] and psychologists. Although not about mental health per se, hopefully this renewed and standardized practice will lessen the stigma attached to the discipline as well as the mentally-ill. This was indeed a great achievement and development which paved way to the persistent efforts of some legislators to hopefully and finally implement a national mental health law.

Consequently, as shown in Table 1, infrastructure-wise, there are three (3) mental hospitals[29], fifty eight (58) private psychiatric health facilities, (19) community based psychiatric in-patient facilities and fifteen (15) community residential facilities in the Philippines.[30] In NCR, there is only one mental hospital: the NCMH which serves an average of 4,200 inpatients and 56,000 outpatients per year.[31]

Table 1: Mental Health Facilities in the Philippines

Facilities	Total number
Government Mental Health Hospitals[32]	3
Private Psychiatric Health Facilities	58
Community residential facilities	15
Community based psychiatric in-patient facilities	19
Total bed capacity in the country	5,456
Beds/ places in community residential facilities	1,456
Beds in mental hospitals	4,200

The underutilization of mental health services in the Philippines can be explained through an economic, historical, cultural and social perspective.

From an economic standpoint, there is a clear uneven utilization of mental health services in urban and rural areas because most of mental health facilities and professionals are located in the NCR. In addition, Filipinos tend to depend on traditional and folk healers

[28] Psychometricians are valid professionals under the supervision of a licensed professional psychologist who (1) administers and scores personality tests excluding higher level forms of psychological tests; (2) interprets results of the same and prepares a written report on these results; and (3) conducts preparatory intake interviews of clients for psychological invention sessions. (Article 3 (d), RA 10029)

[29] World Health Organization, Mental Health Atlas Country Profile 2014, *available at* http://www.who.int/mental_health/evidence/atlas/profiles-2014/phl.pdf?ua=1 (last accessed Sept. 21, 2017).

[30] Department of Health, National Mental Health Program, *available at* http://www.doh.gov.ph/national-mental-health-program (last accessed Sep. 25, 2017).

[31] National Center for Mental Health, About NCMH, *available at* www.ncmh.gov.ph (last accessed Sept. 21, 2017).

[32] NCMH, Mariveles Mental Hospital in Bataan and Cavite Center for Mental Health

instead of mental health professionals since they are more accessible. Sadly, WHO reported that those who are deprived in life are least likely to obtain help for mental illness.[33]

As for the cultural aspect, Filipino value of *hiya* also plays a role in this apathetic attitude, brought about by stigmatization of the mentally ill. According to DOH, stigma is a major cause for neglecting mental health services due to experiences of discrimination, deprivation of opportunity and limitation on civil rights. Other factors include issues of acculturation, racism, history of colonization and social injustice.[34]

An analysis of Philippine Laws done by the WHO-AIMS revealed that there is a need for an extensive legal reform in the Philippines when it comes to Mental Health. While it commended the efforts of the government in providing mental health policies and services, which are separately contained in the Family Code, Penal Code, Magna Carta for Disabled Person and Dangerous Drug Act among others, it urges the government to make every effort to ensure the full and effective implementation of a stand-alone Mental Health Law. It must be noted however that mental health legislation is not a substitute for mental health policy but it provides legal framework for achieving the goals of mental health policy.

A number of bills were being introduced in the Congress since the implementation of Philippine Psychology Act of 2009. For example, Senate President Juan Ponce Enrile introduced Senate Bill No. 3509 in 2009 which intends to integrate mental health into the national health care delivery system. However, like all the proposed bills on the matter, it remained pending at the Committee level.

As of the current 17th Congress, there are sixteen (16) pending bills[35] in the House of Representatives and eight (8) pending bills[36] in the Senate relating to mental health.

Perhaps one of the significant milestones in this advocacy was the passing on third and final reading last May 2, 2017 and November 20, 2017 Senate Bill No. 1354 or the Mental Health Act of 2017 and House Bill No. 6452 or the Comprehensive Mental Health Act respectively. On January 24, 2018, both Houses of Congress finished unifying the versions of the Philippine Mental Health Bill thru the Bicameral Conference. Now, we must await the ratification of the Bicameral Conference's version by both Houses which

[33] World Health Organization, Social Determinants of Mental Health, available at http://apps.who.int/iris/bitstream/10665/112828/1/9789241506809_eng.pdf (last accessed December 27, 2017).
[34] See Antover P. Tuliao. *Mental health help seeking among Filipinos: A review of the literature, Asia Pacific Journal of Counselling and Psychotherapy*, (2014)
[35] House Bill Nos. 349, 584, 844, 1040, 1572, 1676, 1698, 3039, 3433, 3796, 4101, 4184, 4301, 4686, 5676, 6452
[36] Senate Bill Nos. 1354, 1190, 1155, 1079, 657, 522, 415 and 9

will be forwarded to the President who can either sign the bill into law or veto it. Hopefully, a stand-alone mental health law will be passed this 2018.

OBSTACLES IN PROMULGATING AND IMPLEMENTING A STAND-ALONE MENTAL HEALTH LAW

Mental illness constitutes one of the world's most critical and social health problem. Yet, the burden of mental disorders has long been and always been underestimated and ignored.

In the Philippines, numerous bills on mental health have been introduced to the Congress, unfortunately they have not been passed. The big question is what is stopping the Congress to implement the Mental Health law.

A lot, it seems. We blame it to stigma. We treat mental health as insignificant. We reason it out with lack of funding. But the truth is these are all unsound arguments. Whether we admit it or not, most if not all people, including our legislators, take mental health for granted. Aside from the social, cultural and economic barriers mentioned, the WHO[37] laid out five general obstacles to implementation of the law.

First on the list was the **lack of coordinated action**. Collaboration of stakeholders and beneficiaries' efforts to advocate mental health has not been given much interest. This, coupled with scarcity of stakeholders which could facilitate and catalyze the implementation of the law results to slower implementation. This is further aggravated by the decentralize system of the government agencies as well as advocacy groups specialized in this matter. Apparently, an online petition[38] for Philippine legislators to support the country's first ever Mental Health Act was initiated by the Philippine Psychiatric Association in 2014. However, as the petition closed, it failed to reach its target 200,000 signatures. In fact, during the Mental Health Act Now forum held in October 2015, PPA affirmed that the Philippines has been stalling support for those with mental health needs.[39]

Second, there is a **lack of public and legislators awareness** regarding the importance of mental health. The prevalent hesitation and ignorance of implementing a mental health law is in part driven by deeply entrenched cultural beliefs, religious views,

[37] World Health Organization. WHO Resource Book on Mental Health, Human Rights and Legislation, *available at https://ec.europa.eu/health/sites/health/files/mental_health/docs/who_resource_book_en.pdf* (last accessed Nov. 1, 2017).

[38] See https://www.change.org/p/mhactnow

[39] Fritzie Rodriguez. *Advocates push for comprehensive PH mental health law*, Rappler., October 29, 2015, available at http://www.rappler.com/nation/111084-mental-health-act-philippines (last accessed November 1, 2017).

and personal attitudes towards mental health. The stigma attached to mental health also plays a crucial role in this widespread apathy. The truth is, despite the presence of mental health treatment and services, there is still a widespread belief that mental disorders are untreatable.[40]

For instance in suicide incidents, many people believe that suicide is a manifestation of cowardice and incompetency to face the everyday reality and the sad and bad thing is this misunderstanding usually leads to abuse, rejection, isolation and discrimination. Hence, it greatly affects the implementation of the law. When legislators do not understand the importance of the rights of people with mental health problems, it is indeed unlikely that interventions and legislation will be scaled up.

Third, there is **lack of human resources**. As can be seen in Table 1, both human and structural resources are wanting and this is very critical in an effective and efficient implementation of the law since they form part of those who will be directly affected by the law. In effect, this lack of human resources leads to underutilization of mental health services.

In 2008, the DOH reported that there is a disparity between the magnitude of mental health problem and the mental health care resources.[41] According to the report, there were only about 8.47 mental health human resources for every 100,000 general population in the country.

Basically, there are four general professions who are legally recognized to provide mental health services: psychologists/psychometricians as provided in Philippine Psychology Act of 2009, guidance counsellors as authorized by the Guidance and Counselling Act of 2004, social workers as certified by the Republic Act No. 4373 of 1965 and those included in the medical profession such as psychiatrists and psychiatric nurses. While it is difficult to identify the exact number of professionals providing mental health services, apparently there is an average of 134 guidance counsellors (since 2008) and 35 psychologists (since 2014) who get licensed yearly in the country. This is obviously a very small number compared to thousands of Filipinos who needs the mental health services.

Fourth, **procedural issues** also serve as impediment in the implementation. Included here are issues on operational definition of concepts, standard documentation as

[40] Rose Octaviano. *10 Facts on Mental Health*, Sun Star Bacolod., August 11, 2015, *available at* http://www.sunstar.com.ph/bacolod/lifestyle/2015/08/11/10-facts-mental-health-423947 (last accessed Nov 1, 2017)

[41] Department of Health. *Scaling Up the Mental Health Program*, Health Policy Notes, November 2008, at 2, *available at* http://www.doh.gov.ph/sites/default/files/publications/Vol3Issue5November2008.pdf (last accessed Nov. 1, 2017).

well as the legislative process of enacting the law. In the Philippines, before a bill becomes a law, proposals have to undergo three (3) separate readings where members of Congress discuss, vote and recommend amendments to the bill. While a thorough and rigorous review is indispensable and commendable, it cannot be denied that it is such a slow-paced legislation process considering the fact that opposing views among lawmakers and civic groups are bound to take place.

The fifth legal obstacle in the implementation of the law is the **lack of finances**. This is manifested in the miniscule budget the government allots for the mental health sector. In a comparative review by Hamid et. al, it was revealed that developed countries spend only about five percent (5%) of their Gross Domestic Product (GDP) to mental health while developing countries, such as the Philippines, allocate less than one percent (1%) of their GDP to mental health. In the said study, it was reported that the Philippines allot only 0.02% of its total health budget to mental health system.[42] The government must boost investment in mental health in order to effectively implement the law and strengthen psychiatric services.

Though there are lot of obstacles in passing a stand-alone mental health law, the future looks promising as both Houses in Congress approved in third and final reading the proposed bill on mental health. Hopefully this 2018, a stand-alone mental health law will be passed and implemented.

CONCLUSION AND RECOMMENDATION

Progress in the development of mental health legislation is really commendable but efforts need to be scaled up. The advocacy for mental health legislation does not stop in the formulation of the bill nor the passage of such bill into law. It is more important to inform and educate the public about mental health, mental illness, the rights of people with mental health needs and the duties of different sectors in providing mental health services. This will surely facilitate the effective and efficient implementation of the legislation.

Part of this dissemination process is the assurance that such legislation is made in a manner that would be accessible and comprehensible so that every citizen might easily understand it. Moreover, the proposed bill must be put up for consultation to all the

[42] Hamid, Hamada, Karen Abanilla, Besa Bauta, and Keng-Yen Huang. Evaluating the WHO Assessment Instrument for Mental Health Systems by comparing mental health policies in four countries, Bulletin of the World Health Organization, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2647453/ (last accessed Nov. 1, 2017).

stakeholders as well as the beneficiaries of the law. Everyone's input and involvement is highly encouraged not only during the drafting the bill but also in implementing the law.

Obtaining support from the public, legislators and civil societies and other significant groups is crucially important in raising awareness and in finally passing the bill. This is to ensure that conflicts and potential inadequacy and abuse of the law may be addressed.

The process of implementing mental health law is not an easy path but it is possible. Many impediments can be identified and experienced such as (1) lack of coordinated action, (2) lack of public and legislators' awareness, (3) lack of human resources, (4) lack of finances and (5) procedural issues, but unless there is a combination of political will, adequate resources, community support and well-trained personnel, the mental health system will never be improved and developed.

Overall, the necessity to implement a stand-alone mental health law is compelling. First, it addressed the public stigma associated with psychiatric treatment by raising awareness on the importance of mental health. Second, it deals with the pervasive human rights violation and provides protection against inhumane and degrading treatment and services. Third, it supplies resources for effective implementation of the mental health policy. Fourth, it promotes people's autonomy and liberty. Lastly, it sets standard and criteria to guide the actions of people and imposes sanctions for violations of the law.

Indeed, the issue on mental health is an urgent and significant social issue that the government must act upon. Health without mental health is not health at all and while rigorous efforts have been done by different sectors, it is incumbent upon the government to promulgate laws solidifying the mental health rights of every citizen. In order to build mind-strong and psychologically competent citizens, we must recognize the need for government intervention and the need for a national policy on mental health reform that would protect and improve the well-being of every Filipino.

THRIVING IN A FOREIGN LAND:
Manifesting Sovereignty Through Government Intervention

Yves Mikka B. Castelo[1]

Prologue

In his dissertation entitled *International Economic Dependence in the World-System,*[2] Christopher K. Chase-Dunn gave a simple yet straight-to-the-point illustration of why government intervention is necessary. He begins by defining economic power and then demonstrates how that power is directly proportional to the subject over which that power is recognized. According to his article, power is defined by Weber as the probability that an actor (individual or collectivity) can realize its will even against the opposition of others.[3] Emerson points out that the power of A over B is directly proportional to the dependence of B on A.[4] This dependence involves two elements: (1) the extent to which B controls the resources that A needs, and (2) the existence of alternative sources of these resources. Thus power and dependence, both relational concepts, are two sides of the same coin. The power of violence derives from A's ability to deprive B of a most precious resource — survival.

Overview

Governments all over the world are continuously seeking good economic policies to maintain the stability of their economy and provide opportunities for its citizens.[5] Some of the recognized policies to promote economic stability and growth include tax reforms, creating new markets, long-term development of infrastructure projects, and promoting efficient labor policies. Probably the most readily recognized manifestation of economic globalization is the opening of markets to foreign investment and trade. The Philippine

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[2] Christopher K. Chase-Dunn, *International Economic Dependence in the World-System* 6 (1975), available at http://www.irows.ucr.edu/cd/ds/Dissertation1975.pdf (last accessed November 28, 2017 3:24 PM PST).

[3] *Id.*, citing Max Weber, *From Max Weber*, Hans Gerth and C.W. Mills (Eds.), Oxford university Press, New York.

[4] *Id.*, citing Richard m. Emerson, *Exchange Theory*, Sociological Theories in Progress, v.2; Joseph Berger, Morris Zelditch, Jr. and Bo Anderson (Eds.) Houghten Mifflin, Boston.

[5] Francisco M. Zulueta, *Foundations and Dynamics of Political Science* 14 (2003).

