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Editorial Office
Integrated Bar of the Philippines
15 J. Vargas Avenue, Ortigas Center, Pasig City 1600
Telephone: (+632) 8631-3018 ●Fax: (+632) 8634-4696
Website: www.ibp.ph ●Email: publications@ibp.ph

IBP Journal accepts papers dealing with legal issues and developments as well as socio-economic and political issues with legal dimensions. Only manuscripts accompanied by a soft copy, including an abstract and curriculum vitae of the author, shall be considered. Papers are published through a peer-review process undertaken by the Board of Editors.

The articles published in IBP Journal do not necessarily represent the views of the Board of Editors. The articles are representative of the views of the author/s alone and the author/s are responsible for the views expressed therein.

EDITOR $ NOTE

Whether in the broad arena of international law or the smaller venues of a local drug court or a legal aid program for the underprivileged, the articles in this edition of the IBP Law Journal have emphasized a common theme: *The practice of law is pointless if it does not, above all, champion human dignity, respect for rights, and access to justice.*

In *Fear of Reprisal and Access to Justice in the United Nations Human Rights Committee*, Gil Anthony Aquino advances that "the international human r
be for naught if it is not sensitive and responsive to all the experiences of human rights victims that affect their ability to seek justice."

In *The HCCH Conventions and Their Practical Effects to Private International Law in the Philippines*, J. Eduardo Malaya and Jilliane Joyce De Dumo-Cornista assert that private internationade tol wwork fomust be people" and that "certain legal issu
can be addressed and resolved through diplomacy and international law advocacies."

In *Promoting Public Support for Legal Aid and Raising Legal Awareness through Legal Aid Advertising, Law-related Education, and Legal Literacy Campaigns*, Joseph R. Malcontento contends that "the effective d
of legal aid services is but one of many aspects of broader reforms that are necessary to guarantee the right to adequate legal assistance, which shall not be denied to any person by reason of poverty, and to ensure wider access to justice."

In *Some Court Experience-based Suggestions for Law and Implementation Reform in The Comprehensive Dangerous Drugs Act,* Judge Soliman M. Santos, Jr. calls for reform in drug enforcement cases, because "there is already too much collateral damage by the war against drugs, not only to life and liberty but even to property. It should at least be lessened."

The same theme permeates in the fields of agrarian reform and ancestral domain.

In *Retaking Unused Government-Owned Lands for Agrarian Reform*, Luis M.C. Pañgulayan argues that land reform implementation "continues t matter of state policy. It will require an amendment of the Constitution and a revision of our agrarian reform statutes if one is to write *finis* to this social justice p

In *Refocusing Development in the Ancestral Domains of Bukidnon*, Burt M. Estrada and Arbie S. Llesis advocate "more meaningful development within the ancestral domains" in order "to correct a gra our indigenous people."

With the emergence of new technologies, the challenge of protecting human rights has acquired new dimensions.

In *From Cabins to Slash-bins: Constitutionality of Old Search and Seizure Rules in the Age of New Technology*, Nadine Anne Escalona takes the position that "new ways perpetrating crime enabled by these technologies also emerge" including human traffick dangerous drugs, money laundering, libel, and defamation. Thus, there is a cogent need to update legislation to safeguard the right to privacy and the right against unreasonable searches and seizures.

In *The Evolution of Money Laundering Laws in the Philippines*, Benjamin R. Samson chronicles the stages of the development of measures to address money laundering and the evils it brings.

In this edition, the IBP Journal seeks to live up to its role as a platform for advocacies championing human dignity, respect for rights, and access to justice.

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Fear of Reprisal and Access to Justice in the United Nations Human Rights Committee

*Gil Anthony Aquino**

ABSTRACT

The State is the primary protector of human rights, and, most often, is the primary violator as well. Human rights victims often face an uphill battle to attain justice. One of the reasons is their fear of reprisal from State agents involved in the human rights violation. This fear is an obstacle and a deterrent from seeking domestic legal remedies. Where domestic institutions fail, international mechanisms can step in to fill the gap. One of these mechanisms is the individual communication procedure of the United Nations Human Rights Committee (UNHRC).

This paper examines the access to justice of human rights victims before the UNHRC and how the individual communications mechanism deals with victims' fear of reprisal. Part I is

* Gil Anthony E. Aquino received his Juris Doctor from the U.P. College of Law. He worked in Center for International Law (CenterLaw), where he handled human rights cases involving extrajudicial killings, economic rights, and freedom of expression. From 2018 to 2019, he served as Committee Adviser in the International Law Committee of the Integrated Bar of the Philippines. He taught civil law, commercial law, and legal research in the Lyceum of the Philippines University.

II defines the right of access to justice before the UNHRC through an examination of the metes and bounds of the individual communication mechanism, and by identifying the sources and content of the right under the International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol. Part III analyses how the UNHRC treats fear of reprisal under the individual communication mechanism, particularly on the procedural rules on exhaustion of domestic remedies and burden of production and burden of proof. It will also examine two communications considered by the UNHRC, which addressed the issue of fear of reprisal.

Reflecting on these two communications, the UNHRC treated fear of reprisal as an exception to the rule of exhaustion of domestic remedies without providing a satisfactory legal analysis. The UNHRC glossed over the complications presented by the issue of fear of reprisal vis-à-vis the rule on burden of production and burden of proof. Part IV presents proposals to ensure that the right of access to justice is promoted fairly and legitimately by the UNHRC. In particular, the UNHRC must ground its legal analysis on the principles of effectiveness and judicial notice. Part V contains the concluding remarks.

I. INTRODUCTION

On December 10, 1948, the countries of the world produced a milestone document that would change the moral and philosophical landscape of fundamental freedoms and human rights. The Universal Declaration of Human Rights

(UDHR)[1] was adopted by the United Nations (UN) General Assembly. Set to be a universal standard to be achieved for all peoples and all nations,[2] the UDHR recognized the "inherent dignity and of equal and members of the human family [as] the foundation of freedom, justice, and peace in the w[3]

One of these standards is the promotion of social progress and better standards of life in larger freedom.[4] People need freedom from the constraints of political and social disenfranchisement to obtain their needs[5] and to reach their full potential as citizens.[6]

How exactly can we define freedom in a way that relates to the different levels of needs of a human being? When former US President Franklin D. Roosevelt delivered his Four Freedoms speech in 1941, he proposed that there are four freedoms that people everywhere in the world ought to enjoy - freedom of speech, freedom of worship, freedom

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[1] *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Gen. Ass. Off. Rec. 3rd Sess., Suppl. No 13, (A/810) (1948) 71 [hereinafter, UDHR].

[2] *Universal Declaration of Human Rights*, United Nations Website, available at <https://www.un.org/en/universal-declaration-human-rights/> (last visited 23 April 2020).

[3] UDHR, Preamble.

[4] *Id.*

[5] Former Chief Justice Artemio V. Panganiban, *UNLEASHING ENTREPRENEURIAL INGENUITY* (speech delivered at the 12th General Assembly of the ASEAN Law Association, 2015), <https://cjpanganiban.com/2015/02/26/unleashing-entrepreneurial-ingenuity/> (last visited Apr 22, 2020)., statin conquer poverty, to create wealth and to share prosperity is to unleash the entrepreneurial genius of people by granting them the freedom and the tools to help themselves and society."

[6] PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (50th ed., 2018)., saying "Freedom is the indispensable condition condition."

from want, and freedom from fear.[7] Freedom of speech and freedom of worship are expressed as human rights in the International Covenant on Civil and Political Rights (ICCPR). Freedom from want is expressed as the right to an adequate standard of living under the International Covenant on Economic, Social and Cultural Rights (ICESCR). President Roosevelt initially meant "freedom from from physical aggression by another State.[8]

This paper proposes that freedom from fear takes on a different meaning in today's world. liberties of people do not always come from external forces. The danger posed by a person's own go or her fundamental freedoms and human rights is just as dangerous as the threats to international peace and security. This is the kind of fear of injustice, in one a person only subjects himself or herself to the possibility of a graver injustice done against him or her.

One of the biggest challenges to human rights litigants is their fear of reprisal from the police or other State agents. This challenge has been the experience of rape victims during Colombia's[9] the families of the victims of the Kasese massacre in Uganda,[10] and the families of victims President Rodrigo Duterte's war on drugs in the Philippines.[11]

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[7] Franklin D. Roosevelt, *FOUR FREEDOMS* (The Annual Message to Congress,1941), <https://www.roosevelt.nl/fdr-four-freedoms-speech-1941> (last visited Apr 22, 2020).

[8] *Id.*

[9] Anastasia Moloney, *Colombia's war-time rape victims silenced and without justice - report*, THOMSON REUTERS FOUNDATION, 15 December 2019.

[10] Oryem Nyeko, The Legacy of Uganda's Kasese Massacre, Human Rights Watch, available at <https://www.hrw.org/news/2019/11/27/legacy-ugandas-kasese-massacre>.

[11] Amnesty International, *If you are poor, you are killed,* 51-52., available at

Philippine example, petitions filed before the Philippine Supreme Court by family members of victims of extrajudicial killings reveal how they have been continuously harassed or threatened by the involved State agents,[12] stifling their ability to seek accountability from the perpetrators. Their options have been limited to special remedies such as the Writ of *Amparo*,[13] which does not establish any criminal or administrative liability on State agents but merely grants protection to victims.

Victims paralyzed from seeking legal redress due to fear of reprisal usually do not utilize the remedies available under domestic laws. However, where domestic remedies fail, international bodies such as the United Nations Human Rights Committee (UNHRC) can offer relief to victims, albeit in a limited manner. This paper defines the right to access to justice, particularly in the UNHRC mechanism.[14] It also analyzes how the HRC fear of reprisal in considering communications and how this

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<https://www.amnestyusa.org/files/philippines_ejk_report_v19_final_0.pdf.>

[12] *Morillo, et al. v. Philippine National Police, et al.*, G.R. No. 229072, January 31, 2017, and *Morillo, et al. v. Philippine National Police, et al.*, CA-G.R. SP. No. 00063; and *Almora, et al. v. Director General Ronald Dela Rosa, et al.*, G.R. No. 234359 and *Sr. Ma. Juanita R. Daño, RGS, RSW, et al. v. The Philippine National Police*, et al., G.R. No. 234484, currently pending cases before the Supreme Court.

[13] The Rule on the Writ of Amparo, A.M. No. 07-9-12-SC (2001), Sec. 1 provides that "The petition for a writ of a any person whose right to life, liberty and security is violated or threatened with violation by an unlawful act or omission of a public official or employee, or of a private individual or entity. The writ shall cover extralegal killings and enforced disa

[14] An "author" is an individual who has submi UNHRC under the First Optional Protocol, see *General Comment 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights,* Human Rights Committee, U.N. Doc. CCPR/C/GC/33 (2009) [hereinafter, General Comment 33] paragraph 6.

affects their right to access to justice. Finally, it will propose alternative means for the UNHRC to approach better the issue of fear of reprisal that promotes the right to access to justice.

II. DEFINING ACCESS TO JUSTICE BEFORE THE UNHRC

The end of World War II brought with it an overhaul of the international legal order, particularly on human rights. Concerned with ensuring that the atrocities committed during the said period will not happen again, States created the UN, an international organization founded on peace and sovereign equality, and the protection of human rights.[15] This event marked the start of the treatment of individuals as subjects under international law,[16] which meant that individuals could have rights in the international plane over and above their rights under the domestic laws of their respective countries.[17] This overall sentiment led to the creation of the International Bill of Rights, which includes the UDHR, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These instruments were created by virtue of articles 1(3), 55, and 56 of the UN Charter.[18]

The preamble of the UN Charter provides that members "reaffirm [their] faith in fu

[15] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 355-356 (7th ed., 2008).

[16] MALCOLM N. SHAW, INTERNATIONAL LAW 182-183, 190 (4th ed., 1997).

[17] Buergenthal Thomas, *THE ADVISORY PRACTICE OF THE INTER-AMERICAN HUMAN RIGHTS COURT*, 79 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 20 (1985).

[18] United Nations Charter, October 24, 1945, 1 UNTS XVI [hereinafter, UN Charter].

in the dignity and worth of the human person, [and] in the equal rights of men and women ..."[19] One of its purposes, provided in article 1(3) of the UN international co-operation ... in promoting and respect for human rights and fundamental freedoms for all without distinction as to race, sex[20] Article 55 provides that the UN must promote universal respect and observance of these rights and freedoms.[21] In relation to this, all member States of the UN pledge, in article 56, to take joint and separate action in cooperation with the UN for the achievement of the purposes in the immediately preceding article.[22] However, international cooperation can be hindered by the division of the world into States that are extremely protective of their sovereignty. To achieve the purposes of protecting human rights, international institutions such as international courts and tribunals play a crucial role. These institutions are entrusted to carry out the functions and tasks that States could not perform on their own or are reluctant to perform with other States on a bilateral or multilateral capacity.[23] One of these international institutions is the UNHRC.

This chapter will examine the individual communication mechanism of the UNHRC and will introduce the right to access to justice under this mechanism.

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[19] *Id.* at Preamble.

[20] *Id.* at art. 1(3).

[21] *Id.* at art. 55.

[22] *Id.* at art. 56.

[23] This is otherwise known as the functionalist theory, which holds that "the issue of sovereignty becomes irrelevant in the emerging world community." D. MITRANY, A WORKING PEACE SYSTEM 30-31, 65-66 (1966).

A. The UNHRC individual communications mechanism

The UNHRC was established under article 28 of the ICCPR.[24] Generally, its purpose is to monitor and supervise the implementation of the obligations under the ICCPR by the State Parties.[25] It is composed of 18 members[26] who are nominated by a State Party and elected by secret ballot by the State Parties.[27] These members serve in their personal capacity and not as State representatives.[28] The critical considerations for membership are the moral character and recognized competence in the field of human rights, and equitable geographic representation.[29] One of the key functions of the UNHRC is the individual communication mechanism.[30] Under a separate but related instrument to the ICCPR, the First Optional Protocol (OP),[31] a mechanism was created for the UNHRC to receive and consider communications from individuals who allege violations of their rights under the ICCPR. This mechanism

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[24] International Covenant on Civil and Political Rights, March 23, 1976, 999 U.N.T.S. 171 [hereinafter, ICCPR] art. 28.

[25] PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS : THE SUCCESSOR TO INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS : TEXT AND MATERIALS 763 (Ryan Goodman ed., 2013).

[26] ICCPR art. 28(1).

[27] ICCPR art. 29(1).

[28] ICCPR art. 28(3).

[29] ICCPR art. 28(2).

[30] Its other key functions are to receive reports of State Parties on their implementation of the ICCPR rights at the domestic level (ICCPR art. 40(1)), the issuance of general comments (ICCPR art. 40(4)), and the consideration of interstate Complaints (ICCPR art. 41(1), which has never been invoked (See GERALD L. NEUMAN, GIVING MEANING AND EFFECT TO HUMAN RIGHTS: THE CONTRIBUTIONS OF HUMAN RIGHTS COMMITTEE MEMBERS 32 (2018)).

[31] Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 [hereinafter, OP].

was designed to "further achieve the
and the implementation of its provis[32]

There are three significant limitations to the individual communication mechanism. First, it is available only to persons under the jurisdiction of States that have signed the OP. Out of 173 State parties to the ICCPR,[33] only 116 States are parties to the OP.[34] Among the States that are parties to the ICCPR but not the OP are influential countries such as the United States and China. Establishing a mechanism to enforce human rights under an international treaty may seem logical and natural. After all, international lawyers were trained as local lawyers first. The concept of *ubi jus ibi remedium* (when there is a right, there is a remedy) is indispensable in any domestic jurisdiction.[35] The same cannot be said under international law. As the International Court of Justice (ICJ) stated in *Nicaragua v. the USA*,[36] "[w]here human righ
protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions t[37] The concept of human rights and the concept of international measures of protecting and enforcing human rights must, therefore, be distinguished.

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[32] OP Preamble.

[33] Status of ratification of the ICCPR, available at <https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND> (last accessed April 26, 2020).

[34] Status of ratification of the OP, available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4> (last accessed April 26, 2020).

[35] YOGESH TYAGI, THE UN HUMAN RIGHTS COMMITTEE : PRACTICE AND PROCEDURE 16 (Cambridge University Press. 2011).

[36] Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment, ICJ Reports 1986, 14. [hereinafter, Nicaragua v. USA]

[37] *Nicaragua v. USA*, para. 267.

This explains, in part, why not all ICCPR member States ratified the OP.

The second limitation is that decisions of the UNHRC, called Views, are not legally binding. The Views state whether there was a violation of a right protected under the ICCPR. If so, gives recommendations to the State party to remedy the breach. There is no legal mechanism to enforce the recommendations by the UNHRC. [38]

The reason that the individual complaint mechanism is only optional, and that the Views are non-binding, can be explained through the history of the OP. The OP was opened for signature and ratification in 1966, the same time as the ICCPR, but it entered into force only in 1976. There were extended debates on the establishment of the individual complaint mechanism. States such as Jamaica argued that such an arrangement must be obligatory, while socialist States viewed the mechanism as an infringement on sovereignty.[39] Ultimately, the result of the debates was a compromise—a mechanism for non-binding and optional individual complaints. Commentators[40] have described the resulting mechanism as a [41] "which is bones p missing key elements that could have made it truly effective. One of these missing elements is that there are no oral proceedings or any form of witness examination. The

[38] Compare this with the decisions of the European Court of Human Rights. See European Convention on Human Rights, Article 46(1), which provides that the State parties undertake to abide by the final judgment of the Court in any case to which they are parties. The Council of Europe even has a Committee of Ministers Department for the Execution of Judgments of the European Court of Human Rights.

[39] MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS : CCPR COMMENTARY 821 (Felix Ermacora ed., N.P. Engel 2nd rev. ed., 2005).

[40] ALSTON, *supra* note 25, at 809.

[41] *Id.*

proceedings rely solely on written communications. Another missing element is that there are also no public hearings or debates. The process of deliberations in the UNHRC are highly secretive,[42] and the Views themselves also give minimal discussions of the issue of the case.[43] These elements, if present, would have promoted transparency and confidence in the UNHRC.[44] The combined effect of the first two limitations is that the UNHRC's taken as merely optional and can be tossed aside.[45]

Commentators,[46] however, have labelled the UNHRC as a "quasi-judicial organ" and the Views as nature.[47] This means that the Views are considered authoritative interpretations of the ICCPR.[48] This is because

[42] Compare this with Rule 81(A) of both the International Criminal Tribunal for the Former Yugoslavia Rules of Evidence [hereinafter ICTY] and the International Criminal Court for Rwanda [hereinafter, ICTR] Rules of Evidence, both of which state that "[t] Registrar shall cause to be made and preserve a full and accurate record of all proceedings, including audio recordings, transcripts and, when deemed necessary by the Trial Chamber, video recordings."

[43] KIRSTEN A. YOUNG, THE LAW AND PROCESS OF THE U.N. HUMAN RIGHTS COMMITTEE 135 (Transnational Publishers. 2002).

[44] Compare this with article 56(1) of the Statute of the International Court of Justice [hereinafter, ICJ], which states the reason on which it is based," and arti shall contain the names of the judges who have taken part in the decision."

[45] See *Disini, et al. v. The Secretary of Justice, et al.* G.R. No. 203335, Feb. 11, 2014, where the Philippine Supreme Court interpreted that the View issued by the UNHRC in *Adonis v. The Philippines* "did not enjoin" State party but merely "suggested" a certai the Philippine Supreme Court did not heed UNHRC.

[46] MANFRED NOWAK, THE UNITED NATIONS CONVENTION AGAINST TORTURE : A COMMENTARY 77-78 (Elizabeth McArthur & Kerstin Buchinger eds., 2008).

[47] *Id.*

[48] Raija Hanski et al., Leading Cases of the Human Rights Committee (Institute for Human Rights, Abo Akademi University 2nd rev.) (2007).

the power of the UNHRC stems from the State parties themselves that have signed the OP.[49] The principle of good faith requires State parties to consider the Views seriously and, if they disagree with the findings or could not carry out the recommendations, must present their reasons persuasively.[50] This is in line with the U interpretation of its functions and powers. While the UNHRC recognizes that it is not a judicial body, it argues that its Views "are arrived at in a judicial impartiality and independence of [UNHRC] members, the considered interpretation of the language of the [ICCPR], and the determinative character The r State of the d parties' good faith in observing its UNHRC, including its prope views as r treatment authoritative, is their participation in the international cooperation envisioned in the UN Charter.[52]

The third limitation is that the OP is open for reservations, and States have made reservations to the OP. A reservation is a "unilateral however phrased or stateme named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to Generally,[53] States may make reservations to a treaty[54] unless expressly

[49] WALTER KÄLIN, THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION 225 (Jörg Künzli ed., 2009).

[50] CHRISTIAN TOMUSCHAT, HUMAN RIGHTS : BETWEEN IDEALISM AND REALISM 220 (2nd ed., 2008).

[51] General Comment 33, *supra* note 14, at paragraph 11.

[52] UN Charter, Preamble.

[53] Vienna Convention on the Law of Treaties, May 23, 1969, UNTS vol. 1155 p. 331, [hereinafter, VCLT] art. 2(d).

[54] *Id.* art. 19.

prohibited by the treaty[55] or the treaty limits the kind of allowed reservations.[56] Reservations are also prohibited if the reservation is incompatible with the object and purpose of the treaty.[57]

There is a debate on whether reservations should be allowed at all for human rights treaties. In human rights treaties, reservations have been described as "r
extensive and [58] Reservations tend to preserve State sovereignty and domestic standards over a human rights issue, which contradicts the very notion of international human rights law.[59] The question then is, why allow reservations for human rights treaties at all? The answer is because it is generally viewed that the more States ratify or accede to human rights treaties, the better. Not allowing reservations will discourage States from ratifying or acceding to human rights treaties, which will defeat the purpose of the international treaty.[60] This arrangement is more palatable to States, as it reconciles their human rights obligations under international law with their self-interest in preserving State sovereignty.[61] The international legal system, after all, depends almost entirely on State consent. Note as well the unique characteristic of human rights treaties as

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[55] *Id.* art. 19(a).

[56] *Id.* art. 19(b).

[57] *Id.* art. 19(c).

[58] DOUGLAS L. DONOHO, ET AL., INTERNATIONAL HUMAN RIGHTS LAW 20 (2017).

[59] See for example involves the Convention on the Elimination of Discrimination Against Women (CEDAW). Many Islamic States ratified the CEDAW but only after making reservations that Sharia religious law will prevail over the treaty provisions. This, in effect, negates the provisions of the CDAW which aims to eliminate discrimination against women. These reservations, however, stand and do
memberships.

[60] DONOHO, *supra* note 58, at 24

[61] *Id.* at 20.

compared to regular treaties. Treaties usually contain reciprocal obligations between or among States. States, therefore, have a mutual interest in fulfilling their respective obligations. In human rights treaties, States get no benefit in fulfilling their human rights obligations, except to keep appearances and to gain or maintain moral authority in the international arena.

The UNHRC has expressed its wariness regarding reservations to the ICCPR and the OP. In its General Comment No. 24,[62] it stated that reservations to the ICCPR and the OP "may undermine the effective implemen
treaties] and tend to weaken respect for the obligations of
State p[63]a The ies subject and purpose of the
create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.[64] On the other hand, the object and purpose of the C
competence of the [UNHRC] to receive and consider communications from individuals who claim to be victims of a violation by a State party of any of the rights in the [ICCPR]."[65]

The propriety of reservations to the OP was one of the main issues in a communication against Trinidad and

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[62] *General Comment 24, Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant,* Human Rights Committee, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) [hereinafter, General Comment 24].

[63] *Id.* at para. 1.

[64] *Id.* at para. 7.

[65] *Id.* at para. 13.

Tobago.[66] Trinidad and Tobago initially ratified the OP, but later withdrew after a slew of cases against it related to its imposition of the death penalty. It later re-acceded to the treaty with a reservation stating that it does not accept the competence of the UNHRC to receive and consider communications relating to any prisoner serving sentence under the death penalty. In its View, the UNHRC did not accept this reservation as valid, holding that it goes against the object and purpose of the treaty.[67] The reservation does not pertain to any particular provision of the ICCPR or the OP, but to the entirety of the two treaties for a particular set of persons. This amounts to discrimination as it gives lesser procedural protection to the prisoners under death row compared to the rest of the population.[68] This is consistent with the UNHRC's earlier pronounc Comment No. 24, where it states that a reservation against the UNHRC's competence to interpret any provision of the ICCPR would be contrary to the object and purpose of the treaty.[69] There is resistance, however, to the power of the UNHRC to rule on reservations. France, for example, challenged the UNHRC's com the compatibility of reservations with the ICCPR, arguing that the UNHRC only has powers as those conferred to it by State parties.[70] Therefore, it was for those State parties alone to decide the compatibility of reservat object and purpose.[71] In the aforementioned case, Trinidad and Tobago decided not to proceed with its re-accession to

[66] UNHRC, Communication No. 845/1998, *Rawle Kennedy v. Trinidad and Tobago*, U.N. Doc. CCPR/C/74/D/845/1998.

[67] *Id.* at para. 6.7.

[68] *Id.*

[69] General Comment 24, *supra* note 62, at para. 11.

[70] *Twentieth Annual Report of the Human Rights Committee,* U.N. GAOR, 51st Sess., Supp. No. 40 (A/51/40) (1996) 117, Annex VI para. 7.

[71] *Id.*

the OP. This is an overt rejectio
interpretation of its competence to rule on Trinidad and
Tobago's reservation. There has been
issue. No State has seriously challenged this practice in an
official forum. Therefore, as it stan
of interpreting the validity of reservations to the ICCPR and
OP is valid at least in its own eyes.

Despite all these limitations, the individual communication mechanism of the UNHRC has done some good for human rights. No less than the International Court of Justice stated that while it "does
its own interpretation of the [ICCPR] on that of the [UNHRC],
it still believes that "it should as
interpretation adopted by this independent body that was
established specifically to supervise the application of that
trea[72] tAy2010 UN survey[73] claimed that "there ha
around 20 to 25 amendments to legislation to which
decisions of [the UNHRC] ". The study contr
includes a caveat, though, that there is still a large number of States that fail to apply the remedies recommended in the Views.[75] The reasons identified for this failure include a lack of understanding by States parties of their obligations, the unwillingness of the State parties to fulfill their obligations, the non-legally binding nature of the Views, the differing interpretations between States and the UNHRC on the provisions of the ICCPR, insufficient follow-up mechanisms,

[72] Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 852 (para. 66) [hereinafter, *Guinea v. DRC*]

[73] *Follow-up Procedures on Individual Complaints*, U.N. Doc. HRI/ICM/WGFU/2011/13 (2010) at 5.

[74] *Id.*

[75] *Id.*

and lack of political support.[76] Overall, therefore, it can be said that the individual communication mechanism is not as effective in effecting changes in the domestic sphere of human rights protection as one would hope. Nonetheless, the UNHRC is an option for victims where domestic remedies fail them. "Justice" can take many form communications mechanism has a unique take on justice for human rights victims. The value of the UNHRC lies in its role in achieving "the necessary clari consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entit[77] The next section discusses the right to access to justice specific to the individual communication mechanism of the UNHRC.

B. Access to justice in the UNHRC: sources and substance

No international treaty explicitly provides the right to access to justice before international human rights courts or tribunals. However, other related rights comprise the right to access to justice.[78] A related right is the right to an effective remedy,[79] as recognized in the UDHR.[80] In the ICCPR, the right to access to justice is expressed through the right to an effective remedy,[81] the right to take proceedings before a

[76] *Id.*

[77] *Guinea v. DRC* para. 66.

[78] See FRANCESCO FRANCIONI, ACCESS TO JUSTICE AS A HUMAN RIGHT chapter 1 (2007).

[79] Stephanie Redfield, *SEARCHING FOR JUSTICE: THE USE OF FORUM NECESSITATIS*, 45 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 901 (2014).

[80] UDHR art. 8.

[81] UDHR art. 2.

court,[82] and to a fair and public hearing.[83] The right to access to justice is expressed to submit a written communication[84] These related rights are granted to human rights victims seeking justice before the UNHRC.

The substance of the right to access to justice in the UNHRC can also be gleaned from the purposes for which the UNHRC and the OP mechanism were established. One of the purposes of the ICCPR is to ensure implementation of the rights therein,[85] and the purpose of the OP mechanism is "further to achieve the purposes of implementation of its provisions" by setting up a me "to receive and consider ... communicatio claiming to be victims of violations of any rights outlined in the [ICCPR]."[86] The OP mechanism is a vital part of the UNHRC's purpose of promoting rights and pro under the ICCPR. A State's ratificati signifies its intent to afford individuals under its jurisdiction the right to avail of the remedies before the UNHRC, and consequently, recognizes its obligation to ensure that the individuals enjoy this right.

The UNHRC defines State Partie concerning the right to access to justice in General Comment No. 33,[87] which states that State Parties

[82] UDHR art. 9(4).

[83] UDHR art. 14(1).

[84] UDHR art. 3.

[85] Vera Shikhelman, *Access to Justice in the United Nations Human Rights Committee*, 39 MICH. J. INT'L L. 453, 466 (2018).

[86] OP Preamble.

[87] General Comments provide a progressive codi interpretation of a particular article of the ICCPR, see NEUMAN, *supra* note 30 at 38.

hinder access to the [UNHRC] and to prevent any retaliatory measures against any person who has addressed a communication to[88] It is argued that this right also entails an obligation on the State not to create, instigate, or acquiesce to a culture of fear of reprisal, which discourages victims from seeking redress at the domestic level. Non-exhaustion of domestic remedies bars admissibility before the UNHRC,[89] and therefore creating conditions that lead victims to avoid domestic remedies is also a violation of their right to access to justice in the UNHRC, as will be explained more fully in the next chapter.

The right to access to justice in the UNHRC, therefore, consists of two levels - the possibility for an individual to bring a claim before the UNHRC, and the right to have their case heard and adjudicated with fairness and justice.[90] This paper is concerned with the first level and the conditions that inhibit victims from accessing domestic remedies in the first place and instead choose to file their claims directly with the UNHCR. These were the conditions experienced by the victims in the two cases[91] to be discussed in the next chapter, where they allege fear of reprisal as the reason why they did not avail of domestic remedies. Fear of reprisal has been a universal experience,[92] and it has shaped how human rights

[88] General Comments, 33 para. 4.