While foreign businesses play an important role in a state's economic growth, foreign commercial participation must be regulated so that a state's development may not be at the mercy of others.

government welcomes foreign investments which will provide opportunities relative to the amount of the capital being invested, improve productivity of resources, increase volume and value of exports, and provide a foundation for the future development of the economy. Investment-related rules have been liberalized to facilitate entry of foreign investments.[6] In fact, the Foreign Investments Act of 1991 encourages foreign investments that significantly expand livelihood and employment opportunities for Filipinos, enhance economic value of farm products, promote the welfare of Filipino consumers, expand the scope, quality and volume of exports and their access to foreign markets, and/or transfer relevant technologies in agriculture, industry and support services.[7] As an example, the government enters into contracts of various kinds with aliens or legal persons of foreign nationality such as loan agreements (including the issue of state bonds), contracts for supplies and services, contracts of employment, agreements for operations of industrial and other patent rights under license, agreements for the construction and operation of transport or telephone systems, agreements conferring the sole right, or some defined right, to exploit natural resources on payment of royalties, and exploration and production sharing agreements.[8] But although it is a basic rule in contracts that the law is deemed written into the contract between the parties,[9] there are people with money and power who still find ways to get around legal proscriptions. In *Mathews v. Taylor*, the Supreme Court has recognized that more aliens attempt to circumvent the provision against foreign ownership of land. The Court knew that the threat was real:

> We had cases where aliens wanted that a particular property be declared as part of their father's estate; that they be reimbursed the funds used in purchasing a property titled in the name of another; that an implied trust be declared in their (aliens) favor; and that a contract of sale be nullified for their lack of consent.[10]

It has also been observed that many of the poorer states have accepted foreign investment at the expense of economic, and therefore political, independence.[11] Thus, in

[6] Board of Investments One-Window Network, *FAQS*, available at http://boiown.gov.ph/faqs/ (last accessed March 10, 2018 9:30 PM PST).
[7] An Act to Promote Foreign Investments, Prescribe the Procedures for Registering Enterprises Doing Business in the Philippines and for other Purposes [Foreign Investments Act of 1991], Republic Act No. 7042, § 2 (1991).
[8] Ian Brownlie, *Principles of Public International Law* 546 (7th ed. 2008).
[9] *Social Weather Stations, Inc. v. Commission on Elections*, 755 SCRA 124, (2015).
[10] *Matthews v. Taylor*, 590 SCRA 394, (2009).
[11] Brownlie, *supra* note 7, at 537.

order to protect the interest of the citizens, national policy may require prohibition or regulation of the purchase of immovables, ships, aircraft, and the like, and the practice of certain professions by aliens.[12] States receiving foreign investment have long sought means of assimilating the foreign investor and their own nationals, and in treaties they seek to establish a standard of equal treatment or reciprocity.[13]

One of the well-known safeguards that Philippine laws employ is the Filipino First Policy enshrined in Article XII, Section 10 of the 1987 Constitution which mandates that in the grant of rights, privileges and concessions covering the national economy and patrimony, the State shall give preference to Filipino businessmen over foreign investors. It also mandated the Congress to reserve certain areas of investments to citizens of the Philippines or to corporations or associations at least sixty *per centum* (60%) of whose capital is owned by such citizens, or such higher percentage as Congress may prescribe.[14]

Indeed, every sovereign power has the inherent power to exclude aliens from its territory upon such grounds as it may deem proper for its self-preservation or public interest.[15] In relation to this, there has always been considerable support for the view that the alien can only expect equality of treatment under the local law because he submits to local conditions with benefits and burdens and because to give the alien a special status would be contrary to the principles of territorial jurisdiction and equality.[16]

Laws demanding the participation of a minimum, certain percentage of its citizens have been put in place in order to safeguard the state's national interests. Some of these are R.A. 3846 which limits the foreign equity of a radio station license to twenty percent (20%),[17] the Labor Code of the Philippines which requires entities to have at least seventy-five percent (75%) of the authorized and voting capital stock owned and controlled by Filipino citizens before they can participate in the recruitment and placement of workers,[18] and the Cockfighting Law of 1974 which allows only Filipino citizens to own, manage and operate cockpits.[19] These legislations have been necessary because although ideally, the citizens must be in control of the most important fields in their society, be it commercial

[12] *Id*. at 520.
[13] *Id*. at 545.
[14] PHIL. CONST. Art. XII, § 10.
[15] *Secretary of Justice v. Koruga*, 586 SCRA 512, (2009).
[16] Brownlie, *supra* note 7, at 524.
[17] An Act Providing For the Regulation of Radio Stations and Radio Communications in the Philippine Islands and For Other Purposes, Republic Act No. 3846, § 4 (1963).
[18] A Decree Instituting A Labor Code Thereby Revising and Consolidating Labor and Social Laws to Afford Protection to Labor, Promote Employment and Human Resources Development and insure Industrial Peace Based on Social Justice [Labor Code of the Philippines], Presidential Decree No. 442, as amended, Art. 27 (1974).
[19] Cockfighting Law of 1974, Presidential Decree No. 449, § 5(a) (1974).

or for pleasure, not everyone would see things this way. Economics might find defense in technicality that because there was no law restricting aliens' rights, the exercise of such right is therefore legal. And once that right has been exercised *legally*, it would be difficult to annul it because new laws are generally applied prospectively. As they say in criminal law, *nullum crimen, nulla poena sine lege* (there is no crime when there is no law punishing it).

The operation of public utilities is also expressly reserved.[20] However, in explaining the Supreme Court's ruling in *People v. Quasha*,[21] a distinguished author has noted that the mandate to reserve these certain areas serves no benefit, since all it covers is the primary franchise, which merely constitutes a corporation into a juridical entity.[22] He rationalized that it is the secondary franchise by which the corporation may be granted special privileges, licenses or benefits not enjoyed by other corporations, where the real abuse may be committed. In that case, a distinction was drawn between the primary franchise of a corporate entity by virtue of which it is constituted as a body politic endowed with separate juridical personality, and the secondary franchise that it may receive during its life for the exercise of a privilege granted by law, such as the operation of a public utility.[23]

Aside from these restrictions, Section 7 of Article XII of the 1987 Constitution provides that except in cases of hereditary succession, aliens, whether individuals or corporations, are also disqualified from acquiring lands of the public domain as well as private lands.[24] Another special law enacted prior to the current Constitution also has this similar limitation. For instance, Republic Act No. 4726, otherwise known as "*The Condominium Act*", enacted in 1966, provides that where the common areas in the condominium project are owned by the owners of separate units as co-owners thereof, no condominium unit therein shall be conveyed or transferred to persons other than Filipino citizens, or corporations at least sixty percent of the capital stock of which belong to Filipino citizens, except in cases of hereditary succession.[25]

The Supreme Court through then Justice Artemio Panganiban has clarified that the restrictions in favor of Filipino citizens should not be used to strangulate economic growth or to serve narrow, parochial interests. According to the resolution:

[20] PHIL. CONST. Art. XII, § 11.
[21] *People v. Quasha*, 93 Phil. 333, (1953).
[22] Cesar Lapuz Villanueva & Teresa S. Villanueva-Tiansay, *Philippine Corporate Law* 60 (2013).
[23] *Id*. at 59.
[24] *Muller v. Muller*, 500 SCRA 65, (2006).
[25] An Act to Define Condominium, Establish Requirements For Its Creation, and Govern Its Incidents [The Condominium Act], Republic Act No. 4726, § 5 (1966).

> The Constitution should be read in broad, life-giving strokes. It should not be used to strangulate economic growth or to serve narrow, parochial interests. Rather, it should be construed to grant the President and Congress sufficient discretion and reasonable leeway to enable them to attract foreign investments and expertise, as well as to secure for our people and our posterity the blessings of prosperity and peace.[26]

Foreign Investments Negative List

It is imperative that a foreign investor only does business in a field where he is allowed to operate, following the foreign equity restrictions in the law, unless the investor would like to take an atypical business risk, one which involves government forfeiture.[27] The Board of Investments, which is the lead government agency responsible for the promotion of investments in the Philippines,[28] has provided a schematic diagram to serve as a guide on the investments laws in the Philippines.[29] Before any arrow points to anything else, the very first arrow points to the Foreign Investments Act Negative List. The *Foreign Investments Negative List (FINL)* is a list of areas of economic activity whose foreign ownership is limited to a maximum of forty percent (40%) of the equity capital of the enterprise engaged therein.[30] *List A* of the Tenth Regular FINL,[31] which is the latest as of this writing, enumerates the areas and activities the foreign ownership of which has been limited by mandate of the constitution and specific laws. The first eleven (11), which completely prohibits foreign equity, are as follows:

1. Mass media except recording (Art. XVI, Sec. 11 of the Constitution; Presidential memorandum dated 05 May 1994)

[26] *La Bugal-Blaan Tribal Association, Inc. v. Ramos*, 445 SCRA 1, (2004).

[27] An Act to Promote Foreign Investments, Prescribe the Procedures for Registering Enterprises Doing Business in the Philippines and for other Purposes [Foreign Investments Act of 1991], Republic Act No. 7042, § 14 (1991).

[28] Board of Investments, *About BOI*, available at http://www.boi.gov.ph/index.php/en/about-boi.html (last accessed March 10, 2018 10:30 PM PST).

[29] Board of Investments, *Guide on Investment Laws*, available at http://www.boi.gov.ph/index.php/en/doing-business/guide-on-investment-laws.html (last accessed March 10, 2018 6:20 PM PST).

[30] An Act to Promote Foreign Investments, Prescribe the Procedures for Registering Enterprises Doing Business in the Philippines and for other Purposes [Foreign Investments Act of 1991], Republic Act No. 7042, § 3(g) (1991).

[31] Available at http://www.sec.gov.ph/wp-content/uploads/2015/08/EONo.-184-The-Tenth-Regular-Foreign-Investment-Negative-List.pdf (last accessed January 21, 2018 11:00 AM PST).

2. Practice of professions[32] (Art. XII, Sec. 14 of the Constitution, Sec. 1 of R.A. No. 5181, Sec. 7.j of R.A. No. 8981)
   a. Pharmacy (R.A. No. 5921)
   b. Radiologic and x-ray technology (R.A. No. 7431)
   c. Criminology (R.A. No. 6506)
   d. Forestry (R.A. No. 6239)
   e. Law (Art. VIII, Sec. 5 of the Constitution; Rule 138, Sec. 2 of the Rules of Court of the Philippines)
3. Retail trade enterprises with paid-up capital of less than US$2,500,00 (Sec. 5 of R.A. No. 8762)[33]
4. Cooperatives (Ch. III, Art. 26 of R.A. No. 6938)
5. Private security agencies (Sec. 4 of R.A. No. 5487)
6. Small-scale mining (Sec. 3 of R.A. No. 7076)
7. Utilization of marine resources in archipelagic waters, territorial sea, and exclusive economic zone as well as small-scale utilization of natural resources in rivers, lakes, bays, and lagoons (Art. XII, Sec. 2 of the Constitution)
8. Ownership, operation and management of cockpits (Sec. 5 of P.D. No. 449)
9. Manufacture, repair, stockpiling and/or distribution of nuclear weapons (Art. II, Sec. 8 of the Constitution)[34]
10. Manufacture, repair, stockpiling and/or distribution of biological, chemical and radiological weapons and anti-personnel mines (various treaties to which the Philippines is a signatory and conventions supported by the Philippines)[35]
11. Manufacture of firecrackers and other pyrotechnic devices. (Sec. 5 of R.A. No. 7183)

[32] Foreigners are allowed to practice the following professions provided their country allows Filipinos to be admitted to the practice of these professions: aeronautical engineering, agricultural engineering, chemical engineering, civil engineering, electrical engineering, electronics engineering, electronics technician, geodetic engineering, mechanical engineering, metallurgical engineering, mining engineering, naval architecture and marine engineering, sanitary engineering, medicine, medical technology, dentistry, midwifery, nursing, nutrition and dietetics, optometry, physical and occupational therapy, veterinary medicine, accountancy, architecture, chemistry, customs brokerage, environmental planning, geology, landscape architecture, librarianship, marine deck officers, marine engine officers, master plumbing, sugar technology, social work, teaching, agriculture, fisheries, guidance counseling, real estate service (real estate consultant, real estate appraiser, real estate assessor, real estate broker and real estate salesperson), respiratory therapy, psychology and interior design. Architecture, chemistry, electronics engineering, environmental planning, guidance counseling, landscape architecture, metallurgical engineering, naval architecture and marine engineering, psychology, real estate service (real estate consultant, real estate appraiser, real estate assessor, real estate broker and real estate salesperson), sanitary engineering and interior design allow corporate practice by Filipinos.

[33] Full foreign participation is allowed for retail trade enterprises: (a) with paid-up capital of US$2,500,000 or more provided that investments for establishing a store is not less than US$830,000; or (b) specializing in high end or luxury products, provided that the paid-up capital per store is not less than US$250,000 (Sec. 5 of R.A. No. 8762).

[34] Domestic investments are also prohibited (Art. II, Sec. 8 of the Constitution; Conventions/Treaties to which the Philippines is a signatory).

[35] *Id*.

In a media release dated October 10, 2017, the National Economic and Development Authority (NEDA) stated that it is exhausting all measures to further improve the business climate in the Philippines, particularly easing foreign restrictions on several areas of business through the foreign investment negative list (FINL).[36] Socioeconomic Planning Secretary, NEDA Director-General and Vice-Chairperson Ernesto M. Pernia[37] stated in an interview that he wanted a more aggressive liberalization and to be at par with other ASEAN countries.[38] And in a memorandum order dated November 21, President Rodrigo Duterte who is also the chairperson of NEDA, tasked the agency to "take immediate steps" to ease existing restrictions on foreign participation in the following investment areas/ activities:

- Private recruitment, whether for local or overseas employment;
- Practice of particular professions, where allowing foreign participation will redound to the public benefit;
- Contracts for the construction and repair of locally-funded public works;
- Public services, except activities and systems that are recognized as public utilities such as transmission and distribution of electricity, water pipeline distribution system, and sewerage pipeline system;
- Culture, production, milling, processing, and trading except retailing, of rice and corn and acquiring by barter, purchase or otherwise, rice and corn and the by-products thereof;
- Teaching at higher education levels;
- Retail trade enterprises; and
- Domestic market enterprises.[39]

Age of Interdependence

No man is an island. International participation is necessary. In our modern world, no state can be an "island". Self-interests and the interests of peace, commerce and friendly intercourse with other nations may compel a nation to enter into treaties, join the United Nations and other international organizations and adhere to international

[36] National Economic and Development Authority, *NEDA Says Foreign Businesses Confident on PH Business Climate*, October 10, 2017, available at http://www.neda.gov.ph/2017/10/10/neda-says-foreign-businesses-confident-on-ph-business-climate/ (last accessed January 21, 2018 9:30 PM PST).

[37] National Economic and Development Authority, *NEDA Board*, available at http://www.neda.gov.ph/functions-and-organizations/ (last accessed January 21, 2018 9:30 PM PST).

[38] Chrisee Dela Paz, *PH to add more sectors allowing 100% foreign ownership*, Rappler, September 14, 2017, available at https://www.rappler.com/business/182205-neda-pernia-philippines-sectors-foreign-ownership (last accessed January 21, 2018 9:40 PM PST).

[39] Nicolas Cigaral, *Duterte orders NEDA Board to ease foreign ownership limits*, The Philippine Star, November 23, 2017, available at http://www.philstar.com/business/2017/11/23/1761765/duterte-orders-neda-board-ease-foreign-ownership-limits (last accessed January 21, 2018 10:20 PM PST).

conventions. By doing so, a state voluntarily restricts or waives part of its sovereign rights, as an independent and sovereign nation, in return for the benefits which it may derive therefrom.[40] As aptly put by John F. Kennedy, "Today, no nation can build its destiny alone. The age of self-sufficient nationalism is over. The age of interdependence is here."[41] Unquestionably, the Constitution did not envision a hermit-type isolation of the country from the rest of the world.[42]

Take for example the case of the Democratic People's Republic of Korea (North Korea, for brevity). North Korea has been described by the Central Intelligence Agency of the United States of America as one of the world's most centrally directed and least open economies.[43] In a Huffington Post article, it was noted that in that country, foreign media is forbidden, interaction with tourists is strictly controlled and the internet is inaccessible to almost everyone.[44] Of course, even if those facts were not published, many people are already aware of this situation.

Xiyang Group, a mining company from China, has an unfortunate story to tell about its experience in investing in North Korea. Once the company had finished constructing an iron ore mine in North Korea in 2012, its personnel were kicked out and its investments expropriated. As a result, the Chinese company lost around $45 million. At the time, it was the largest state confiscation of private foreign investment in North Korea. The Xiyang Group published extensive documentation and publicised the issue, but soon discovered that even with the extensive support of the Chinese government, it could not recover its investment. It was also noted that Moscow and Beijing's investments in North Korea were really strategic aid in disguise.[45]

The Xiyang Group described its venture in North Korea as "a nightmare", accusing North Korea of violating its own investment laws. In its defense, a spokesman for North Korea said that Xiyang has carried out only fifty percent (50%) of its investment obligations though almost four years have past since the contract took effect. Wu Xisheng, Vice General Manager of Xiyang, told Reuters: "They just don't have the conditions for foreigners to invest. They say they welcome investment but they don't have the legal or

[40] Ruben E. Agpalo, Public International Law 125 (2006).
[41] Agpalo, *supra*, citing Tanada v. Angara, 272 SCRA 15 (1997).
[42] *Tanada v. Angara*, 272 SCRA 18, (1997).
[43] Central Intelligence Agency, *The World Fact Book*, available at https://www.cia.gov/library/publications/the-world-factbook/geos/kn.html (last accessed March 9, 2018 4:00 PM PST).
[44] Charlotte Alfred, *How North Korea Became So Isolated*, Huffington Post, October 17, 2014, available at https://www.huffingtonpost.com/2014/10/17/north-korea-history-isolation_n_5991000.html (last accessed March 9, 2018 4:00 PM PST).
[45] Andrei Lankov, *Foreign indirect investment in North Korea*, Aljazeera, December 13, 2015, available at http://www.aljazeera.com/indepth/opinion/2015/12/foreign-indirect-investment-north-korea-151210110219878.html (last accessed March 9, 2018 4:00 PM PST).

social foundations." And then, Wu added, "The Chinese government can do nothing - it is thinking more about political stability."[46]

Wu was also quoted saying that his company had been "cheated" by its North Korean partners. He said they had violated the contract by raising the costs for land, power, water and labor with the express purpose of driving out their Chinese partners. The North Korean statement on Korean Central News Agency pledged changes to "ensure the legitimate rights and interests of all investors" but also said that investment had to be in line with the "security of the country," which was guaranteed by its songun, or military-first, ruling philosophy. *The New York Times* stated that the North faces a difficult balancing act, as any potential economic opening could undermine the leadership.[47]

To be sure, the Philippines' partiality towards Filipino entities in identified economic fields still recognizes the importance of foreign investors. The Foreign Investments Negative List states that *only the investment areas and/or activities listed in the Annex hereof shall be reserved to Philippine Nationals*, which conveys the idea that there is inclination to allow more foreign equity in all other fields. Our laws are transparent enough for foreign nationals to be able to see if their participation is restricted. And if the laws on their faces aren't clear enough, processes for allowing businesses to commence aid in determining if the requirements, such as nationality, are met.

The effect of Xiyang Group's failed venture in North Korea is not limited to that country. Although the restrictions in foreign equity do not make the Philippines less open to foreign investors, what happened with Xiyang serves as a lesson that violations (or at least, violations as considered by the state party) can lead to serious repercussions. On the other hand, government actions in response to alleged violations can give a "chilling effect" that may drive away potential investors. "Chilling effect" is a usually undesirable discouraging effect or influence.[48] In the case of investments, the discouragement may occur when a state has been known to act in a way that undermines commercial undertakings that makes investing therein more of a gamble than a normal business risk. But the reservation of certain areas for Filipinos is necessary for the citizens to be sure that they will reap the benefits that the country has to offer. This reservation cannot be equated to an absurd claim of independence. This is an assertion of sovereignty.

[46] David Chance & David Stanway, *North Korea launches barbed attack on Chinese investor*, Reuters, September 5, 2012, available at https://www.reuters.com/article/us-korea-north-xiyang/north-korea-launches-barbed-attack-on-chinese-investor-idUSBRE88405O20120905 (last accessed February 9, 2018, 1:50 PM PST).

[47] Reuters, *North Korea Blasts Chinese Company in Failed Deal*, The New York Times, September 6, 2012, available at http://www.nytimes.com/2012/09/06/business/global/north-korea-blasts-chinese-company-in-failed-deal.html (last accessed February 9, 2018 2:00 PM PST).

[48] *Chilling effect*, Merriam-Webster, available at https://www.merriam-webster.com/legal/chilling%20effect (last accessed March 9, 2018 2:00 PM PST).

Against Reliance

The rise and decline of foreign investments make it to the news.[49] But wait, there's more. Foreign investments are vested with national interest that they also draw our very own legislators' attention. In a news article, it was reported that Senator Franklin Drilon expressed serious concerns over the government's capacity to attract new investments for the country as the foreign direct investments (FDI) significantly dropped over the past year. Commenting on the reports on the deceleration in new investment, the senator was quoted saying that it was very alarming. His colleague, Senator Loren Legarda, said that she was not convinced that the decline was due to certain restrictions. "I do not agree with that answer because these restrictions were already there when there was an increase," Legarda said. Drilon added that the government should seriously look into the huge plunge in FDIs because it is critical to the country's economic growth and contributes in providing job and business opportunities to Filipinos.[50]

It would not be so difficult to *start* imagining the Philippines without foreigners in the local market. All that one has to think about is the pre-colonial era some many years ago. The difficulty would begin in the attempt to *continue* imagining the Philippines without foreigners in the local market. Although trade had already taken place before colonization, the practice of trading with foreign nationals has become part of the commercial system. It's not like foreign investors came here to eventually invade the country. As an observance, these business people would like to as much as possible stay away from politics and just concentrate on making money. And that's where the problem usually begins.

What benefit would foreigners have if they give too much consideration to the country? Of course, while business is good, enough consideration should be made. After all, a good country would mean good business. But eventually, when they decide to close up shop, or when they find another place to thrive in, leaving the country would not be as hard as a parent leaving a child to look for greener pastures overseas. That lack of real connection in the Philippines is a fact that we must always consider as a threat. The truth is that for foreign investors, the Philippines is a mere place for business. But for citizens, it is

[49] Lawrence Agcaoili, *Foreign investments surge 57% in May*, The Philippine Star, August 11, 2017, available at http://www.philstar.com/business/2017/08/11/1727576/foreign-investments-surge-57-may (last accessed January 21, 2018 11:00 AM PST); Jhoanna Ballaran, *Drilon raises concern over decline in PH foreign investments*, INQUIRER.net, October 07, 2017, available at http://newsinfo.inquirer.net/936306/drilon-raises-concern-over-decline-in-ph-foreign-investments-senate-drilon-fdi-bsp (last accessed January 21, 2018 11:00 AM PST); Chrisee Dela Paz, *Foreign direct investments in PH drop to one-year low in July*, Rappler, October 10, 2017, available at https://www.rappler.com/business/184828-philippines-foreign-direct-investments-july-2017-duterte (last accessed January 21, 2018 11:00 AM PST).

[50] Jhoanna Ballaran, *Drilon raises concern over decline in PH foreign investments*, INQUIRER.net, October 07, 2017, available at http://newsinfo.inquirer.net/936306/drilon-raises-concern-over-decline-in-ph-foreign-investments-senate-drilon-fdi-bsp (last accessed January 21, 2018 11:00 AM PST).

their home (ideally). Unlike a lucky child who may have relatives who can give care in the absence of his or her parents, who else can the citizens really turn to when the foreigners relied upon as pillars of the economy take back what they have put in?

This is not to say the citizens must have hostile relations with foreigners. Again, at the risk of being repetitive, the age of interdependence is here, and it is now. But while foreign businesses play an important role in a state's economic growth, foreign commercial participation must be regulated so that a state's development may not be at the mercy of others.

Sovereignty and *Parens Patriae*

No less than the Constitution provides that sovereignty resides in the people and all government authority emanates from them.[51] The Constitution is the basic and paramount law to which all other laws must conform and to which all persons, including the highest officials of the land, must defer.[52] Right or wrong, the Constitution must be upheld as long as it has not been changed by the sovereign people lest its disregard result in the usurpation of the majesty of law by the pretenders to illegitimate power.[53]

In the case of *Government of the Philippine Islands v. El Monte de Piedad*,[54] the Court said that when this country achieved its independence, the prerogatives of the crown devolved upon the people of the States. It was explicated that this power still remains with the people, and that they have only delegated a portion of it to the government. The sovereign will is made known to us by legislative enactment. The State as a sovereign, is the *parens patriae*.

Sovereignty is the supreme power in a state by which the state is governed. Internal sovereignty is the power inherent in the people or vested in its ruler by the constitution to govern the state. This does not, in any manner, depend upon its recognition by other states. On the other hand, external sovereignty consists of the independence of one political society with respect to all other political societies. The external sovereignty of any state requires recognition of other states in order to make it perfect and complete.[55] As it would chaotic for a million of citizens to directly exercise their sovereignty and run the government, some individuals have been tasked to exercise this power on behalf of the constituents. Citing Mechem, a recognized authority on the subject, the Supreme

[51] PHIL. CONST. Art. II, § 1.
[52] Isagani A. Cruz, *Philippine Political Law* 12 (2002).
[53] *Id*. at 13.
[54] *Government of the Philippine Islands v. El Monte de Piedad,35 Phil. 42, (1916)*.
[55] *Id*. at 39 (2003).

Court stated that a public office is the right, authority and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.[56]

The laws we have are therefore enacted by the legislature on our behalf. Thus, when our laws restrict certain acts, it is no other than the people who are imposing such restrictions. In the regulation of foreign participation, it is no other than the people who are intervening, only that we are represented by the government.

External sovereignty may be easy to assert in the international scene because of some claims that there is really no international law which can demand a state's obedience. And really, those who talk about sovereignty are usually state heads who are mostly diplomatic. And they have to be diplomatic because while sovereignty may be likened to an identification document before entering the international scene, there are other concerns which are more recurring than the issue of sovereignty. And that's why external sovereignty is easy to assert. *Par in parem non habet imperium*. Equals have no sovereignty against each other. After sovereignty has been successfully asserted (effortlessly, most of the time), internal sovereignty, on the other hand, is a different matter. Unlike its external counterpart, internal sovereignty may be more easily circumvented locally through loopholes in domestic laws. The players in an internal sovereignty issue are not diplomats. International law is sustained by considerations of morality, commercial advantage, and fear of hostile attack.[57] As observed by one of the members of the 1986 Constitutional Commission:

> The basic challenge to international law as law is the claim that there can be no law binding sovereign states. Moreover, there exists no international legislative body. There is, of course, the General Assembly of the United Nations; but its resolutions are generally not binding on anybody. There is no international executive. The Security Council was intended to be that entity but it is often effectively hamstrung by the veto power. Neither is there a central authority that can make judgments binding on states. The International Court of Justice can bind states only when states consent to be bound. Moreover, national officials tend to find justification for whatever they do. Psychologically too, the allegiance to one's sovereign state can be very strong to the point of defying reason. When the chips

[56] *Laurel v. Desierto*, 381 SCRA 48, (2002).
[57] Ruben E. Agpalo, *Public International Law* 15 (2006)

are down, national policy or interest is often preferred over international law.[58]

Having said that, assuming arguendo that a foreign element violates our laws and eventually causes damage to the country and all domestic means have been exhausted, is there anybody out there who can help us out? We can't even enforce an arbitral judgment.[59] Yes, we will have moral support. And of course, at least we have something to hold on to if we win an arbitral award. But what good is a favorable judgment if the damage has already been done? To say that the Philippines is an independent state is the diplomatic way to say it. The other way is bold: unless we can be colonized again, and our precious resources be enjoyed by another, why should other nations really care so much? So we must love our own.