[89] OP Article 5(2)(b).

[90] FRANCIONI 1 (2007).

[91] UNHRC, Communication No. 594/1992, *Irving Phillip (represented by Ms. Natalia Schiffrin, of Interights) v. Trinidad and Tobago*, U.N. Doc. CCPR/C/64/594/1992 [Phillip v. Trinidad and Tobago]; UNHRC, Communication No. 1633/2007, *Khilal Avadanov v. Azerbaijan,* U.N. Doc. CCPR/C/100/D/1633/2007 [*Avadanov v. Azerbaijan*].

[92] Unfortunately, State-sponsored violence such as police brutality is as commonplace in developing countries as it is in developed countries such as the United States. See Dorothea Beane, *Human Rights in Transition - Freedom from Fear*, 6 WASH. & LEE RACE & ETHNIC ANC. L.J. 1, 19-17 (2000).

institutions evolved through the years.[93] Fear of reprisal is primarily subjective, and it can be real or imagined. Regardless, the State has the responsibility to ensure the full enjoyment of rights of its subjects, and instigating fear in its people or not holding responsible authority figures accountable for threats against the common people is a failure in this responsibility.

For individuals that choose to seek a remedy before the UNHRC instead of availing domestic remedies first, the major roadblock is the requirement of exhaustion of all domestic remedies for admissibility.[94] Under these circumstances, their fear would, therefore, have a direct effect on their right to access to justice in the UNHRC. The next section examines the UNHRC's treatment as an admissibility of repr issue under the relevant treaties and rules, as well as in published Views.

III. ANALYZING UNHRC'S TREATMENT OF VICTIMS' FEAR OF REPRISAL

The OP was opened for signature and ratification at the same time as the ICCPR. The history of the drafting and adoption of the OP reveals that the discussions on the procedure for petitions from individuals or organizations started as early as 1950 in the now-defunct Human Rights Commission.[95] Since adherents of State sovereignty

[93] The UDHR Preamble provides: "Whereas, disre human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiratio

[94] OP art. 2.

[95] ALSTON, *supra* note 40, at 808.

dominated the Commission, the 1954 draft of what was to become the ICCPR did not include a provision for individual communications. It was more than a decade later, in 1966, that the issue was taken up again, and after much resistance from the Socialist bloc, it was agreed, for the sake of better chances at the ratification of the ICCPR, that an individual communication mechanism would be provided in a separate and optional protocol.[96] The drafting of the OP was hurried, and the discussion of the proposed draft was superficial, leaving very little in the *travaux preparatoires* to aid readers in interpreting its provisions of the OP.[97] The result is an optional protocol that has no provisions on the nature of the proceedings, on the possibility of oral and public hearings, and on the binding nature of UNHRC's d also no provisions dealing with the fear of reprisal by victims. The UNHRC has taken advantage of the barebones structure of the OP, taking upon itself to interpret the metes and bounds of its own powers. For instance, it granted itself the power to issue interim measures.[98] Expectedly, these moves have been controversial, but absent a more superior authority on matters on the ICCPR, these self-imposed rules stand.[99] It is in the context of this freedom to lay down its own rules of procedure and interpret its own powers that the UNHRC's treatment of novel and unpr begin to be understood.

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[96] *Id.*

[97] *Id.*

[98] *Rules of Procedure of the Human Rights Committee* , U.N. Doc. CCPR/C/Rev.11 (2019) [hereinafter, UNHRC Rules of Procedure], Rule 92; General Comment 33 par. 19.

[99] This practice must be differentiated from the established rule of *kompetenz-kompetenz.* International bodies tend to exercise a wide discretion in interpreting the limits of its own power and even the justifying its existence. See *Prosecutor v. Tadić* Case No. IT-94-1-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l. Crim. Trib. For the Former Yugoslavi of the creation of the ICTY.

A. Exhaustion of all available domestic remedies

The OP mechanism requires individuals to comply with several requirements before the UNHRC can consider their communication. Among the key requirements are that the communication must be written,[100] it must not be anonymous,[101] it must not constitute an abuse of the right of submission,[102] and that the author must have exhausted all available domestic remedies.[103]

The rule on the exhaustion of domestic remedies is a standard requirement in international bodies,[104] and it served a special purpose for the OP. It was the compromise for the two opposing sides in the debate on the complaints mechanism, and was "the price to be paid" for the recognition and acceptance of the right of individual petition.[105] It made the State's duty to provide remedies and the individual's right to exhaust domestic remedies complementary to each other.[106] This arrangement revolutionized the established rule on the exhaustion of domestic remedies[107] and served as the safeguard of States from unwanted intrusion and interference in their domestic affairs.

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[100] OP art. 2.

[101] *Id.* art. 3.

[102] *Id.* art. 3.

[103] *Id.* art. 2.

[104] TYAGI, supra note 35, at 479.

[105] *Id.* at 480.

[106] *Id.* at 481.

[107] *Id.* at 481.

This rule of admissibility ensures that State Parties are furnished with an opportunity to correct any violations of the ICCPR at the domestic level before the matter is addressed at the international level.[108] Its purpose is to direct possible victims to seek, in the first place, redress from the State party authorities and, at the same time, to enable State parties to examine the implementation of the provisions of the ICCPR within its territory and remedy the violations, if necessary.[109] The author must have raised the substance of their complaint under the ICCPR before domestic authorities[110] and issues not raised before domestic authorities are inadmissible before the UNHRC.[111] The UNHRC has been fairly strict in implementing the exhaustion of domestic remedies rule, and it is the most common reason for rejecting the admissibility of communications.[112]

An important factor of the rule of exhaustion of domestic remedies is that the domestic remedies to be exhausted must be effective, i.e., it must objectively have a prospect of success.[113] In its earliest cases, the UNHRC placed the burden on the State Party to prove that remedies are available and that these would be effective. In the Uruguay

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[108] SARAH JOSEPH, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS : CASES, MATERIALS, AND COMMENTARY 121 (Melissa Castan ed., Third ed., 2013).

[109] UNHRC, Communication No. 220/1987, *TK v. France*, U.N. Doc. CCPR/C/37/D/220/1987, para. 8.3.

[110] JOSEPH, *supra* note 108, at 125.

[111] See UNHRC, Communication No. 597/1994, *Peter Grant v. Jamaica*, U.N. Doc. CCPR/C/56/D/597/1994; UNHRC, Communication No. 536/1993, *Francis Peter Perera v. Australia*, U.N. Doc. CCPR/C/53/D/536/1993; UNHRC, Communication No. 273/1989, *B. d. B., et al. v. The Netherlands*, U.N. Doc. Supp. No. 40 (A/44/40).

[112] JOSEPH, *supra* note 110, at 149.

[113] See UNHRC, Communication Nos. 210/1986 & 225/1987, *Pratt and Morgan v. Jamaica,* U.N. Doc. A/44/40.

cases[114] , for example, the authors alleged grave human rights violations such as summary killings, torture, and arbitrary detention. There were indications of a lack of remedies *de jure* and *de facto*, and the State security forces were essentially afforded impunity.[115] Thus, the UNHRC held, Uruguay had a high burden of proof to prove the effectiveness of the alleged available remedies.[116] Ultimately, the UNHRC found the communications admissible.[117]

The standard was further expanded in the 1996 view in *Vicente et al. v. Colombia*.[118] The authors reported the victims' disappearance to the local complaint with the Human Rights Division of the Office of the Attorney-General. They also initiated proceedings before a criminal court. Notwithstanding these efforts, a military investigation was initiated, and two military officers were cleared and not indicted. The UNHRC considered that "doubts as to the effectiveness of re authors" arise in the light of the c investigation.[119] The case was deemed admissible.

However, "mere doubts about the su do not absolve the authors[120] from resor

[114] See UNHRC, Communication No. 84/1981, *Guillermo Ignacio Dermit Barbato, et al. v. Uruguay*, U.N. Doc. CCPR/C/OP/2.

[115] *Id.* at para. 9.4.

[116] *Id.*

[117] *Id.*

[118] UNHRC, Communication No. 612/1995, *José Vicente, et al. v. Colombia*, U.N. Doc. CCPR/C/60/D/612/1995.

[119] *Ibid* at para. 5.2.

[120] UNHRC, Communication No. 358/1989, *R.L. et al., v. Canada*, U.N. Doc. CCPR/C/43/D/358/1989 para. 4.2.

v. France,[121] the UNHRC stated that "all av
remedies" clearly refers in the f
remedies.[122] The author of the communication had refused to seek judicial remedies as he did not want to become engaged in a "vicious and empty judicial act[123] the UNHRC understood this as an indication of his belief that the pursuit of such remedies would be futile. The UNHRC further stated that the author fail
not have resorted to the judicial procedures which the State party has plausibly submitted were available to him, or that their pursuit could be deemed to be, *a priori*, futile.[124] The UNHRC deemed the communication inadmissible on these grounds.

The exhaustion of domestic remedies rule holds a special place in the entire international human rights legal system. It served as the key to the wide ratification of the OP and, ultimately, to the development of the right to access to justice before the UNHRC. It was als
shield against interference in its domestic affairs. Any circumvention of this rule would be an affront to its original purpose and the intention of the original State Parties to the OP. However, as earlier established, the UNHRC has since taken the reins on its own evolution, and the next question is to determine whether the UNHRC interprets the rule of exhaustion of domestic remedies as it was originally intended. The next section reviews two cases that dealt directly with allegations of fear of reprisal as the basis to circumvent the rule on exhaustion of domestic remedies and

[121] See UNHRC, Communication No. 262/1987, *R.T. v. France*, U.N. Doc. CCPR/C/35/D/262/1987.

[122] *Id.*

[123] *Id.* at para. 7.3.

[124] *Id.* para. 7.4.

reflects upon how the UNHRC interpreted the rule under the circumstances.

B. The burden of production and the burden of proof

The OP and its Rules of Procedure are not clear on the burden of proof. The rules on the burden of proof must, therefore, be lifted from related provisions, particularly in the Rules of Procedure, and, and from revealed in its Views.

The OP and the Rules of Procedure do not make any distinction between the burden of proof in admissibility proceedings versus that imposed during the consideration of the merits. Dr. Kirsten Young[125] distinguishes between "burden of production" and "burden of of production refers to the evidentiary burden at the admissibility stage. The author bears this burden to establish *prima facie* that all grounds of admissibility are met.[126] Once the communication has been registered,[127] the State party will be furnished a copy of the communication, with a request that it submit a written reply within six months.[128] The UNHRC may also decide on the admissibility (or inadmissibility) of the communication even without the participation of the State party concerned.[129] Otherwise, it will

[125] YOUNG, *supra* note 43.

[126] *Id.* at 225.

[127] The decision to register the communication is acted upon by the UNHRC through its special rapporteur designated under Rule 107(2). See *Rules of Procedure of the Human Rights Committee*, U.N. Doc. CCPR/C/3/Rev.11 (2019) [UNHRC Rules of Procedure].

[128] *Id.* Rule 92(2).

[129] *Id.* Rule 92(3).

examine the State party shall relate both to the admissibility of the communication and its merits.[130]

"Burden of proof" on the other ha
burden on the consideration of the merits.[131] In this stage, the general principle that the party who is asserting an allegation has the burden of proof.[132] Due to the unique nature of human rights cases, the UNHRC has developed its own rule on the burden of proof. In the often-cited View on *Bleier v. Uruguay*,[133] the HRC held that the burden rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access[134] It to the also noted the duty of the State party in article 4(2) of the OP to investigate in good faith all allegations of violation of the ICCPR made against it.[135] This duty is a significant component of the individual communication mechanism,[136] and the failure of a State party to fulfill this obligation and

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[130] *Id.* Rule 92(5).

[131] YOUNG, *supra* note 126, at 225-236.

[132] See *Nicaragua v. USA* para. 30, where the ICJ held that Nicaragua still had the obligation to prove its allegations despite the latent non-appearance of the U.S.A. See also, *Diversion of Water from the Meuse (Neth. v. Belg.)*, 1937 P.C.I.J. (ser.A/B) No. 70, at 30 (June 28), where the Permanent Court of International Justice required Belgium to produce evidence on the facts it alleged; See also *Vélasquez Rodriguez v. Honduras*, Merits, para. 123 (Inter-Am. Ct. H.R., July 29, 1988), where the Inter-American Court of Human Rights held that the Inter-American Commission on Human Rights, in accusing that the Government was responsible for the disappearance of Manfredo Vélasquez, it should, in principle, bear the burden of proving the facts in its petition.

[133] UNHRC, Communication No. 30/1978, *Irene Bleier Lewenhoff and Rosa Valiño de Bleier v. Uruguay*, U.N. Doc. CCPR/C/OP/1.

[134] *Id.* para. 13.3

[135] *Id.*

[136] TYAGI, *supra* note 104, at 541.

communicate its compliance to the UNHRC will lead to undesirable results. The UNHRC held t
the author submitted to the [UNHRC] allegations supported by substantial witness where further
clarification of the case depends on information exclusively in the hands of the State party, the [UNHRC] may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party.[137] This is otherwise known as the "default judgment" mechanism of t[138]

The issue of the burden of production and the burden of proof is a significant factor in communications that allege fear of reprisal. Precisely because of this fear, the author would likely not have exhausted all remedies, much less obtained the necessary evidence to substantiate their claims fully. As will be evident in the case studies in the next chapter, the issues of the burden of production and the burden of proof will bleed unto each other. The allegations that relate to fear of reprisal are rooted on violations of human rights under the ICCPR such as cruel, inhuman and degrading treatment.

C. Case studies: *Avadanov v. Azerbaijan* and *Philip v. Trinidad and Tobago*

Two cases have been decided by the UNHRC that dealt directly with fear of reprisal, *Phillip v. Trinidad and Tobago*[139] decided in 1998 and *Avadanov v. Azerbaijan*[140] decided in 2010. These cases will be dealt with in turn.

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[137] *Id.*

[138] YOUNG, *supra* note 131, at 228.

[139] *Phillip v. Trinidad and Tobago.*

[140] *Avadanov v. Azerbaijan.*

In *Phillip v. Trinidad and Tobago*, the author was convicted of murder and was sentenced to death which was later commuted to life imprisonment.[141] He alleges violations of his right to a fair trial under article 14 of the ICCPR, with the allegations raised at various points of his trial.[142] He also complained about the conditions of his prison cell, which he alleged was unduly filthy, with bad ventilation and infested with cockroaches and rats.[143] He sleeps on cardboard without any bedding and is not given adequate food, toiletries, or medication.[144] He claims that these are violations of his right against cruel, inhuman, and degrading treatment under article 7 and his right as a person deprived of his liberty to be treated with humanity and with respect for his inherent dignity under article 10(1) of the ICCPR. These concerns, however, were not reported to authorities because of fear of reprisal from his warder, and the author claims that he is living in complete fear of his life.[145]

The State Party did not refute the conditions of his detention and did not provide information on effective domestic remedies available to the latter.[146] Under these circumstances, and statement that he had not filed a complaint because of his fears of the warders," the UNHRC communication was not precluded by article 5(2)(b) of the OP and was therefore admissible.[147]

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[141] *Phillip v. Trinidad and Tobago*, para. 2.1.

[142] *Id.* paras. 3.1-3.3

[143] *Id.* paras. 3.4

[144] *Id.*

[145] *Id.*

[146] *Id.* para. 6.4

[147] *Id.*

In *Avadanov v. Azerbaijan*, the author and his wife were victims of a crime. They filed a complaint with the police and went through the judicial processes, all the way to the Supreme Court.[148] Unsatisfied with the outcome of the proceedings in their State, they filed a communication before the European Court of Human Rights (ECtHR).[149] The police, after learning of the complaint before the ECtHR, severely beat him at his residence and he was subsequently brought to the police station to be tortured by electric shock.[150] He also claimed that his wife was raped by the police in his presence and threatened to rape his daughter.[151] He was then brought to a waste ground, where he was left.[152] He did not seek medical attention because, according to him, any forensic examination would be conducted in the presence of a police officer.[153] They never raised the allegations of torture and rape before local authorities because of fear of reprisal.[154] Upon the advice of their lawyer that he would be "exterminated" by the police,[155] he and his wife left Azerbaijan and were eventually granted refugee status in Greece.[156]

The State Party raised the issue of non-exhaustion of domestic remedies as the allegations of torture were never

[148] *Avadanov v. Azerbaijan* paras. 2.1-2.8.

[149] *Id.* para. 2.9

[150] *Id.* para. 2.10

[151] *Id.*

[152] *Id.* para. 2.11

[153] *Id.*

[154] *Id.*

[155] *Id.* para. 2.12

[156] *Id.* para. 2.16

raised in the domestic courts.[157] The author responded by alleging, among other things, that it was impossible for him to raise the issues before domestic courts owing to his fear of reprisal, and seeking to do so from abroad would also put his family in Azerbaijan at risk.[158] Therefore, he argued that the remedies in Azerbaijan were unavailable.[159] He requested the UNHRC to exempt him from the requirement of exhaustion of all available domestic remedies. The UNHRC noted that the State Party only stated *in abstracto* that the torture allegations have never been raised before the domestic courts without addressing the alleged threats against the author and his family, contrary to the requirements of article 5(2)(b) of the OP.[160] The UNHRC concluded that "in the absence of f the State party, it could not be held against the author that he had not raised these allegations before the State party authorities or courts for fear that this might result in his victimization and the victimization[161] It also noted his successful refugee status application in a third State.[162] Therefore, the domestic remedies in the State party were "ineffective[163] and the communication admissible," was not precluded by article 5(2)(b) of the OP.

In both these cases, the UNHRC found that the communications were admissible despite the non-exhaustion of all domestic remedies. At the outset, it can be said that the UNHRC carved out an exception to the rule based on the

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[157] *Id.* para. 4.3

[158] *Id.* para. 5.3

[159] *Id.*

[160] *Id.* para. 6.4

[161] *Id.*

[162] *Id.*

[163] *Id.*

authors' fear of reprisal even if s
provided in the ICCPR or the OP. A closer look at these Views
is warranted to understand fully, and the UNHRC'
this will be dealt with in the next section.

D. Reflections on UNHRC's treatmen reprisal

Unfortunately, the UNHRC's Views
extensive details on the evidence submitted by the parties to support their allegations, and thus the analysis is limited to the available information. Nonetheless, the Views in the two cases are telling as to the standards of the UNHRC on admissibility, and three observations can be made.

The first observation is that in both cases, the UNHRC found the communications admissible despite the non-exhaustion of domestic remedies. This finding is a welcome
development that promotes victims' ri
in the UNHRC and serves as an antidote to the State-sponsored climate of fear that threatened th
to access to justice. In a way, the UNHRC, whether it was aware of it or not, upheld and promoted the right to access to justice when the State Party failed to do so. This also signifies that State Parties that create or allow conditions of fear of reprisal violate their obligations to afford individuals the right to access to justice.

The second observation is that the UNHRC invoked the standard procedural rule on the burden of production and the burden of proof. Still, the application of these rules for allegations of fear of reprisal is problematic. In both cases, the claims of the author related to fear of reprisal were not addressed directly by the State Parties in their responses to the two communications, which led the UNHRC to a finding of admissibility. Should the State Party adduce sufficient

evidence, the burden shifts back to the author to prove that they had exhausted all remedies.[164] Applying this rule in the two cases, however, appears unfair to the State parties. In the two cases, the availability of domestic remedies became a non-issue, because the State parties did not provide information on the available domestic remedies. This led to a "default judgment" on this cla Essentially, the State parties were expected to do more than provide information on the available domestic remedies if they were to have a chance at challenging the claim of admissibility. The problematic part about this is that fear of reprisal was the reason why the authors failed to exhaust all domestic remedies. And yet, fear of reprisal is intimately connected with the allegations of violations of substantive rights under the ICCPR. The UNHRC expected them to address the crux of the issue of fear of reprisal at a stage where the State party only expected to refute claims of admissibility. In *Avadanov*, the State Party was imposed the burden of disproving facts of torture as these were the cause of the author's fears. The State Par evidence amounting to a defense on the merits while still dealing with an admissibility issue. This treatment places the State party in an unfair position.

The result is a reversal of procedure, where the State party must overcome the burden of proof reserved for the consideration of the merits in over to overcome the claim of admissibility by the author. By virt on admissibility, the author could easily meet the required burden of production. That is, as the two cases exhibit, there is presumptive admissibility when authors invoke fear of reprisal to justify non-exhaustion of domestic remedies. This does not seem controversial at the outset, as the State party

[164] See, generally UNHRC, Communication No. 5/1977, *Moriana Hernandez Valentini de Bazzano v. Uruguay,* U.N. Doc. CCPR/C/OP/1.

is supposed to defend its actions in its reply to the communication and must address both claims of admissibility and merits at the same time. The problem is that this reversal of procedure is not apparent in any provision of the OP or the Rules of Procedure. The UNHRC appears to be making rules as it goes. This method of application of procedural rules to decide on a novel issue such as fear of reprisal leaves the UNHRC vulnerable to legitimate criticism of overreach. Justice should swing both ways, and the State party has a valid case to make on fairness and due process in this regard.

The third observation is that the UNHRC set a precedent where the author's fear of repri to the rule on exhaustion of domestic remedies without a clear legal basis. In *Phillip*, the finding of admissibility rested primarily on the failure of the State Party to provide information on the available domestic remedies, and the author's fear of reprisal was an add admissibility. In *Avadanov*, the author's fear of r treated as an independent issue for admissibility.[165] While the issue of fear of reprisal may appear to be a mere *obiter dictum* in *Phillip,* the reiteration of the rule on fear of reprisal in *Avadanov* suggests that the UNHRC has identified this as an established rule. There is a legitimate concern here because there are no express exceptions to the rule on exhaustion of all domestic remedies, except for whe remedies is unreasonably prolonged."[166] Further, in the two decades since *Phillip*, and even after almost a decade since *Avadanov,* the UNHRC has not amended its Rules of

[165] The UNHRC treated the issue of fear of reprisal more thoroughly in *Avadanov* than in *Phillip* probably because the author put more attention to establish facts proving his fear. Regardl that fear of reprisal is now a legitimate justification for non-exhaustion of domestic remedies.

[166] OP article 5(2)(b).

Procedure to reflect its rule on fear of reprisal. The UNHRC appears to have created the exception out of thin air, even if, as will be established later, it can be based on a sound legal basis.

In summary, fear of reprisal as an exception to the rule of exhaustion of domestic remedies is a positive development in the advancement of v to justice in the UNHRC. Fear of reprisal cripples victims from obtaining justice in domestic courts, where the perpetrators would usually have control and power. By easing the rules on admissibility in favor of the victims in this circumstance, the UNHRC makes the individual communication mechanism a realistic prospect for marginalized and disenfranchised people all over the world. However, the legitimacy of this development becomes questionable because of how the UNHRC approached the problem. The UNHRC can better promote victims' right to access to in a way that is fair to both the author and the State Party. The next section contains proposals for the UNHRC to approach the problem in a more legally sound and fair manner.

IV. PROPOSING IMPROVEMENTS TO ACCESS TO JUSTICE FOR VICTIMS

Fairness in the UNHRC's pOProcedur mechanism is vital to the maintenance, development, and implementation of ICCPR rights.[167] Fair procedural rules are key to protecting substantive rights, and this must begin with international bodies such as the UNHRC as they set the

[167] YOUNG, *supra* note 131, at 104.

standards for international human rights protection.[168] Article 14 of the ICCPR[169] mandates fairness in proceedings before courts and tribunals.[170] The right to access to justice can only hold meaning if how this is upheld is fair to the author and the State Party.[171] As earlier established, the UNHRC's treatment of fear of repris burden on State Parties, making the legitimacy of the rule questionable.

There is no established framework of evidentiary rules in international law.[172] As part of its attributed powers,[173] the UNHRC is empowered to establish its own rules of procedure.[174] However, the Rules of Procedure of the UNHRC on the OP mechanism does not provide detailed rules on evidence and has been approaching many procedural questions on a case-by-case basis,[175] as is evident in its

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[168] Thomas Franck & H. Fairley, *Procedural due process in human rights fact-finding by international agencies*, 74 AMERICAN JOURNAL OF INTERNATIONAL LAW (1980).

[169] ICCPR article 14(1).

[170] This obligation also applies to international tribunals. See *Prosecutor v. Tadić* Case No. IT-94-1-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. Fo 2, 1995), par. 45, which states that the ICTY all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized hu

[171] See UNHRC, *General Comment No. 13, Article 14 (Administration of Justice) Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law* (1984) paragraph 1, which states that Article 14 is aimed at ensuring the proper administration of justice.

[172] YOUNG, *supra* note 167, at 108.

[173] See JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL ORGANIZATIONS LAW 54-56 (Third ed., 2015). International organizations (such as the UN) and their organs (such as the UNHRC) can only perform acts for which they are empowered.

[174] ICCPR article 39(2).

[175] YOUNG, *supra* note 172, at 186.

treatment of fear of reprisal. It is submitted that to cement the status of fear of reprisal as an exception to the rule on exhaustion of domestic remedies, the following two recommendations are proper, neither of which requires the amendment of the OP.

First, the analysis of fear of reprisal must be grounded on more recognized principles such as the requirement of "effectiveness" in the rule of ex remedies. This principle has a solid grounding in article 3(a) of the ICCPR,[176] which requires that any persons who suffered violations of their ICCPR rights must have an effective remedy. This has been one of the oldest principles used by the UNHRC.[177] In a series of communications filed against Jamaica,[178] the UNHRC consistently held that indigents who were not accorded legal aid did not have access to an available and effective remedy. The economic and social conditions of the authors in the Jamaica cases, as well as the State Party's refusal or failure to was enough basis for the UNHRC to find that the authors did not have an effective remedy. It is logical to apply the same standard to authors whose lives are threatened and therefore find it impossible to access the courts. There are also more established guidelines on the "effe State Party may refer to in order to defend its position.

[176] ICCPR article 3(a).

[177] YOUNG, *supra* note 175, at 170.

[178] See UNHRC, Communication No. 355/1989, *George Winston Reid v. Jamaica*, U.N. Doc. CCPR/C/51/D/255/1989; UNHRC, Communication No. 230/1987, *Raphael Henry v. Jamaica,* U.N. Doc. CCPR/C/43/D/230/1987; UNHRC, Communication No. 321/1988, *Maurice Thomas v. Jamaica,* U.N. Doc. CCPR/C/49/D/321/1988; UNHRC, Communication No. 283/1988, *Aston Little v. Jamaica*, U.N. Doc. CCPR/C/43/D/283/1988; UNHRC, Communication No. 237/1987, *Denroy Gordon v. Jamaica*, U.N. Doc. CCPR/C/46/D/237/1987.

The second recommendation is to utilize general principles of international law, such as the rule on judicial notice.[179] The rule provides that "proof is facts that are of common knowledge or[180] The UNHRC has invoked this rule in establishing facts in a State Party through its previously issued Views on the same State Party. In *Sanjuán Arévalo v. Colombia*,[181] the UNHRC was presented with very few pieces of evidence, but it took judicial notice of known facts existing in Colombia at the time to find a violation of the right to life. The UNHRC has also relied on its previous decisions to support a finding of fact, particularly in cases related to *Uruguay*[182] and *Trinidad and Tobago.*[183] Another means of information may be the reports submitted by States under article 40 of the ICCPR. These reports are usually submitted every four years and contain information on "the measures

[179] The ICJ used the rule of judicial notice and public knowledge in United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 3 paras. 12-13. The Rules of the ICTY (ICTY Rules of Evidence rule 94(A) and ICTR (ICTR Rules of Evidence rule 94(A)) provides for judicial notice. The ICTR also had the occasion to use the rule in *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Appeal Judgment (In Crim. Trib. For Rwanda, June 1, 2001).

[180] YOUNG, *supra* note 177, at 208.

[181] UNHRC, Communication No. 181/1984, *Elcida Arevalo Perez, Alfredo Rafael and Samuel Humberto Sanjuan Arevalo v. Colombia*, U.N. Doc. CCPR/C/37/D/181/1984.

[182] UNHRC, Communication No. R. 2/9, *Edgardo Dante Santullo Valcada v. Uruguay*, U.N. Doc. Supp. No. 40 (A/35/40); UNHRC, Communication No. R. 2/8, *Beatriz Weismann Lanza and Alcides Lanza Perdomo v. Uruguay*, U.N. Doc. Supp. No. 40 (A/35/40); UNHRC, Communication No. R/2/10, *Alberto Altesor v. Uruguay,* U.N. Soc. Supp. No. 40 (A/37/40); UNHRC, Communication No. 74/1980, *Miguel Angel Estrella v. Uruguay*, U.N. Doc. CCPR/C/OP/2.

[183] UNHRC, Communication No. 813/1998, *Dole Chadee v. Trinidad and Tobago*, U.N. Doc. CCPR/C/63/D/813/1998; UNHRC, Communication No. 533/1993, *Harold Elahie v. Trinidad and Tobago*, U.N. Doc. CCPR/C/55/D/533/1993; UNHRC, Communication No. 523/1992, *Clyde Neptune v. Trinidad and Tobago*, U.N. Doc. CCPR/C/53/D/523/1992.

adopted which give effect to the rights recognized [in the ICCPR] and on the progress they made in the enjoyment of those rights.[184] The UNHRC studies these reports and may issue general comments to the State Parties as they deem appropriate.[185] The advantage of this method is its efficiency.[186] More importantly, the UNHRC can administer justice more fairly as this method can provide information that is missing because of the difficulties faced by the author, or the refusal or negligence of the State Party in its responses. Nothing in the OP precludes the UNHRC to utilize other means to obtain information so long as it can justify its findings. The rule of judicial notice can prove especially useful in States with authoritarian regimes that have firm control of information on involving the police and other State agents.

V. CONCLUSION

As stated by a Filipino jurist, liberty, the scales of justice should weigh heavily against government and in favor of the poor, the oppressed, the marginalized, the dispossessed and the disadvantaged.[187] The protection of human rights, particularly those in the ICCPR, is an *erga omnes* obligation.[188] This paper submits that this obligation also extends not only to States but also to treaty

[184] ICCPR article 40(1).

[185] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 article 40(4).

[186] YOUNG, *supra* note 180, at 212.