Foreign Investment at Any Cost

Government intervention is an exercise of police power, which is an inherent attribute of sovereignty. As an inherent attribute of sovereignty which virtually extends to all public needs, police power grants a wide panoply of instruments through which the State, as *parens patriae,* gives effect to a host of its regulatory powers.[60]

It cannot be gainsaid that the government must protect its citizens. And this protection is not without cost. Undeniably, measures which are meant as safeguards may encroach on areas which are not as welcoming as they ought to be. There may be cases where an alien is harmed by acts or omissions which are on their face merely a normal exercise of the competence of organs of administration and government of the host state. These situations include the malfunction of judicial organs dealing with acts which are breaches of the local law affecting the interests of the alien, so-called 'denial of justice', and also general legislative measures, not directed at aliens as such, affecting the ownership or enjoyment of foreign owned assets.[61] Thus, investor states attempt to keep issues out of the national courts of the latter by appropriate clauses on jurisdiction in case of dispute and on choice of applicable law.[62] This may also be characterized as a "chilling effect". It has been observed that there is inherent bias for forum courts to favor their own laws over that of others. This could be a matter of training, upbringing, or even culture as judges are

[58] Joaquin G. Bernas, S.J., *Introduction to Public International Law* 2 (2009)
[59] Frank E. Lobrigo, *How to enforce the PCA ruling*, INQUIRER.net, July 21, 2017, available at http://opinion.inquirer.net/105721/enforce-pca-ruling (last accessed March 10, 2018 11:00 PM PST).
[60] *Gerochi v. Department of Energy*, 527 SCRA 696, (2007).
[61] Cesar L. Villanueva & Teresa Villanueva-Tiansay, *Philippine Corporate Law* 523 (2013).
[62] *Id.* at 545 (2013).

apt to apply what they have been taught in law school promoting their state's values and interests.[63]

In upholding the validity of a penal provision of the *Cybercrime Prevention Act of 2012*, the Supreme Court recognized the inherent "chilling effects" of penal laws. But to prevent the State from legislating criminal laws because they instill such kind of fear, said the Court, is to render the state powerless in addressing and penalizing socially harmful conduct.[64] All the same, the State cannot be excused for avoiding measures which protect the very economic *foundations* of the country so that it may give more way to potential economic *growth*.

And it's not like everything is restricted. Merriam-Webster defines "pawn" as "one that can be used to further the purposes of another". In chess, it is "one of the chessmen of least value having the power to move only forward ordinarily one square at a time, to capture only diagonally forward, and to be promoted to any piece except a king upon reaching the eighth rank".[65] An important characterization of a pawn which was not mentioned is that at the start of the game, all the pawns are always in front. The system established for foreign nationals is like a pawn in chess because it serves as a warning of what cannot be done, and it's not like the parties would have to engage in hostility so that their interests may be preserved. Simply put, restrictions in foreign equity are a matter of defense. Chess in action demonstrates pawn better than a dictionary. A pawn may have been described as having the least value because it could only ordinarily move one square at a time, but in truth and in fact, it is the first line of defense of the rest of the chessmen who can simply just choose to act only when all the pawns in front of them have been taken by the opponent. After all the pawns have been taken, which would necessarily mean that the opponent has reached the other player's territory, it would not be long before they crowd the king. While the opponent plans for the next move, king might have the feeling that foreign relations is doing well. But the possibility of turning against the king is not far. After all, the goal is to win the game. And before the king knows it - checkmate. And even if the opponent does not directly go after the king, there would be not much difference if it was the other chess officials which are taken. It could actually be worse because in that case, the king retains its title but not anymore its sovereignty.

The Supreme Court, noting that business enterprises are not unnaturally evincing lack of enthusiasm for police power legislation that adversely restrict their profits, maintained that its response had been far from sympathetic, even on the allegation of

[63] Galahad R. A. Pe Benito, *Conflicts of Laws* 68 (2016).
[64] *Disini v. Secretary of Justice*, 716 SCRA 237, (2014).
[65] *Pawn*, Merriam-Webster, available at https://www.merriam-webster.com/dictionary/pawn?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last accessed February 11, 2018 1:08 AM PST).

violation of the due process clause. Thus, during the Commonwealth, the Court sustained legislations providing for collective bargaining, security of tenure, minimum wages, compulsory arbitration, and tenancy regulation. Neither did the objections as to the validity of measures regulating the issuance of securities and public services prevail.[66]

It is conceded that the assertion of sovereignty through government intervention may result in repercussions which may slow down economic growth. In a resolution, the Supreme Court did not falter in issuing a ruling which could drive away foreign investors, as argued by the public respondents therein. The Court said:

> The Constitution gave this Court the authority to strike down all laws that violate the Constitution. It did not exempt from the reach of this authority laws with economic dimension. A 20-20 vision will show that the grant by the Constitution to this Court of this all important power of review is written without any fine print.[67]

And even the Foreign Investments Act of 1991 has made this limit clear when it stated that the encouragement of foreign investments is only to the extent that it is allowed by the Constitution and relevant laws.[68] But this is a price that we have to pay to keep what is rightfully ours. It must be remembered that this kind of dependence is exactly what government intervention seeks to prevent. There is need to attract foreign investment but the policy has never been foreign investment at any cost.[69] The government must step in before the people realize that all has been lost to foreign nationals. And for security, the government must always be welcomed to intervene if the case warrants.

Epilogue

The Philippine government welcomes foreign investments which will provide opportunities relative to the amount of the capital being invested, improve productivity of resources, increase volume and value of exports, and provide a foundation for the future development of the economy. Investment-related rules have been liberalized to facilitate entry of foreign investments.[70] Nevertheless, it is imperative that a foreign investor only does business in a field where he is allowed to operate, following the foreign equity

[66] *Tatad v. Secretary of the Department of Energy (Resolution)*, 282 SCRA 337, (1997).
[67] *Id*.
[68] An Act to Promote Foreign Investments, Prescribe the Procedures for Registering Enterprises Doing Business in the Philippines and for other Purposes [Foreign Investments Act of 1991], Republic Act No. 7042, § 2 (1991).
[69] *See id*.
[70] Board of Investments One-Window Network, *FAQS*, available at http://boiown.gov.ph/faqs/ (last accessed March 10, 2018 9:30 PM PST).

restrictions in the law, unless the investor would like to take an atypical business risk, one which involves government forfeiture.[71] In our modern world, no state can be an "island". But while foreign businesses play an important role in a state's economic growth, foreign commercial participation must be regulated so that a state's development may not be at the mercy of others. In the regulation of foreign participation, it is no other than the people who are intervening, only that we are represented by the government. Government intervention is an exercise of police power, which is an inherent attribute of sovereignty. It is conceded that the assertion of sovereignty through government intervention may result in repercussions which may slow down economic growth. However, it must be remembered that this kind of dependence is exactly what government intervention seeks to prevent.

[71] An Act to Promote Foreign Investments, Prescribe the Procedures for Registering Enterprises Doing Business in the Philippines and for other Purposes [Foreign Investments Act of 1991], Republic Act No. 7042, § 14 (1991).

TEMPERING JUDICIAL DISCRETION:
Applying the Precautionary Principle in Environmental Cases

Kevin Ken S. Ganchero[1]

It must be remembered that at the heart of cases involving the precautionary principle is a living environment and people whose lives, culture, and well-being depend on.

I. Introduction

For generations, our ancestors have relied on the blessings and bounty of the soil. Our pre-colonial traditions and practices revolved around sacred rituals for an abundant harvest and for blessings from deities who personified our respect for the land. But our ancestors, while superstitious, were also innovative. They were pioneers of advanced agricultural methods and 2000 years ago, carved the land with their hands and left one of the most famous man-made creations on the planet, the Banaue Rice Terraces.

Last December 2016, the Supreme Court, through a Writ of Kalikasan, decided to stop the field testing of "*Bt eggplant*," a special variety of eggplant capable of making a bacterial protein,[2] which resists the fruit and shoot borer, its natural pest.[3] Many feared that this ruling would result to adverse effects such as delay on other research involving genetically modified crops such as golden rice, virus-resistant papaya, and *Bt cotton*.[4]

The rapid advancement of technologies and scientific knowledge, has brought about increasingly unpredictable and uncertain risks.[5] Government authorities have always been confronted with the necessity to formulate an approach that will protect their

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[2] International Service for the Aquisition of Agri-Biotech Applications, Inc. vs. Greenpeace Southeast Asia (Philippines), et al., G.R. Nos. 209271, December 8, 2015, *available at* http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/december2015/209271.pdf (last accessed November 11, 2017) [hereinafter ISAA vs. Greenpeace]

[3] *Bt talong case: Striking at heart of PH concerns*, Inquirer.Net, February 14, 2016, *available at* http://opinion.inquirer.net/92844/bt-talong-case-striking-at-heart-of-ph-concerns (last accessed Aug. 26, 2017).

[4] *Id*.

[5] WORLD COMMISSION ON THE ETHICS OF SCIENTIFIC KNOWLEDGE AND TECHNOLOGY, THE PRECAUTIONARY PRINCIPLE 7 (2005) [hereinafter COMEST].

citizens and the environment against risks produced by various activities.[6] Because of this, the precautionary principle was devised.

The precautionary principle connotes the taking of measures to protect the environment and human health even before conclusive scientific evidence on the perilous effects of certain activities or substances, is found.[7] In simple terms, it is an expression of the old adage "better safe than sorry."[8] With the ushering in of the Precautionary Principle, the world saw a drastic shift from the curative approach to preventive and anticipatory risk management in dealing with possible health hazards and environmental damage.[9]

States and international institutions, recognizing its undeniable relevance to the global environment, have increasingly incorporated the Precautionary Principle in various international instruments and conventions.[10] Principle 15 of the Rio Declaration has become the standard reference for the Precautionary Principle being the most broadly accepted expression of the principle.[11]

The Philippines is no stranger to the Precautionary Principle. In fact, our Congress has incorporated the language of the Precautionary Principle in the provisions of the Food Safety Act of 2013. Section 10 of the law provides that "[i]n specific circumstances when the available relevant information for use in risk assessment is insufficient to show that a certain type of food or food product does not pose a risk to consumer health, *precautionary* measures shall be adopted."[12]

The same was also expressly incorporated in Section 1, Rule 20 of the Rules of Procedure for Environmental Cases which provides: "When there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect, the court shall apply the *precautionary principle* in resolving the case before it."[13] Furthermore, the Philippine government had made use of precautionary measures in the form of import bans to prevent the entry and spread of diseases. In 2009, the Department of Agriculture ordered the prohibition on the importation of hog and hog meat from Mexico and the

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[6] *Id*.

[7] Hannes Veinla, Free Trade and the Precautionary Principle 186, *available at* http://www.juridicainternational.eu/public/pdf/ji_2003_1_186.pdf (last accessed June 20, 2017).

[8] COMEST, *supra* note 4.

[9] *Id*.

[10] Pierre-Marie Dupuy And Jorge Vinuales, International Environmental Law 54 (2015).

[11] Julian Morris, Rethinking Risk And The Precautionary Principle 5 (2000).

[12] An Act to Strengthen the Food Safety Regulatory System In The Country To Protect Consumer Health And Facilitate Market Access Of Local Foods And Food Products, And For Other Purposes [Food Safety Act of 2013], Republic Act No. 10611, §10 (2012).

[13] 2010 Rules on Procedure for Environmental Cases, Rule 20 §1 [hereinafter Rules on Environmental Procedure].

United States to prevent the entry of the fatal AH1N1 virus or swine flu.[14] Precautionary measures were put in place even if the government did not have adequate information on how to counter the potential outbreak and notwithstanding the absence of technological devices to detect the new strain of virus.[15]

However, inevitable conflict may arise between the policy of prioritizing science, technology, innovation,[16] and economic development[17] against the conservative approach of the Precautionary Principle. On one hand, the Constitution endeavors to achieve economic development through scientific innovation. On the other, the application of the Precautionary Principle seems to restrict such pursuit by adopting the loose standard of "lack of full scientific certainty" as a justification for shifting the burden of proof. This contradiction poses foreseeable repercussions on research and development especially on genetically modified crops which could increase food production but also potentially endanger the environment.

It must be remembered that at the heart of cases involving the precautionary principle is a living environment and people whose lives, culture, and well-being depend on.

If the precautionary principle is to work in the context of judicial review, courts must do more than pay it lip-service. When the principle is seen as nothing more than common sense where the judge has a wide latitude of discretion in determining when it applies, at best it provides little decisional guidance and at worst promotes uncertainty and subjectivity.

II. The Proposed Approach

The Philippine *Bt Eggplant* case is the first instance where our Supreme Court applied the Precautionary Principle. The principle is notorious for its vagueness. It provides little decisional guidelines for judges. This begs the question: then how should judges decide, pursuant to the precautionary principle, in situations where an activity or project could simultaneously lead to benefits as well as uncertain harms?

Before applying the precautionary principle, it is necessary to formulate a test on when to apply it. It is submitted that precaution and opportunity could be reconciled by following a structured approach in order to determine whether the principle applies.

[14] *RP officials say prepared to prevent swine flu*, ABS-CBN NEWS, Apr. 26, 2009, *available at* http://news.abs-cbn.com/nation/04/26/09/rp-officials-says-prepared-prevent-swine-flu-entry (last accessed Aug. 26, 2017).
[15] Id.
[16] PHIL. CONST. art. XIV, §§ 10-13.
[17] PHIL. CONST. art. XIII, § 1.

Consequently, the reckoning point of the proposed test's application is when a petition for the issuance of a *writ of kalikasan* or any environmental case is filed in court for its review or judgment.

This part shall lay down the proposed criteria or test, divided in hierarchical steps, and then discuss each criterion's components in depth. This will provide an overarching guide which shall shape all further discussion of particular problem areas. All justification as to why particular questions are asked and how particular circumstances are resolved, shall be provided in the subsequent discussions in this chapter.

Broadly, the test has two steps, in the form of questions that courts should answer prior to applying the precautionary principle: (A) Does field testing pose a serious or irreversible injury or loss to the environment and (B) Is there scientific uncertainty regarding the alleged environmental injury or loss as well as its seriousness or irreversibility?

It is submitted that an affirmative an answer to both questions should validly trigger the application precautionary principle. However, this does not preclude the court from making equitable considerations on a case to case basis. Additionally, the thesis also endeavors to suggest a clearer process of what should happen when (C) shifting the burden of proof to the project proponent.

To better illustrate how the framework operates, (D) it will be hypothetically applied to the facts of *International Service for the Acquisition of Agri-biotech Applications et. Al. vs. Greenpeace et. al. or the Bt Eggplant* case.

A. Does field testing pose a serious or irreversible injury or loss to the environment?

As previously discussed, this element connotes the unacceptability of the risk. Hence, if the threatened damage is negligible or reversible, the courts cannot apply the principle. Alternatively, the environmental harm to be avoided should be irreversible in character. This criterion may be linked to the span of time the environment may recover from damage.

One significant illustration of a judicial attempt to apply the precautionary principle in domestic litigation is the Australian case, *Telstra Corporation Ltd. v. Hornsby Shire Council*.[18] The case arose out of a dispute concerning the construction of a mobile telephone base station in a suburb of Sydney, Australia. The Shire Council, in consideration of the community's fears about the health effects of radiofrequency electromagnetic energy

[18] Telstra Corporation Ltd. v. Hornsby Shire Council NSWLEC 133 (2006) (Australia).

refused the application for the base station despite the fact that the installation complied with peer-reviewed, applicable national safety standard. The Council's decision was appealed to the Land and Environment Court of New South Wales.

While the first condition precedent of "threat of injury or loss" does not require damage to have actually occurred, it is submitted that there must be a real threat that damage will occur.