[187] *David, et al. v. Arroyo, et al.,* G.R. No. 171396, May 3, 2006, quoting Former Philippine Supreme Court Chief Justice Artemio V. Panganiban

[188] UNHRC, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on Sates Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.1326 (2004).

bodies such as the UNHRC, as these bodies were created to ensure the implementation of the human rights and were granted powers to fulfill this purpose.[189] These institutions were created in order for States to carry out their duty of international cooperation in the promotion and protection of fundamental freedoms and human rights. The right to access to justice is one of these human rights which, while not expressly provided by the ICCPR, exists based on several other rights that could not be realized without it. The international human rights system will be for naught if it is not sensitive and responsive to all the experiences of human rights victims that affect their ability to seek justice. Fear of reprisal is one of these experiences, and the UNHRC has recognized this. This is an experience shared by marginalized and oppressed people all over the world. It is only through a recognition of this experience can the international community, through institutions like the UNHRC, can truly act to correct and remedy this experience. By making fear of reprisal as an exception to the rule on exhaustion of domestic remedies, the UNHRC has, knowingly or not, promoted the right to access to justice. However, it can and should do better at promoting and protecting the right to access to justice of these victims by doing so in a manner that is fair and equitable to all the parties concerned.

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[189] See Kristina Daugirdas, *How and Why International Law Binds International Organizations*, 57 HARV. INT'L L.J. 325(2016), where the author argues that customary laws also binds international organizations and their organs. This paper does not seek to argue this as well. The source of the obligation of the UNHRC is not the formal sources of international law but rather on the good faith compliance with its mandated purpose and functions as stated in the ICCPR and OP.

The HCCH Conventions and Their Practical Effects to Private International Law in the Philippines

J. Eduardo Malaya and*
*Jilliane Joyce R. De Dumo-Cornista***

On March 4, 2020, the Chief Justice of the Supreme Court of the Philippines visited The Hague, The Netherlands, together with officials of the Philippine Department of Foreign Affairs (DFA).[1] The Honorable Chief Justice Diosdado

* Malaya is Undersecretary for Foreign Affairs and until August 2019 was Assistant Secretary for Treaties and Legal Affairs (Legal Adviser) at the Philippine Department of Foreign Affairs (DFA). A career member of the Philippine foreign service since 1986, he was Philippine Ambassador to Malaysia from September 2011 to March 2017. He served also as Assistant Secretary for Treaties and Legal Affairs and concurrently Foreign Affairs Spokesman from February 2009 to September 2011. He is the author, main co-author or editor of eight books on Philippine diplomacy, the Philippine presidency and law, notably Treaties: Guidance on Practices and Procedures (University of the Philippines Law Center, 2019); Forging Partnerships: Philippine Defense Cooperation under Constitutional and International Laws (University of the Philippines Law Center/Foreign Service Institute, 2017) and Philippine Treaties Index, 1946 to 2010 (Foreign Service Institute/Central Law Books, 2010). He has BA Economics (*cum laude*) and Law degrees, both from the University of the Philippines. He is currently Vice President of the Philippine Society of International Law.

** De Dumo-Cornista is a Foreign Service Officer at the Department of Foreign Affairs. Prior to this, she worked in the Supreme Court of the Philippines and taught at the De La Salle College of Law and the San Beda University Graduate School of Business. She is an alumnae of the International Visitors Leadership Program (IVLP) of the U.S. Department of State and a winner of the IVLP Small Grants Competition for her project *Usapang Kabataan.* She obtained her B.S. Business Administration (*cum laude*) and Juris Doctor (Dean's Medal for Academic Leadership Awardee), both from the University of the Philippines.

[1] The Philippine delegation was composed of Chief Justice Diosdado M. Peralta and Court Administrator Midas Marquez for the judiciary,

M. Peralta made the customary courtesy call on the President of the International Court of Justice, but his main engagement was with another The Hague-based international organization. He was to attend a meeting of the Council on General Affairs and Policy of The Hague Conference on Private International Law (HCCH), and to witness the deposit of the Philippines' instrument of accession to the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* or "Service Convention."

At the opening session of the HCCH meeting, Chief Justice Peralta noted that "*there is an increasing number of cases requiring international legal cooperation because of the inherent differences in the legal systems among countries.*"[2] He also noted "*how it affected overseas Filipino workers* [who] *spend their hard-earned money just to serve legal documents through layers of bureaucracy.*"[3] The Supreme Court looked to the HCCH processes and its Service Convention to facilitate inter-state legal cooperation and, in particular, to help address delays in court proceedings and enhance the administration of justice.

Despite its existence for over a century, however, the HCCH and the norm-making processes under its auspices have not figured prominently in the Philippine legal scene, at least not until recent years. The visit of the Chief Justice and his notable travel in our profession

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Undersecretary J. Eduardo Malaya and Atty. Jilliane Joyce R. De Dumo-Cornista of the Department of Foreign Affairs, and Ambassador Jaime Victor B. Ledda and Second Secretary and Consul Zoilo A. Velasco of the Embassy of the Philippines, The Hague. The deposit of the instrument of accession was made by Undersecretary Malaya.

[2] Diosdado M. Peralta, Speech delivered at the HCCH Meeting of the Council of General Affairs and Policy, The Peace Palace, The Hague, Netherlands (March 4, 2020).

[3] *Id.*

highlighted the country's private international law as a tool to foster international legal cooperation and underscored the vital role played by the HCCH.

Private international law has a long history in the Philippine legal system. Defined as model laws, national laws, legal guides, and other documents and instruments that regulate private relationships across national[4] but is the dualistic character of private international law (*i.e.* balancing "international with domestic recognition and implementation"[5]) that gives it a continuing relevance in light of globalization and the increased mobility of people and transactions.

Rapid globalization necessitates a stable set of laws that are both recognized and enforced by different States to which the transacting parties (or the transaction itself) have a close connection. This is because private international law and globalization is about responsiveness to a relative interdependence of legal systems,[6] as "the rules of a given legal system reflect the degree to which that system accommodates situations arising from[7] other systems." In this sense, should a dispute arise from an international commercial contract, there would be an endless course of suits filed in different States (which can afford a certain level of advantage to one of the transacting parties), if there is no controlling legal principle recognized

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[4] Don Ford, *Private International Law,* 3, *at* https://www.asil.org/sites/default/files/ERG_PRIVATE_INT.pdf (last modified August 2, 2013).

[5] *Id.*

[6] Olusoji Elias, *Globalisation and private international law: reviewing contemporary local law,* 2001 (36) AMICUS CURIAE 5, 2, *available at* https://sas-space.sas.ac.uk/3746/1/1319-1424-1-SM.pdf.

[7] *Id.*

by all parties involved. Thus, with the rising number of cross-border transactions concluded, globalization cannot afford unstable legal systems, as "intern contract[s]... in its wider sense, is globali[8]zation."

The Philippines is familiar with the situation. With its unique position in the international landscape represented by the Filipino diaspora, the country has consistently been faced with complex conflicts of law concerns, particularly in the field of persons and family law. From recognition and enforcement of divorce to issues on surrogacy and child support, it is clear that it is to the best interest of the Philippines to actively participate in the development of conventions in this field, and ensure that the rights and welfare of the Filipino community worldwide are preserved and honored.

Thus, comes the important role of international law experts and diplomats who have been, in recent years, looking into a body of work of international agreements,[9] and municipal laws including rules of procedures,[10] in an attempt

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[8] *Id.*

[9] *See* Elliot Cheatham, *Sources of Rules for Conflict of Laws* , 89 U. PA. L. REV. 430, 442 (1941), *available at* https://scholarship.law.upenn.edu/penn_law_review/vol89/iss4/2. The article stated that "[t]here was for a long doubt whethe extended over the whole field of Conflict of Laws. x x x These doubts have been completely dispelled, it is believed, by a series of recent cases. x x x Chief Justice Hughes stated the broad control of treaty-making power over Conflict of-making power is broad enough to cover all subjects that properly pertain to our foreign relations, and agreement with respect to the rights and privileges of citizens of the United States in foreign countries, and of the nationals of such countries within the United States, and the disposition of property of aliens dying within the territory of the respective parties, is within the scope of that power, and any conflicting law of the State must yield."

[10] *See* D. Josephus Jitta, *The Development of Private International Law Through Conventions,* 29 YALE L.J., 497, 499, (1920), *available at*

to streamline issues on jurisdiction, choice of law, and recognition and enforcement of foreign judgments, among others.[11]

As an advocate of private international law and with a mandate to negotiate international agreements,[12] the DFA led the push for the Philippines' membership in the HCCH in 2010, in order to adopt international standards and practices from other Contracting States and contribute in the discussions on inter-state legal cooperation. As the designated national organ to the HCCH, the DFA facilitates regular inter-agency discussions to ensure that the Hague Conventions to which the Philippines is a Contracting Party are properly implemented, update the competent authorities in the Philippines on significant movements in the HCCH, and develop a Philippine position and strategy framework on other Hague Conventions which the country may accede to in the future.

This article gives an overview of the work of the HCCH as the premier international institution dedicated to the

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https://digitalcommons.law.yale.edu/ylj/vol29/iss5/2. The article stated that "[t]he conception that private international law is merely a part of the law of a country is a too narrow conception. Private international law is certainly a matter of national regulation, it includes directions, given by the lawgiver of a country to the courts of the same country, for their guidance in matters connected with aliens, foreign laws and foreign judgments. But private international law may be considered from a higher point of view, that of a universal law, even from the point of view of the collectivity of nations, acting as the public power of mankind and able to give to mankind universally working regulations. We have to discriminate, therefore, a national branch of private international law, and an international branch."

[11] See Elizabeth Aguiling-Pangalangan, *International Judicial Cooperation through The Hague Conference of Private International Law*, 2017 Colloquium on International Law Issues, 2017 Philippine Yearbook of International Law 31, 46-48.

[12] Exec. Order No. 459 (1997), Providing for the Guidelines in the Negotiation of International Agreements and its Ratification.

"progressive unification of the rules of private international law"[13] and of the various HCCH Conventions to which the Philippines is a Contracting Party. It will also attempt to present a roadmap on other conventions which the Philippines may consider acceding to as possible ways forward.

I. THE ROLE OF INTERNATIONAL ORGANIZATIONS IN THE FIELD OF PRIVATE INTERNATIONAL LAW

The preeminent role of inter-state or international organizations in the formulation of norms in the field of public international law, notably those that govern the conduct of relations between and among sovereign states, is well known. Among the leading international organizations are the United Nations (UN) and the regional organizations such as the Association of Southeast Asian Nations. A similar role, albeit not as highlighted, has been played by international organizations in the field of private international law.

It has been opined that "[t]hrough private international law, a pervasive interest in certainty or predictability, and an effort to achieve uniformity of decisions whatever the forum, this have we is in response to a "general societal in particular, in rules that permit private parties to form and

[13] Statute of the Hague Conference on Private International Law (hereinafter "HCCH Statute"), July 15, 1955,

[14] Henry Steiner, *The Development of Private International Law by International Organizations*, 59 Proceedings of the American Society of International Law at Its Annual Meeting 1921-1969, 38, 42 (1965), *available at* http://www.jstor.org/stable/25657643.

then realize [15] The existence of these interests remain
prime motivations for national or international systems
of law.[16] Thus, private international law has the
purpose of ordering the international society, of creating
conditions which facilitate [17] intercourse.

The primary sources of private international law are codifications, special legislations, case law, international customs, bilateral treaties, and multilateral treaties or conventions.[18] A facet of private international law which has piqued the interest of practitioners and scholars alike is the increasing importance of conventions which are the products of the work of international organizations. The conclusion, however, is unanimous: that the "rapid growth of international organizations [already in the] has created a situation in which international law can exercise a far more constructive influence in the future than it was ever able to exercise in the past."[19]

In fact, "international organizations [20] and deal with a broad range of issues relations in the fields of service contracts, bank and exchange transactions, real property, construction, transportation and insurance, liability of employment, tort, and even family law.[21] The increasing complexity of these cross-border transactions challenges international organizations in the

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[15] *Id.*

[16] *Id.*

[17] *Id.* at 39.

[18] JOVITO SALONGA, PRIVATE INTERNATIONAL LAW 33 (1995).

[19] C. Wilfred Jenks et al., *The Impact of International Organisations on Public and Private International Law*, 37 Transactions of the Grotius Society, 23, 25 (1951), *available at* http://www.jstor.org/stable/743171.

[20] *Id.* at 47.

[21] *Id.*

field of conflicts of laws to crystallize applicable principles for every known permutation of these private transactions.

Clearly, international organizations play the important role as conduits of international law to private transactions, with the arduous task of balancing international consensus and domestic implementation.[22]

II. THE HCCH AS THE CENTER FOR PRIVATE INTERNATIONAL LAW

The leading international organization in the field of private international law is the Hague Conference on Private International Law or HCCH. The acronym HCCH stands for **H**ague **C**onference on Private International Law - **C**onférence de La **H**aye de droit international privé, its name in the English and French languages. Described as "remarkable international organization dealing with the unification of the HCCH was first convened,"[23] on September 12, 1893 by Tobias Asser, a Dutch jurist, scholar, and statesman. The HCCH was convened as a multilateral platform for dialogue, discussion, negotiation and collaboration to create strong legal frameworks governing private cross-border interactions among people and businesses.[24] During this period, the HCCH produced various documents, in the areas of succession, family law, and civil procedure, including the Hague Convention on Civil Procedure.[25]

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[22] *See supra* note 5.

[23] Salonga, *supra* note 18, *at* 36.

[24] HCCH, *125 Years HCCH, at* https://www.hcch.net/en/news-archive/details/?varevent=636 (last modified Sept. 12, 2018).

[25] *Id.*

The HCCH, however, is not the only international or regional organization involved in the harmonization or unification of the internal rules or laws of various countries. The UN Commission on International Trade Law, of which the Philippines is a member, has been undertaking similar work for over 50 years in the field of international trade law, notably the modernization and harmonization of rules on international business and the 1980 UN Convention on Contracts for the International Sale of Goods. A number of conventions have also been concluded under the auspices of the UN, including the 1954 Convention Relating to the Status of Stateless Persons. On the regional level, the European Union has regulations for member states on mutual recognition of companies, the law applicable to contractual obligations, and the enforcement of judgments in civil and commercial matters.[26]

Over the years, the HCCH formally evolved as an inter-governmental organization under the Conference on Private International "HCCH" Statute"). The Statute was Seventh Session of the Hague Conference on Private International Law on October 31, 1951 and entered into force on July 15, 1955, initially with 16 Contracting States, namely: the Federal Republic of Germany, Austria, Belgium, Denmark, Spain, Finland, France, Italy, Japan, Luxembourg, Norway, the Netherlands, Portugal, the United Kingdom of Great Britain and Northern Ireland, Sweden and Switzerland.[27]

Though still referred to as a Conference, the HCCH is an international organization with distinct legal personality, has a permanent headquarters, and maintains a secretariat

[26] Salonga, *supra* note 18, *at* 35-38.

[27] HCCH Statute, *supra* note 13, ¶ 2.

headed by a Secretary General. It is paramount institution devoted to the unification of conflict rules."[28]

To date, the HCCH is a robust inter-governmental organization with 85 Members (84 States and the European Union), building bridges between legal systems and reinforcing legal certainty and security through its various Conventions.[29]

There are currently 41 Conventions (including the HCCH Statute) under the helm of the HCCH, covering cross-cutting issues in family law, commercial law, and civil procedure. A list of the 41 HCCH Conventions is found in the Annex to this article.

Under Article 8 of the HCCH Statute, the Council on General Affairs and Policy, which is composed of all Member States,[30] may create Special Commissions to prepare draft Conventions or to study all questions of private international law which come within the purpose of the Conference.[31] The Special Commissions are also charged with monitoring the practical operations of The Hague Conventions and recommend protocols for its efficient implementation.

Apart from the 41 Conventions in place, Special Commissions have also been set-up to study emerging concerns in private international law, specifically

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[28] Steiner, *supra* note 14, at 44.

[29] HCCH, *About HCCH, at* https://www.hcch.net/en/about (last visited April 14, 2020).

[30] HCCH Statute, *supra* note 13, art. 4(1).

[31] HCCH Statute, *supra* note 13, art. 8(1). A similar function is undertaken by the International Law Commission for the United Nations General Assembly.

cohabitation outside marriage, family agreements involving children, jurisdiction, parentage or surrogacy, protection orders and protection of tourists.[32]

III. THE PHILIPPINES AS CONTRACTING PARTY IN THE HCCH AND THE ROLE OF THE DFA

In the late 2000s, the DFA Office of Treaties and Legal Affairs[33] (OTLA), then headed by the first co-author as Assistant Secretary, advocated for t in the HCCH. The decision to join came rather late for the country, given the long history and existence of the HCCH. Though the Philippine Embassy in The Hague had monitored the activities of the HCCH, handling of the matter was done by another DFA office –that for the United Nations and Other International Organizations –and not OTLA. The latter office volunteered in 2009 to handle the subject matter.

After consultations with the Department of Justice (DOJ) and other relevant agencies, the DFA sought, and received approval, from the Office of the President to join the HCCH, and later deposited the instrument of accession signed by President Gloria M. Arroyo with the Government of The Netherlands, which acts as the depositary for HCCH instruments.

The Philippines became a Contracting Party to the HCCH Statute on July 14, 2010, and designated the DFA as its

[32] HCCH, *Legislative Projects, at* https://www.hcch.net/en/projects/legislative-projects (last visited April 14, 2020).

[33] The office was titled simply as the Office of Legal Affairs. The change in office name was made in 2018.

national organ to the HCCH under Article 7(1) of the Statute.[34] As the national organ, the DFA is tasked as the communications liaison between the Philippines and the HCCH.

Within the DFA, OTLA, as earlier mentioned, handles all HCCH matters. Apart from conducting regular inter-agency discussions, DFA OTLA also initiates activities which can generate interest in the HCCH, its conventions and private international law in general. A year after becoming a HCCH member, DFA OTLA hosted in Manila the Fourth Asia Pacific Conference of The Hague Conference on October 26 to 28, 2011,[35] in cooperation with the Philippine Judicial Academy. The conference drew 230 delegates and participants from 28 countries across Asia, Pacific, Australia, New Zealand and the Middle East, and was graced by the presence of then HCCH Secretary General Hans van Loon.

On December 4, 2017, DFA OTLA convened a Colloquium on International Law Issues at the Jen Hotel in Manila, in partnership with the University of the Philippines Law Center –Institute for International Legal Studies.[36] The one-day event featured presentations on treaties and conventions, including HCCH Conventions, that would be beneficial to overseas Filipinos, the business community and society at large and thus recommended for ratification or accession. At the sidelines of the 7th Biennial Conference of the Asian Society of International Law in August 2019, DFA

[34] HCCH Statute, *supra* note 13, art. 7(1).

[35] HCCH, *The Fourth Asia Pacific Conference of the Hague Conference, Manila*, *at* https://www.hcch.net/en/news-archive/details/?varevent=237 (last modified Nov. 1, 2011).

[36] Department of Foreign Affairs, *International Law Colloquium Yields Recommendations For Ph Government*, *at* https://dfa.gov.ph/dfa-news/dfa-releasesupdate/14894-international-law-colloquium-yields-recommendations-for-ph-government (last visited April 14, 2020).

OTLA also organized the General Meeting of Philippine Competent Authorities, with HCCH Secretary General Christophe Bernasconi in attendance.

Even before it became a member, the Philippines had acceded to the *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* ("Intercountry Adoption Convention") specific conventions by a non-member country is allowed under the HCCH rules. After joining the HCCH in July 2010, the Philippines completed accessions to three more conventions, namely (a) *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* ("Child Abduction Convention"); (b) *Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* ("Apostille Convention"); and (c) *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* ("Service Convention").

Below is an overview of these conventions and the Philippines' accession and implement

A. Intercountry Adoption Convention

As a context, the Convention's noted that the number of intercountry adoptions increased considerably after the World War II.[37] Because it was creating "serious and complex hum and legal

[37] HCCH, *Information Brochure*, 5 (2017), *at* https://assets.hcch.net/docs/994654cc-a296-4299-bd3c-f70d63a5862a.pdf, *citing* G. Parra-Aranguren, *Explanatory Report on the 1993 Hague Intercountry Adoption Convention, in Proceedings of the Seventeenth Session* (1993), *available at* https://assets.hcch.net/docs/78e18c87-fdc7-4d86-b58c-c8fdd5795c1a.pdf.

absence of existing domestic and international legal instruments" that were tailored to a bilateral approach,[38] the HCCH Contracting States decided to adopt the Intercountry Adoption Convention.

The Convention is intended to establish safeguards which ensure that intercountry adoptions take place in the best interest of the child and with respect for the child's fundamental rights[39] and to prevent the abduction, the sale of, or traffic in children.[40] It is also meant to complement Article 21 of the UN Convention on the Rights of the Child (UNCRC), "by adding substantive safeguards and by strengthening broad principles and norms laid down in the Convention on the Rights of the Child."[41]

Particularly, the Convention emphasizes certain principles and minimum standards which Contracting States should apply when considering intercountry adoption. These principles include the following:

1. Principle of best interests of the child – Contracting States must "ensure the child is adequately informed, information about the child and his/her parents; evaluate thoroughly the prospective adoptive parents; match the child with a suitable family; [and] impose additional safeguards where needed."[42] In addition, the Convention mandates that "States should establish safeguards to prevent abduction, sale and trafficking in children for

[38] *Id.*

[39] *Id.*

[40] *Id.* at 7.

[41] *Id.* at 6.

[42] *Id.* at 6.

adoption by protecting birth families from exploitation and undue pressure; ensuring only children in need of a family are adoptable and adopted; preventing improper financial gain and corruption; and regulating agencies and individuals involved in adoptions by accrediting them in accordance with Convention stan[43]

2. Principle of subsidiarity – Contracting States recognize that national solutions must first be considered before intercountry adoption may be resorted to, including the option that the child may be raised by his or her birth family or extended family, whenever possible, or other forms of permanent care in the country of origin.[44]

3. Cooperation through Central Authorities – The Convention provides for a system of Central Authorities which must supervise the implementation of intercountry adoption within their given jurisdictions.[45]

The Philippines signed the Convention on July 17, 1995, and the Convention entered into force for the Philippines on November 1, 1996. There are currently 102 Contracting States to the Convention.

The Intercountry Adoption Board (ICAB) is the designated Central Authority – the term in HCCH Conventions for implementing agency – in the Philippines. Created under Republic Act (R.A.) No. 8043 otherwise known

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[43] *Id.* at 7.

[44] *Id.*

[45] *Id.* at 8-9.

as the Act Establishing the Rules to Govern Inter-Country Adoption of Filipino Children, and for which was enacted on June 7, 1995, the ICAB is empowered "to prepare, review or modify, and the DFA, Memoranda of Agreement respecting inter-country adoption consistent with the implementation of this Act and its stated goals, entered into, between and among foreign governments, international organizations and recognized international non-governmental organizations."[47] The DFA, upon representation of the Board, is also tasked to prepare executive agreements with countries of the foreign adoption agencies to ensure the legitimate concurrence of said countries in upholding the safeguards provided by law.[48]

It may be noted that the accession to the Inter-country Adoption Convention took place a month after the enactment of R.A. No. 8043.

ICAB officials attend relevant HCCH conferences. There are no known major issues with respect to the Philippines' implementation of the provisions of the Convention. Through the programs of the ICAB, the Philippines is considered to have one in the implementation of the Inter-Country Adoption Convention.[49]

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[46] Rep. Act No. 8043, art. II, § 4 (1995), "Inter-Country Adoption Board. — There is hereby created the Inter-Country Adoption Board, hereinafter referred to as the Board to act as the central authority in matters relating to inter-country adoption. It shall act as the policy-making body for purposes of carrying out the provisions of this Act, in consultation and coordination with the Department, the different child-care and placement agencies, adoptive agencies, as well as non-governmental organizations engaged in child-care and placement activities. x x x

[47] Rep. Act No. 8043, art. II, § 6(k) (1995).

[48] Rep. Act No. 8043, art. II, § 15 (1995).

[49] *See The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide To Good Practice, Guide No. 1* (2008),

B. Child Abduction Convention

With 101 Contracting Parties as of 2019, the objective of the Convention is to protect children from the harmful effect of international abduction and retention across international boundaries by a parent by providing a procedure for prompt return of the children to their country of habitual residence.[50] This is based on the presumption that "save in exceptional circums removal or retention of a child across international boundaries is not in the interests of the child, and that the return of the child to the State of the habitual residence will promote his or her interests by vindicating the right of the child to have contact with both parents, by supporting continuity in the child's life, and by ensuring that any determination of the issue of custody or access is made by the most appropriate court having regard to the likely availability of [51] relevant evidence."

Although predating the UNCRC, the Convention in part implements[52] UNCRC Articles 11[53] and

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available at https://assets.hcch.net/docs/bb168262-1696-4e7f-acf3-fbbd85504af6.pdf.

[50] HCCH, *Child Abduction Section, at* https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction (last visited April 14, 2020).

[51] HCCH, *Outline of the 1980 Hague Child Abduction Convention* (2014), *at* https://assets.hcch.net/docs/e6a6a977-40c5-47b2-a380-b4ec3a0041a8.pdf (last visited April 14, 2020).

[52] *Id.*

[53] United Nations Convention on the Rights of the Child (hereinafter "UNCRC"), Sept. 2, 1990, art. 11: "1. State combat the illicit transfer and non-return of children abroad. 2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to

35,[54] and helps give effect to the fundamental rights of the child under UNCRC Articles 9.3[55] and 10.2.[56]

Prior to the Philippines' accessio
been separated from their minor children may opt to file for a petition for custody and *writ of habeas corpus* under Administrative Matter (A.M.) No. 03-04-04-SC.[57] With the Convention however, these parents may seek the assistance of Central Authorities in securing the return of the child.[58] The Central Authority in receipt of the application is mandated to take all appropriate measures to obtain the voluntary return of the child,[59] or if not possible, through a judicial or administrative proceeding.[60]

The judicial or administrative authority hearing the case is given a wide latitude of powers to be able to determine if the child should be returned or not to the requesting parent.[61] However, should a return order be issued by the judicial or administrative authority, such order is not a

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[54] UNCRC, *supra* note 53, art. 35: "States Parties sha
national, bilateral and multilateral measures to prevent the abduction, the
sale of or traffic in children for any purpos

[55] UNCRC, *supra* note 53, art. 9.3: "States Parties sh
the child who is separated from one or both parents to maintain personal
relations and direct contact with both parents on a regular basis, except
if it is contrary to the child's best interes

[56] UNCRC, *supra* note 53, art. 10.2: "A child whose
different States shall have the right to maintain on a regular basis, save
in exceptional circumstances, personal relations and direct contacts with
both parents x x x"

[57] A.M. No. 03-04-04-SC, April 22, 2003, Re: Proposed Rule on Custody of Minors and Writ of Habeas Corpus In Relation to Custody of Minors.

[58] Convention of 25 October 1980 on the Civil Aspects of International
Child Abduction (hereinafter "Child Abduction

[59] Child Abduction Convention, *supra* note 58, art. 10.

[60] Child Abduction Convention, *supra* note 58, art. 11.

[61] Child Abduction Convention, *supra* note 58, arts. 11-15.

custody determination; rather, it is an order that the child be returned to the jurisdiction which is most appropriate to determine custody and access.[62]

The Philippines deposited its instrument of accession to the Convention on March 16, 2016, and the Convention entered into force for the Philippines on June 1, 2016, with the DOJ - Office of the Chief State Counsel (OCSC) as the Central Authority.

To date, no guidelines have been issued by the DOJ OCSC to implement the Convention, despite it clearly stating that no legislation or similar formality may be required in the context of the Convention.[63]

The challenge, it seems, is the need for the DOJ OCSC to accordingly coordinate with the and the Judiciary to discuss the nuances of a judicial proceeding for the return of the child. Domestic courts already have the framework for similar proceedings under A.M. No. 03-04-04-SC; it only needs representation from the Central Authority to streamline the requirements of the Convention.

Parents – whether residing in the Philippines or overseas – who have been separated from their minor children could not at present avail of the simplified return procedure under the Convention and have been much anguished by the situation.

C. Apostille Convention

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[62] *Outline of the 1980 Hague Child Abduction Convention*, *supra* note 51.

[63] Child Abduction Convention, *supra* note 58, art. 23. "No le similar formality may be required in the co

The *Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*, more commonly known as the "Aposti simplifies the authentication process of public documents whenever they are used abroad or in foreign jurisdictions.

The DFA OTLA and DFA Office of Consular Affairs had identified accession to the Convention as a priority starting in the late 2000s in order to lessen the administrative burdens on the business community and the overseas Filipino workers, among other sectors, who needed to present documents in other countries. The Philippine Chamber of Commerce and Industry had also recommended accession. The earlier challenges were the need to upgrade the authentication database and ensure recognition by the Judiciary of the new authentication format as a valid piece of evidence.

The HCCH explained the Convention's impo the following wise:

> "Public documents, such as certificates, judgments, patents or notarial attestations (acknowledgments) of signatures, frequently need to be used abroad. However, before a public document can be used in a country other than the one that issued it, its origin must often be authenticated. The traditional method for authenticating public documents to be used abroad is called legalization and consists of a chain of individual authentications of the document. This process involves officials of the country where the document was issued as well as the foreign Embassy or Consulate of the country where the document is to be used. Because of the number of authorities involved, the legalisation

> process is frequently slow, cumbersome and costly... Where heitreatyaeduces the, t authentication process to a single formality: the issuance of an authentication certificate by an authority designated by the country where the public document was issued. This certificate is called an *Apostille*.[64]"

In essence, the *apostille* replaces the authentication certificate (or commonly known as consular affairs) by certifying the origin of the public document to which it relates.[65]

The usual authentication process is comprised of the following steps: (1) a document is first certified by the issuing government agency such as the Philippine Statistics Authority for birth certificates; (2) the certified document is then submitted to the DFA for authentication; and (3) the authenticated document will be submitted to the relevant foreign Embassy or Consulate for legalization. In contrast, the *Apostille* Convention trims down the process down to two steps: (1) a document is first certified by the issuing government agency; and (2) the certified document is *apostillized* by the DFA.[66] The *apostillized* document is automatically recognized by all 117 Contracting States (except Austria, Finland, Germany and Greece),[67] to the

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[64] HCCH, *The ABCs of Apostilles: How to ensure that your public documents will be recognized abroad*, 2, *at* https://assets.hcch.net/docs/6dd54368-bebd-4b10-a078-0a92e5bca40a.pdf, (last visited April 14, 2020).

[65] *See* Department of Foreign Affairs, *Question-And-Answer and Infographics on Authentication Through Apostille*, *at* https://dfa.gov.ph/dfa-news/dfa-releasesupdate/22280-question-and-answer-and-infographics-on-authentication-through-apostille, (last visited April 14, 2020).

[66] *Id.*

[67] The Federal Republic of Germany, Finland, Republic of Austria, and the Hellenic Republic have objected to the Ph

Apostille Convention; hence, the document no longer needs to pass through another authentication or legalization by the foreign embassies in the Philippines.

The Apostille however only applies if both the country where the public document was issued and the country where the public document is to be used are Parties to the Convention.[68] If the document to be used originated from or to be used in a country which is not a party to the Convention, such as some ASEAN Member States, or if it originates from or to be used in Austria, Finland, Germany and Greece,[69] the usual authentication process (will apply. ribbon") p

Because of its practical effects, the Apostille Convention has attracted the highest number of ratifications and accessions.[70]

The Convention entered into force for the Philippines on May 14, 2019, with the DFA Office of the Consular Affairs as the Competent Authority. As of January 2020, the DFA Office of Consular Affairs has had issued over 520,000 apostilles. These apostilles may be verified online by inputting the appropriate number or code written in the issued apostille.[71]

Apostille Convention, and thus as of this writing do not recognize the *apostilles* issued by the country. *See* HCCH, Declarations / Reservations / Notifications to t https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1398&disp=type.

[68] *The ABCs of Apostilles*, *supra* note 64, at 7.

[69] *See supra* note 67.

[70] HCCH, *Apostille Handbook on the Practical Operation of the Apostille Convention*, 1 (2013), *available at* https://assets.hcch.net/docs/ff5ad106-3573-495b-be94-7d66b7da7721.pdf.

[71] Department of Foreign Affairs, *Apostille Verification, at* https://www.dfa.gov.ph/verify-apostille, (last visited April 1, 2020).

The Philippines' accession has bee several groups, including legal professionals, the business sector, overseas Filipino workers, and the overburdened Philippine embassies and consulates worldwide. The Convention has enabled them to legalize public documents for foreign use with less rigidity and cost, while taking advantage of present technology.[72]

On the part of the DFA and its foreign service posts, the use of apostilles has significantly eased their workload and given them added safety nets to ensure that the signature in the document they are presented with is indeed authentic.

Immediately after the Philippine representations by the DFA OTLA, the Supreme Court of the Philippines complemented the action and moved to recognize the *apostille* as a valid piece of evidence in domestic courts. Such reference may be found in Section 3(e) of A.M. No. 19-08-14-SC or the Rules of Procedure for Admiralty Cases,[73] and Section 24, Rule 132 of A.M. No. 19-08-15-SC or the 2019 Amendments to the Revised Rules on Evidence.[74] Section 24 of Rule 132 on Proof of Official Record states, in part, as follows:

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[72] Jomel Manaig, *Goodbye ribbons! Hello apostilles!*, BUSINESS MIRROR, May 28, 2019, *at* https://businessmirror.com.ph/2019/05/28/goodbye-ribbons-hello-apostilles/, (last visited April 14, 2020).

[73] RULES OF PROCEDURE FOR ADMIRALTY CASES, § 3(e). Verified Complaint. –The verified complaint shall state or contain: x x x (e) Specification of all evidence supporting the cause of action, su **Official documents from a foreign jurisdiction shall be considered as admissible when duly authenticated in accordance with The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, otherwise known as the Apostille Convention**. x x x

[74] REVISED RULES ON EVIDENCE, Rule 132, § 24. Proof of official record. — The record of public documents referred to in paragraph (a) of Section 19, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal

> A document that is accompanied by the certificate or its equivalent may be presented in evidence without further proof, the certificate or its equivalent being *prima facie* evidence of the due execution and genuineness of the document involved. The certificate shall not be required when a treaty or convention between a foreign country and the Philippines has abolished the requirement, or has exempted the document itself from this formality.

Moving forward, the DFA Office of Consular Affairs is taking steps towards implementation of the successor e-Apostille program, which "promotes th

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custody of the record, or by his or her deputy, and accompanied, if the record is not kept in the Philippines, with a certificate that such officer has the custody.

If the office in which the record is kept is in a foreign country which is a contracting party to a treaty or convention to which the Philippines is also a party or considered a public document under such treaty or convention pursuant to paragraph (c) of section 19 hereof, the certificate or its equivalent shall be in the form prescribed by such treaty or convention subject to reciprocity granted to public documents originating from the Philippines.

For documents originating from a foreign country which is not a contracting party to a treaty or convention referred to in the next preceding sentence, the certificate may be made by a secretary of the embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in which the record is kept, and authenticated by the seal of his or her office.

A document that is accompanied by the certificate or its equivalent may be presented in evidence without further proof, the certificate or its equivalent being *prima facie* evidence of the due execution and genuineness of the document involved. The certificate shall not be required when a treaty or convention between a foreign country and the Philippines has abolished the requirement, or has exempted the document itself from this formality.

further enhance the secure and effe
Apostille Convention.[75]

D. Service Convention

Another initiative which DFA OTLA spearheaded is the accession to the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters,* or simply the "Se Convention," as a tangible contribut inter-state legal and judicial cooperation, and more importantly, in addressing delays in court proceedings and enhancing the administration of justice.

With at least 73 Contracting States, the Service Convention is an effective tool to facilitate the "transmissi of documents (whether judicial or extrajudicial document) from one State to another State."[76] For the Convention to apply, the following requirements must be met:

1) A document is to be transmitted from one State Party to the Convention to another State Party for service in the latter (i.e., the law of the State of origin determines whether or not a document has to be transmitted abroad for service in the other State);
2) An address for the person to be served is known;
3) The document to be served is a judicial or extrajudicial document; and

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[75] Mayela Celis, *11th International Forum on the e-APP (electronic Apostille Program) will be held in Fortaleza, Brazil, from 16 to 18 October 2019,* at http://conflictoflaws.net/2019/11th-international-forum-on-the-e-app-electronic-apostille-program-will-be-held-in-fortaleza-brazil-from-16-to-18-october-2019/ (last modified April 7, 2019).

[76] HCCH, *Frequently Asked Questions on the Service Convention*, XLV ¶ I.1, *at* https://assets.hcch.net/docs/aed182a1-de95-4eaf-a1ae-25ade7cd09de.pdf, (last visited April 14, 2020).

4) The document to be served relates to a civil and/or commercial matter.[77]

Under the Convention, the authority or judicial officer competent under the law of the requesting State shall transmit the document to be served to a Central Authority of the requested State (*i.e.* the State where the service is to occur).[78] The request for service transmitted to the Central Authority must comply with the Model Form annexed to the Convention, and be accompanied by the documents to be served (the list of documents to be served is to be determined according to the law of the requesting State).[79]

The Central Authority however may refuse execution of the request if the Central Authority considers that the request does not meet the formal and substantive requirements of the Convention,[80] or if it considers that execution of the service would infringe the sovereignty or security of the requested State.[81] As stated in the Convention's title, it is applicable in civil or commercial cases and not to criminal cases.

The Service Convention is meant to address efficiency issues in the justice system, as it allows for the direct transmission of documents to a competent judicial authority who may execute the service.

Prior to the Convention, outbound documents from domestic courts are first transmitted to the DFA main office

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[77] *Id.* at XLV-XLVI, ¶ 3.

[78] *Id.* at XLVI, ¶ 7.

[79] *Id.* at XLVII, ¶¶ 10-11.

[80] *Id.* at XLIX, ¶ 19.

[81] *Id.*

in Manila, which then forwards them to the relevant Philippine Embassy or Consulate General abroad. The Embassy or Consulate General then requests the host Ministry of Foreign Affairs to have the service done by local authorities. The Embassy or Consulate General at times send the documents directly via registered mail. The turnaround time for the service often take four to six months. On some occasions, there is no return (result) of service.

On the other hand, prior also to the Convention, inbound documents from foreign jurisdictions are first transmitted to the Ministry of Foreign Affairs, which then transmits them to their Embassy in Manila. The latter in turn transmits the documents to the DFA main office. The DFA OTLA then sends the documents to the Executive Judge of the area where the service is expected to be made, with a request to serve the same. The turnaround time for the service is the same as for outbound documents, and within that period, cases are on a standstill while awaiting the return (result) of service.

Under the Service Convention, this roundabout way of serving will no longer apply. Documents will henceforth be directly transmitted from one Central Authority to another. The experience under the Convention is that documents are served within one and a half months.[82]

After securing the concurrence of the Supreme Court to the accession to the Convention and approval for such accession from the Office of the President, the DFA deposited the instrument of accession on March 4, 2020 in The Hague.

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[82] HCCH, *Authorities and Practical Information on the Service Convention, at* https://www.hcch.net/en/instruments/conventions/authorities1/?cid=17 (last visited April 14, 2020).

For the Philippines, the Convention enters into force on October 1, 2020, absent any objection from other Contracting States.

The Central Authority for the Philippines is the Office of the Court Administrator in the Supreme Court, which will issue guidelines to operationalize the Convention. In the meantime, legal professionals have the assurance that a service made under this Convention is legally recognized under A.M. No. 19-10-20-SC or the 2019 Amendments to the 1997 Rules of Civil Procedure, specifically under Rule 14, Section 17 thereof.[83] Rule 14, Section 17 provides that "extraterritorial service effected, by leave of out of the Philippines by personal service as under Section 6; or as provided for in international conventions to which the Philippines is a party or by publication in a newspaper of general circulation xxx."

IV. A PROPOSED HCCH ROADMAP FOR THE PHILIPPINES

[83] REVISED RULES ON CIVIL PROCEDURE, Rule 14, § 17. Extraterritorial service. — When the defendant does not reside and is not found in the Philippines, and the action affects the personal status of the plaintiff or relates to, or the subject of which is, property within the Philippines, in which the defendant has or claims a lien or interest, actual or contingent, or in which the relief demanded consists, wholly or in part, in excluding the defendant from any interest therein, or the property of the defendant has been attached within the Philippines, service may, by leave of court, be effected out of the Philippines by personal service as under Section 6; **or as provided for in international conventions to which the Philippines is a party**; or by publication in a newspaper of general circulation in such places and for such time as the court may order, in which case a copy of the summons and order of the court shall be sent by registered mail to the last known address of the defendant, or in any other manner the court may deem sufficient. Any order granting such leave shall specify a reasonable time, which shall not be less than sixty (60) calendar days after notice, within which the defendant must answer. (15a)

Ever since becoming a HCCH member in 2010, the Philippines has been attending the various conferences and negotiating sessions and studying the various HCCH conventions and evaluating which ones to prioritize for accession. As earlier mentioned, the DFA OTLA hosted on December 4, 2017 a Colloquium on International Law Issues at the Jen Hotel in Manila, and Professor Elizabeth Aguiling-Pangalangan, co-author of a book on Private International Law[84] and a participant in a number of HCCH conferences as a member of the Philippine delegation and subject matter expert, presented a paper on the HCCH Conventions which "will be advantageous"[85] and may be (Fil recommended for accession, specifically the Apostille Convention, Evidence Convention, Service Convention, Child Support Convention, and the Choice of Court Conventions.

As of this writing, accessions to two of the above five recommended conventions – the Apostille and the Service Conventions – have been completed. The DFA is currently undertaking studies and consultations with relevant agencies, notably the Supreme Court of the Philippines and the DOJ, on the three other Conventions, namely the Evidence Convention, Child Support Convention and the Choice of Court Convention, as well as a fourth one - the Recognition and Enforcement of Foreign Judgments Convention. These Conventions are discussed below.

A. Evidence Convention

The *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* ("Evidence Convention") states that a Contracting State may designate a

[84] ELIZABETH AGUILING-PANGALANGAN & JORGE COQUIA, CONFLICT OF LAWS: CASES, MATERIALS, AND COMMENTS (2010).

[85] *Aguiling-Pangalangan, supra* note 11.

Central Authority which shall receive Letters of Request (to obtain evidence) from a *judicial authority* of another Contracting State and transmit them to the authority competent to execute them. The executor of the request may be a judicial authority,[86] diplomatic officer,[87] or a commissioner as appointed by a competent authority.[88] If so desired, the presence of a judicial authority of the requesting party may be allowed upon prior authorization by the competent authority.[89] Certain States have in fact amended their domestic rules in order to permit techniques which will allow the presence of judicial authorities from the requesting State to participate in the evidence-taking proceeding (i.e., authority to use video-links, live conferencing).[90] However, the execution of the request to obtain evidence may be refused by a subject person if it will violate his or her rights or privilege under his or her internal laws.[91]

In current practice, the Letters of Request may be equated with the letters rogatory issued by a foreign state to request for assistance in the taking of depositions locally, which is a recognized legal procedure under Sections 11 and 12, Rule 23, of the 1997 Rules on Civil Procedure.[92] These

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[86] Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (hereinafter "Evidence

[87] Evidence Convention, *supra* note 86, arts. 15-16.

[88] Evidence Convention, *supra* note 86, art. 17.

[89] Evidence Convention, *supra* note 86, art. 8.

[90] HCCH, *Outline of the Evidence Convention*, *at* https://assets.hcch.net/docs/ec1fc148-c2b1-49dc-ba2f-65f45cb2b2d3.pdf, last visited April 14, 2020.

[91] Evidence Convention, *supra* note 86, art. 11.

[92] RULES ON CIVIL PROCEDURE, Rule 23, §§ 11-12. § 11. Persons before whom depositions may be taken in foreign countries. In a foreign state or country, depositions may be taken (a) on notice before a secretary of embassy or legation, consul general, consul, vice-consul, or consular agent of the Republic of the Philippines; (b) before such person or officer

requests are entertained by judicial authorities only when coursed through the proper diplomatic channels.[93] With the Evidence Convention, a direct line may be made between the judicial authority of the requesting State to the judicial authority in the Philippines, and vice-versa, which will make the process of evidence-taking efficient and easy to coordinate.

The Evidence Convention is bound to benefit Filipino law practitioners who are engaged in cases requiring the testimony of witnesses in foreign jurisdictions, or submission of documents originating abroad or in the custody of a foreign institution. One hurdle however is the need for the Philippine competent authority, possibly the Office of the Court Administrator, to designate domestic courts per judicial region to do the evidence-taking and determine with clarity the requirements for a Letter of Request to be accommodated.

Should the Philippines consider becoming a Contracting Party to the Evidence Convention, it will join the roster of 63 other Contracting Parties,[94] which include the

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as may be appointed by commission or under letters rogatory; or (c) the person referred to in section 14 hereof.

§ 12. Commission or letters rogatory. A commission or letters rogatory shall be issued only when necessary or convenient, on application and notice, and on such terms and with such direction as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed to the appropriate judicial authority in the foreign country.

[93] *See* Office of the Court Administrator, OCA Circular No. 169-2018, *Re: Policy to Entertain Letters Rogatory Only When Coursed Through the Proper Diplomatic Channels* (2018), *available at* http://oca.judiciary.gov.ph/wp-content/uploads/2018/08/OCA-Circular-No.-169-2018.pdf.

[94] HCCH, *Status Table of the Evidence Convention*, *at* https://www.hcch.net/en/instruments/conventions/status-table/?cid=82 (last visited April 14, 2020).

United States, countries in the European Union, China, South Korea, and Singapore, among others. To do this, there must first be a determination on which national government agency will undertake the functions of the competent authority. Once determined, the would-be competent authority will have to submit its concurrence to the proposal to the DFA so that the process of accession[95] may begin.

B. Child Support Convention

The completion of the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* ("Child Support Convention") and its Protocol on the Law Applicable to Maintenance Obligations is the culmination of work which had begun in the 1990[96] to update the existing Hague Conventions concerning maintenance and the 1956 United Nations Convention on the Recovery Abroad of Maintenance (otherwise called the "New York Convention").[97]

The Philippines is already a signatory to the New York Convention, with the Office of the Solicitor General as the designated central authority. This Child Support Convention replaces the New York Convention in so far as its scope of application as between such States coincides with the scope of application of the Hague Convention.[98]

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[95] Exec. Order No. 459 (1997), Providing for the Guidelines in the Negotiation of International Agreements and its Ratification.

[96] Special Commissions of November 1995 and April 1999 on the operation of the Hague Conventions relating to maintenance obligations and of the New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance.

[97] HCCH, *Outline of the Child Support Convention*, *at* https://assets.hcch.net/docs/70cda9de-283c-4892-80ec-292daec4f667.pdf (last visited April 14, 2020).

[98] Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance

For the Philippines, the Convention will directly benefit the increasing number of Filipinos (and their children) who have been abandoned by their foreign spouses without any form of support. With 41 Contracting States, including the United States, European Union countries, and Canada,[99] the Philippines stands to benefit from the modern, efficient and accessible international system for the cross-border recovery of child support and other forms of family maintenance.[100]

In particular, the Convention covers obligations arising from: (1) maintenance obligations under (a) a parent-child relationship towards a person under the age of 21 years (however, States may reserve to limit the age to 18 years), regardless of the marital status of parents; and (b) a family relationship, parentage, marriage or affinity, including obligations in respect of vulnerable persons; and (2) recognition and enforcement or enforcement of a decision for spousal support.[101]

A Contracting State shall designate a Central Authority to discharge the duties that are imposed by the Convention on such an authority, with the following functions: transmit and receive such applications; initiate or facilitate the institution of proceedings in respect of such applications;

Support Convention"), art. 49. "In relations betw
States, this Convention replaces the United Nations Convention on the Recovery Abroad of Maintenance of 20 June 1956, in so far as its scope of application as between such States coincides with the scope of application of this Convention."

[99] HCCH, *Status Table of the Child Support Convention*, *at* https://www.hcch.net/en/instruments/conventions/status-table/?cid=131 (last visited April 14, 2020).

[100] HCCH, *Child Support Section*, *at* https://www.hcch.net/en/instruments/conventions/specialised-sections/child-support (last visited April 14, 2020).

[101] Child Support Convention, *supra* note 98, art. 2(1).

provide legal assistance; locate the debtor or the creditor; obtain relevant information concerning the income and, if necessary, other financial circumstances of the debtor or creditor, including the location of assets; encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where suitable by use of mediation, conciliation or similar processes; facilitate the ongoing enforcement of maintenance decisions, including any arrears; facilitate the collection and expeditious transfer of maintenance payments; facilitate the obtaining of documentary or other evidence; provide assistance in establishing parentage where necessary for the recovery of maintenance; and initiate or facilitate the institution of proceedings to obtain any necessary provisional measures.[102]

Consequently, recognition and enforcement of maintenance decisions issued by the Contracting States is also highlighted. The Convention only allows for the refusal to recognize or enforce maintenance arrangement or decision if it is manifestly incompatible with the public policy of the requested State; it was obtained by fraud or falsification; or if it is incompatible with a decision rendered between the same parties and having the same purpose, provided that the latter decision fulfills the conditions necessary for its recognition and enforcement in the State addressed.[103]

It was observed "the only ground not to recognize a foreign judgment compelling a Filipino husband who is living in the Philippines to pay for support of his child residing in another State is when recognizing such foreign judgment will violate Ph[104]

[102] Child Support Convention, *supra* note 98, arts. 5-7.

[103] Child Support Convention, *supra* note 98, art. 30(4).

[104] Aguiling-Pangalangan, *supra* note 11, at 52.

Considering the policy of the country to protect the best interest of the child, "[105] this is highly unlikely. If, on the other hand, it is the Filipino spouse who seeks for support either abroad (in a Contracting State) or in the Philippines, the decision over such application is expected to be mutually recognized and enforced domestically or in the foreign Contracting State.

In current practice, foreign decision of support may be enforced under Section 48, Rule 39 of the Rules on Civil Procedure.[106] However, under this rule, "a judgment or order against a person is merely presumptive evidence of a right as between the parties and their successors-in-interest and the judgment may be repelled by evidence of a want of jurisdiction,[107] want of notice to the party, collusion, fraud, or clear mistake of law or fact."[108] The party impugning a foreign judgment has the burden of overcoming the presumption of its validity.

The challenge for the Philippines is to identify a national government agency which is best suited to undertake the functions of the designated Central Authority, with the requisite competencies. At the outset, the Public Attorney's Office may also be cons

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[105] *Id.*

[106] RULES ON CIVIL PROCEDURE, Rule 39, § 48. "Effect of foreign j
The effect of a judgment or final order of a tribunal of a foreign country, having jurisdiction to render the judgment or final order is as follows: (a) In case of a judgment or final order upon a specific thing, the judgment or final order is conclusive upon the title to the thing; and (b) In case of a judgment or final order against a person, the judgment or final order is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title. In either case, the judgment or final order may be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, o

[107] St. Aviation Services Co., Pte., Ltd., v. Grand International Airways, Inc., G.R. No. 140288, Oct. 23, 2006.

[108] *Id.*

considering that it has a nationwide network of lawyers who may take up the cudgels for the Filipino spouse and child to file support cases in any jurisdiction within the Philippines. There may also be a need to communicate with the Judiciary if there is a necessity to amend the rules of procedure to conform with the requirements of the Convention as regards the recognition and enforcement of maintenance obligations or support.

C. Choice of Court Convention

Subject to certain conditions, the *Convention of 30 June 2005 Choice of Court Agreements* ("Choice of Court Convention") allows the parties, by agreement, to designate for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts.[109]

There are three basic principles[110] that Contracting States must adhere to when acceding to the Convention: (1) the chosen court must in principle hear the case;[111] (2) any court *not* chosen must in principle decline to hear the case;[112] and (3) any judgment rendered by the chosen court must be recognized and enforced in other Contracting States, except where a ground for refusal applies.[113] Consequently, the

[109] Convention of 30 June 2005 Choice of Court Agreements (hereinafter "Choice of Court Convention") art. 3(a).

[110] HCCH, *Outline of the Choice of Court Convention*, *at* https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf (last visited April 14, 2020).

[111] Choice of Court Convention, *supra* note 109, art. 5(2).

[112] Choice of Court Convention, *supra* note 109, art. 6.

[113] Choice of Court Convention, *supra* note 109, arts. 8-9.

chosen court shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.[114]

The Convention applies to cases where there is an exclusive choice of court agreement concluded in civil or commercial matters, except those pertaining to contracts of employment, including collective agreements; the status and legal capacity of natural persons; maintenance obligations and other family law matters; wills and succession; insolvency, composition and analogous matters; the carriage of passengers and goods; marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage; anti-trust (competition) matters; liability for nuclear damage; claims for personal injury brought by or on behalf of natural persons; tort or delict; rights in rem in immovable property, and tenancies of immovable property; the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs; intellectual property; and the validity of entries in public registers.[115] The reasons for these exclusions are, in most cases, the existence of more specific international instruments, and national, regional or international rules that claim exclusive jurisdiction for some of these matters.[116]

The Convention is also not applicable to arbitration and relevant proceedings,[117] but judicial settlements are enforced under the Convention.[118]

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[114] Choice of Court Convention, *supra* note 109, art. 5(2).

[115] Choice of Court Convention, *supra* note 109, art. 2(2).

[116] *Outline of the Choice of Court Convention*, *supra* note 110.

[117] Choice of Court Convention, *supra* note 109, art. 2(4).

[118] Choice of Court Convention, *supra* note 109, art. 12.

Moreover, a judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognized and enforced in other Contracting States,[119] provided that the same may also be enforced in the State of origin.[120]

There as so far 32 Contracting States to the Convention.

The governing principle behind the Convention is *lex loci intentionis,* in which "parties are allowed particular court where the case will be heard should there be any dispute arising from the contract."[121] However, Philippine courts have consistently equated choice of court stipulations as an agreement on venue, which may be waived impliedly or expressly,[122] and not of jurisdiction, under the principle that jurisdiction is conferred by law and not subject to any stipulation of the parties.[123] Thus, to be able to accede to this Convention, the hurdle on jurisdiction must first be overcome.

D. Recognition and Enforcement of Foreign Judgments

The *Convention of 02 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* ("Recognition and Enforcement of Foreign Judgments Convention") is the newest agreement concluded under the HCCH auspices. It was concluded on July 2, 2019 and has not

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[119] Choice of Court Convention, *supra* note 109, art. 8(1).

[120] Choice of Court Convention, *supra* note 109, art. 8(3).

[121] Aguiling-Pangalangan, *supra* note 11, at 53.

[122] Gumabon v. Larin, G.R. No. 142523, Nov. 27, 2001.

[123] Ley Construction and Development Corporation v. Sedano, G.R. No. 222711, Aug. 23, 2017.

yet entered into force.[124] Already an HCCH member at the time the subject was taken up, the Philippines was present at the negotiation sessions.

With the goal of promoting "effe
for all and to facilitate rule-based multilateral trade and investment, and mobility, through judicial co-operat[125]ion," through "an international legal reg
predictability and certainty in relation to the global circulation of foreign judgments, and that is complementary to the Convention of 30 June 2005 on Choice of Court Agreem[126]ents. This Convention was concluded to facilitate the effective recognition and enforcement of judgments in civil or commercial matters.

In particular, the Convention applies to the recognition and enforcement in one Contracting State of a judgment in a civil or commercial matter given by a court of another Contracting State, except[127] the status and legal capacity of natural persons; maintenance obligations and other family law matters;[128] wills and succession; insolvency, composition, resolution of financial institutions, and analogous matters;

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[124] Under Article 28 thereof, the Convention shall enter into force on the first day of the month following the expiration of the period during which a notification may be made in accordance with Article 29(2) with respect to the second State that has deposited its instrument of ratification, acceptance, approval or accession referred to in Article 24.

[125] Convention of 02 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (hereinafter "Recognition and Enforcement of Foreign Ju
preambular clause.

[126] Recognition and Enforcement of Foreign Judgments Convention, *supra* note 125, 4th preambular clause.

[127] Recognition and Enforcement of Foreign Judgments Convention, *supra* note 125, art. 2.

[128] This matter is specifically covered by the Child Support and Maintenance Convention discussed earlier.

the carriage of passengers and goods; transboundary marine pollution, marine pollution in areas beyond national jurisdiction, ship-source marine pollution, limitation of liability for maritime claims, and general average; liability for nuclear damage; the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs; the validity of entries in public registers; defamation; privacy; intellectual property; activities of armed forces, including the activities of their personnel in the exercise of their official duties; law enforcement activities, including the activities of law enforcement personnel in the exercise of their official duties; anti-trust (competition) matters, except where the judgment is based on conduct that constitutes an anti-competitive agreement or concerted practice among actual or potential competitors to fix prices; or sovereign debt restructuring through unilateral State measures. This Convention shall also not apply to arbitration and related proceedings.[129]

In general, a judgment is eligible for recognition and enforcement if one of the following requirements is met: the person against whom recognition or enforcement is sought was habitually resident in the State of origin at the time that person became a party to the proceedings in the court of origin; the natural person against whom recognition or enforcement is sought had their principal place of business or a branch, agency or establishment in the State of origin; the defendant expressly consented to the jurisdiction of the court of origin; the defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law; the judgment ruled on a lease of immovable property (tenancy); the judgment ruled against the defendant on a contractual obligation secured by a right

[129] Recognition and Enforcement of Foreign Judgments Convention, *supra* note 125, art. 2.3.

in rem in immovable property located in the State of origin; the judgment ruled on a tort; the judgment concerns trusts; or the judgment was given by a court designated in an agreement concluded or documented in writing, other than an exclusive choice of court agreement.[130]

However, recognition or enforcement may be refused on the following grounds:[131] an evidence/document was not presented to the respondent/defendant; judgment was obtained in fraud; recognition or enforcement would manifestly be incompatible with public policy; proceedings in court of origin were contrary to an agreement; judgment is inconsistent with a judgment given in the requested State; judgment is inconsistent with a judgment given in another State between the same parties and cause of action; or judgment award does not compensate for actual loss or harm suffered.[132]

The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State.[133]

As with the Child Support Convention, an action to recognize and enforce judgments on civil and commercial matters also falls under Section 48, Rule 39 of the Rules on

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[130] Recognition and Enforcement of Foreign Judgments Convention, *supra* note 125, art. 5.

[131] Recognition and Enforcement of Foreign Judgments Convention, *supra* note 125, art. 7.

[132] Recognition and Enforcement of Foreign Judgments Convention, *supra* note 125, art. 10.

[133] Recognition and Enforcement of Foreign Judgments Convention, *supra* note 125, art. 13.

Civil Procedure.[134] In similar vein, it may be necessary for the Judiciary to examine the Convention determine if there is a possibility to incorporate these best practices to the current rules of procedure.

As mentioned earlier, there are currently 41 HCCH Conventions, covering cross-cutting issues in family law, commercial law, and civil procedure. In addition, Special Commissions are studying emerging concerns, specifically parentage or surrogacy, cohabitation outside marriage, family agreements involving children, jurisdiction, protection orders and protection of tourists. Engagements with HCCH will therefore be an ongoing concern for the country.

V. MAKING PRIVATE INTERNATIONAL LAW WORK FOR PEOPLE

In an interconnected, globalized world, interactions among people across state borders have intensified exponentially, and these have given rise to civil, commercial and other transactions, such as marriages and sales contracts, and consequently to innumerable cases with foreign elements. This phenomenon is best exemplified by the increasing number of Filipino companies that conduct business in the Southeast Asian region and the millions of overseas Filipinos who reside and work across the globe. Their activities have led at times to problems in contracts, torts, marriages, family relations and property rights involving diverse foreign laws, cultures, religions and traditions. This brings to fore the need for a universally accepted system of conflicts of law.

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[134] *See supra not*e 106. *See also* Asiavest Merchant Bankers (M) Berhad v. Court of Appeals, G.R. No. 110263, July 20, 2001.

Because of its wide scope, private international law has the capacity to address complex issues on cross-border transactions and eventually produce tangible benefits for the people. By taking the lead in efforts to harmonize the rules of procedures of different countries, the HCCH has made significant gains in addressing cross-border legal challenges and facilitating international legal cooperation. Their methodologies also often represent the best practices in the field.