To determine if a threat is serious or irreversible, Chief Justice Preston in *Telstra* outlined a variety of factors be considered to wit: (a) the spatial scale of the threat (e.g. local, regional, statewide, national, international); (b) the magnitude of possible impacts, on both natural and human systems; (c) the perceived value of the threatened environment; (d) the temporal scale of possible impacts, in terms of both the timing and the longevity (or persistence) of the impacts; (e) the complexity and connectivity of the possible impacts; (f) the manageability of possible impacts, having regard to the availability of means and the acceptability of means; (g) the level of public concern, and the rationality of and scientific or other evidentiary basis for the public concern; and (h) the reversibility of the possible impacts and, if reversible, the time frame for reversing the impacts, and the difficulty and expense of reversing the impacts.[19] These are mere considerations and hence, not completely exhaustive but they can nonetheless guide domestic courts in the proper determination of the existence of a "threat of injury or loss to the environment."

It is further submitted that the seriousness or irreversibility of the threat should be determined by consulting a broad range of experts, stakeholders, and right holders. Thus, even if experts might not consider a threat to be serious, this would not end the inquiry, as the values and perceptions of the stakeholders and right-holders need to be considered as well. Nevertheless, the threat of environmental damage must be adequately sustained by scientific evidence. Such evidence must be grounded in scientific method and procedures, and the existence of the threat must be based on more than subjective belief or unsupported speculations.

It is understood that the principle only applies at the stage of determining burden of proof at the preliminary stages of an action. At this stage of the analysis, a detailed or thorough examination of the scientific evidence by the judge is not necessary. The only determination that the judge should make with regard to the evidence of the seriousness or irreversibility of the threat, is whether such evidence is mere speculation or based on subjective belief. If so, the there is an absence of the first element of the precautionary

[19] ISAA vs. Greenpeace *supra* note 1.

principle. Documentary and object evidence should support the claim that the threat being alleged is not speculative or based on belief alone.

B. Is there scientific uncertainty regarding the alleged environmental injury or loss as well as its seriousness or irreversibility?

Once it has been established that there is a threat of irreversible or serious harm, then the second condition precedent, scientific uncertainty, must be considered. When assessing whether the degree of scientific uncertainty concerning the nature and scope of the threatened environmental damage meets the requisite standard, the ruling in *Telstra* suggests that courts should consider: (a) the sufficiency of the evidence that there might be serious or irreversible environmental harm caused by the development plan, program or project; (b) the level of uncertainty, including the kind of uncertainty (such as technical, methodological or epistemological uncertainty); and (c) the potential to reduce uncertainty having regard to what is possible in principle, economically and within a reasonable time frame.

It is suggested that courts should be mindful of the need to calibrate the level of scientific uncertainty of the threat to the nature and scope of the apprehended environmental harm. Thus, where the claimed degree or magnitude of potential environmental damage is greater, the degree of certainty concerning the threat should accordingly be lowered in order to accommodate the principle. This is because the right to a balanced and healthful ecology is more compromised in such cases.

It is submitted that the threshold test for this stage of the analysis should be one of *reasonable scientific plausibility*, a standard forwarded by Sadeleer.[20] The same standard was followed in Telstra as well as the case of *Gray v. Minister of Planning*.[21]

Sadeleer points out that there is 'reasonable scientific plausibility' when risk begins to represent a minimum degree of certainty, supported by repeated experience. But a purely theoretical risk may also satisfy this condition, as soon as it becomes **scientifically credible** (emphasis supplied): that is, it arises from a hypothesis formulated with methodological rigor and **wins the support of part of the scientific community, albeit a minority**.

It is submitted that scientific credibility of evidence is best established through "peer reviewed" academic journals which have been carefully examined by experts in the field who specialize in the same scholarly area as the author and hence his or her peers.

[20] Nicholas de Sadeleer, Environmental Principles: From Political Slogans to Legal Rules 160 (2005).
[21] Gray v. Minister of Planning 152 LGERA 258 (2006) (Australia).

In a nutshell, the peer reviewers check the scholarly work for accuracy and assess the research methodology and procedures. They can also suggest revisions. If they find the article lacking in scholarly validity and rigor, they reject it. A journal that fails to meet the standards established for a given discipline will not be published. Hence, they exemplify the best research practices in a field.

C. Shifting the burden of proof to the project proponent.

If the conditions precedent, as set out above, are satisfied then the precautionary principle should be triggered. At this juncture a shift in the burden of proof occurs. The judge must assume that the threat of serious or irreversible environmental damage is no longer uncertain but is a reality. The burden of showing that this threat does not in fact exist or is negligible effectively reverts to the project proponent and the approving agency.

It must be emphasized that the shifting of the burden of proof does not determine the outcome of the decision. On the contrary, the shift operates only in relation to one input of the decision-making process: the question of environmental damage. As such, the judge, in these circumstances, must assume that damage will occur; they must then proceed to examine the merits with the proponent now carrying the burden of dispelling such assumption at the risk of having the project suspended, postponed, or ultimately enjoined by the court.

There is nothing in the formulation of the precautionary principle which requires decision-makers to give the assumed factor of "serious or irreversible environmental damage" an overriding consideration against the other factors required to be considered, such as social and economic factors, when deciding how to proceed.

It is submitted that the precautionary principle does not and should not conflict with social and economic benefits because such considerations should be dealt with after the burden of proof has been determined.

The precautionary principle is not a "zero risk" principle. There is no such thing as completely "risk-free" innovation. Rather, it provides a structured way to determine the *inputs* to a cost-benefit analysis which happens after the procedural concern of who between the proponent and complainant, has the "burden of proof" is disposed of. Judges should be careful so as not to expand its effect beyond procedure as contemplated by the rules.

D. Hypothetical application of the proposed test to International Service for the Acquisition of Agri-biotech Applications et. Al. vs. Greenpeace et. al.

At this juncture, the proposed framework of the precautionary principle discussed above will be compared to the court's approach in the *Bt* eggplant case. The court's approach will be substituted with the proposed framework and the hypothetical outcome will be examined.

Generally, the question to be settled is "whether the precautionary principle should have been applied." Specifically, the thesis will make a hypothetical determination of the existence (1) of a serious or irreversible injury or loss to the environment and (2) of scientific uncertainty. Further, (3) the hypothetical outcome of the case, if such framework, in lieu of the court's approach, was adopted.

1. Does field testing pose a serious or irreversible injury or loss to the environment?

The respondents Greenpeace et. al. alleged the following injuries which may result from the field testing of Bt eggplant: possible health risk for people who will consume it and possible contamination and leakage. To support this, they heavily relied on the works of Drs. Seralini, Moreno-Fierros, Garcia, Gutierrez, Vasquez-Padron, Lopez-Revilla, Quijano, Kiat, and Andow.22

Culling from *Telstra* and *Gray*, the (a) first step is to consider the following factors in relation to the injury alleged: the spatial scale of the threat (e.g. local, regional, statewide, national, international); the magnitude of possible impacts, on both natural and human systems; the perceived value of the threatened environment; the temporal scale of possible impacts, in terms of both the timing and the longevity (or persistence) of the impacts; the complexity and connectivity of the possible impacts; the manageability of possible impacts, having regard to the availability of means and the acceptability of means; the level of public concern, and the rationality of and scientific or other evidentiary basis for the public concern; and the reversibility of the possible impacts and, if reversible, the time frame for reversing the impacts, and the difficulty and expense of reversing the impacts.

The (b) *second* step is for judges to determine whether the evidence for the seriousness or irreversibility of such harm or injury is speculative or subjective. In order to do this, judges must consider whether such evidence is from experts, stakeholders, and right holders and sustained by scientific evidence grounded in scientific method and procedures.

[22] ISAA vs. Greenpeace et al. *supra* note 1 at 22-23.

a. First step: a consideration of factors.

The first harm alleged is injury to health. For Drs. Moreno-Fierros, Garcia, Gutierrez, Vasquez-Padron, Lopez-Revilla, the Bt eggplants contain protoxin which is a potent allergen. This could trigger severe allergic reactions when injected into the bloodstream or when ingested.[23] As for Dr. Seralini, his findings showed statistical significant differences between group of animals fed GM and non-GM eggplant that raise food safety concerns and warrant further investigation. Drs. Quijano and Kiat interpreted Dr. Seralini's findings and concluded that the adverse effect of *Bt* on rats may also extend to humans who will consume such crops.[24] The first alleged harm lacks magnitude, scale, unmanageability and even irreversibility.

It must be pointed out firstly, that these harms can only be realized once the *Bt* eggplants are *consumed* by animals or humans. There would be no damage to human health yet since no *Bt* eggplant will be ingested by any human being during the field trial stage. Thus, it was premature to consider these harms as the project being enjoined is not the distribution, sale, or consumption of the eggplant but its field testing. There is no consumption involved. Second, even granting that the court would overlook this nuance, the cited studies make no mention of the possible magnitude, scale, or irreversibility of the health risk associated with consuming plants containing *Bt*. This means that the health risk should not be considered as serious or irreversible.

The second harm alleged is contamination or the unintended transfer of genes from the *Bt* eggplant in the field to other plants. Greenpeace et. al cite studies contained in "*Adverse Impacts of Transgenic Crops/Foods: A Compilation of Scientific References with Abstracts*"; a study on *Bt* corn in the Philippines, "*Socio-economic Impacts of Genetically Modified Corn in the Philippines*"; and the published report of the investigation conducted by Greenpeace, "*White Corn in the Philippines: Contaminated with Genetically Modified Corn Varieties*" which revealed "positive results for samples purchased from different stores in Sultan Kudarat, Mindanao, indicating that they were contaminated with GM corn varieties, specifically the herbicide tolerant and *Bt* insect resistant genes from Monsanto."[25] All of these studies point to the potential for GM organisms, such as *Bt* eggplant released into the environment, to contaminate non-GM traditional varieties and other wild eggplant relatives and turn them into novel pests, outcompete and replace their wild relatives, increase dependence on pesticides, or spread their genes to weedy relatives, potentially creating superweeds, and kill beneficial insects. Unlike the first alleged harm, the second

[23] *Id*.
[24] *Id*.
[25] *Id* at 22.

harm is characterized by magnitude, scale, complexity and potential irreversibility.

Thus, only the second harm may be considered as serious or irreversible so as to trigger the principle's application.

b. Second step: determination of credibility of evidence supporting "seriousness" or "irreversibility" of the threat.

It must be remembered that the only role of the judge here is to strike out speculative or subjective evidence which are those not backed up by "experts, stakeholders, and right holders and sustained by scientific evidence grounded in scientific method and procedures." It is submitted that both harms are supported by studies conducted by reputable scientists and organizations and hence, pass the second step for determining seriousness of irreversibility.

2. *Is there scientific uncertainty?*

Courts should consider the following factors: (a) the sufficiency of the evidence that there might be serious or irreversible environmental harm caused by the development plan, program or project; (b) the level of uncertainty, including the kind of uncertainty (such as technical, methodological or epistemological uncertainty); and (c) the potential to reduce uncertainty having regard to what is possible in principle, economically and within a reasonable time frame to determine the existence of uncertainty.

To determine "sufficiency of evidence" it is suggested that the standard should be "reasonable scientific plausibility" or when a theoretical risk becomes scientifically credible, that is, "it arises from a hypothesis formulated with methodological rigor and wins the support of part of the scientific community, albeit a minority." One good example of this are peer reviewed academic journals. Courts should also consider how the journals are received or assessed by the author's "peers". Special consideration should be given to peer assessments of the research method and the conclusion reached.

The more challenging dimension of the principle's application is determining uncertainty. Here, the evidence for the possibly serious or irreversible harm are definitely neither subjective nor speculative. But it is firmly submitted that it would be a mistake to confuse the standards in determining the existence of the "harm" and the existence of "scientific uncertainty" as both as clearly separate conditions *sine qua non* to trigger the principle's application.

At this stage, it is suggested that the judge should follow two steps: first (a) to apply the considerations to the allegations and second, (b) if he or she finds that there seems to be uncertainty, the standard of reasonable scientific plausibility should be used to assess the evidence.

a. First step: applying the considerations

Following the *Telstra* considerations, it would be clear that there must be evidence of harm. This evidence of harm must be questioned in order to lead to uncertainty. At this point, the second consideration of the degree and kind of uncertainty must be examined. This is because judges should not jump into the conclusion that there is uncertainty based purely on the fact that there are conflicting claims. In order to identify the kind of uncertainty, the work of Klinke and Renn should be helpful.[26] According to them, there are four categories of scientific uncertainty: variability, measurement errors, inconsistencies, and lack of knowledge. As for the degrees of uncertainty, Zander provides for five levels: inexactness, lack of observations or measurements, conflicting evidence, practical immeasurability, and finally, ignorance.[27] Since the concern of the parties in the case here is how to measure pieces of evidence proving harm against those which disprove such harm, the category of uncertainty is lack of knowledge. On the other hand, the degree is "conflicting evidence" due to the mutually exclusive claims from different studies produced by the adverse parties. Thus, it is clear that the alleged uncertainty can be classified, and its degree can likewise be approximated. However, this does not end the inquiry.

b. Second step: applying the standard of reasonable scientific plausibility to assess the "sufficiency" of evidence supporting scientific uncertainty.

As discussed, the evidence for harm has "reasonable scientific plausibility" when it becomes scientifically credible, or that "it arises from a hypothesis formulated with methodological rigor and wins the support of part of the scientific community, albeit a minority."

The respondents, Greenpeace et. al. heavily relied on the study conducted by Dr. Seralini. However, such reliance met persistent opposition from the proponents of the field testing. While the study was published, it was heavily criticized by those in the academic community. It is submitted that courts should also consider how the journals are received

[26] Andreas Klinke and Ortwin Renn, *A New Approach to Risk Evaluation and Management: Risk-Based, Precaution-Based, and Discourse-Based Strategies*, 22 Risk Analysis, 1071 (2002).
[27] Joakim Zander, The Application Of The Precautionary Principle In Practice 26 (2010).

or assessed by the author's "peers" with special consideration given to peer assessments of the research method and the conclusion reached.