Yet, the dynamic nature of private international law can only be fully harnessed if complemented with an equally vigorous interest and study of the conventions already developed or being developed in various international platforms. The task therefore is also up to the legal profession, the law academe, the business community, and the rest of society to remain engaged with each other and the relevant national government agencies in order to ensure that the dialogues and discussions thrive and continue.

The Philippine Supreme Court recognized this situation and acted on it, believing further that, in the words of Chief Justice Peralta, acceding to the Service and other Conventions [also] *is a golden opportunity for the Philippine Supreme Court to be recognized as an emerging champion of private international law in the Philippines and in the Asia Pacific Region...*"[135]

For its part, by giving priority to the HCCH and its processes, the DFA has seen the usefulness of its work in terms of direct relevance and benefits to the overseas Filipinos, the business community, and the society in general, and reaffirmed that certain legal issues faced by our people

[135] *See supra* note 2.

can be addressed and resolved through diplomacy and international law advocacies.

With this recognition and being continually engaged with the HCCH processes and private international law, the Philippines can look forward to enhanced legal cooperation with other States and also "overcome barriers faced by here and abroad Filipinos"[136]

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[136] Aguiling-Pangalangan, *supra* note 11, at 54.

Promoting Public Support for Legal Aid and Raising Legal Awareness through Legal Aid Advertising, Law-Related Education, and Legal Literacy Campaigns

*Joseph R. Malcontento**

ABSTRACT

The effective delivery of legal aid services is one of many aspects of broader reforms that are necessary to guarantee the right to adequate legal assistance, which shall not be denied to any person by reason of poverty, and to ensure wider access to justice. Despite the existence of entities offering legal aid services, majority of Filipinos fail to avail of the same due to the lack of knowledge regarding the legal system, the concept of rights and entitlements, the nature and functions of the judiciary, and the role of the State in providing legal assistance and redress mechanisms to the poor and the marginalized sectors of society. Overall, the prevailing lack of legal information is mainly attributable to widespread poverty and illiteracy. This Paper examines potential

* Joseph Reyna Malcontento received his Juris Doctor and Bachelor of Science in Business Economics (Magna Cum Laude) from the University of the Philippines. While in law school, he was a member of the Order of the Purple Feather, the honor student organization of the College of Law. He worked as a research assistant for Dr. Julian Nowag, associate professor at both the Oxford University Center for Competition Law and Policy and the Lund University.

areas of reform which the government could undertake in order to effectively deliver legal aid information to the general public, namely: strengthening the advertising functions of the Integrated Bar of the Philippines (IBP), the Public Attorney's Office (PAO), and public interest groups (PILGs), introducing the concept of legal aid as a component of the basic education curriculum, and encouraging lawyers from the private sector to pursue basic legal literacy programs specifically targeted towards the poor and marginalized sector.

I. INTRODUCTION

The 1987 Constitution protects the right of every individual to adequate legal assistance, especially to the impoverished and disadvantaged sectors of society.[1] Subsumed under this right is the access to free legal assistance from the State and key volunteer groups exclusively dedicated to public lawyering. A vital aspect of the access-to-justice problem in the Philippines is the lack of information on sources of free legal assistance and representation, the structure of the justice system, the processes involved in criminal, civil, or administrative litigation, and the legal advocacies and services offered by State instrumentalities and certain private groups. Meaningful access to such legal information is necessary for upholding human rights, social and economic rights, and is a main component of legal empowerment, thereby ensuring equal protection of the law.[2] Moreover, the right to legal

[1] CONST. art. III, sec. 11.

[2] United Nations Office on Drugs and Crime, 'Global Study on Legal Aid: Global Study on Legal Aid', Available at https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global-Study-on-Legal-Aid_Report01.pdf. January 5, 2020. [hereinafter referred to as Global Study on Legal Aid]

information is of utmost importance since the effective delivery of legal aid would not be possible if its potential beneficiaries are unaware of the right to legal aid.

This Paper, therefore, attempts to provide measures which the government and lawyers in the private sector could undertake in order to address this information gap and to raise legal awareness among the main beneficiaries of legal aid in the Philippines, in a manner consistent with independence, integrity, and effectiveness of the legal profession.[3] Part I presents the problem of inaccessibility of justice in the Philippines. Part II discusses the nature of advertising as a source of legal information, the rules governing lawyer advertising, its applicability to legal aid services, and its limitations. Part III suggests the viability of law-related education and basic legal literacy campaigns in addressing the lack of legal awareness among Filipinos.

II. INACCESSIBILITY OF JUSTICE IN THE PHILIPPINES

The promotion of peaceful and inclusive societies and the strengthening of governmental institutions form part of the Sustainable Development Goals (SDGs) of the United Nations (UN). Equal access to justice for all individuals is an essential indicator of a country's progress toward such a goal.

A study conducted by the *World Justice Project* (WJP) gives an overview of the contrasting level of access to justice across different jurisdictions.[4] Countries are categorized

[3] CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2.

[4] World Justice Project, Rule of Law Index 2019' World Justice Project Available

based on geographical location and income level and are assigned scores ranging from a scale of 0 to 1, based on their respective aggregate survey responses from a probability sample of 1,000 household respondents and an average of 300 highly qualified individuals from each country selected from directories of law firms, universities and colleges, research organizations, and non-governmental organizations (NGOs), as well as through referrals from the WJP global network of practitioners. All are vetted by WJP staff based on their expertise. In terms of access to justice, a score closer to 1 indicates greater access while a score closer to zero indicates poor access. **Table 1.1** indicates the accessibility scores garnered by 15 countries in the East Asia and Pacific region, while **Table 1.2** indicates the accessibility scores garnered by 30 lower middle-income countries.

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https://worldjusticeproject.org/sites/default/files/documents/ROLI-2019-Reduced.pdf. March 5, 2020.

The study gives a portrait of the rule of law in 126 countries by providing scores and rankings based on eight factors: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice. The country scores and rankings were derived from more than 120,000 household surveys and 3,800 expert surveys in 126 countries and jurisdictions. The survey for each country was administered by a local polling company. This Paper shall focus solely on scores relating three specific sub-indicators under the factor "civil access to justice in general, access to complaint and redress mechanisms, and access to alternative modes of dispute resolution.

ACCESSIBILITY SCORES: EAST ASIA AND PACIFIC REGION			
Country	**Accessibility of Complaint Mechanisms**	**Accessibility of Justice**	**Accessibility of Alternative Modes of Dispute Resolution**
Australia	0.89	0.62	0.83
Cambodia	0.26	0.35	0.37
China	0.45	0.66	0.67
Hong Kong	0.87	0.64	0.89
Indonesia	0.62	0.51	0.568
Japan	0.71	0.7	0.88
Malaysia	0.39	0.58	0.61
Mongolia	0.5	0.53	0.64
Myanmar	0.42	0.36	0.5
New Zealand	0.83	0.72	0.81
Philippines	**0.518**	**0.491**	**0.573**
Singapore	0.65	0.65	0.81
South Korea	0.68	0.66	0.86
Thailand	0.55	0.55	0.48
Vietnam	0.54	0.5	0.53
Rank of Philippines	**10th**	**13th**	**10th**

Table 1.1 Accessibility Scores in Countries in the East Asia and Pacific Region

ACCESSIBILITY SCORES: LOWER MIDDLE INCOME COUNTRIES			
Country	**Access to Complaint Mechanisms**	**Access to Justice**	**Access to Alternative Modes of Dispute Resolution**
Angola	0.45	0.53	0.62
Bangladesh	0.49	0.45	0.55
Bolivia	0.5	0.48	0.58
Cambodia	0.26	0.35	0.37
Cameroon	0.42	0.44	0.566
Egypt	0.31	0.48	0.49
El Salvador	0.58	0.6	0.59
Georgia	0.57	0.65	0.71
Ghana	0.71	0.58	0.75
Honduras	0.522	0.45	0.67
India	0.72	0.4	0.58
Indonesia	0.62	0.51	0.568
Ivory Coast	0.4	0.5	0.7
Kenya	0.71	0.42	0.64
Kyrgyzstan	0.5	0.6	0.63
Mauritania	0.25	0.38	0.49
Moldova	0.56	0.5	0.63
Mongolia	0.5	0.53	0.64
Morocco	0.46	0.53	0.66
Myanmar	0.42	0.36	0.5
Nicaragua	0.53	0.488	0.58
Nigeria	0.6	0.59	0.67
Pakistan	0.5	0.39	0.48

Philippines	**0.518**	**0.491**	**0.573**
Sri Lanka	0.5	0.47	0.59
Tunisia	0.517	0.6	0.59
Ukraine	0.54	0.58	0.65
Uzbekistan	0.46	0.46	0.66
Vietnam	0.54	0.5	0.53
Zambia	0.38	0.46	0.47
Rank of Philippines	**13th**	**15th**	**21st**

Table 1.2 Accessibility Scores in Lower Middle-Income Countries

Household respondents were made to answer a General Population Poll (GPP) which includes 127 perception-based questions and 213 experience-based questions, along with socio-demographic information on all respondents. In the Philippines, 35% of the respondents have encountered a legal problem over the past two years. **Table 1.3** categorizes the legal problems experienced by the respondents.

NATURE OF LEGAL PROBLEM EXPERIENCED	
Category	**Incidence**
Accidental, Illness and Injury	35%
Citizenship and Identification	2%
Community and Natural Resources	7%
Consumer	7%
Employment	5%
Education	5%

Family	5%
Housing	5%
Land	13%
Law Enforcement	6%
Money and Debt	2%
Public Services	11%

Table 1.3 Categories of Legal Problems Experienced by Filipinos

Approximately 80% of the Filipino respondents who experienced a legal problem were not able to obtain any form of legal assistance due to accessibility problems, which include lack of knowledge regarding sources of legal aid and the processes involved in enforcing rights, fear of legal costs, time and geographical constraints. **Table 1.4** provides for the types of advisors availed of by the remaining 20% of the Filipino respondents who experienced a legal problem.

SOURCES OF LEGAL ASSISTANCE	
Source	**Percentage of the Respondents Availing**
Friend or family with no legal background	72%
Lawyer or professional advice service	15%
Government legal aid office	9%
Court, government agencies, or the police	12%
Health or welfare professional	3%
Trade union or employer	3%

Religious or community leader or organization	4%
Civil society organization or charity	3%
Other organizations	12%

Table 1.4 Sources of Legal Assistance by Filipinos Able to Obtain Legal Advice

The study also revealed that only 11% of those who encountered a legal problem turned to an authority to mediate, adjudicate, or resolve the same, 49% of whom opt to go to courts or quasi-judicial tribunals, while 44% resorted to a formal complaint or appeals process before other government offices.

Among those who sought legal assistance or representation and took their legal problem for adjudication or mediation through the courts, quasi-judicial bodies, barangay conciliation, or other alternative modes of dispute resolution, 40% believed that the judicial process was slow. On the average, the resolution of legal matters lasted for 8 months. Furthermore, 39% found the process to be expensive and disproportionate to their current income.

Filipino legal practitioners, on the other hand, were made to answer Qualified Responder (QRQs), which complement the household data with assessments from in-country professionals with expertise in civil and commercial law, criminal and constitutional law, and labor law. These questionnaires gather input on a range of topics from practitioners who frequently interact with state institutions. Such topics include information on the efficacy of courts, the strength of regulatory enforcement, and the reliability of accountability mechanisms.

Majority of local experts identified the following factors which heavily influence the decisions of the poor and the marginalized sector on whether or not to go to court to resolve a dispute: lack of *pro bono* legal aid or legal clinics, language barriers, physical location of courthouses, cumbersome and complex court procedures, insufficient or inefficient alternative dispute resolution mechanisms, and widespread lack of awareness of the general population about the formal justice mechanisms through which grievances could be addressed.

The perceptions of local experts in the QRQs are supported by another study conducted by the UN, where national experts from Member States of the unanimously pinpointed people's lack of awareness of legal aid services as one of the top three challenges facing their respective countries.[5] Specifically, 66% of national experts believed that individuals may be unaware of the availability legal aid services at little or no cost, 53% believed that individuals do not know where to find legal assistance, while 55% believed that individuals may not understand how legal aid services can help them.[6] With respect to women and children who are victims of violence, including sexual and gender-based violence, 82% of experts in the Asia-Pacific region observe that women may not be aware that legal aid services are available at little or no cost.[7] Governments also contribute to the information gap regarding free legal aid services. Nearly a third, or 29%, of UN Member States have reported that they have never conducted

[5] United Nations Office on Drugs and Crime, 'Global Study on Le
note 2 at 2

[6] *Ibid.*

[7] *Ibid.*

an awareness-raising campaigns on the right to legal aid and on how to access legal aid services.[8]

Guided by the foregoing, the accessibility scores in **Table 1.1** and **Table 1.2** were determined based on the following findings:

1. Eighty percent of Filipinos have no access to legal assistance or representation, due to socio-economic, educational, and geographical factors.

2. Lack of knowledge regarding or entitlements and the institutional mechanisms and processes for the enforcement thereof prevent the poor and the marginalized from attaining justice.

3. Assuming that individuals are aware of the applicable legal remedies and the institutions from which they could seek advice or assistance, they are discouraged from availing of the same because of the length of time required before the matter could be resolved and the monetary cost involved.

4. There is a need to develop popular support for developmental legal aid institutions and clinics as a source of legal assistance and representation, since most individuals who encounter legal problems only resort to friend or family members who have no legal background for advice.

5. Experts from both local and international jurisdictions find that low levels of legal awareness inhibit individuals from seeking legal assistance from legitimate authorities.

[8] *Id.*

III. ADVERTISING AS A SOURCE OF LEGAL INFORMATION

A. Advertising as a Mode of Acquiring Legal Information

Individuals cannot avail of legal aid services unless they are aware of their right or ability to do so, for which legal matters legal aid is available, and where to access it. Consequently, it is imperative to ensure access to information on the right to legal aid and on the availability of legal aid services, particularly for marginalized and vulnerable populations for whom legal awareness is most prominently lacking by reason of poverty and comparatively low levels of education or literacy.[9]

Informed decision-making in the availment of legal services, including legal aid for the vulnerable members of society, would require individuals to rely on three main sources of information that consumers similarly rely on in other markets for ordinary goods and services: personal knowledge, reputation, and advertising.[10] An examination of how these sources information affect the decision-making of members of the lower-income group and the marginalized sector in the market of legal services is pertinent in determining the necessity of strength right to legal information.

[9] *Id.*

[10] G. Hazard Jr., R. Pearce & J. Stempel, *Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. Rev 1084 (1983). Available http://ir.lawnet.fordham.edu/faculty_scholarship/465. December 19, 2019.

1. First Common Source of Information : Personal Knowledge

The first and probably strongest source of consumer information is personal knowledge about a product.[11] A field study published by the American Bar Foundation shows that an average adult uses a lawyer only once or twice during his lifetime, while only a very small percentage of adults uses a lawyer as often as five times.[12] As a result, an individual, at the first instance, will ordinarily have no personal knowledge regarding where and how legal services, including legal aid, may be availed of. Assuming *arguendo* that a consumer has used a particular legal service with relative frequency, such individual is still unlikely to have had the direct experience necessary to compare it with the services of other firms or with possible substitutes for legal services.[13]

Under this principle, even if a member of the vulnerable sector of society has previously availed of legal aid from one source, the former would not have sufficient direct experience which would enable him to determine where he would seek the most suitable assistance with respect to other legal matters which he may subsequently encounter during his lifetime.

The IBP and PAO handle different kinds of criminal, civil, and administrative cases and would have varying requirements and internal processes before accepting potential clients, while PILGs are not limited to court litigation but are also involved in a multitude of sectoral legal advocacies and specialized legal services in different parts of the Philippines. Viewing the legal services delivered by these

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[11] *Id.* at 1094.

[12] *Id.* at 1095.

[13] *Ibid.*

entities as services offered by firms in a typical marketplace, main beneficiaries of legal aid are exposed to a number of substitutes for ordinary legal services but lack the sufficient personal knowledge to locate, match their current need to, and properly avail of the same.

2. Second Common Source of Information: Reputation

As a partial result of the general insufficiency of personal knowledge, a second source of information - reputation - becomes an important element of consumer decisions to purchase legal services.[14]

Reputation information can be reliable because it emanates from legitimate sources such as family and friends and the acquisition thereof requires relatively small investments of time and energy.[15] Nevertheless, reputation information is less complete and less trustworthy than a consumer's personal knowledge since create a reputation are not those of the prospective purchaser himself.[16]

When faced with reputation information about an entity offering legal services, a prospective client will commonly attempt to confirm the reputation's accuracy. A discussion on the sufficiency reputation information as a source of legal information is warranted, since the Philippine Supreme Court, in the context of the prohibition against lawyer advertisement, firmly espouses the belief that a lawyer's merit or demerit reputation for good and efficient service is the former's best form of

[14] *Ibid.*

[15] *Ibid.*

[16] *Ibid.*

Reputation information as source of legal information is insufficient for members of the lower-income group and the marginalized sector. Despite the nature of reputation information as being capable of verification, not all prospective purchasers of legal services, by reason of economic status, educational attainment, or degree of literacy, are equally well-equipped to verify reputation information.[17]

As an example, in the United States, one valuable source of reputation information, personal contact with a lawyer or with those who frequently use legal services, is concentrated most heavily among whites and property owners with high incomes and better education.[18] Applying the same principle in the Philippines, individuals of low and middle socio-economic status or those belonging to the marginalized sector will usually have fewer sources of reputation information about legal services, further reflecting the reality that only high-income individuals have access to reputation information and thus having the capability to relay the same to those in need of legal services.

3. Advertising as an Alternative Source of Information on Legal Aid

The lack of personal knowledge regarding free and adequate legal assistance and the general inaccessibility of reputation information among the members of the impoverished and marginalized sector provide an opportunity for the exploitation of advertising as a source of product information, thus enabling consumers to gather, at little personal cost, information about a range of goods or

[17] *Id.* at 1096.

[18] *Ibid.*

services which may be indispensable for substantiated market comparisons and choices.[19] However, maximizing the benefits of advertising in promoting the availability of legal services is greatly tempered by the ethics of the legal profession. Legal services cannot be simply categorized as readily available goods or services peddled in the marketplace, as they essentially involve the protection and enforcement of rights and duties of individuals and directly affect one's life, liberty, or proper
are imbued with public interest and the delivery thereof must be governed with utmost care, professionalism, and integrity.

B. The Rules on Advertising in the Legal Profession

1. A Historical Perspective on Lawyer Advertising

The prohibition on lawyer advertising traces its roots from ancient Greek and Roman law. In ancient Greece, a legal controversy was believed to concern only the judge and the persons actually involved in the underlying transaction.[20] As time passed, a litigant who was escorted to court surrounded by supporters was perceived to be a person of power and dignity, and a person not so supported was pitied.[21] However, by the sixteenth century, the practice of intervening on behalf of an unsupported litigant was eventually abused, as *sycophants* voluntarily undertook the prosecution of a matter motivated by money, prestige, or as a means of political agitation or to harass other litigants.[22] In ancient Rome, the

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[19] *Id.* at 1097.

[20] M. Brooks, *Lawyer Advertising: Is There Really a Problem?*, 15 LOY. L.A. ENT. L. REV. 3 (1994). Available http://digitalcommons.lmu.edu/elr/vol15/iss1/1. December 6, 2019.

[21] *Id.*

[22] *Id.*

practice of *calumny*, which is the equivalent of sycophancy of the Greeks, emerged and was marred by an aura of distrust, since a counselor has no personal connection with the proceedings.[23] This attitude of skepticism against disinterested intervenors naturally discouraged counselors from advertising their talents.

In England, the law, along with medicine and theology, came to be regarded as a learned profession and training in the law became more formalized.[24] These learned professions were drastically distinguishable from ordinary craft and trade associations in terms of social class, economic status, and level of education. Afraid of being referred to as tradesmen, lawyers refused to compete for clients for fear of ruining their reputation and intimacy among their colleagues.[25] Furthermore, it was unnecessary for lawyers to actively pursue clients because there were very few legal experts and numerous clients. Thus, the principles of etiquette and good taste of the class of legal professionals, along with the existence of readily available business, led to the attitude that solicitation of business was unnecessary.[26] As such, client solicitation was not an issue and thus not practiced.

In the United States, there was an influx of attorneys by the turn of the nineteenth century, as states enacted laws allowing virtually anyone to become a lawyer; consequently, lawyers competed for business insufficient to accommodate their number.[27] The competition among so many

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[23] *Id.* at 4.

[24] *Id.* at 5.

[25] *Ibid.*

[26] *Ibid.*

[27] *Id.* at 6.

professionals led to the onset of lawyer advertising and solicitation. Leaders of the bar attempted to stop commercialism in the legal profession by reestablishing standards of character, education, and training within the profession.[28]

Under the American Bar Association (ABA) Canons of Professional Ethics of 1908, lawyer advertising was absolutely prohibited, primarily because law practice is a profession, as embraced by the English barristers, and not an ordinary trade or business. The prohibition was also premised on the weakening public opinion on the legal profession, the fear that advertising will lead to increased unnecessary litigation, and the high likelihood of public deception by inappropriate advertising. However, this rule was eventually relaxed under the Model Code of Professional Responsibility of 1969, which embodied a "laundry-list" approach to lawyer advertising and explicitly designated the information which lawyers could use in publications regarding their services.[29] This change was motivated by the increasing consumer awareness and the fact that the general public sought more information regarding the availability of legal services. Under the current Model Rules of Professional Conduct of 1983, only false or misleading communications by lawyers are prohibited, giving lawyers a wide leeway for advertising their talents and soliciting business from potential clientele using any media, including the kinds of services the lawyer will undertake, the basis on which the lawyer's fees are determined, prices payment or credit schemes.[30]

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[28] *Id.* at 7.

[29] *Id.* at 9.

[30] MODEL RULES OF PROFESSIONAL CONDUCT, Rule 7.2(a).

2. *Liberalizing Lawyer Advertising Under the Free Speech Clause*

The arguments against lawyer advertisements can be classified into three categories: philosophical, ethical, and economic. The leading case of *Bates v. State Bar of Arizona*[31] addressed these key arguments, as the United States Supreme Court (U.S. Supreme Court) was faced with the issue of whether or not lawyer advertisements are within the protection of the free speech clause of the United States Constitution.

a. Philosophical arguments against lawyer advertising

The main philosophical argument against lawyer advertisements harps on the traditional adage that the law is a form of public service, rather than as a means of earning a living; consequently, the "hustle" and bustle of advertising would adversely affect the profession's service orientation and irreparably damage the delicate balance between the lawyer's need to earn and his obligation to society.[32] Thus, it is forwarded that advertisements would inevitably tarnish the legal profession's prestige and prejudice the client's welfare. However, the U.S. Supreme Court held otherwise and recognized that the absence of advertising reflects the profession's failure to reach out and serve the

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[31] 433 U.S. 350 (1977) [hereinafter *Bates*]. In *Bates*, two lawyers published in a newspaper of general circulation in Phoenix, Arizona an advertisement stating that they were offering legal services at very reasonable fees and listed their fees for certain services. Eventually, these lawyers were charged with a violation of the Disciplinary Rules of the Supreme Court of Arizona, which absolutely prohibited lawyer advertisements of any form. The lawyers admitted that their advertisements constituted a violation of the prohibition against lawyer advertisements, but alleged that such prohibition infringed upon their right to commercial free speech.

[32] *Id.* at 368.

community, since many individuals fail to obtain counsel, even when they perceive a need thereto, because of the feared price of services or because of an inability to locate a competent attorney.[33]

The prohibition against lawyer advertising started as a rule of etiquette, which ultimately developed into an aspect of legal ethics, among early lawyers of Great Britain who looked down on "trade" as unseemly.[34] However, the U.S. Supreme Court refused to adopt this discriminatory belief, ruling that in these modern times, o the person who earns his living by the strength of his arm or the force of his mind" and the tradi somehow above trade has become an anachronism.[35]

b. Ethical arguments against lawyer advertising

Ethical arguments against lawyer advertisements can be further subdivided into three components. First, lawyer advertisements are inherently misleading, since legal services are so individualized with regard to content and quality as to prevent informed comparison on the basis of an advertisement.[36] Second, lawyer advertising will stir up unnecessary litigation among individuals. Third, lawyers who advertise will lower their quality of service since they may advertise a given "package" of services at a set price and will be inclined to provide, by indiscriminate use, the standard package regardless of whether it fits the client's needs.[37]

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[33] *Id.* at 370.

[34] *Id.* at 371.

[35] *Id.* at 372.

[36] *Ibid.*

[37] *Id.* at 378.

In addressing the first ethical argument, the U.S. Supreme Court adopted a policy of information disclosure, rather than restriction. It recognized that although attorneys are likely to be employed to perform specific tasks and the client may not know the detail involved in performing such task, advertising no doubt is able to aid the client in identifying the service he desires at the level of generality to which advertising lends itself.[38] Even if an advertisement does not contain a complete repository of information which would fully inform a potential client, it is peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision.[39] The alternative, which is the prohibition of advertising, serves only to restrict the information that flows to consumers. Moreover, the U.S. Supreme Court observed that this ethical argument assumes that the public is not sophisticated enough to realize the limitations of advertising and that the public is better kept in ignorance than trusted with correct but incomplete information.[40]

With respect to the allegations of potential barratry, granted that lawyer advertising might increase the use of the judicial machinery, the U.S. Supreme Court refused to accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action.[41] It observed that the American legal profession has failed to reach or to adequately serve the middle 70% of the American population, mainly due to fear of legal costs and an inability to locate competent counsel. The U.S. Supreme Court ruled that advertising may address this problem, especially for the poor

[38] *Id.* at 374.

[39] *Ibid.*

[40] *Id.* at 375.

[41] *Id.* at 376.

and unknowledgeable, and is accord with the bar's obligation to facilitate the process of intelligent selection of lawyers and to assist in making legal services fully available.[42]

c. Economic arguments against lawyer advertising

The postulated connection between lawyer advertisements and lower quality of work due to the indiscriminate use of "packaged" serv specific needs of a client was found to be speculative at best. An absolute restraint on advertising is an ineffective way of deterring shoddy work and an attorney who is inclined to cut quality will do so regardless of the rule on advertising.[43]

Another foreseen economic repercussion of allowing lawyer advertisements is an increase in the overhead costs of the legal profession, which will inevitably be passed on to consumers in the form of increased legal fees. In addressing this issue, the U.S. Supreme Court adopted the positive effect of information dissemination on competition in the market for legal services. It observed that the absence of advertising serves to increase the difficulty of discovering the lowest cost seller of acceptable ability; consequently, attorneys are isolated from competition and the incentive to price competitively is reduced.[44] Allowing a restricted form of advertising will alleviate information asymmetry in the legal market, allowing consumers to choose their perceived best price for their corresponding needs. Furthermore, a ban on lawyer advertisements propagates a high entry barrier in the legal profession. Without any form of advertising, an attorney must rely on his contacts within the community to generate

[42] *Id.* at 377.

[43] *Id.* at 378.

[44] *Ibid.*

a flow of business.[45] In view of the time necessary to develop such contacts, the ban perpetuates the market position of established attorneys. Consideration of entry barrier problems would urge that advertising be allowed so as to aid the new competitor in penetrating the legal market.[46]

d. On 'actually misleading or fraudu

In striking down as unconstitutional the blanket prohibition on lawyer advertising under the Disciplinary Rules of the Supreme Court of Arizona, the U.S. Supreme Court made it clear that lawyer advertisements may still be subjected to state regulation and may be declared as invalid if proven to be actually misleading or prone to deception. In fact, the validity of some forms of lawyer advertisements have been challenged before the U.S. Supreme Court subsequent to the *Bates* decision. Thus, there is no hard-and-fast rule in determining what an unreasonable or unlawful lawyer advertisement is, and each challenged advertisement must be examined on a case-to-case basis. The U.S. Supreme Court has upheld the validity of lawyer advertisements which utilize visual aids or illustrations,[47] direct mail solicitation,[48] and advertisement of specializations or those which address specific legal problems,[49] but has prohibited in-person solicitation, since the person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the

[45] *Ibid.*

[46] *Ibid.*

[47] Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985).

[48] Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988).

[49] Peel v. Attorney Disciplinary Commission of Illinois, 496 U.S. 91 (1990).

and insistence upon an immediate response.[50] In conclusion, the prevailing test in determining the existence of a valid lawyer advertisement is whether or not there is a finding of actual misleading or fraudulent information therein.[51]

3. Lawyer Advertising under Philippine Law

The Code of Professional Responsibility prohibits lawyers from advertising their talents, as this is a form of soliciting business.[52] The prohibition applies equally across all kinds of legal services, whether a lawyer renders the same free of charge or for adequate compensation, and is intended to prevent the commercialization of legal services. This proscription is rooted from the time-honored principle that the law is an honorable profession and not a trade nor a business. As such, advertisement of legal services is seen to be destructive of the honor of a great profession, lowers its standards, works against the confidence of the community in the integrity of the members of the bar, and results in needless litigation and in incenting to strife otherwise peacefully inclined citizens.[53] The rationale behind the prohibition against lawyer advertising is two-pronged. First, the proscription rests on the fundamental postulate that the practice of law is a profession; consequently, a lawyer cannot, without violating the ethics of his profession, advertise his talents or skills as in a manner similar to a merchant advertising his goods.[54] Second, the best advertising possible for a lawyer is a well-merited reputation for professional

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[50] Ohralik v. Ohio State Bar, 436 U.S. 447 (1978).

[51] In re R.M.J., 455 U.S. 191 (1982).

[52] CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2, Rule 2.03.

[53] In re Tagorda, 53 Phil. 37 (1929).

[54] Ulep v. Legal Clinic Inc., Bar Matter No. 553, 223 SCRA 378, June 17, 1993.

capacity and fidelity to trust, which must be earned as the outcome of character and conduct.[55]

The Philippine Supreme Court has adopted the main philosophical argument against lawyer advertisements raised in the case of *Bates*, emphasizing that lawyering is not primarily meant to be a money-making venture and law advocacy is not a capital that necessarily yields profits.[56] Moreover, the duty to public service and to the administration of justice should be the primary consideration of lawyers, who must subordinate their personal interests or what they owe to themselves.[57] Further bolstering such stance, it ruled that with the present situation of our legal and judicial systems, allowing the publication of advertisements would only serve to aggravate what is already a deteriorating public opinion of the legal profession whose integrity has consistently been under attack lately by the media and the community in general.[58] Thus, the urgent need to instill irreproachable professional conduct among the members of the bar and to exert utmost efforts to regain the high esteem formerly accorded to the legal profession has rightfully deterred the Philippine Supreme Court from allowing lawyer advertisements.