However, in one contrary study, according to the United States National Environmental Policy Act (NEPA), confined field tests may not be required to have an environmental assessment because "the means through which adverse environmental impacts may be avoided or minimized have been built into the confinement and containment actions themselves."[28]

Also, in separate reviews by the European Food Safety Agency (EFSA) and the Food Standards Australia and New Zealand (FSANZ), the "work" of one Prof. Seralini relied upon by Greenpeace et. al was dismissed as "scientifically flawed", thus providing no Further, petitioner ISAAA presented in evidence the findings of regulatory bodies, particularly the EFSA and the FSANZ, to controvert Seralini's findings. The EFSA and the FSANZ rejected Seralini's findings because the same were based on questionable statistical procedure employed in maize in 2007.[29]

It is submitted that the court should have given weight to both the methodological rigor *and* the support of a portion of the scientific community. While the fact that a group of scientists' support Dr. Seralini's findings, a greater number of scientists question his findings and *methodology*. This is where the thesis, following a more rigorous standard in applying the precautionary principle, substantially diverges from the findings of the Supreme Court decision. Therefore, due to the overwhelming negative peer assessment of Dr. Seralini's methodology, his work cannot be considered as sufficient evidence to create scientific uncertainty for failing to meet the standard of "reasonable scientific plausibility".

3. Hypothetical outcome

The precautionary principle finds direct application in the assessment of evidence in cases before the courts. It has the effect of allowing the court to construe a set of facts as necessitating either judicial action or inaction, with the goal of protecting the environment. The principle shifts the burden of evidence of harm away from those likely to suffer harm and onto those desiring to initiate a project which may change the environmental status quo. It is thus submitted that even if the principle is to be applied, the case should have been remanded to the Court of Appeals for further reception of evidence from the proponent showing that the project does not pose harm to the environment, that the regulatory guidelines were sufficiently complied with, and that the guidelines comply with the

[28] ISAA vs. Greenpeace *supra* note 1 at 29.
[29] *Id*.

requirements under the National Biosafety Framework and the Cartagena Protocol.

Adopting the proposed framework, the issue should have been resolved differently. The court would have found that the counter-evidence for harm, which allegedly gives rise to the uncertainty, does not meet the standard of reasonable scientific plausibility. Thus, the petitioner should have been the one to carry the burden of proof.

III. Conclusion

While determining the existence of a possible serious or irreversible environmental harm can be done without issue, the determination of the existence of scientific uncertainty is more challenging. For example, in ISAA vs. Greenpeace et. al, there are pieces of evidence that support the existence of harm but their reliability has been heavily questioned by experts in the field. While the principle has a good intention of easing the burden of those who have the best interest of the environment at heart, it can also create problems.

Most of the time, environmental cases cannot be painted in shades of black and white. Usually, both the party-litigants have good intentions. A haphazard application of the principle by a judge who is given a wide latitude of discretion, may result to injustice. The proposed framework of applying the precautionary principle in environmental cases, can be summed up in four steps:

First, the judge determines the existence of serious or irreversible harm to the environment. To gauge "seriousness" or "irreversibility" he or she can refer to a non-exclusive list of factors such as magnitude, scale, or the accessibility or presence of means to reverse the alleged adverse effects of the project.

Second, he or she must determine whether the evidence for the existence of serious or irreversible harm is neither speculative nor purely bases on subjective belief.

Third, the judge must determine whether uncertainty exists. To do this, he or she can look into the kind and degree of uncertainty in order to make a value judgment on the relevance of such uncertainty. This is because some degrees of uncertainty such as "inexactness" or "measurement errors" can be dispelled by requiring parties to adduce more evidence subject to reasonable considerations such as time and capability.

Fourth, the judge must assess the sufficiency of the pieces of evidence which create uncertainty. This is because scientific evidence which are not reasonably plausible or those that were reached with "methodological rigor" and enjoy the support of some members of the scientific community, should not be considered. This is important because if they

are refused consideration, then the judge can a make a more accurate determination of the existence of scientific uncertainty.

Admittedly, the proposed framework may still have weaknesses as far as a more detailed step-by-step analysis is concerned of the entire process of determining the existence of a possible harm and scientific uncertainty. Future studies on the same subject matter can look into the actual experience of judges and party-litigants in applying the principle. The present study is a critical analysis of a framework adopted in a *particular* case. These studies can delve into the practical realities that affect the court's decision. It must be remembered that at the heart of cases involving the precautionary principle is a living environment and people whose lives, culture, and well-being depend on.

PURGING THE MOST SERIOUS CRIMES IN THE WORLD: Recent Multilateral Developments

Mark Dean dR Itaralde[1]

> "All men are equal before the law. Nobody is above the law. More men and women in this world are united by the conviction that genocide, crimes against humanity, war crimes and the crime of aggression cannot go unpunished – regardless of the nationality and the rank of the perpetrators."
>
> -H.E. Judge Dr. jur. h. c. Hans Peter Kaul

"How far the States must go when implementing modern international criminal law? Judge Van den Wyngeart posed this poignant question in his *Dissenting Opinion in the Arrest Warrants of 11 April 2000*.[2] Postulating the role of States as agents of international community, he espoused that States must weigh two divergent interests in resolving complaints on crimes alleged to be universal in character,: (1) "the need of international accountability for such crimes as torture, terrorism, war crimes and crimes against humanity", and (2) "the principle of sovereign equality of States, which presupposes a system of immunities".[3] These two divergent interests remain at the core of debates on how available legal tools in international criminal law could effectively be enforceable and fully utilized. Truly, the dissenting judge's estimation encapsulates a framework on how the world must progress in establishing better legal standards of how universal international crimes may be purged and prevented.

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[2] Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo vs. Belgium). Dissenting Opinion (2002) International Court of Justice, http://www.icj-cij.org/docket/files/121/8144.pdf

[3] Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo vs. Belgium). Dissenting Opinion (2002) International Court of Justice, http://www.icj-cij.org/docket/files/121/8144.pdf

The increasing magnitude of human rights violations as well as international crimes of massive character pose as serious problems that deserve utmost attention of the world and international response. Zooming in to present the norms of "responsibility to protect", universal jurisdiction, and the establishment of the International Criminal Court (ICC) in international criminal law, this article aims to further ignite this attention with a hope of increasing awareness to available legal tools in the international arena. it tries to analyze the effectivity and enforceability of these legal tools while the world continues to crumble upon threats of global terrorism, and atrocious human rights violations.

At the heart of this article, is a perspective of constructivism – "a theory based on the thinking that there is no such thing as objective truth in social or political society", and that that "neither individual, state, nor international community interests are predetermined or fixed, but are socially constructed through constant interaction,"[4] noting that International Laws' relevance lie in the compromise that it strikes between diverging reasons for action: utility and appropriateness,[5] and in securing each state's national interest.

These developments can compensate the weaknesses of our domestic processes, when local play of power prevent domestic impunity of the heinous crimes.

Responsibility to Protect

Secretary-General Kofi Annan, in his United Nations (UN) General Assembly 54th session address in 1999, reflected upon the "prospects for human security and intervention in the next century" - recalling the failures of the Security Council to act and intervene in Rwanda and Kosovo, and challenging the United Nations to find common ground in upholding the principles of the Charter and defend common humanity.[6] The world saw the incapability of the international community to enforce appropriate response to massive atrocious crimes. Secretary-General's address became the turning point to the paradigmatic shift from the previous right to "humanitarian intervention" into "responsibility to protect" or R2P. Through the trailblazing efforts of the International Commission on Intervention and State Sovereignty (ICISS), R2P as a developing norm, became the prospect towards internationally accepted framework to guide the effective international response to atrocious crimes against humanity.

[4] Simon Knuters, The Responsibility to Protect: An Emerging Norm Applied to the Conflict of Syria, Digitala Vetenskapliga Arkivet, http://www.diva-portal.org/smash/get/diva2:933567/FULLTEXT01.pdf

[5] Jutta Brunnee, A Constructivist Theory of International Law?, EJIL: Talk, September 23, 2015, https://www.ejiltalk.org/a-constructivist-theory-of-international-law/

[6] See The Responsibility to Protect, Report of the Commission on Intervention and State Sovereignty (Ottawa: International Development Research Centre, 2001).

Three primary documents made R2P the buzzword in the international political platform in the recent past:[7] the 2001 Report of the ICISS, the 2004 Report of the High Level Panel,[8] and the 2005 UN World Summit Outcome Document. The last document, were more than 150 world leaders unanimously endorsed R2P, defined R2P as a ***primary responsibility of a state to protect its own citizens from four serious crimes: genocide, war crimes, crimes against humanity and ethnic cleansing***.[9] To be exact, paragraphs 138 and 139 of the 2005 UN World Summit Outcome Document provided as follows:

> "138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.
>
> 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing

[7] Astha Pandey, The Responsibility to Protect ("R2P") in International Law: Protection of Human Rights or Destruction of State Sovereignty?, 2(1) NLUJ Law Review 115 (2013), http://www.nlujodhpur.ac.in/downloads/lawreview/Final_R2P.pdf

[8] [Hereinafter "the Panel Report"].

[9] 2005 World Summit Outcome, GA Res. 60/1 (Oct 24 2005)

and crimes against humanity and to assisting those which are under stress before crises and conflicts break out."[10]

In 2009, then Secretary-General of the UN, Ban Ki-moon, emphasized three-pillared framework for R2P to prevent or halt mass atrocities: (i) states have a **responsibility to protect** their populations from the , (ii) the international community has a **responsibility to assist** other states in fulfilling these obligations, and (iii) the international community has a **responsibility to take collective action**, including ultimately military action, in a timely and decisive manner when a state is manifestly failing to provide such protection.[11] From these propositions, two major responsibilities are delineated: (i) States have responsibility to protect their populations, from serious crimes aforementioned – this responsibility is already deeply rooted in the principles of international law;[12] and (ii) international community also have a collective responsibility, when host states are unwilling or unable to fulfill their responsibility to protect.[13]

Fast forward to 2015, 30 Security Council resolutions and six presidential statements refer to, and supported R2P.[14] In fact, the Security Council had emphasized the need to support national authorities in upholding the progression of R2P.[15] 13 resolutions were adopted by the Human Rights Council featuring the R2P, including three on the prevention of genocide and nine relating to country-specific situations. The General Assembly has continued consideration of the principle, holding a formal debate, and convening six annual informal interactive dialogues to push for the R2P.[16] At a regional level, the African Commission on Human and Peoples' Rights has adopted a resolution on strengthening the R2P in Africa and the European Parliament has recommended full implementation of the principle by the European Union.[17]

Apart from these multilateral discussions, R2P had been invoked in several practical and actual international situations. In 2007-2008, systemic ethnic violence in Kenya, out of

[10] 2005 World Summit Outcome, GA Res. 60/1, Oct 24 2005, http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf
[11] Ban Ki-moon, Implementing the Responsibility to Protect: Report of the Secretary-General, A/63/677, January 12, 2009, https://www.un.org/ruleoflaw/files/SG_reportA_63_677_en.pdf
[12] Astha Pandey, The Responsibility to Protect ("R2P") in International Law: Protection of Human Rights or Destruction of State Sovereignty?, 2(1) NLUJ Law Review 115 (2013), http://www.nlujodhpur.ac.in/downloads/lawreview/Final_R2P.pdf
[13] Luke Glanville, The Responsibility to Protect Beyond Borders, 12 HUMAN RIGHTS LAW REVIEW, at 3-4, 2012, https://academic.oup.com/hrlr/article/12/1/1/562103
[14] UN Secretary-General (UNSG), A vital and enduring commitment: implementing the responsibility to protect: Report of the Secretary-General, 13 July 2015, A/69/981–S/2015/500, available at: http://www.refworld.org/docid/55cb3cd44.html
[15] Id.
[16] Id.
[17] Id.

a national election crisis, resulted to the death of 1,000 people and displacement of 500,000 civilians. Invoking R2P, French government appealed to the UN Security Council, which led to the naming of UN Secretary-General Kofi Annan as Chief Mediator, and ended with power-sharing agreement between Kenyan identified leaders.[18] In Libya, the UN Security Council, in 2011, issued several resolutions making specific reference to R2P, to deploring gross and systemic human rights violations by the Muammar Gaddafi's regime; NATO eventually made airstrikes against Gaddafi's forces.[19] In the Central African Republic, Séléka-initiated military campaign to overthrow the government led by President Francois Bozizé. This resulted to grave human rights abuses, sufficient for the Chad, the African Union and even French government to intervene by way of invoking R2P and with the authorization of the Security Council, to protect the civilians and restore security.[20]

Despite the emergence of R2P in the international arena, several proponents raised concerns over its legitimate application. Foremost among these concerns is that R2P is a mere aspiration, rather than a real principle of international norms, much so an international law[21]. In fact, stemming from the initiatives of the UN, R2P is actually at odds with the fundamental principle of the UN – the deference to national sovereignty as decided by the members of the Security Council.[22] Moreover, the statement of the responsibility to take collective action had a conservative and very reserved wording as paragraph 139 of the 2005 UN World Summit Outcome Document merely affirmed that the foreign states are "prepared to take collective action…" which makes it voluntary, rather than mandatory for foreign states to actually intervene in case of actual gross and massive human rights violations.[23] Furthermore, even its crystallization as a customary international law enters into a dimmer and unsecured tunnel, as the R2P appears to have inconsistent state practices; In fact, while R2P had been invoked in nine different cases, there has been no consensus on what is a legitimate invocation of R2P.[24]

[18] International Coalition for the Responsibility to Protect, http://responsibilitytoprotect.org/index.php/crises/crisis-in-kenya

[19] International Coalition for the Responsibility to Protect, http://responsibilitytoprotect.org/index.php/crises/crisis-in-libya#violence

[20] International Coalition for the Responsibility to Protect, http://responsibilitytoprotect.org/index.php/crises/crisis-in-the-central-african-republic

[21] Kim R. Holmes, The Weakness of the Responsibility to Protect as an International Norm, January 7, 2014, https://www.heritage.org/defense/commentary/the-weakness-the-responsibility-protect-international-norm

[22] Id.

[23] Amanda Lo, Should the Responsibility to Protect Be Enshrined in International Law?, CORNELL INTERNATIONAL AFFAIRS REVIEW 2012, VOL. 6 NO. 1, http://www.inquiriesjournal.com/articles/1211/should-the-responsibility-to-protect-be-enshrined-in-international-law

[24] Alex J. Bellamy, The Responsibility to Protect—Five Years On, Ethics & International Affairs, 24, no. 2 (2010), pp. 143–169, http://responsibilitytoprotect.org/Bellamy.pdf

R2P also presents structural concerns. Roland Paris had exhausted this in his 2014 article: 1) **mixed motives problems** – R2P is being presented as purely altruistic intervention when in practice, historical patterns of intervention reveals neither exclusively norm-based explanations, nor exclusively self-interested foreign policy; 2) **counter-factual problems** - in order to demonstrate that an intervention has been effective, R2P implementers must resort to 'counterfactual' reasoning about what might have happened if not for the intervention, which counterfactuals are hard to prove or disprove; 3) **conspicuous harm problem** - "no matter how carefully coercive operations may be planned and conducted, they almost always cause collateral damage and accidental deaths – they break things and kill innocent people – which is bound to have a more immediate impact on public debates than a conjectured counterfactual scenario"; 4) **end-state problem** – "in cases where outside forces set out to secure a population under threat, they may achieve their initial objective but then face a quandary: how to disengage or withdraw without recreating the same threatening conditions that prompted military action in the first place"; and 5) **inconsistency problem** – "inconsistency in the international response to mass atrocity emergencies. There will be circumstances in which civilians are gravely threatened and outside actors cannot, or choose not, to intervene"[25]

Each of these five structural problems gives rise to dilemmas. The mixed motives problem renders self-interest both a necessity and a liability for preventive humanitarian intervention. The counterfactual problem makes it inherently difficult to demonstrate the effectiveness of this type of intervention. The conspicuous harm problem draws attention to the costs of such a mission, rather than to its benefits. The end-state problem creates pressures for mandate expansion and highlights the costs of an intervention's second-order effects. The inconsistency problem makes the application of R2P seem fickle and hypocritical. All of the above problems arise from tensions in the strategic logic of preventive humanitarian intervention, which is at the core of R2P. It should come as little surprise, therefore, that they were also visible in the Libya operation and its aftermath.

Universal Jurisdiction

It can be traceable that the exhaustion of the universal jurisdiction concept in several jurisdictions, both national and international became prevalent in the recent times after the *Pinochet case*.[26] Augusto Pinochet, for alleged violation of human rights in Chile, was indicted by a Spanish magistrate and eventually arrested in London where he was seeking

[25] Roland Paris The 'Responsibility to Protect' and the Structural Problems of Preventive Humanitarian Intervention, International Peacekeeping, 2014, 21:5, 569-603, DOI: 10.1080/13533312.2014.963322, https://www.tandfonline.com/doi/full/10.1080/13533312.2014.963322

[26] See R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte 3 WLR 1,456 (H.L. 1998) and In re Pinochet, Oral Judgment: 17 December 1998, Oral Judgment: 17 December 1998, [1999] UKHL 52

medical attention. Eventually, the United Kingdom House of Lords had the occasion to legitimize his arrest by ruling that state immunity cannot apply when certain international crimes are violated.[27] Consequently, various states applied universal jurisdiction to try states authorities alleged to have committed, or were committing international crimes.

Universal jurisdiction refers to "jurisdiction established over a crime without reference to the place of perpetration, the nationality of the suspect or the victim or any other recognized linking point between the crime and the prosecuting state"[28] In other words, the principle of universal jurisdiction allows national judicial authorities to investigate and prosecute people for serious international crimes, regardless of where the crime was actually committed. M. Cherif Bassiouni wrote that for an international crime to be considered under this jurisdiction, the crime must be within the standards of *jus cogens* principle.[29] The following are considered *jus cogens* international crimes in the order of their emergence in international criminal law: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against humanity; (5) genocide; (6) apartheid; and (7) torture.[30] What makes the appreciation and application of universal jurisdiction difficult however, is the fact that most of the time, state authorities are the ones being accused of committing the mentioned crimes, and this is the reason why the principle of state sovereignty overlaps.[31]

The International Court of Justice (ICJ) as a well-regarded bastion of international law, under its function to rule upon contentious cases, had two occasions in the recent past to consider the concept of *Universal Jurisdiction*: 1) The Arrest Warrants of 11 April 2000 (decided in 2002)[32], and 2) The Questions Relating to the Obligation to Prosecute or Extradite[33] (considered in 2012).

Under the Arrest Warrant Case[34], the Democratic Republic of Congo claimed that Belgium violated international law by issuing an arrest warrant for its foreign affairs minister, Mr. Abdulaye Yerodia Ndombasi, on charges of grave breaches of the Geneva Conventions and for crimes against humanity committed during his term of office. Congo

[27] Id.
[28] See Michael P. Scharf (2012). Universal Jurisdiction and the Crime of Aggression. Harvard International Law Journal. Volume 53, Summer. Vol. 12; Brian Man-ho Chok (2014) The Struggle Between the Dcotrines of Universal Jurisdiction and Head of State Immunity. 20 U.C. Davis J. Int'l L. & Pol'y 233
[29] M. Cherif Bassiouni (2001) Universal Jurisdiction For International Crimes: Historical Perspectives And Contemporary Practice. Virginia Journal of International Law Fall 2001
[30] Id.
[31] See Brian Man-ho Chok (2014) The Struggle Between the Doctrines of Universal Jurisdiction and Head of State Immunity. 20 U.C. Davis J. Int'l L. & Pol'y 233
[32] *Supra No. 2.*
[33] Questions Relating to the Obligation to Prosecute of Extradite (Belgium v. Senegal) (2012). International Court of Justice, http://www.icj-cij.org/docket/files/144/17064.pdf
[34] *Supra No. 2*, starting para. No. 13

at the onset, claimed that universal jurisdiction cannot be invoked because of the principle of sovereign equality of states and that the foreign affairs minister was covered by the diplomatic immunity[35]. However as the case progressed, the issue on universal jurisdiction was seemingly dropped by Congo, leading the ICJ to basically rationalize the case based on the rules on diplomatic immunity. The ICJ then ruled, in favor of Congo, highlighting the importance of functional immunity - that the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States[36]. It also noted that jurisdiction does not imply absence of immunity, while absence of immunity does not infer jurisdiction - purporting, that while international conventions may oblige states to extend its criminal jurisdiction for certain crimes, such extension of jurisdiction cannot alter immunities given by customary law[37]. Nonetheless, the court considered universal jurisdiction, in relation to the application of diplomatic immunity, when it said that the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances as: 1) where such person is tried in his own country; 2) where the State which he represent or has represented decided to waive that immunity; 3) where such person no longer enjoy all of the immunities accorded by international law in other States (i.e., ceasing to hold the office of Minister for Foreign Affairs); and 4) where such person is subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.[38]

Under the Questions Relating to the Obligation to Prosecute or Extradite[39], a former state head of Chad, Mr. Hissène Habre, was issued a warrant of arrest in Belgium. The warrant alleged large-scale violations of human rights which were committed through implementing arrests of actual or presumed political opponents, detentions without trial or under inhumane conditions, mistreatment, torture, extrajudicial executions and enforced disappearance while he was the President of Chad. After he was overthrown as President of Chad, since he was on political asylum in Senegal, Belgium initiated extradition discussion with Senegal.[40] The case was eventually brought to ICJ because of the failure of Senegal to prosecute Mr. Habre. Belgium claimed among others, that Senegal breached Article 5 of the Convention against Torture which required it to establish measures necessary to criminalize torture. The ICJ eventually held that because Senegal failed to adopt the necessary universal jurisdiction legislation until 2007, the obligation to submit the case to competent authorities for prosecution had not been observed.

[35] *Id. Para No. 41-43; Para No. 45*
[36] *Id. Para No. 53*
[37] *Id. Para. No. 59*
[38] *Id. Para. No. 61*
[39] *Supra No. 32,*
[40] *Id. Para. Nos. 15-41*

It should be noted that in both cases, the ICJ did not directly attack the issue on the application of universal jurisdiction. However, it can be gleaned very well from the observations of the ICJ that there are specific crimes that admit of being *jus cogens*, when universal jurisdiction may apply. The ICJ also observed that universal jurisdiction, albeit with unclear standards at present, may not be considered when it violates functional immunities afforded to certain individuals. There were also profound pronouncements from other judges who expressly noted their points in their dissenting or separate opinions. In the Arrest Warrant Case, Judges Higgins, Kooijmans, Buergenthal, [41] and Van den Wyngaert found that customary international law does not prohibit applying universal jurisdiction to other offences, subject to certain conditions.[42] In the Congo vs. Belgium Case, Judge Cancado Trindade, noted that application of universal jurisdiction contribute to make time work *pro persona humana, pro victima*; that the principle of universal jurisdiction appears nourished by the ideal of universal justice, without limits in time (past or future) or in space (being transfrontier); He added that it should transcend inter-state dimension, purporting to safeguard the fundamental values shared by the international community as a whole.[43]

But these led to inconsistent state practices and pronouncements and steered to question the uncertainty and legitimacy of the principle of universal jurisdiction principle.

International Criminal Court

The horrors of the world wars manifested the need for an international court that could impugn crimes of universal character. After the Second World War, and before the establishment of the International Criminal Court (ICC), there were four notable special tribunals established:[44] 1) the International Military Tribunal at Nuremberg (1945-1946); 2) the International Military Tribunal for the Far East in Tokyo (1946-1948); 3) International Criminal Tribunal for Yugoslavia (ICTY), established in 1993; and 4) the International Criminal Tribunal for Rwanda (ICTR) established in 1994. The first two tribunals were set to punish German Nazi leaders and Japanese war criminals during the World War II while the last two were created, in response to large-scale atrocities committed by armed forces during Yugoslav Wars, and following the Rwandan Genocide, respectively. These four tribunals stamped the need for a permanent international court for the protection of the international community.

[41] Supra No. 2. (joint separate opinion of Judges Higgins, Kooijmans & Buergenthal) Para No. 43
[42] Id. Para Nos.. 87-88
[43] Supra No. 32. (Dissenting Opinion) Judge Cancado Trindade (2012) paras. 176-178
[44] Heidi Bucheister, The International Criminal Court: An Overview, Beyond Intractability, December 2012, https://beyondintractability.org/essay/international-criminal-court-overview

Now, the ICC is the world's first permanent international criminal court with jurisdiction to prosecute individuals responsible for the most serious crimes under international law: (i) genocide, (ii) crimes against humanity, and (iii) war crimes.

Celebrating its 20th anniversary this year, ICC's founding treaty, the Rome Statute, was adopted on 17 July 1998 by 120 States, and the same entered into force on 1 July 2002, the date the ICC was operationalized. As of January 2018, 123 countries are States Parties to the Rome Statute of the International Criminal Court - 33 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and Caribbean States, and 25 are from Western European and other States.[45] Notably, United States, China, and Russia and even India are not state parties to the Rome Statute, and Burundi, South Africa and Philippines have expressed their withdrawal as State Parties very recently.

The functioning of the Court is based on the 'principle of complementarity', under which States Parties have affirmed their primary responsibility to investigate, prosecute and punish the perpetrators of the most heinous crimes under international law in their respective jurisdictions, and protect the victims of these crimes. In other words, ICC as independent and impartial court is only a court of last resort, and can only intervene in situations where State Parties themselves are either unwilling or unable to investigate and prosecute the perpetrators of genocide, war crimes and crimes against humanity and crimes of aggression.[46]

The jurisdiction of the ICC is non-retroactive. This means the ICC has no power to investigate events that took place before 1 July 2002. For States that ratify or accede after this date, the Court has jurisdiction for crimes committed only after the Rome Statute has entered into force in that State Party, unless that State declares otherwise.[47] This exception actually took an example when Côte d'Ivoire allowed ICC jurisdiction over the Gbagbo and Blé Goudé even before it has ratified the Rome Statute.

Apart from the Assembly of State Parties which basically is represented by all State parties and which powers are set by Article 112 of the Rome Statute, four organs were established for the ICC to fully become functional: 1) the Presidency, 2) the Judicial Division, 3) the Office of the Prosecutor, and 4) the Registry.[48]

[45] International Criminal Court, State Parties to the Rome Statute, https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx

[46] International Criminal Court, Joining International Criminal Court: Why does It Matter, https://www.icc-cpi.int/news/seminarBooks/2018%2001%20Universality_Eng_pages.pdf

[47] *Id*.

[48] Article 34 of the Rome Statute

The Presidency is composed of the President and First and Second Vice-Presidents, all of whom are elected by an absolute majority of the Judges of the Court for a three-year renewable term. The judges composing the Presidency serve on a full-time basis and acts on three main areas of responsibility: (i) judicial, when it constitutes and assigns cases to Chambers and conducts judicial review of certain decisions of the Registrar; (ii) administration, when it oversees the work of the Registry and the proper administration of the Court; and (iii) external relations, when it maintains relations with States and other entities and promote understanding and public awareness of the ICC.[49]

The Judicial Division is composed of 18 judges of the Court, organized into three chambers—the **Pre-Trial Chamber, Trial Chamber and Appeals Chamber**—which carry out the judicial functions of the Court. Judges are elected to the Court by the Assembly of States Parties. They serve nine-year terms and are not generally eligible for re-election. All judges must be nationals of states parties to the Rome Statute, and no two judges may be nationals of the same state. They must be "persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices"[50]

The Office of the Prosecutor, headed by the Chief Prosecutor, who is assisted by one or more Deputy Prosecutors is responsible for conducting investigations and prosecutions. The Rome Statute provides that the Office of the Prosecutor shall act independently; as such, no member of the Office may seek or act on instructions from any external source, such as states, international organizations, non-governmental organizations or individuals. The Prosecutor can initiate an investigation following a referral from a State Party or the UN Security Council. When the UN Security Council refers a situation to the Court, it can do so regarding any State member of the UN, including non-States Parties of the ICC (this was for instance the case for Darfur, Sudan; and Libya). The Prosecutor can also initiate an investigation on his or her own initiative, with the authorization of the Judges of the Pre-Trial Chamber.