The concept of reputation information is also a key aspect in the prohibition against lawyer advertising. The Philippine Supreme Court believed t efficient service to a client and to the community has a way of publicizing itself and catching public attention.[59] Under

[55] *Id.* at 407.

[56] Khan, Jr. v. Simbillo, G.R. No. 157053, 409 SCRA 299, August 19, 2003.

[57] *Id.* at 303.

[58] Ulep v. Legal Clinic Inc., Bar Matter No. 553, 223 SCRA 378, June 17, 1993.

[59] *Id.* at 407.

this premise, a good and reputable lawyer would no longer resort to advertisements in order generate and magnify his practice, since publicity, which is the very function of advertisements, will only be a mere by-product of his effective service.

However, the prohibition against lawyer advertising is not an iron-clad rule. The Philippine Supreme Court has provided for a narrow set of permissible forms of advertising, which must be dignified and consistent with lawyering as a legal profession.[60] Advertisements in legal periodicals or reputable law lists are allowed, provided that it is published primarily for that purpose and not on a mere supplemental feature of a paper, magazine, trade journal or periodical which is published principally for other purposes.[61]

It could only contain a statement of the lawye and the names of his professional associates, addresses, telephone numbers, cable addresses, branches of law practiced, date and place of birth and admission to the bar, schools attended with dates of graduation, degrees and other educational distinctions, public or quasi-public offices, posts of honor, legal authorships, legal teaching positions, membership and offices in bar associations and committees thereof, in legal and scientific societies and legal fraternities, the fact of listings in other reputable law lists, the names and addresses of references, and, with their written consent, the names of clients regularly represented.[62]

A lawyer may also distribute professional calling cards, which may only contain a statement of his name, the name

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[60] Khan, Jr. v. Simbillo, G.R. No. 157053, 409 SCRA 299, August 19, 2003.

[61] *Id.* at 303.

[62] *Id.* at 304.

of the law firm which he is connected with, address, telephone number and special branch of law practiced.[63] With respect to more traditional forms of advertising, simple signages containing only the name or names of the lawyers, the office and residence address and fields of practice and listings in telephone directories, directory but not under a designation of special branch of law, are permissible.[64]

Guided by the foregoing, the prevailing rules governing lawyer advertising under Philippine jurisdiction is a hybrid of the ABA Canons of Professional Ethics of 1908, which provides a broad prohibition against lawyer advertising, and the Model Code of Professional Responsibility of 1969, which embodies a "laundry-list" approach to lawyer advertising by allowing a narrow form of advertisements which can only contain limited information. Thus, the case-to-case type of analysis adopted by the U.S. Supreme Court in determining actual misleading or fraudulent information in lawyer advertisements finds no application under Philippine jurisdiction, since an advertisement which is not embodied under the proper medium or which presents information beyond what is allowed under the narrow exceptions aforementioned will be adjudged as inappropriate and illegal, regardless of the existence of good faith on the part of the advertiser or the accuracy of the information exhibited in the lawyer advertisement.

4. The Advertising Functions of the IBP, PAO, and PILGs

A distinction must be made between traditional legal services and legal aid services in terms of the availability of lawyer advertising as one of the solutions to the prevalent lack of legal information, since the markets for the former

[63] *Id.* at 303.

[64] *Id.*

and the latter have different types of consumers and contrasting levels of access to legal information. Allowing legal aid authorities to advertise will level the playing field in favor of the underprivileged with respect to access to justice, since advertising can assist in equalizing access to legal information for all, regardless of socio-economic status, education, or degree of literacy.

For a legal aid system to be accessible and sustainable, it is essential that States raise awareness on legal aid in order to develop popular support for the latter as an essential tool for making justice proceedings fair and reliable, especially in developing countries.[65] For many individuals, coming in contact with the justice system can be a challenging and overwhelming experience due to its complexity and esoteric nature. Moreover, particularly for the poor and marginalized groups, the justice system can be difficult to understand and navigate due to various obstacles, such as widespread poverty, inequality, lack of awareness on how to access the justice system, insufficient command of the local language, and geographical limitations which li service provider.[66] Thus, the rampant and consistent dissemination of legal information is an integral component of every national and local legal aid strategy.

To this end, the IBP, through its Committee on Public Services, has been expressly empowered under its by-laws to adopt plans for disseminating information of interest to the general public in relation to the functions of the departments of government, the judicial system, and the bar and to utilize

[65] United Nations Office GolnobDarlugSstuadhyd oCnr iLmeeg,al" A note 2 at 2

[66] *Id.* at 5.

the facilities of the media of public communication.[67] On the other hand, the PAO, under its enabling law, has been tasked to independently discharge its mandate to render, free of charge, legal representation, assistance, and counselling to indigent persons in criminal, civil, labor, administrative and other quasi-judicial cases.[68] Although the PAO was not expressly given the power to disseminate information regarding the availability of its services and other matters relating to legal aid, such power is deemed to be within its capacity as an incidental or necessary power for the effective delivery of legal services to qualified individuals.

Governmental legal aid authorities, such as the IBP and PAO, and private entities such as PILGs must be considered as having the implied or inherent authority to advertise its existence, availability, and services offered and to disseminate pertinent legal information for three main reasons.

First, the limited forms of lawyer advertising allowed by the Philippine Supreme Court are insufficient to deliver the aforementioned legal information to the main beneficiaries of legal aid. Legal periodicals, reputable law lists, professional callings cards, telephone directories and other permissible forms of lawyer advertisements are not primarily directed towards members of the poor and marginalized sectors of society, but are meant to target potential clientele from middle- to high-income classes. Moreover, these forms of advertisements are less circulated in public as compared to traditional forms of advertising.

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[67] BY-LAWS OF THE INTEGRATED BAR OF THE PHILIPPINES, art. VIII, sec. 61.

[68] Rep. Act No. 9406 (2007), sec. 3.

The likelihood of access by the underprivileged to such advertising paraphernalia is significantly lower as compared to those of higher socio-economic status, thus, the prevailing exception to the proscription against lawyer advertising serves only to enhance the right of higher-income individuals to legal information. Assuming *arguendo* that the underprivileged has meaningful access to such paraphernalia, they could not afford the legal fees charged by private law firms, who are often the entities availing of such limited forms of advertising.

Second, construing these aforementioned entities as having the authority to advertise legal aid services will not contravene the rationale behind the proscription against lawyer advertising, since advertising will allow these entities to expand their reach to the main beneficiaries of legal aid in the Philippines.

This will enhance the delivery of basic legal services to the underprivileged, reinforce the notion that the practice of law is foremost a public service, and actually improve the overall credibility of and confidence in the legal profession and the justice system. Advertising can raise public awareness as to the availability of various sources of legal aid, giving full effect to every indi and effective legal assistance and representation, regardless of socio-economic status or educational attainment.

The principle that the law is not a trade nor a business will also not be violated, since the IBP and PAO are solely and exclusively dedicated to the delivery of legal aid. The same is true for PILGs, which are defined under the Rule on Community Legal Aid Service as any group, association, institution, office, or center duly-organized and with *a specific and clear mandate to assist specific marginalized*

sectors of society in their legal needs.[69] Furthermore, the fear of increased legal fees due to the additional overhead costs caused by lawyer advertising cannot prejudice the clients of IBP, PAO, and PILGs since the services of such entities are traditionally without charge.

Allowing these entities to advertise will also give the underprivileged better access to reputation information regarding the quality of legal services rendered by such institutions. Thus, reputation information as a rationale behind the proscription against lawyer advertising will not be biased in favor of individuals who can afford the services of ordinary private law practitioners, since the sources of reputation information by the poor and the marginalized sector are increased by virtue of the enhanced circulation of information caused by the advertisements of the aforementioned entities.

Third, governmental legal aid authorities around the world are encouraged to adhere to the international standards recommended by the UN regarding the meaningful delivery of legal aid information to their respective constituents. Under the UN Model Law on Legal Aid, legal aid authorities are mandated to make information regarding the right to legal aid, what such aid consists of, the availability of legal aid services, how to access such services, and other relevant information available to the general public.[70] Moreover, these entities must ensure that the needs of isolated and marginalized groups are appropriately catered for and that geographical areas and economically and socially

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[69] A.M. No. 17-03-09-SC, sec. 4, par. (g).

[70] United Nations Office on Drugs and Crime, Model Law on Legal Aid in Criminal Justice Systems with Commentaries, Available https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Model_Law_on_Legal_Aid.pdf. January 6, 2020.

disadvantaged populations with large numbers of potentially eligible legal aid applicants are effectively targeted in the development, publication, and dissemination of such legal information.[71]

It must be noted that the ability to advertise and disseminate legal information pertains to governmental legal aid entities and not to the individual lawyers who compose the same, since the latter are still covered by the prohibition against lawyer advertisements. As such, the information made available to the public must objectively relate to legal aid, and not to promote the individual reputation or interest of the lawyers involved.

The IBP, PAO, and PILGs may resort to a myriad of media in advertising their services or advocacies. The UN recommends that legal information be made available by posting the same in police stations, detention centers, courts and quasi-judicial agencies, local government offices or educational and religious institutions, publication in national, regional or local newspapers, broadcast in radio and television programs, public service announcements, community meetings, legal information campaigns, dissemination through the internet and other electronic means, and other feasible forms of advertisement.[72]

As an example, legal aid providers of several countries in Africa have resorted to print advertising as a strategy to make the general population aware of their existence and the services they provide, which includes the distribution of annual reports, booklets, brochures, and flyers couched in the vernacular concerning their activities and application processes, and the posting of signages and posters in

[71] *Id.* at 25.

[72] *Id.*

conspicuous places, such as the department, the police, the courts, and prisons.[73] Moreover, members of the African legal profession engaged in legal aid services has also resorted to radio and television program advertising, which are transmitted in local languages, social media campaigns, and other forms of electronic advertisement in order boost public knowledge regarding legal aid services.[74]

In New Zealand, legal aid authorities utilize a National Indigenous Media Service to promote legal aid services to aboriginal and indigenous communities.[75] Thus, legal aid authorities are not constrained to utilize the limited forms of advertising ordinary law firms and individual practitioners are allowed to use under Philippine jurisprudence.

5. The Limitations of Traditional and Modern Advertising

The advertisement of legal aid services will usually entail additional overhead expenses, which may take a toll on the limited financial resources of the IBP and the PAO. Meanwhile, PILGs who render developmental legal aid services and promote specific sectoral advocacies may not have a sufficient budget allocated for the acquisition of simple advertising paraphernalia. As the effectivity of advertising relies on the effective proliferation of information through various media, a considerable

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[73] Danish Institute for Human Rights, 'Access East Africa (2011)' *Available* https://www.humanrights.dk/files/media/billeder/udgivelser/legal_aid_east_africa_dec_2011_dihr_study_final.pdf. January 6, 2020.

[74] *Id.*

[75] Legal Aid Queensland, Community Legal Education Strategy 2018–19 (2018)' Available http://www.legalaid.qld.gov.au/files/assets/public/cle-strategy/community-legal-edu-strategy-2018.pdf. January 7, 2020.

investment towards advertising must be made in order to maximize its benefits.

Individuals also face challenges in accessing advertisements. For those who do not reside in urban centers, there is a lesser possibility of encountering billboards, signages, brochures, and other advertising paraphernalia. Since the headquarters of the IBP and the PAO are located in the National Capital Region (NCR), with branches spread across the country, advertising may be focused on urban centers and enlarging the reach of advertising outside major cities and municipalities may strain the limited financial resources of the IBP and PAO. Although the internet can be a medium for advertisements and other information campaigns, accessibility issues are still encountered by Filipinos, most especially in rural areas. A recent survey reveals that while 47% of Filipino adults use the Internet, only 37% of Filipino adults in rural areas are Internet users.[76] In Visayas and Mindanao, only 35% and 32%, respectively, of Filipino adults access the Internet.[77] Language barriers also serve to diminish the ability of advertisements to convey useful information to different groups of people.

Lastly, the market for advertisements is already oversaturated. Numerous firms have already resorted to print and digital advertising to capture more consumers and ensure brand recognition. If legal aid services are to be advertised, it would have to compete for consumer attention with other goods and services similarly promoted in various platforms. Advertisement fatigue also deters the effectivity of advertisements. Since consumers commonly have short

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[76] Christia Mae, *47% of Filipino adults use the Internet — SWS*, Available https://technology.inquirer.net/84201/47-of-filipino-adults-use-the-internet-sws#ixzz6HWDGjzGq.

[77] *Id.*

attention spans devoted to advertisements, exposure to a myriad of advertisements and promotions, especially in digital formats, may cause consumers to ignore advertisements altogether.

III. The Role of Law-Related Education and Legal Literacy Movements in Mitigating the Information Gap

1. Law-Related Education and the PERLAS Project

The inaccessibility of justice in the Philippines is inextricably linked to the prevailing lack of legal awareness among Filipinos. The availability of advertising legal aid services as one of the solutions in addressing this problem does not account for the need to educate the masses regarding their basic rights and the composition and processes of the justice system. Lawyer advertisements convey to individuals the fact that legal services are available and where they could avail the same, but do not necessarily increase basic legal literacy among its recipients. Boosting legal awareness through an educational and rights-based approach is a better long-term solution to inaccessibility of justice which can empower individuals to demand justice, accountability, and effective remedies across all platforms, regardless of socio-economic status. If a vast majority of the population is ignorant of their rights, correlative duties, and the institutional mechanisms in place for the benefit of the poor and the marginalized, then they are prevented from anticipating legal troubles and timely approaching a lawyer for assistance and advice, consequently magnifying the impact of their legal troubles and difficulties should these arrive.

The acquisition of knowledge regarding the concepts of law, rights, and legal processes begin by giving more attention to the specific study of basic legal principles as part of the primary and secondary education of children and adolescents. Unfortunately, any concentrated study of law has been reserved for college students preparing for careers in it, while on the pre-college level, little is offered in this field other than the usual civics courses and indirect approaches to it through other courses in the social studies curriculum.[78] However, in the US, law-related education (LRE) has become a significant component of the social studies curriculum in elementary schools, with support coming from both educators and state and local bar associations which have developed instructional materials for use in the schools.[79] An age-appropriate curriculum commonly features a multimedia approach in delivering lessons, including traditional reading materials, video presentations, resource persons, case studies, debates, role-playing, and court simulations. Students who have undergone an experimental six to eight week LRE curriculum on basic topics such as the concept, history, and various bodies of law, the role of law enforcement and the duty of the State in conflict resolution, the principles of due process, equality, and civil liberties, have shown not just an increased knowledge of legal precepts and law-related concepts, but also a more positive and analytical attitude towards the law and legal processes and greater self-awareness with respect to individual rights.[80] Exposure of high school students to LRE also yielded similar

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[78] J. Johnson, II and The Hachsu Judge Law, Jr. the, Elementa 1969 PEABODY JOURNAL OF EDUCATION 116, Available https://www.jstor.org/stable/1492116?origin=JSTOR-pdf&seq=1. April 12, 2020. [hereinafter referred to as "Teachi

[79] M. Jacobson and S. Palonsky, Related Education Effects of Program', 82 THE ELEMENTARY SCHOOL JOURNAL 4 Available https://www.jstor.org/stable/1001296?seq=1. April 19, 2020.

[80] *Id.* at 51.

results. In relation to the problem of inaccessibility of justice, LRE can be broadened to cover component issues such as the role of lawyers in society, the right to counsel, the structure of the justice system, and the concept of legal aid. Indeed, the scope and benefits of LRE are limited only by the level of involvement of attorneys with school teachers, supervisors, administrators in the planning and execution of a curriculum unit.[81] With this meaningful interaction, teachers, supervisors, administrators, and curriculum specialists would gain a knowledge and appreciation of certain law principles and their significance for the student, while attorneys working with these educational personnel would attain a more comprehensive perspective with regard to the educative process.[82]

The institutionalization of LRE in the Philippine education system began with the issuance of Executive Order No. 361[83] (E.O. No. 361) by former President Gloria Macapagal-Arroyo on September 22, 2004. The general framework of E.O. No. 361 aims to vest the youth with a greater understanding of and respect for the importance of the rule of law, develop awareness on role and functions of the judiciary, and to promote the recognition by the youth of their stake and responsibility in the maintenance and improvement of the rule of law, dispute resolution, and the protection of individual rights.[84] The main thrust E.O. No. 361 involves a two-fold policy. First, the Department of Education (DepEd) was mandated to ensure the proficiency of teachers in delivering age-appropriate LRE by conducting nationwide training programs in order to enhance the teaching of the

[81] J. Johnson, II and H. Sublett, Jr., 'Teach

[82] *Id.* at 117.

[83] Exec. Order No. 361 (2004).

[84] *Id.* sec. 1.

rule of law, conflict resolution, and the role of the judiciary to students.[85] Second, public and private educational institutions were highly encouraged to prepare adequate learning materials which would supplement their existing curricula.[86] The judiciary was also given the opportunity to assume a proactive role in the development and evaluation of the aforementioned learning materials and training methodologies, as the DepEd is empowered to collaborate with other branches of government and other institutions.[87]

Guided by the foregoing, the DepEd, the Supreme Court of the Philippines, and the Law (LIBERTAS), together with the United Nations Development Program (UNDP), conceptualized the Public Education on the Rule of Law Advancement and Support (PERLAS) Project, with the financial assistance of USAID, World Bank, and the Asian Development Bank. Under DepEd Memorandum No. 229[88], issued on August 15, 2005, a technical working group was formed for the crafting of education materials and the drafting of lesson guides for primary and secondary schools nationwide. The Supreme Court and LIBERTAS ensured the accuracy of the legal content of model lesson guides, while education officials from DepEd and curriculum writers from the University of the Philippines assessed the lesson plans in terms of their appropriateness and relevance to the basic education curriculum.[89] The model lesson guides were tested in 100 public schools in Luzon, Visayas, and Mindanao and

[85] *Id.* sec. 3.

[86] *Id.* sec. 2.

[87] *Id.* sec. 5.

[88] Department of Education Memorandum No. 229 (2005).

[89] GMANews Online, DepEd to teach 'rule of law' in s Available at https://www.gmanetwork.com/news/news/nation/221987/deped-to-teach-rule-of-law-in-schools/story/. April 26, 2020.

were subsequently revised based on the feedback of teachers and students.[90]

An examination of the lesson guides under the PERLAS Project reveals that the following law-related topics are tackled through various classroom activities and use of multimedia materials:

a. *For students in the Grades 1-4 level*[91]

1. The role of children in nation-building, their rights and responsibilities under the law, and their relationship with other members of society. Teachers are primarily guided by the Child and Youth Welfare Code[92] and the Human Relations provisions of the New Civil Code.[93]

2. The concept of a Constitution and the characteristics of a penal law.

3. The free exercise and non-establishment clause of the Constitution,[94] in relation to the value of respecting other people's religious beliefs and manifestations.

4. The role of judges in resolving disputes in society, as a manner of explaining the concept of judicial power.[95]

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[90] *Id.*

[91] "Public Education on the Rule of Law Grade 1 to 2 Exemplars," Available at http://www.ombudsman.gov.ph/UNDP4/wp-content/uploads/2013/02/Grade-1-to-2-exemplars.pdf/. May 10, 2020. [hereinafter referred to as "Public Educati

[92] Pres. Dec. No. 603 (1974), secs. 3-4, 16.

[93] CIVIL CODE, art. 19, 26.

[94] CONST. art. III, sec. 5.

[95] CONST. art. VIII, sec. 1.

5. Public office as a public trust,[96] in relation to the relevance and importance of government and its officers and employees in the improvement of society.

b. For students in the Grades 5-6 level[97]

1. The concepts of state sovereignty, democracy, and republicanism.

2. Basic understanding of the law-making process.

3. A basic overview of criminal due process, specifically the steps involved in prosecuting an individual for a crime committed.

4. Children in conflict with the law, as contemplated under the Juvenile Justice and Welfare Act.[98]

5. The five pillars of criminal justice system: the law enforcement officers, prosecutors, competent courts, correctional institutions, and the community at large. Students are also familiarized with the institutional agencies involved in these pillars.

6. The role of the government with respect to conflict resolution, in relation to the *Katarungang Pambarangay* law.[99]

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[96] CONST. art. XI, sec. 1.

[97] 'Public Education', note 91 at 35

[98] Rep. Act No. 9344 (2006), secs. 1, 5-6.

[99] Rep. Act No. 7160 (1991), secs. 399-422.

7. The powers and responsibilities of the police under the law.[100]

c. For students in the High School level[101]

1. Building on the concept of public office as a public trust by familiarizing students with the norms of conduct of public officials and employees[102] and specific corrupt practices of public officers.[103]

2. The constitutionally-guaranteed freedom of speech, of expression, and the press, and the right of the people peaceably to assemble and petition the government for redress of grievances.[104]

3. The concept of separation of powers.

4. Promoting an inclusive society by introducing special topics on vulnerable sectors of society, specifically including: disabled persons[105], indigenous peoples[106], senior citizens[107], women and children[108], and workers[109].

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[100] Rep. Act No. 6975 (1990), sec. 24.

[101] 'Public Education', note 91 at 35

[102] Rep. Act No. 6713 (1989), sec. 4..

[103] Rep. Act No. 3019 (1960), sec. 3.

[104] CONST. art. III, sec. 4.

[105] Rep. Act No. 7277 (1992), sec. 1.

[106] Rep. Act No. 8371 (1997), sec. 1.

[107] Rep. Act No. 9257 (2003), sec. 1.

[108] Rep. Act No. 9262 (2004), sec. 1.

[109] CONST. art. II, sec. 18.

5. Environmental sustainability and the right of the people to a balanced and healthful ecology.[110]

6. An overview of the Universal Declaration of Human Rights.

7. The protection accorded by the state to intellectual property.[111]

8. Suffrage as a necessary ingredient of a democratic society.

9. The role of lawyers in society and the values ought to be possessed by members of the legal profession.

In addition to the information campaign conducted by various legal aid authorities, advocating popular support for developmental legal aid programs and clinics among the impoverished and marginalized groups could also begin in schools. The coverage of the curricula under the PERLAS Project can be expanded by introducing key topics on the concept of legal aid, its role in the administration of justice, and the governmental and private institutions offering the same, all discussed under the overarching theme of the importance of adequate legal assistance, which shall not be denied to any person by reason of poverty.[112] The IBP, PAO, PILGs can also participate in the teaching of these topics as resource persons by reviewing the educational materials pertinent to said topics and perform speaking engagements before students. Through this methodology, these legal aid

[110] CONST. art. II, sec. 16.

[111] CONST. art. XIV, sec. 13.

[112] CONST. art. III, sec. 11.

authorities can be given a wide platform to raise awareness as to their existence and functions among the youth.

1. *Private Sector Participation in Law-Related Education and Legal Literacy Movements*

The general public, especially the members of impoverished and marginalized sectors of society, should not be left out from the benefits of LRE. In order to accommodate these groups, lawyers from the private sector must be encouraged to undertake legal literacy campaigns, in addition to the mandatory legal services which they must render. Incentives for private sector participation in LRE are already available in our existing legal framework.

Under the Free Legal Assistance Act of 2010,[113] a lawyer or professional partnerships rendering *actual free legal services*, as defined by the Supreme Court, shall be entitled to an allowable deduction from the gross income, the amount that could have been collected for the actual free legal services rendered or up to 10% of the gross income derived from the actual performance of the legal profession, whichever is lower.[114] Furthermore, the law sets forth the following guidelines for the availment of the tax deduction:

1. A lawyer or professional partnership shall secure a certification from the PAO, the Department of Justice (DOJ) or accredited association of the Supreme Court indicating that the said legal services to be provided are within the services defined by the Supreme Court, and that the agencies cannot provide the legal services to be provided by the private counsel.

[113] Rep. Act No. 9999 (2010), sec. 1.

[114] *Id,* sec. 5.

2. In determining the number of hours actually provided by the lawyer and/or professional firm in the provision of legal services, the association and/or organization duly accredited by the Supreme Court shall issue the necessary certification that said legal services were actually undertaken.

3. The certification issued by, among others, the PAO, the DOJ and other accredited association by the Supreme Court shall be submitted to the Bureau of Internal Revenue (BIR) for purposes of availing the tax deductions as provided for in this Act and to the DOJ for purposes of monitoring.[115]

As the law broadly defines the ter any activity which requires the application of law, legal procedure, knowledge, training and experiences[116], the undertaking of legal literacy campaigns for the benefit of indigents and marginalized groups are within the ambit of said definition. The Supreme Court has not yet formulated the necessary implementing rules and regulations (IRR) with respect to the legal services covered under by the said law and the process of accreditation of organizations and/or associations which will provide free legal assistance.[117] The rule-making powers of the Supreme Court[118] can formalize the inclusion of LRE initiatives as one of the creditable legal services and set forth the proper documentation requirements whenever such activity would be pursued. The Supreme Court has sufficient discretion to determine how

[115] *Id,* sec. 4.

[116] *Id, sec.* 3.

[117] Ellson Quismorio, Solon decries free legal ,assistanc Available https://news.mb.com.ph/2020/02/23/solon-decries-free-legal-assistance-laws-lack-of-irr/. May 10, 2020.

[118] CONST. art. VIII, sec. 5, par. (5).

many times can LRE activities be credited, what topics should be taught, and the manner in which it should be diversified along with other common legal services, such as actual court representation, preparation of legal documents, and giving legal advice. As the allowable tax deduction under the law involves either the amount that could have been collected for the actual free legal services rendered or up to 10% of the gross income derived from the actual performance of the legal profession, whichever is lower, the BIR should formulate uniform standards and limitations in appraising the monetary value of LRE initiatives and other common legal services. Through this incentive mechanism, lawyers are given an avenue to perform their duty to assist in the dissemination of the law and jurisprudence.[119]

Meanwhile, under the Rule on Community Legal Aid Service, developmental legal assistance consisting of rights awareness, capacity-building, and training in basic human rights, documentation, and affidavit-making, rendered in public interest cases, are considered as *pro bono* legal services for the purpose of complying with the requirement of rendering 120 hours of *pro bono* legal aid services for new lawyers.[120] This type of legal service is broad enough to include LRE initiatives and legal literacy campaigns undertaken by lawyers.

Legal aid offices in law schools can also be mobilized to engage in legal literacy and LRE initiatives. Under the recently amended Law Student Practice Rule[121], a law student can engage in specific practice areas of law depending on his

[119] CODE OF PROFESSIONAL RESPONSIBILITY, Canon 5.

[120] A.M. No. 17-03-09-SC, sec. (4), par. (2)(iii).

[121] A.M. No. 19-03-24-SC. Rule 138-A Law Student Practice.

or her level of certification.[122] These practice areas could be further expanded by the Supreme Court to include student-led LRE efforts in favor specific communities, with the supervision of a member of the Bar.

CONCLUSION

Given the esoteric nature of the law, the government and the legal profession must assume a more proactive role in demystifying basic legal concepts and processes for the benefit of the ordinary Filipino citizen. A holistic approach to legal empowerment demands both effective dissemination of legal aid information and arming the populace with basic adequate legal knowledge.

In addition to increased budgetary allocations to governmental legal aid authorities, w
discretion, measures such as enhancing legal aid advertising, formalizing and expanding LRE in all levels of instruction, and giving incentives for the conduct of legal literacy programs serve as potential starting points for reform, all of which find adequate basis under the law or policies of various instrumentalities of the government.

These policy recommendations aim to supplement current and future laws or rules of the Supreme Court which aim to lend assistance to indigents, expedite the disposition of cases, eliminate graft and corruption in the prosecutorial and judicial system, and improving the overall administration of justice in the Philippines.

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[122] *Id.,* sec. 4.

Some Court Experience-based Suggestions for Law and Implementation Reform in The Comprehensive Dangerous Drugs Act

Judge Soliman M. Santos, Jr.[*]

As a Judge in the RTC of Naga City, hearing, deciding, and otherwise disposing of drug cases, mostly criminal cases but also petitions for voluntary rehabilitation confinement, I have my own share of observations that are best translated into suggestions on law and implementation reform of R.A. No. 9165 (the Comprehensive Dangerous Drugs Act of 2002), its Implementing Rules and Regulations, and Supreme Court jurisprudence.

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[*] A senior member of the IBP Camarines Sur Chapter, Soliman M. Santos, Jr. is Presiding Judge of the Regional Trial Court (Branch 61) in Naga City. From 2010 to 2015, he was both Presiding Judge of the 9th Municipal Circuit Trial Court of Nabua-Bato, Camarines Sur and Acting Presiding Judge of the Municipal Trial Court of Balatan, Camarines Sur. His experience as a judge in a first-level court was the subject of his book, *Justice of the Peace* (2015). As a private law practitioner (from 1983 to 2010), there were at least ten Supreme Court decisions where he was counsel of record, often for the petitioner, including two cases as defense counsel for the "Abadilla Five." He earned his A.B. History (1975) *cum laude* from the University of the Philippines (U.P.) from Diliman, his LLB (1982) from the University of Nueva Caceres (UNC) in Naga City, and his LL.M. (2000) from the University of Melbourne.

I. REVIEW AND RESTRUCTURE THE VERY HIGH PENALTIES FOR CERTAIN DRUG OFFENSES

One cannot but notice the very high penalties for certain drug offenses.

For example, the penalty of "life imprisonment to death and a fine ranging from P500,000.00 to P10,000,000.00" is uniformly imposed (*importation of dangerous drugs*), Sec. 5 (*sale, etc. of dangerous drugs*), Sec. 6 (*maintenance of a drug den*), Sec. 8 (*manufacture of dangerous drugs*), Sec. 10 (*manufacture of dangerous drug equipment*), Sec. 11 (*possession of dangerous drugs e.g. at least 50 grams of shabu*[1] *or at least 500 grams of marijuana*), Sec. 13 (*possession of dangerous drugs during parties*), Sec. 16 (*cultivation of dangerous drug plants*), Sec. 19 (*unlawful prescription of dangerous drugs*), Sec. 26 (*conspiracy to commit violations of Secs. 4, 5, 6, 10 & 16*), and Sec. 27 (public officer's misappropriation or *failure to account for the seized dangerous drugs, etc.*). Secs. 5, 13, and 16 expressly states that the penalties are to be imposed "regardless of the quantity" involved. The "death penalty" is to be imposed if (*planting of evidence*). With the current abolition of the death penalty, life imprisonment is to be imposed instead.