The Registry is responsible for the non-judicial aspects of the administration and servicing of the Court.[63] This includes, among other things, "the administration of legal aid matters, court management, victims and witnesses matters, defense counsel, detention unit, and the traditional services provided by administrations in international organizations, such as finance, translation, building management, procurement and personnel".[63] The Registry is headed by the Registrar, who is elected by the judges to a five-year term.[22] The current Registrar is Herman von Hebel, who was elected on 8 March 2013.[64]

[49] International Criminal Court, The Presidency, https://www.icc-cpi.int/about/presidency?ln=en
[50] Article 36 of the Rome Statute

The process of the ICC starts from preliminary examinations, investigation, pre-trial, trial, appeal and then enforcement of judgment and award.[51] Under preliminary examination, the Office of the Prosecutor must determine whether there is sufficient evidence of crimes of sufficient gravity falling within the ICC's jurisdiction, whether there are genuine national proceedings, and whether opening an investigation would serve the interests of justice and of the victims.[52] Investigation considers gathering of evidence and identifying a suspect, and ends with the Prosecution requesting ICC judges to issue: (i) an arrest warrant (the ICC relies on countries to make arrests and transfer suspects to the ICC); or (ii) a summons to appear where suspects appear voluntarily. During pre-trial stage, three Pre-Trial judges confirm suspect's identity and ensure suspect understands the charges, and after hearing the prosecution, the defense, and the legal representative of victims, the judges decide (usually within 60 days) if there is enough evidence for the case to go to trial. Before three Trial judges, the Prosecution must prove beyond reasonable doubt the guilt of the accused. Judges consider all evidence, then issue a verdict and, when there is a verdict of guilt, issue a sentence. The judges can sentence a person to up to 30 years of imprisonment, and under exceptional circumstances, a life sentence. Verdicts are subject to appeal by the defense and by the prosecutor. Judges can also order reparations for the victims. During appeal stage, Both the Prosecutor and the defense have the right to appeal a Trial Chamber's decision on the verdict (decision on guilt or innocence of the accused) and the sentence. The victims and the convicted person may appeal an order for reparations. An appeal is decided by five judges of the Appeals Chamber, who are never the same judges as those who gave the original verdict. The Appeals Chamber decides whether to uphold the appealed decision, amend it, or reverse it. This is thus the final judgment, unless the Appeals Chamber orders a re-trial before the Trial Chamber. Sentences are served in countries that have agreed to enforce ICC sentences.[53]

As of this writing, the ICC's caseload includes: 1) 10 preliminary examinations, 2) 11 situations under investigation, 3) four trials, 4) three hearings on victims' reparation, and 5) five closed cases. The ongoing preliminary examinations cover a war crimes and crimes against humanity case from **Afghanistan** in 2003, admissibility of alleged war crimes committed since 1 November 2009 and alleged crimes against humanity committed since 1 November 2002 in **Colombia**, alleged crimes under the ICC's jurisdiction committed in **Gabon** since May 2016, alleged crimes against humanity committed in the context of the 28 September 2009 events in Conakry, **Guinea**, alleged war crimes committed by **United Kingdom** nationals in the context of the **Iraq** conflict and occupation from 2003 to 2008, alleged crimes against humanity or war crimes committed in the Niger Delta, the

[51] International Criminal Court, How The Court Works, https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx#legalProcess
[52] *Id*.
[53] *Id*.

Middle-Belt States and in the context of armed conflict between Boko Haram and Nigerian security forces in **Nigeria**, alleged crimes committed in the occupied **Palestinian** territory, including East Jerusalem, since 13 June 2014, alleged crimes committed since at least 1 July 2016, in the context of the "war on drugs" campaign in the **Philippines**, alleged crimes committed in the context of the "Maidan" protests since 21 November and other events in **Ukraine** since 20 February 2014, and alleged crimes committed since at least April 2017, in the context of demonstrations and related political unrest in **Venezuela**.[54]

The situations under investigations include: alleged crimes against humanity committed in **Burundi** or by nationals of Burundi outside Burundi since 26 April 2015 until 26 October 2017, alleged crimes against humanity and war crimes committed in the context of an international armed conflict between 1 July and 10 October 2008 in **Georgia**, alleged war crimes and crimes against humanity committed in the context of renewed violence starting in 2012 in **Central African Republic (CAR)**, alleged war crimes committed in **Mali** since January 2012, alleged crimes within the jurisdiction of the Court committed in the context of post-election violence in **Côte d'Ivoire** in 2010/2011, but also since 19 September 2002 to the present, alleged crimes against humanity committed in the context of the situation in **Libya** since 15 February 2011, alleged crimes against humanity committed in the context of post-election violence in **Kenya** in 2007/2008, alleged genocide, war crimes and crimes against humanity committed in in, **Darfur, Sudan** since 1 July 2002, alleged war crimes and crimes against humanity committed in the context of a conflict in **CAR** since 1 July 2002, with the peak of violence in 2002 and 2003, alleged war crimes and crimes against humanity committed in the context of a conflict between the Lord's Resistance Army (LRA) and the national authorities in **Uganda** since 1 July 2002 (when the Rome Statute entered into force), and alleged war crimes and crimes against humanity committed in the context of armed conflict in the **Democratic Republic of Congo** since 1 July 2002.[55]

The four cases on trial stage include: **Gbagbo** and **Blé Goudé** Case of **Côte d'Ivoire**, **Ntaganda** Case of **Democratic Republic of Congo, Banda** Case of **Darfur, Sudan** (which remains pending until arrest or voluntary appearance of the accused, and **Ongwen** Case of **Uganda**.[56]

Under appeal, are convictions of **Jean-Pierre Bemba Gombo of CAR** for committing war crimes and crimes against humanity, and another case involving **Jean_ Pierre Bemba Gomobo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo,**

[54] International Criminal Court, Preliminary Examinations, https://www.icc-cpi.int/pages/pe.aspx
[55] International Criminal Court, Situations under Investigation, https://www.icc-cpi.int/pages/situations.aspx
[56] International Criminal Court, Trial, https://www.icc-cpi.int/Pages/trial.aspx

Fidèle Babala Wandu and Narcisse Arido of CAR for offences against the administration of justice allegedly committed in connection with the case of Jean-Pierre Bemba Gombo.[57]

For the convictions of **Al Madhi** of **Mali, Katanga** and **Lubanga**, both of **Democratic Republic of Congo**, reparation awards or hearing are also on-going for the victims of the said cases.[58]

Notably, there were also five more cases that reached trial but were eventually not confirmed or cases were withdrawn for lack of sufficient evidence. These include the cases of **Kenyatta** of **Kenya, Ruto** and **Sang** of **Kenya, Abu Garda** of **Darfur, Sudan,** and **Mbarushimana** of **Democratic Republic of Congo. Ngudjolo Chui** case of **Democratic Republic of Congo** was acquitted both on trial and appeal.[59]

Major among the challenges faced by the ICC is the noticeable non-active participation of some of the states with biggest populations and major human rights issues. United States, Russia, India, China are but a few of these States that have yet to consider ratifying the Rome Statute. What appeared to have been the early trajectory of the ICC is the seeming cases considered here and there, mostly of African continent. In fact, in 2016, African states begun to verbalize what they considered as neo-colonialist approach of the ICC or what in simple terms appeared to be hypocrisy or biases of the ICC, focusing on impugning cases in Africa and Middle East only.[60]

Functioning by way of principle of complementarity, another concern that may serve as limitation to the effective exercise of ICC of its jurisdiction, is how to get and sustain the cooperation of involved states.[61] Until the States are being run by charlatans who have personal interests to protect, there is no way these States may be compelled to actually participate in this promising institution. As can be gleaned from the accomplishments of the ICC, the "ICC struggles to get states to cooperate when, first, it has indicted a member of the government's ruling party or coalition, and, second, when there's no guarantee that

[57] International Criminal Court, Appeal, https://www.icc-cpi.int/Pages/Appeal.aspx

[58] International Criminal Court, Reparation/Compensation Stage, https://www.icc-cpi.int/Pages/ReparationCompensation.aspx

[59] Intenrational Criminal Court, Closed Stage, https://www.icc-cpi.int/Pages/closed.aspx

[60] Karen Allen, Is this the end for the International Criminal Court?, BBC News, October 24, 2016, http://www.bbc.com/news/world-africa-37750978; see also http://www.e-ir.info/2011/04/28/the-limits-and-pitfalls-of-the-international-criminal-court-in-africa/

[61] Courtney Hillebrecht & Scott Straus, Last week, the International Criminal Court convicted a war criminal. And that revealed one of the ICC's weaknesses, The Washington Post, March 28, 2016, https://www.washingtonpost.com/news/monkey-cage/wp/2016/03/28/last-week-the-international-criminal-court-convicted-a-war-criminal-and-that-revealed-one-of-the-iccs-weaknesses/?utm_term=.9821b71e6be3

the opposition will be investigated and tried first. The best way for perpetrators to avoid ICC prosecution is to win on the battlefield and at the ballot box"[62].

The ICC also have to continuously hurdle the disadvantage and difficulty of being able to conduct their investigation, free, comfortably and with necessary support and tools. Unlike domestic investigation, where structure and bureaucracy is clear, the ICC have no clear structure with the sovereign states in terms of conducting the necessary examinations and investigations. And the same, concern as shared before this paragraph, is traceable as to how ICC can penetrate the locations of the cases and be able to successfully conduct their investigations.

Final Observations and Conclusions

Central to the core of the three topics covered here, is that all three have to contend with one of the most sacrosanct norms in international relations, which is the principle of state sovereignty. The legitimacy of the R2P yields on the fact that state practices remain inconsistent and the soft law document where invocation of R2P is anchored appears not to have teeth of its own that can bite, but merely reserves for the State to voluntarily act based on the R2P norm that is without clear parameters. We have seen the trend that application of universal jurisdiction digressed from being without exception, to admitting certain limitations pushed by the same standards of state sovereignty. And the ICC continue to hurdle the question of legitimacy, while some powerful states remain outside the radar of its jurisdiction and its operation is being dragged by the use of the state sovereignty standards to keep the ICC ineffective.

Nonetheless, there should be no place for offenses that shocks the conscience of mankind, to proliferate in the world. R2P, Universal Jurisdiction and the presence of ICC proved that international community can have stake in securing more people, regardless of race or citizenship, to be free from atrocities, and unforgivable crimes. While international have no central legislator and executor, and since state practices continue to be contradictory, inconsistent and inconsequential, we have political will and vigilance to fill an important lacuna and devise systems and processes overarching to considered even the realities of all the inconsistencies and disorders affecting our international community.

Perhaps, we can consider these developments in the international community just as how we treat domestic affairs. There are ideals that we hope to see on how our domestic processes are conducted. But sometimes, the realities are far from how we expected things to be, and even domestic affairs are beset by politics, discrimination and corruption –

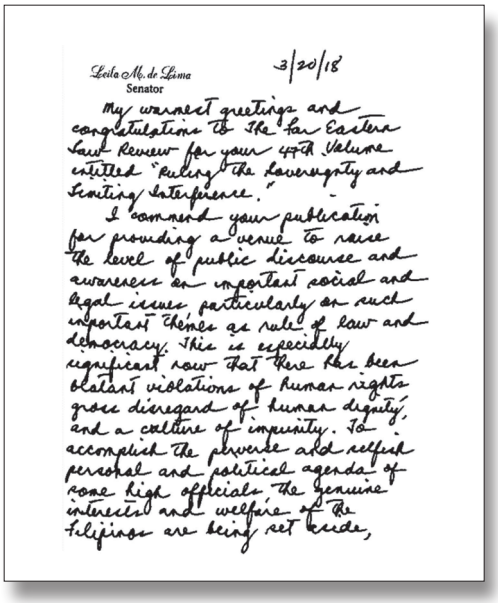
[62] *Id*.

power play to simplify it. But even then, we do not aspire to dilute these domestic affairs, instead, we look for opportunities to change the process, upgrade the system, and ensure its sustainability. The challenges the concepts covered here experience do not mean that that these concepts must end.

In fact, these international challenges become windows to possible positive progression of these multilateral developments. These developments can compensate the weaknesses of our domestic processes, when local play of power prevent domestic impunity of the heinous crimes. More so, these developments are answering the clarion's call to stop these heinous crimes from happening, to create more avenues for dialogues, and to ascertain accountability and responsibility.

The application of R2P, universal jurisdiction and the presence of ICC will further mature as it is being tested by time and practices and possibly, limited by how diplomacy binds international community. And so we hope that R2P, universal jurisdiction, and ICC would remain instrumental in securing that these offenses be remedied, if not restrained, safeguarding the fundamental values of our global community. Until then, we can only hope for responsible and judicious application of the concept, consistent with international law.

Foreword[1]

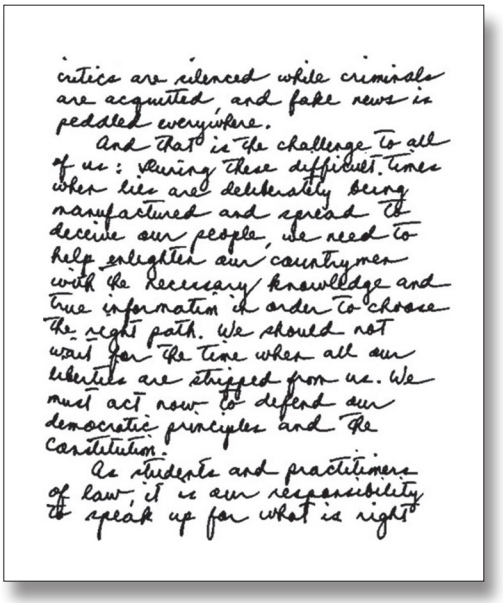


Leila M. de Lima
Senator

3/20/18

My warmest greetings and congratulations to the Far Eastern Law Review for your 49th Volume entitled "Ruling the Sovereignty and Limiting Interference."

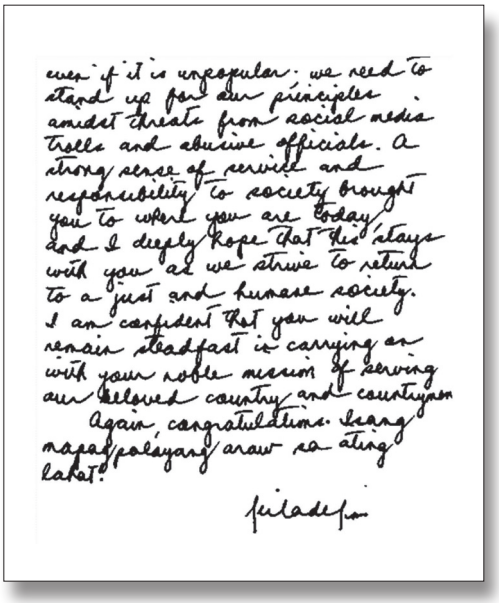
I commend your publication for providing a venue to raise the level of public discourse and awareness on important social and legal issues particularly on such important themes as rule of law and democracy. This is especially significant now that there has been blatant violations of human rights, gross disregard of human dignity, and a culture of impunity. To accomplish the perverse and selfish personal and political agenda of some high officials the genuine interests and welfare of the Filipinos are being set aside,



critics are silenced while criminals are acquitted, and fake news is peddled everywhere.

And that is the challenge to all of us: during these difficult times when lies are deliberately being manufactured and spread to deceive our people, we need to help enlighten our countrymen with the necessary knowledge and true information in order to choose the right path. We should not wait for the time when all our liberties are stripped from us. We must act now to defend our democratic principles and the Constitution.

As students and practitioners of law, it is our responsibility to speak up for what is right



even if it is unpopular: we need to stand up for our principles amidst threats from social media trolls and abusive officials. A strong sense of service and responsibility to society brought you to where you are today, and I deeply hope that this stays with you as we strive to return to a just and humane society. I am confident that you will remain steadfast in carrying on with your noble mission of serving our beloved country and countrymen.

Again, congratulations. Isang magaal palayang araw sa ating lahat!

Filadelfa

[1] The strict rules of Camp Crame's Custodial Center prohibit its detainees to have any type of gadget, thus the Senator's message had to be hand-written. A type-written version is provided for below.

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