There are also relatively low uniform penalties like "imprisonment of six months and one day to four years and a fine ranging from P10,000.00 to P50,000.00" of Sec. 12 (*possession of drug paraphernalia*), Sec. 14 (*possession of drug paraphernalia during parties*), and Sec. 32 (*violation of any DDB Regulation*) and "a minimum of six months rehabilitation in a government center for the first

[1] Slang for Methamphetamine.

offense" and "for the second time... from six years and one day to 12 years and a fine ranging from ₱50,000.00 to ₱200,000.00" for violation of *dangerous drugs*). There is also an "inter penalty of "imprisonment ranging fro to 20 years and a fine ranging from ₱100,000.00 to ₱500,000.00" for violation of *visiting a drug den*), Sec. 16 (*protector/coddler of cultivation of dangerous drug plants*), and Sec. 18 *(unnecessary prescription*).

By far, the most common cases are those for violations of Sec. 5 and 11. The cases usually the result from buy-bust operations and search warrant implementations, respectively. For Sec. 11, there is at least the graduation of penalties based on quantities of the drugs possessed and seized, down to "imprisonment of 12 20 years and a fine ranging from ₱300,000.00 to ₱400,000.00" for rams of shabu or less than 300 grams of marijuana. Many, if not most, cases involve less than one gram of shabu. For possessing shabu (less than one gram), the penalty would be not less than 12 years and one day of imprisonment and not less than a ₱300,000.00 fine. But for selling shabu (less than 1 gram or even less than 0.1 gram), the penalty would be life imprisonment and a fine of not less than a ₱500,000.00. The penalty would be the same if it were for the sale of more than 50 grams of shabu.

The disparity between the Sec. imprisonment to death and a fine ranging from ₱500,000.00 to ₱10,000,000.00" and the Sec. 15 fir minimum of 6 months rehabilitation i manifests the different policy treatment between pushers (sellers) and users, with the former treated as culprits and the latter as victims of the drug problem. It is common that arrested suspects deny" t(hpauts hteh resy) , a readily admit or volunteer the information that they are only

"*adik*" (addicts) or "*gamit*" (users). But many pu
sellers are themselves small-time drug users trying to
in an exceedingly vast network of dr
certainly not your "drug lords" and m
addicts who resort to small-time drug selling to sustain their addiction and other daily living needs.

These conditions are not valid justifying circumstances, but they give us a better contextual understanding of particular cases as well as the whole drug problem. The different policy treatment between pushers as culprits and users as victims needs to be delineated.

Incidentally, as an important aside, the Supreme Court in the 2014 case of *People v. Holgado* observed the "disproportionate focus on street-level enforcement. The decision antedated by several years the similar observation made in the recent Inter-Agency Committee on Anti-Illegal Drugs (ICAD) Co-Chairperson's Report in Nove
which states:

> ... Both law enforcers and prosecu
> realize that <u>the more effective and efficient strategy is to focus resources more on the source and true leadership of these nefarious organizations</u> [the drug cartels]. Otherwise, all these executive and judicial resources expended to attempt to convict an accused for 0.05 gram of shabu under doubtful custodial arrangements will hardly make a dent in the overall picture. It might in fact be distracting our <u>law enforcers from their more challenging task: to uproot the causes of this drug menace</u>. <u>We stand ready to</u>

[2] To use the words of Justice Leonen in People v. Holgado, 741 Phil. 78, at 100 (2014).

> assess cases involving greater amounts of drugs and the leadership of these cartels.

The patent disproportionality in penalties is not my main point here. My main point here is that while the very high penalties are ostensibly intended to deter the commission of drug offenses, they can also deter judges from convicting the accused, especially when the accused has already suffered several years of preventive detention while their cases were pending or delayed for whatever reason.[3] And this goes not only for offenses for using and selling drugs, but also for other offenses under R.A. No. 9165. This is how I put it in my Judgment of acquittal promulgated 17 January 2020 in Crim. Case No. 2016-0391 (*People vs. Orlando Porcalla*) for violation of Sec. 6:

> At this point, we must make an admittedly side remark or *obiter* that "unusually severe penalties for drug offenses" (w Supreme Court), while possibly being a deterrent to their commission by drug offenders, can imaginably also be a deterrent of sorts to otherwise deserving convictions by judges. Aside from the main Sec. 6 penalty of life imprisonment to death and a fine ranging from P500,000.00 to P10,000,000.00, the house which is the drug den, even if owned by a third person, shall be confiscated and escheated in favor of the government. One author has described this as "considered[4] confiscatory."

[3] At least one retired RTC Naga City Judge shared this perspective with me.

[4] E. M. Villareal II, Comments and Cases on Republic Act No. 9165 "Dangerous Drugs Act" 66 (2011).

The thing is, these very high penalties have not deterred the commission of drug offenses, as shown in huge and growing volume of drug cases filed over the years, despite the "intensive and[5] wargrienlgenotfing" the war a drugs" upon the assumption to office mid-2016.

Furthermore, the high penalties are also the basis for bail not being available or imposition of high bail amounts of usually ₱200,000.00, which are unaffordable to the majority of indigent accused.[6]

Both these reasons result in jail congestion. There are also related constitutional issues here about excessive bail[7] and, more fundamentally, what the SC already referred to several timensuuasllys severe penalties for drug offenwsheich[8] may even rise to the level of cruel, degrading or inhuman punishment.[9] Justice Leonen, in his Separate Concurring Opinion to the landmark 2017 *Estipona v. Lobrigo* Decision[10] of the SC striking down Sec. 23 of R.A. No. 9165 disallowing plea bargaining opined:

> The application of the mandatory penalty of life imprisonment, as practiced, appears to have a

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[5] Wording of Rep. Act No. 9165 (2002), sec. 2 Declaration of Policy, second paragraph.

[6] But for non-indigent or monied accused drug sellers who successfully apply for bail, it can and has been fixed by courts to be as high as ₱2 million. See Krixia Subingsubing, *Rapper Loonie freed after posting P2-M bail*, Philippine Daily Inquirer, Jan. 26, 2020, p. A8.

[7] CONST. art. III, sec. 13.

[8] Valdez vs. People, 563 Phil. 934, 956 (2007), cited in People vs. Ga-a and Adobar, G.R. No. 222559, June 06, 2018. See also People vs. Marilou Hilario, G.R. No. 210610, January 11, 2018.

[9] CONST. art. III, sec. 19(1).

[10] G.R. No. 226679, August 15, 2017.

> disproportionate impact on those who are poor and those caught with very miniscule quantities of drugs. A disproportionate impact in practice of a seemingly neutral penal law, in my view, will amount to an unusual punishment considering that drugs affect all economic classes.
>
> … Preventing the accused from pleading to the lesser offense of possession is a cruel, degrading, and unusual punishment for those who genuinely accept the consequences of their actions and seek to be rehabilitated. It will not advance the policy of the law to punish offenders with penalties not commensurate with the offense and to hinder their reintegration into society. (underscoring supplied)

The high penalties highlight the punitive policy aspect (Article II) of R.A. No. 9165 in a way that tends to overshadow its preventive (Articles III-VII) and rehabilitative (Article VIII) policy aspects. The rehabilitation objective of the law was called attention to in *People v. Martinez*[11] and was reaffirmed in *Dela Cruz v. People*[12] in this way: "To file charges under Sec. 11 [instead of Sec. 15] on the basis of residue alone would frustrate the objective of the law to rehabilitate drug users and provide them with an opportunity to recover for a second chance at life."

Perhaps there can be more use (with any necessary amendatory provisions) of penalties that somehow combine both the punitive and rehabilitative service in lieu of imprisonment and/or fine in the discretion of the court" mentioned in Sec. 57

[11] G.R. No. 191366, December 13, 2010, 637 SCRA 791, at 823-25.

[12] G.R. No. 200748, July 23, 2014, 739 Phil. 578, at 587.

and the voluntary submission program. In the so-called *Tokyo Rules* or 1990 *UN Standard Minimum Rules for Non-Custodial Measures*, Rule 8.2 provides the following options in non-custodial sentencing (which I advocate should be especially available for women offenders with small children):

> (a) Verbal sanctions, such as admonition, reprimand and warning;
> (b) Conditional discharge;
> (c) Status penalties;
> (d) Economic sanctions and monetary penalties, such as fines and day-fines;
> (e) Confiscation or an expropriation order;
> (f) Restitution to the victim or a compensation order;
> (g) Suspended or deferred sentence;
> (h) Probation and judicial supervision;
> (i) A community service order;
> (j) Referral to an attendance center;
> (k) House arrest;
> (l) Any other mode of non-institutional treatment;
> (m) Some combination of the measures listed above.

Some of these non-custodial measures may also be appropriate at the trial stage. In any case, Rule 8.1 provides that: "The judicial authority, having non-custodial measures, should take into consideration in making its decision the rehabilitative needs of the offender, the protection of society and the interests of the victim, who

should be consulted whenever appro
should also consider jail (de)congestion.[13]

In this regard, the relevant amendatory expansion of the application or scope of R.A. No. 11362 (the Community Service Act) should at least be studied and considered.

II. ADMINISTRATIVE RATHER THAN JUDICIAL PROCEEDINGS FOR VOLUNTARY SUBMISSION, DRUG DEPENDENCY EXAMINATION REQUIREMENTS, AND REHABILITATION CONCERNS

In 2016, I suggested that it would be more practical to process voluntary confinements of drug defendants administratively, rather than judicially. The suggestions were raised in my Orders granting several petitions for voluntary confinement of drug dependents (under Sec. 54 of R.A. No. 9165). The suggestion was first made in the Order of 18 July 2016 in Spec. Procs. No. 2016-0066 (*Petition of Drug Dependent Knight Michael R. Morano*), shortly after the assumption to office of President Duterte in mid-2016. The cited case provides as follows:

> Considering the influx in this Court alone of petitions such as this for voluntary confinement of drug dependents for treatment and rehabilitation, and the very publicly known mass surrender of drug suspects including drug users or addicts for a similar purpose, this Court deems it timely, if not urgent, to CALL THE

[13] I first called attention to by me in a pap
Relaxed Bail Requirements for Detained Accused Women-Mothers with Small Children" (22 January 2018).

ATTENTION OF CONGRESS through the Honorable Representative of the 3rd District of Camarines Sur, Gabriel Hidalgo Bordado, Jr., on the following concerns for Congressional study, deliberation and action:

1. Whether it may be more expeditious, practical and otherwise better to process the confinement, at least voluntary if not also compulsory, of drug dependents administratively rather than judicially under R.A. No. 9165 Article III Program for Treatment and Rehabilitation of Drug Dependents, without prejudice to related court case matters that are clearly of judicial nature.

2. The obvious rising budgetary need for adequate or additional drug dependent treatment and rehabilitation facilities and resources to augment the existing centers for this purpose.

That first suggestion antedates by a few years a similar recommendation of the afore-mentioned ICAD Co-Chairperson's Report which said that the program "without need for court o

Drug dependency examination (DDE) is required for voluntary confinement and compulsory confinement under Secs. 54 & 61 of R.A. No. 9165, respectively, as well as for plea bargaining under the SC *En Banc* Resolution dated 10 April 2018 in A.M. No. 18-03-16-SC (*Adoption of the Plea Bargaining Framework in Drug Cases*).

In case of plea bargaining judgments usually for the lesser offense of violation of Sec. 12 (with a probationable penalty and the subsequent giving due course to an application for probation), the DDE recommended that level or form should factor into the design of the probation program. The program should feature proper crediting, such as considering the probation period. In any case, whether there is to be residential (in-patient), out-patient or community-based rehabilitation, there must be good "cooperation, coordination" between and com the Probation Office and the rehabilitation provider.[14]

Rehabilitation of the criminal mind behind drug offenses is distinct from rehabilitation for drug dependency, whether they are drug offenders or of voluntary confines. Incidentally, the SC *Plea Bargaining Framework* uses the term "drug dependent" when it should be "drug test" when it should be "drug examination," otherwise there might be c kind of "authorized drug testing" under Sec. 36.

A person is charged under Sec. 15 if he was arrested and "found to be positive for use of a confirmatory test," in short, a d penalty for a first offense is "a rehabilitation in a government center" (u supplied). The word "in-patient" tends t residential rehabilitation, warranted only by a DDE recommendation after the subject was diagnosed with a severe substance abuse disorder. Otherwise, if the drug dependency of the Sec. 15 convict is only moderate or mild, or possibly even none (as the positive urine test can result from even just one-time drug use), it would be a waste of

[14] Mantra of the Justice Zone concept.

scarce resources to commit them to a government rehabilitation center.

But if it is not to be a first offense penalty of in-patient or residential rehabilitation, then what should be the penalty? In my view, it should be the level or form of rehabilitation recommended by a DDE report, such as out-patient or community-based rehabilitation. And if there is no diagnosed drug dependency, then we suggest a minimum of six months community service in the discretion of the court, like the arrangement under Sec. 57.

It appears to us now that a DDE should be availed in all R.A. No. 9165 cases, even in cases not subject to plea bargaining, so that the DDE recommendation may factor into whatever prisoner reform program during the service of sentence, as ideally should be directed as part of the judgment.

In this regard, among the recommendations at the National Summit on Dangerous Drugs Law last 3 October 2019 was for the BJMP, BUCOR, and other correctional institutions to "be authorized and ma maintain separate [drug] rehabilitation/reformatory facilities within their premises." A question mi report can factor into the decision on the merits of the case, on the theory that the drug dependency circumstances of the accused are part of the context of the alleged drug offense.

In any case, the DDE reports and also the psychiatric evaluation reports in petitions for voluntary confinement of drug dependents, and for that matter Post-Sentence Investigation Reports (PSIRs) for probation purposes, are rich sources of personal circumstances and histories of drug offenders and dependents that would certainly shed insights on the root causes of the demand side of the drug problem.

It would be a pity if this rich resource of information is not availed of by responsible and competent psycho-social research which can be commissioned as a judicial contribution for a deeper and better understanding of the drug problem as basis for its solution, beyond crime and punishment.

There is a distinction between in-patient or residential rehabilitation in the context of voluntary submission as opposed to criminal penalty and probation. In voluntary submission, it is clear that the costs and fees should be shouldered by the committing family of the drug dependent. By contrast, in criminal penalty or probation, it is unclear who will should shoulder the costs and fees for in-patient or residential rehabilitation.

In my view, the costs and fees should be shouldered by the government for initiating the criminal action. More so, most convicted drug offenders are indigents, because most are represented by public attorneys. By contrast, most drug dependents who submit voluntarily tend to be more well-off and can afford the cost of rehabilitation.

I have submitted this view in a letter to the Camarines Sur Treatment and Rehabilitation Center (CSTRC) dated 10 July 2019. The CSTRC reply dated 08 August 2019 cited R.A. No. 9165 Sec. 74 on cost-sharing in the treatment and rehabilitation of a drug dependent voluntary submission program or compulsory commission program shall be charged a certain Based on this, the CSTRC says, "It fees cover both voluntary cases as well as criminal cases requiring compulsory care/confinement." I disagree matter has to be clarified.

In addition, should it finally become clear that it is the government that should shoulder the costs and fees of in-patient or residential rehabilitation in the context of a criminal penalty and probation, then it should also be made clear from which government agencies and which government fund sources would the payments come. This will likely entail budgetary action both at the national and local government levels.

In more recent months after the influx of plea bargain judgments and subsequent releases of convict-probationers under probation, there is a trend of re-arrests for drug offenses, just as there is also a trend of relapses by drug dependents temporarily released from in-patient or residential rehabilitation, who should report to the center for after-care and follow-up treatment under Sec. 56 of R.A. No. 9165. These emerging trends, though not yet of alarming proportions, should be given serious attention in a systematic study of their causes with a view to taking corrective measures.

One such measure is purposive pre-release preparation/orientation for plea bargainer-probationees. The suggested systematic study will need to go beyond the needed "system for tracking the individuals after surrenders and arrests" (and for confinements) recommended in page 12 of the ICAD Co-Chairperson's Report. This should understanding and solving the persistent and lingering drug problem. Otherwise, some of the probation and rehabilitation objectives, efforts and resources would come to naught or be put to waste.

III. RELEASE OF SEIZED VEHICLES AND PERSONAL ITEMS BELONGING TO NON-ACCUSED

In my four years as a judge, I have encountered several Motions for Release by the registered owners of motorcycles or passenger tricycles (trimobiles in Naga City) seized by drug enforcers during anti-drug operations.

Aside from claiming ownership, the Motions for Release of motorcycles and passenger tricycles would usually cite two considerations: [1] The family needs the vehicle for service use, especially in bringing and fetching their schooling children to and from school, or needs it as a passenger tricycle for livelihood purposes; and [2] "That moreover experiences have established that incidents of thefts, deterioration, cannibalization, corrosion befall the impounded property in government premises resulting in its unserviceability leading to losses in value to the prejudice of innocent third-parties." The latter is quot for Release filed by the non-accused registered owner, a motorcycle dealer and vendee-mortgagee of the subject motorcycle purchased on installment basis but not yet fully paid by the accused as vendee-mortgagor in Crim. Case Nos. 2018-0144 to -0147 (*People vs. Janet Felicitas-Palibino, et al.*) for several drug offenses.

The existing jurisprudence guiding this Court in resolving such Motions for Release is the leading applicable and analogous case of *PDEA vs. Brodett et al*:[15]

> We rule that henceforth the Regional Trial Courts shall comply strictly with the provisions of Section 20 of R.A. No. 9165, and should not

[15] G.R. No. 196390, September 28, 2011, 674 Phil. 121, at 138.

> release articles, whether drugs or non-drugs, for the duration of the trial and before the rendition of the judgment, even if owned by a third person who is not liable for the unlawful act.

This reiterates as well as interprets the third paragraph Sec. 20 of R.A. No. 9165:

> During the pendency of the case in the Regional Trial Court, no property, or income derived therefrom, which may be confiscated and forfeited, shall be disposed, alienated or transferred and the same shall be in *custodia legis* and no bond shall be admitted for the release of the same.

I denied the Motion for Release in the aforesaid *Palibino, et al.* cases in a Resolution of 23 November 2018 but also made this final remark:

> Finally, given the above-cited *Brodett* case ruling, this Court CALLS THE ATTENTION of Congress through Rep. Gabriel H. Bordado, Jr. of the Third District of Camarines Sur to consider, as part of emerging law reform efforts regarding R.A. No. 9165 (the Comprehensive Dangerous Drugs Act of 2002), possible amendments to the above-quoted Sec. 20, third paragraph thereof [1] that would allow reasonable exceptions with safeguards and standards for the exercise of the sound discretion of the Court, [2] that would ensure the proper keeping, integrity, photo-documentation, inspection, production, non-transfer or non-disposal of seized items especially in case duly released, AND [3] that would deter any abusive or oppressive seizures

> of personal property or objects of lawful commerce, especially those belonging to third persons who are not liable for the unlawful act, in the course of an enforcement of RA 9165. Also FURNISH a copy of this Resolution to the Supreme Court through the Office of Justice Diosado M. Peralta.

There is already much collateral damage drugs," not only to life and liberty damage should at least be lessened.

IV. EARLY DESTRUCTION OF SEIZED DANGEROUS DRUGS VERSUS EVIDENTIARY IDENTIFICATION OF THE *CORPUS DELICTI*

In recent months, the new Naga City Justice Zone[16] grappled with the problem of destroying seized dangerous drugs that somehow have accumulated *in custodia legis*. In fact, under Sec. 21(4) of R.A. No. 9165, this destruction of the seized dangerous drugs should have been done within four days after the filing of the case.

In the 5th Judicial Region of Bicol or at least in the province of Camarines Sur (with six RTC stations and a total of 27 branches), seized drugs are hardly ever destroyed after the case was filed for two main reasons: (1) the usually very small amounts of seized shabu involved, especially before the SC *Plea Bargaining Framework* was issued in April 2018 (since then there has been an observed trend of bigger than

[16] Launched on 30 September 2019 as the sixth Justice Zone in the country by the Justice Sector Coordinating Council (JSCC). It institutionalizes a better coordinated approach to delivery of justice on a sector-wide perspective.

usual amounts of shabu seized or alleged to be seized), making the destruction of small amounts of shabu impractical or tedious (but of course even small amounts can accumulate and become big); and (2) the continuing lack of lead drug enforcement agency PDEA protocols and appropriate facilities for the turnover and immediate destruction of seized dangerous drugs in Bicol. The obvious concern for the proper turnover and destruction of seized dangerous drugs is to avoid their b illegitimate purposes.

Before seized drugs are destroyed, Sec. 21(4) requires "[t]hat a representative sample, duly weighed and recorded, is retained" for evidentiary purposes. *Guidelines on the Implementing Rules and Regulations (IRR) of Section 21 of Republic Act No. 9165 as Amended by Republic Act No. 10640*, dated 28 May 2015, which was referred to as "the Chain of Custody Regulations" in *People v. Ramoy Lim*,[17] particularly Section 1, C.1.6, it is specifically provided samples to serve as the *corpus delicti* in the trial of the case..." Under DDB Regulations, such as Board Regulation No. 1, Series of 2017, the maximum quantity of representative samples to be retained for shabu is the amount of seized dangerous drugs.. than [the] prescribed amount of retention... items shall be preserved as evidence

Here lies the rub. For example, if 50 grams of shabu was seized, the representative sample retained cannot go beyond five grams. But if only five grams were retained, it will look very different in volume and likely even in form from the initially seized 50 grams. The remaining 45 grams should be destroyed under the DDB Regulations in relation

[17] G.R. No. 231989, September 4, 2018.

to Sec. 21(4) of R.A. No. 9165 and *corpus delicti*" look very different when the retained representative five-gram sample is shown to the forensic chemist, poseur-buyer, or seizing officer for identification by them as prosecution witnesses in open court. The same may be said in the case of the accused if presented as a defense witness who was shown the *corpus delicti*" for identification Because defense witnesses may be asked what they can say about the *corpus delicti*" presented, marked and the prosecution, then this drug item should not yet be turned over to the PDEA for destruction until after trial or until it may still be needed for the trial.

The obvious question which stares us in the face is: which is more important, the destruction of the seized dangerous drugs (leaving only a representative sample) to avoid their being "recycled" for il 21[4] actually allows them to be " purposes") or "the integrity and e seized items" (to use the wording as for their identification by witnesses during the trial (which may be prejudiced by being shown only a representative sample of much less quantity and thus different or changed appearance than when originally seized)? Some kind of policy decision—whether legislative, executive or judicial—has to be made on this.

V. OTHER SUGGESTIONS FOR DRUG LAW AND IMPLEMENTATION REFORM

I join fellow judges who articulated, in the National Drugs Summit held on 3 October 2019, Section 90 of R.A. No. 9165 such that trial and decision of drug cases be completed in one hundred twenty (120) days

or four (4) months instead of the 75 average caseload of 582 cases[18], so it is unrealistic[19] to expect trial to finish within 60 days after the Information was filed and to expect a decision 15 days after the case was submitted for resolution. The prescribed time frame remains unrealistic even with the adoption of the *Revised Guidelines for Continuous Trial of Criminal Cases*. These reasons call for a more realistic time frame and other measures like the prompt filling of vacancies in RTC judgeships (currently about 25% of the 1,100 RTCs).[20] Although the timeframes to try and decide drug cases are provided by Sec. 90 of R.A. No. 9165, an Act of Congress (just like the erstwhile Sec. 23 *Plea-Bargaining Provision*), could such statutory timeframe exclusive and constitutional rule-making power[21], just like plea bargaining as ruled in the landmark *Estipona* Decision?

Recent SC Decisions[22], especially in the 2019 cases *People v. Tanes*[23] and *People v. Manabat*,[24] held that the mandatory witnesses must be present at the time and place

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[18] Artemio V. Panganiban, *Eliminating the backlog in all other courts*, Philippine Daily Inquirer, January 19, 2020, p. A13.

[19] Chief Justice Diosdado M. Peralta, Training Seminar in Special Issues on the Implementation of the Revised Guidelines for Continuous Trial of Criminal Cases, Conrad Hotel, Pasay City (December 6, 2018).

[20] Ibid.

[21] CONST, art. VIII, sec. 5(5).

[22] Our attention in RTC Naga City was called to this by Branch 23 Presiding Judge Valentin E. Pura, Jr.

[23] G.R. No. 240598, April 03, 2019. Our attention in the Philippine Judicial Academy Camarines Sur Chapter was called to this by RTC Naga City Branch 21 PJ Pablo Cabillan Formaran III, coming from the National Drugs Summit of 3 October 2019.

[24] G.R. No. 2428467, 17 July 2019. Our attention in RTC Naga City was called to this by retired RTC Legazpi City Branch 3 PJ Frank E. Lobrigo (of Estipona vs Lobrigo fame) at the Training Workshop on Apprehension & Prosecution of Drug Cases in Naga City held on 12-13 December 2019 in Haciendas de Naga.

of the buy-bust operation, warrantless arrest, seizure of drug items, marking, inventory and photographs (with more reason in the case of search warrant implementation) since it is a planned operation. *Tanes* traces the recent line of jurisprudence to the 2016 case *People v. Jehar Reyes*.[25] The rulings in *Tanes* and *Manabat* may adversely impact pending drug cases, including convictions on appeal, unless the prosecution can justify or explain non-compliance or deviation.

It is a wonder though that *Tanes* and *Manabat* follow the mandatory three-witness rule when this was reduced to two witnesses by the amendatory R.A. No. 10640 in 2014. Thus, understandably the ICAD Co-Chairperson's Re
notes "Despite the amendment of Secti
10640 and issuances by the Supreme Court, confusion remains as to the rule on witnesses during physical inventory." This confusion should b
Separate Concurring Opinion of Justice Diosdado M. Peralta in the 2018 case *People v. Ga-a and Adobar*[26], citing that R.A. No. 10640 "now only requires two w
should be no confusion that we can retroactively apply in favor of the accused the mandatory two-witness rule and rule requiring two witnesses present at the buy-bust operation (and, for that matter, when the search warrant is implemented), because a favorable, retroactive application is warranted for being "a matter of s[27] By contrast, this retroactive application is unlike the requirement of compliance affidavits under Sec. 21(1) laid down in *People v. Romy Lim*, providing said requirement "should not be given retroactive eff

[25] 797 Phil. 671 (2016).

[26] G.R. No. 222559, 06 June 2018.

[27] People vs. Ga-A and Adobar, G.R. No. 222559, 06 June 2018.

before the promulgation of *Lim* on 4 September 2018 because "said policy is a [28] for the stage and rule..." determining probable cause in court.

Some argue that mandatory witnesses be present when the drug enforcers bring the suspects to the station and the seized drug items to the crime laboratory—not only at the buy-bust operation, search warrant implementation, warrantless arrest, seizure of drug items, marking, inventory and photographs. While in transit and without any witnesses, evidence may be tampered with and planted. Some accused, being brought to the police station for drug testing, complain they were mauled and physically abused by drug enforcers. To prevent further abuses, researchers should study expanding the pool of mandatory witness. One possible addition to the pool of witnesses is the Commission on Human Rights (CHR). And the government should train and incentivize the mandatory witnesses.

The SC, in *Tanes* and *Manabat*, stressed that the strict measures to prevent evidence from being contaminated were guarantees "against [29] For example, one measure requires witnesses present at the buy-bust operation, warrantless arrest, seizure of drug items. Together, the measures serve as an " against "the evils of [30] the evidence that had tainted the buy-bust's No wonder an author wrote, "On this score, it that the Highest Court of our Land observed the prevalence of frame-up (HULIDAP) or planting evidence. Otherwise put,

[28] People vs. Romy Lim, G.R. No. 231989, November 13, 2018.

[29] Tanes citing People vs. Jehar Reyes.

[30] Manabat quoting People v. Tomawis, G.R. No. 228890, April 18, 2018, which in turn quoted People v. Mendoza, 736 Phil. 749 (2014).

the ones who should uphold the rule of law are the persons violating or transgressing the same.[31]

The accused usually answers "No" cross-examination, if he filed a Sec. 29 case against the drug enforcers. And when asked why, the often a combination of reasons—fear of police retaliation, ignorance of law and legal procedure, and lack of resources and support for legal services.

These problems call for a more systematic study of Sec. 29 cases and remedial measures. There ought to be a way to balance the scales of justice on this front. As noted above, the "death penalty" does not deter planting evidence, but only deters judges from imposing the harsh penalty. On one hand, there should be no impunity for planting of evidence, though perhaps with a less harsh penalty. On the other hand, as they say, prevention is better than cure.

4. Still on evidence, there are two areas to lessen over-reliance on unreliable testimonial evidence, as indicated by experience:

a. The markings and photographs required by Sec. 21(1) of RA 9165 should involve marking pens with indelible quality and include close-up photographs of the seized drug items where the markings can be read by the naked eye.

b. Maximize hardly-used cellphone evidence, mainly the cellphones the suspect used to contact the confidential informant (C.I.) and the cellphones the C.I. used to

[31] Igmidio C. Lat, Notes and Cases on Comprehensive Dangerous Drugs Act of 2002 (R.A. 9165), p. xiv (2010).

contact suspect for the buy-bust operations. In those phones, the text messages or lack of them may decisively establish the guilt or innocence of the accused.[32]

5. Finally, it is clear from SC jurisprudence that drug law enforcers should obtain not only the right evidence but also obtain it the right way.[33] The right way focuses on Sec. 21, which provides for the "Chain of required compliance has become increasingly stricter with *Lim, Tanes, Manabat*, et al.

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[32] Per exchange of notes informally among RTC Naga City Judges and formally at Naga City Justice Zone meetings.

[33] In this regard, I must relay some drug enforcer feedback, such as this text message from a local PDEA agent; "... sa unfair samin ang sc d siguro nila alam kung g tayo sir alam natin yung nangyayari ditto sa ground po at alam po natin na malaki ang problema sa drugs yong justices po ata parang dnila alam sir correct me nalang po if I am wrong." Don

Refocusing Development in the Ancestral Domains of Bukidnon

Burt M. Estrada[*] *and Arbie S. Llesis*[**]

INTRODUCTION

Bukidnon is known as the food basket of Mindanao. It is the heart of Mindanao not only because it is geographically found at the center of the Island or that it is the source of water for most of the Island, but also because it is home to the keepers of the Indigenous culture of Mindanao which gives it its own identity. Bukidnon is renowned for its very fertile soil. It is said that you can grow almost anything in Bukidnon. Today, Bukidnon is the producer of many commodities such as but not limited to: corn, rice, sugar, flour, vegetables, pineapple, banana, poultry, pork, beef etc. However, despite what has been said, Bukidnon remains as one the poorest provinces in the country.

Like other provinces, poverty incidence in Bukidnon is seen to be highest in Indigenous Peoples (IP) communities. Having one of the highest population of IPs would seem to

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[*] Burt M. Estrada is the senior lawyer of Estrada and Associates Law Office in Malaybalay, Bukidnon. A member of the IBP Bukidnon Chapter, he is currently the IBP's Executive Vice Presid Mindanao Region. He is a member of the Tagoloanon Tribe of Bukidnon, where he also teaches at the College of Law of Bukidnon State University.

[**] Arbie S. Llesis is a member of the Talaandig, an indigenous group in the province of Bukidnon, Mindanao. He joined the Philippine Bar in 2015 and currently serves as IBP adviser for indigenous peoples.

explain why Bukidnon is one of the poorest provinces. But with all the natural resources within the Ancestral Domains of the IP communities, this should not have been the case. Out of the 1,049,900 hectares total land area of the province, 227,715 hectares or more than 21% is identified to be within Ancestral Domains (AD) already issued with Certificate of Ancestral Domain Title (CADT).[1] This still does not include those claims that are still in process and those that did not elect to have formal recognition but is anchored on Native Title. With all this vast track of land, how is it that the IP communities of Bukidnon have remained poor?

Before the enactment of the Indigenous Peoples Rights Act (IPRA), most of the ancestral domains were classified as public forest which were legally considered as beyond the commerce of man. The IPRA law has paved the way for these ancestral domains to become areas of production and commercial activities.

Twenty years ago, the IPRA was enacted by Congress not only to fulfill the constitutional mandate of protecting the indigenous cultural communities' right to their ancestral land but more importantly, to correct a grave historical injustice to our indigenous people.[2] To achieve such constitutional mandate, the law declares that the state shall "protect the rights of ICCs/IPs to th ensure their economic, social and cultural well-being and shall recognize the applicability of customary laws governing property rights or relations in determining the ownership and extent of the ADs."[3]

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[1] NCIP Provincial Ov ce of Bukidnon.

[2] Cruz v. Secretary of Environment, G.R. No. 135385, December 6, 2000.

[3] Rep. Act No. 8371 (1997), Sec. 2(b). The Indigenous Peoples Rights Act of 1997.

The law has given recognition to IP ownership over ADs. Lands that were classified as public forest lands and hence outside the commerce of man can now be used for economic activities subject only to the recognition and respect to the customary laws which is supposed to be complied thru the observance of the Free and Prior Informed Consent (FPIC) procedure prescribed by the Implementing Rules of IPRA. However, despite the lapse of more than 20 years, there has been very minimal economic activities within the domains. Existing contractual relations within the domains have either been looked upon as mostly exploitative of the IPs right to their ancestral domains or unstable and unpredictable for any sustainable commercial relation to be invested upon.

It is really a big puzzle why despite all the resources available to the IP communities there is no industry within the domains. The political leaders of Bukidnon have also expressed their concerns that despite all the interventions and programs they tried to introduce, nothing seems to work in bringing about economic progress in the lives of our IP communities. Perhaps it is time to revisit the mandate of the IPRA law and determine how it can be better implemented with a focus on capacity building for the creation of industries within the domains and introducing a framework that will enable commercial relations to be cultivated within these domains which is protective of IP rights, promotes economic development of the IPs and the community as a whole and attractive for economic partners.

This submission seeks to learn from the experience of the seven tribes of Bukidnon relative to their struggle to bring about economic development in their ADs under the existing law and implementing rules. The focus of this study will be to come up with recommendations on how the IPRA and the cultural law can be harmonized to foster an ev cient, viable

and culturally sensitive environment for business and industry in order to bring about economic development in the IP communities and the Province as a whole and how to refocus our euorts in order to bring about development in the ADs.

REGULATION OR EMPOWERMENT

A careful reading of the IPRA and its corresponding implementing rules will show that that the rigid and lengthy processes prescribed before any activity can be undertaken within the AD, is aimed to protect the rights and interest of the IPs. As a rule, no project or economic activity can take place within ADs without going thru the FPIC process.

The Revised Guidelines on FPIC and related processes of 2012 (herein referred to as AO No. 3) categorizes four kinds of processes of FPIC namely:

I. Full blown FPIC
II. Validation of Non-extractive and Small Scale Activities
III. Validation of Community Solicited/Initiated
IV. Validation of Exercise of Priority Rights

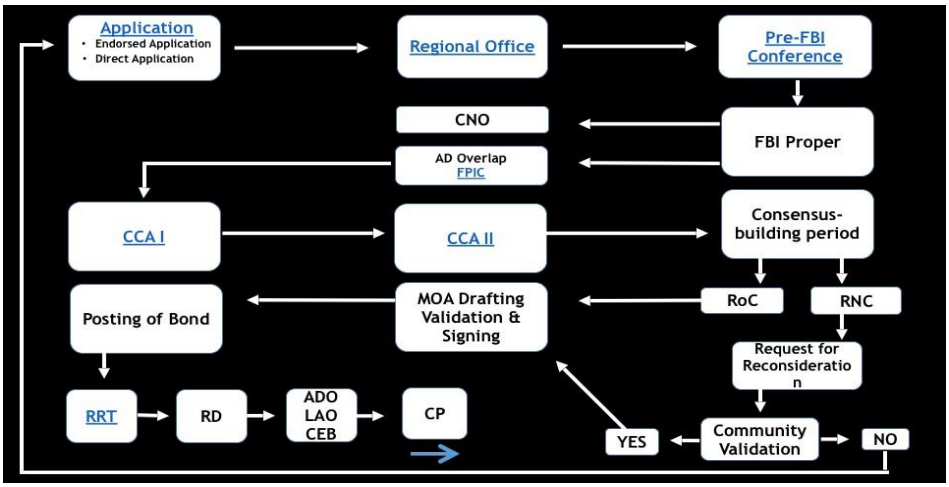
A full blown FPIC process is the usual procedure being undertaken by the NCIP for the communities as it is required before any Extractive/Intrusive/Large Scale projects or programs can be introduced within Ancestral Domains. According to Section 19 of the Revised Guidelines on FPIC and related processes of 2012, the following are considered as extractive/ intrusive or Large Scale:

a. Exploration, development, exploitation, utilization of land, energy, mineral, forest, water, marine, air,

and other natural resources requiring permits, licenses, lease, contracts, concession, or agreements, e.g. production-sharing agreement, from the appropriate national or local government agencies, including feasibility studies related thereto;

b. Those that may lead to the displacement and/or relocation of Indigenous Cultural Communities (ICCs)/IPs;
c. Resettlement programs or projects by the government or any of its instrumentalities that may introduce migrants;
d. Declaration and management of protected and environmentally critical areas, and other related undertakings;
e. Bio-prospecting and related activities;
f. Activities that would affect their spiritual and religious traditions, customs
g. and ceremonies, including ceremonial objects, archeological exploration, diggings and excavations and access to religious and cultural sites:
h. Industrial land use including the establishment of economic zones;
i. Large scale agricultural and forestry management projects;
j. Carbon trading and related activities;
k. Large scale tourism projects;
l. Establishment of temporary or permanent military facilities; conduct of military exercises, or organizing para-military forces;
m. Issuance of land tenure instrument or resource use instrument by any government agency and related activities; and
n. Others analogous to the foregoing, except small-scale quarrying. (emphasis and underscoring supplied)

Under a full blown FPIC, the following process must be followed:[4]



From the abovementioned flow chart, the entire process may take months if not years depending on so many factors including availability of funds to support the conduct of such activities. It is submitted that such process may be necessary to regulate extractive activities within the ADs. However, it may also become too onerous and restrictive that would hinder development of the AD.

It must be emphasized that although the IPRA recognizes the IPs rights to all the resources within its domain, the readily available resource that the ICCs have is their land. And based on the above definition, it could be interpreted that any business undertaking done within the ADs would require a full blown FPIC since all businesses are required to secure at the very least a business permit from the local government.

[4] National Commission on Indigenous Peoples (3 (2012). The Revised Guidelines on Free and Prior Informed Consent (FPIC) and Related Processes of 2012, Sec. 22.

Such complexity was enough for the Manobo Tribal Chieftain of Pangantucan, Bukidnon, Datu Sulda to find other ways to be able to execute their project. In our interview with Datu Sulda, he recounted the experience they had when they implemented a research and reforestation project within their domain under the ICCA (Indigenous Communities Conserved Areas) of the DENR.

Datu Sulda remembered then NCIP Chair Pawid initially manifested frustration over DENR's prescribed full blown FPIC process, but was later relieved that Datu Sulda took the initiative. According to Datu Sulda, they did not follow the full blown FPIC process as the same was their initiative or decision and they knew and understood that it was good for their community and that the cultural process of decision making, thru the council of elders was observed. They did not follow the prescribed FPIC process as doing so would mean delay and payment to the NCIP for the conduct of the FPIC process which meant a deduction from the available funds. Whether or not the interpretation of the law was correct will be the subject of a separate discussion, but what can be gathered from the experience shared by Datu Sulda is that adherence to a full blown FCIP process would cost delay and expenses before the project can be implemented.

Another important lesson learned from the discussion with Datu Sulda is on the process of consensus building. The law defines FPIC as the consensus of all members of the tribe but later qualifies it with the phra respective customary laws and practi

The definition can be a source of confusion. In many situations, the usual "democratic" concept building is being insisted upon. The

even a unanimous vote is understood to be the import of the said definition of FPIC. This may be owing to our Western concept of consensus building. However, while it may be the design of any democratic organization that everyone is given a say on the matter, such is not always true when it comes to decision making under the customary beliefs and traditions. The former also does not always ensure that the best decision is made or that everyone is benefited therefrom. On the contrary, many programs have been put on hold or even abused because of a few unscrupulous members of the tribe who are more politically motivated rather than culturally guided.

What Datu Sulda intimated is also shared by another leader, Datu Migketay Victoriano Saway. According the leaders, the cultural law is actually simple: it is based on natural law. And natural law dictates that a good leader naturally decides what is best for his people. The authority of the leader has already been pre-agreed from the moment he or they are recognized as the leaders of the community. Hence, the decision of the Tribal council of elders should be sufficient to proceed with any project or program. This is supported by the definition of the law itself when it says that it should be in accordance with the customary law and practice of the tribe. The challenge, however, is in identifying the true cultural leaders of the tribe.

The FPIC procedures have only been undertaken when someone other than the community seeks to make business out of the resources within the domain. There are minimal, if any, proceedings undertaken by the NCIP of programs and projects that concerns the ICCs exercise of priority rights or community-initiated projects. Why it is so can be the subject of speculation. Based on our interviews, it appears that undertaking full blown FPIC is a very expensive undertaking which only big companies and rich businessmen can afford.

Programs or projects from the communities, however, are lacking any ready funding from the community. Because the NCIP has become preoccupied mostly with applications of companies to utilize resources from the ADs, the development of the ADs has become dependent on the availability of interested investors on the resources of the domain.

For instance, in the Bukidnon Tagoloanon Tribe of Malaybalay City, the NCIP Local Office has only been involved on development projects when a hydroelectric power plant was proposed by Sta. Clara Electric Corp. However, the government agency was not involved when the tribe decided it will develop 100 hectares of its domain to a cacao plantation by forming its own cooperative that will enter into marketing agreements and apply for a bank loan to fund its own project. This will be further elaborated in the succeeding discussions.

What is noteworthy at this point is that there is intervention or assistance only within the domains when it is initiated by an interested proponent not when it is initiated by the community itself. More importantly, there is hardly any initiative from government to capacitate the communities to undertake development on their own.

Again, this submission does not seek to impute any malfeasance or misfeasance, it only seeks to point out that by focusing more on its regulatory function in the issuance of CADTs and Certificates of Preconditions for extractive and intrusive activities proposed by outsiders, the ICCs have been treated more as lessors or landlords who can only develop its land if a lessee or investor desires to utilize its domain for business. This has left much of the areas of the ADs undeveloped as mostly only mining activities, quarrying for sand and gravel, hydro power plants have been identified as

viable businesses within the Ads where ICCs are only expected to give their consent for royalties.

At this juncture, it must already be stressed that most of the IPs are farmers. More effort should be focused on developing agricultural production within the domains rather than the above-mentioned activities.

HARMONIZING THE LAWS

Another major issue raised by many of the tribal leaders and ICCs is the continued disconnect between the IPRA and the other laws such as the Local Government Code (LGC) and the Cooperative Law. In a number of interviews and discussions, Tribal Leaders have lamented the difficulty of proceeding with any project even if with the assistance of local government units. This is especially true with those domains that do not have CADTs issued.

The IPRA and the LGC

In the Municipality of San Fernando, Bukidnon, a brewing conflict was seen between the Local Government Unit (LGU) and the Manobo Tribe led by Bae Lea Tumbalang. The LGU is proposing the construction of a water impounding facility but the area is within the Ancestral Land claimed by the Manobo Tribe of San Fernando. In one of the meeting between the parties, it was apparent that the LGU was becoming frustrated with the tribe coming up with their "demands". The LGU. One of the "demands", a
of a request according to Bae Lea, was that a reforestation project be undertaken and that the same be managed by the tribe. The request is *ang tribu Mano ang mag-*. "*dumala.*"

The wordings alone led to a misunderstanding as it appeared to be a precondition set by the tribe before a water impounding facility can be put up. Secondly, although the LGU already appropriated a budget of PhP1,000,000, it insisted that it is not possible to give the budget to the tribe for them to manage as it is not allowed by the LGC or the COA rules. Initially, the tribe was also of the conviction that being within their Ancestral Land, they should manage and establish the program as it is theirs. But, upon further inquiry, it was learned that the paramount consideration of the tribe is to have a livelihood program to provide its members.

If the IPRA is to be strictly followed, then the water system should not be implemented before the issuance of a certificate of precondition which called for a full blown FPIC. If the LGC and COA rules are also to be strictly followed, no funds can be disbursed to the tribe as they do not have an issued CADT over the area nor a registered juridical personality recognized by the law to be a recipient of any project of funds. An impasse or deadlock seems inevitable.

Ideally, it would be more in keeping with the vision of IPRA if the funds are transferred to the tribe and that they be able to implement such project based on their own initiatives and traditions. This empowers the tribes and supports their struggle for self-determination. However, the IPRA is not the only law to be followed, the provisions of the LGC and the COA rules must be observed as well.

At present, the parties are undertaking continued negotiations, which was made possible after two basic considerations were agreed upon. First, the tribe assured the LGU that it supports the construction of the water impounding system as it is pro-life and is needed by

everyone. The indigenous culture of the tribe mandates that it support pro-life activities (*Pa ba- tonbatona hu batasan*).

The LGU announced the appropriation of 1 million pesos for the reforestation project and will work with the tribe to meet the livelihood needs of the tribe subject to the provisions of pertinent laws such as the LGC and COA rules. It is submitted that the best and legal way is to have a registered Indigenous Peoples Organization (IPO) of the tribe that can be the legal subject of any agreement with the LGC. However, as will be discussed below, the procedure for registration is quite a long and tedious one. In the meantime, other legal ways are being explored to meet the needs of both parties.

During a subsequent meeting with the LGU, Datu Migketay was asked to be one of the panel members for the tribe to negotiate. Datu Migketay was one of the framers of the IPRA law and was one of the first commissioners of the *en banc* commission. Datu Migketay explained the need to find a way to harmonize the IPRA and the LGC. The goal according to Datu Migketay is to build good and strong relationships between the LGU and the tribe anchored on the recognition of the rights of the tribe. This can only be done if we find a way to harmonize the laws. He also emphasizes on the importance of getting the consent of the cultural or spritual leaders meaning those that still observe the cultural laws.

IPRA and the Cooperative Law

One of the expected propellers of inclusive growth is cooperativism. Through the collective effort of people bound by a common interest, the marginalized sector is given an opportunity to be a part of nation building and to experience economic progress at the grass root level. There are

numerous advantages in forming cooperatives. Having a registered cooperative gives the organization a recognized or even preferred juridical personality when dealing with financial institutions and even the LGUs.

In the experience of the Bukidnon Tagoloanon Tribe of Malaybalay, it had difficulty even in seeking assistance from the LGU when it still did not have a registered cooperative. Although the tribe was organized in accordance with its indigenous traditions and culture, it was legally difficult or even impossible for the LGU to give any form of assistance as the tribe did not have the legal personality that is recognized by the LGC. Even with a CADT already issued over its domain, the Bukidnon Tagoloanon Tribe could not access financial assistance much more loan accommodations to fund its development projects.

The option to form as a cooperative was there, but the decision was not that easy as there were fundamental issues where the Cooperative Law and the tr
meet. While cooperation is also the heart of cultural life, one of the fundamental difference is in the manner of governance. One of the basic principles of cooperativism is "one member, one vote." This is n
decision making is done by the tribe. The cultural law of decision making is different from what we have been accustomed to under the western concepts of democracy. Even with good intentions, the tribe did not hastily form itself into a cooperative as it might lead to supplanting its own culture.

The Bukidnon Tagoloanon Tribe was very fortunate to have been chosen as the target comm
Growth thru Inclusive Business Prog
Oro Chamber which is funded by the USAID thru the Gerry Roxas Foundation. Thru the said program, the tribe was

assisted in looking for ways to bring about inclusive growth in its domain by engaging in inclusive business. One of the first issue the tribe faced was whether or not to form a cooperative. The following is part of the Business Plan formulated by the tribe in its quest to undertake its own business:

> The Bukidnon Tagoloanon Tribe cannot abandon its indigenous political structure for the expediency of gaining access to government assistance, bank loans and commercial transactions. However, the Tribe has agreed to form an a cooperative to serve as the technical or economic arm of the IPS to be able to have a juridical personality preferred by the modern world. This cooperative however will not take the place of the IPS but will be under it. While it shall exist as an independent entity, it is entrusted by the IPS to function and decide based on its bylaws which will be centered on t or our cultural laws in as far as it does not conflict with the basic principles of cooperativism. Our culture is very much akin to the essence of cooperativism. Mutual help is the key to our collective success.
>
> To insulate the tribe from possible vested personal interests from outsiders or even from within, we agreed to register a cooperative to be composed initially of the minimum requirement of members. These members were selected for their awareness and belief on our cultural laws. They will be given the authority over particular portions of our domain to establish economic activities. The cooperative members are fully cognizant that while they are the only registered

members of the cooperative, the benefits to be derived from the activities of the cooperative can be enjoyed by the rest of the members of the tribe. While the members of the cooperative technically will own the proposed 50 hectare cacao plantation, the benefits derived from this project can be enjoyed by all. The livelihood to be created will not be limited to the members of the cooperative only. The profit that may be generated from this endeavor will later be used to fund other economic activities which will be the vehicle of the IPS to deliver basic services to all its members.

The cooperative will open its own pharmacy, clinics, schools, and lending centers. These businesses will not only cater to the members of the cooperative but to every member of the tribe and perhaps even to everyone. All the members of the tribe shares in the profit of the business being ran by the cooperative by having access to subsidized or cheaper basic goods and services. Our culture does not believe in profit sharing based on one's equity. Our cultur be useful members of the community by doing your assigned duty. Thru your loyalty and industry for the good of the community, you are given opportunities and protection by the community thru its leadership. During times of need –sickness, hunger, ignorance, your leaders will pro- vide for you to ensure that you do not go astray and be able to do your integral role in the community's life and ultimate harmony within the community.

The experience of the Bukidnon Tagoloanon Tribe shows that the IPRA and the Cooperative law are not contradictory but rather complimentary. The ICCs should not be made to abandon their IPS by urging them to form themselves into a cooperative. It is imperative that the State empowers the IPs as it is what will bring about stability and cultural integrity within the domain. Under the IPRA a cooperative can be formed to be the Indigenous Peoples Organization (IPO) of the tribe.

EQUAL OPPORTUNITY TO ACCESS TO FINANCIAL CAPITAL

The most common cause of the underdevelopment of the ADs is the lack of financial capital. As mentioned earlier, the ICCs have two very important capital resource: vast lands and manpower. However, owing to the fact that Ancestral Domains have no collateral value and the prevalent low educational background of most ICCs, the ancestral domains mostly remain dormant in terms of sufficient economic activities as ancestral domains and ICCs are perceived to be unbankable, unstable and unpredictable for any financial institution or well-meaning would-be business partner to invest in.

From the vision and mission of the Bukidnon Tagoloanon Tribe mentioned above, the tribe sees the opportunity to be able to develop much of the AD for the benefit of its members. But any plan for development almost always boils down to the question of financial capital. The Constitutional mandate of the IPRA historical injustice" is the promotio IPs as a neglected, discriminated and marginalized sector. Recognition of their Ancestral Domains have been implemented in the last 20 years of IPRA yet social justice is

still elusive. The IPRA declared as members of the ICCs/IPs benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population."[5]

Social justice demands that equal opportunity to exercise its political and civil rights be given to those who have less in life. This can only be achieved if the poor are uplifted and given the chance to exercise their rights with dignity and without having to sacrifice their rights in order to address basic necessities such as food. Social justice calls for the humanization of laws. In the case of the IPs, social justice is not achieved by merely regulating the utilization of their resources by others for mere royalties or rentals. Social justice would be better served if they are truly given equal opportunity under the law. And one of the opportunities not made available to the marginalized sector is access to financial capital.

Without financial capital, the tribes are almost powerless to develop their lands. This in-turn renders much of the lands of Bukidnon undeveloped. In a bet to access much needed financial capital, the Tagoloanon Tribe visited the main office of the Landbank of the Philippines. In a meeting with one of the assistants of the President of the Bank, the Tribe explained the dilemma commonly shared by other marginalized sectors. How can the marginalized sector progress if financial capital is only available to those who are already rich?

The Bukidnon Tagoloaonon Tribe wants to avail of the CACAO 100 program of the LandBank In order to be eligible for such program, the tribe addressed the issue of having a legal personality by registering its own agricultural co-

[5] *Supra*, Note 4, Sec. 2(e).

operative. However, despite having the preferred legal personality, the approval of the loan application is still a tall order as the bank still requires a 3-year financial statement and 20 to 30% equity. It is understandable that the landbank would require such things as it is first and foremost a bank. However, if the government is to fulfil its mandate to deliver social justice, this laws or policies must be humanized. There must be a way for the marginalized sector to truly have equal opportunity to access capital. Lest these programs be available only to those who already have. Presently, the Bukidnon Tagoloanon Tribe is awaiting on its loan application.

Another striking example is that of Datu Diaon of the Matigsalug Tribe of Sinuda, Kitao-tao, Bukidnon. This 84-year old Datu has no formal education. After laying down his arms decades ago, he has struggled to develop his domain and uplift the lives of his people. One of the problems he wanted to address was the lack of electricity in their area. For three years, he and his family strived to put up a hydro power plant in a waterfalls near their community. According to Datu Diaon, he merely used his common sense and the help of the *"Tumanods"* spirits to be able to copy the mechanism of a hydro power plant. Using mostly wood and recycled materials such as rubber from worn out tires, Datu Diaon finally electrified his community which they are now able to use for cooking Lutya or taro crackers.

Datu Diaon declared that he undertook such project without government financial assistance as he grew wary of the delays and intricacies of the bureaucracy. He used the proceeds from the sale of his cassava plant and bought a dynamo. With the help of some friends who provided him drop wires, he was able to put up a truly indigenous hydro power plant. But Datu Diaon also laments that if only he had enough financial capability he could have built something

bigger and better. He postulates that given the fact that the IPs have the land and the manpower, it should be impossible why the IP can't be rich. It is only that is the major road block and this road block is very real.

RECOGNITION OF INDIGENOUS POLITICAL STRUCTURES (IPS) AND INDIGENOUS PEOPLES ORGANIZATIONS (IPOS)

After recognition of the ownership over their domains, three essential provisions of the IPRA can be focused on by the NCIP to promote the above-mentioned relationship reform:

a. Assist the community in the confirmation of its IPS.
b. Assist the community form its IPO preferably by helping them form a cooperative.
c. Assist the community formulate its ADSDPP.

These three elements will give the IP communities the legally recognized structures to be able to enter into commercial transactions, access financial capital and undertake business.

NCIP Administrative Order No. 02-12 defines IPS as the organizational and cultural leadership systems, institutions, relationships, patterns and processes for decision-making and participation, identified and accepted by ICCs/IPs.[6] The IPS shall be recognized as the highest governing body with the IPO as its technical arm.[7] The IPO shall have legal capacity to assist the ICCs/IPs inensuring

[6] NCIP Administrative Order No. 2 Series of 2012, *General Guidelines on the Confirmation of Indigenous Political Structures and the Registration of Indigenous Peoples' Organizations.*

[7] *Id.*, Sec. 6(a).

their collective rights to their ancestral domains and to strengthen their political, economic and social systems or institutions.[8]

The reality is that while the IP community has its own political structure, it is not known or recognized by other parties. This uncertainty in the leadership and political structure of the IP community renders them unbankable and a high-risk investment for would be partners. It is no secret that business and economic progress strives in stability and predictability. But for as long as others do not see the IP community as a stable and predictable partner, no bank or businessman would venture to invest or partner with them. In more than one occasion, a businessman who is interested to partner with a community would shy away after not having any assurance that any agreement with the present leader/s would be honored by the next generation of leaders.

This desired environment of stability, continuity and predictability can be fostered by the state's the IPS of the Tribe. It is not a simple task as much of the framework of governance and leadership of the tribe is passed on thru oral tradition, but if not given due attention and assistance it would be very difficult for the community to have such framework confirmed.

Many of the tribal leaders are one in opinion that the NCIP may have been too focused on the Indigenous Peoples Mandatory Representative (IPMR) selection under the LGC. In many communities, the IPMR selection has become a partisan and divisive exercise. Instead of empowering the culture of the ICCs, the focus on the IPMR selection has somewhat weakened the cultural leadership system of the tribes. Because the IPMRs become part of the political structure of the local government, it has been observed that they are

[8] *Id.*, Sec. 3(f).

susceptible of being used for partisan activities and lose track of their role of being representatives of the IPs voice in order that IP concerns and interest are included in the policy making of the local government units.

If the tribes are to be uplifted and their domains developed, their culture must be preserved and strengthened. The people must be allowed to unite behind their indigenous culture and their indigenous political structure. The selection of the IPMR must be secondary only to the empowerment of the true cultural leaders. Only by empowering the true cultural leaders is it possible for the IP to be united instead of divided in election-like processes of selection which has reduced the idea of IP leadership to mere political positions.

The selection of IPMRs must be continued as IP communities should have a voice in the LGU policy making bodies. But the selection must be truly in accordance with the customary processes of the tribe as this is what the law also prescribes. In order to follow the customary process, the Indigenous Political Structure should be consulted and followed as this is the "organizatio systems, institutions, relation- ships, patterns and processes for decision-making and participation, identified and accepted by[9] It is the power and function of the IPS "to convene the ICCs/IPs and in a processes to lead the selection of the IP mandatory representatives in all policy making bodies and in local legislative[10] councils."

[9] *Id*, Sec. 3(i)

[10] National Commission on Indigenous Peoples (NCIP) Administrative Order No. 12 (2012), Art. III, Sec. 7, par. 15.

The confirmation of the tribe's IPS stability within the ancestral domains. Government recognition of the indigenous framework of governance should settle issues of conflicting claims to leadership and procedures. This will enable the other parties to have a sense of security that they are dealing with the right leaders when dealing with ancestral lands. This recognition in turn empowers the true cultural leaders and refocuses the power to bring about development to the bearers of the tribe's culture and away from those with only personal or political vested interest in mind.

The confirmation is a tedious process but one that should be pursued in order to create a better and conducive environment for development. The confirmation also enables the tribe to take the next step towards engaging in inclusive business, i.e., the registration of the Indigenous Peoples Organization.

The IPS does not have a legal or juridical personality hence cannot be the party or subject of many legal relationships that is necessary for business (e.g. government financial assistance, bank loan accommodations, commercial contracts). Hence, equal opportunity is still not accessible at this point. Section 19 of NCIP Administrative Order No. 2, Series of 2012 expressly states: "The with the NCIP confers to it a juridical personality to represent the ICCs/IPs in pursuing and securing their collective rights over their ancestral domains."

As the technical arm of the IPS, the IPO is supposed to be the legal entity that the ICCs need to be able to be elevated to the equal footing with other organizations in the mainstream legal system. theoretically, the IPO as a juridical entity representative of the ICC should be able to enter into commercial contracts with other persons and apply for loans

with banks and financial institution. theoretically, this should enable the ICC to develop more of its domain for economic activities. This theory however seems to have not been converted into practice on the ground. Aside from the fact that the registration process is very tedious, it appears that an IPO is still not a preferred or recognized entity by financial institutions.

An example of this is the experience of the Bukidnon Tagoloanon Tribe of Malaybalay. While awaiting the confirmation of its IPS, the tribe has been eager to undertake economic activities on its own within its domain. One of the identified activities was the establishment of a cacao plantation.

With the assistance of the Inclusive Growth thru Inclusive Business Program of the Oro Chamber, the tribe met with officers of the Land Bank of the Philippines for their CACAO 100 program. During the meeting it was discovered by the tribe that even if its IPS or IPO is already registered, it still cannot avail of such program as it is not one of the identified eligible borrowers. Candidly, the bank officers informed the tribe that it has not heard of such entity and that based on the bank policies only the following are eligible for the program.

It is imperative for the government to update its policies to catch up with the declarations of the IPRA and the need to interface. These policies will create a ripple effect towards private business entities who will be engaging the tribes thru the IPO for commercial partnerships and transactions.

As of the writing of this paper, there is not a single registered IPO known to the author. The IPS of the Bukidnon Higaonon Tribes was recently confirmed by the NCIP en banc

last December 2017. The Bukidnon Tagoloanon Tribe of Malaybalay IPS will be registering its IPO as soon as the Certificate of Confirmation is received. This situation renders the prospect of interfacing and ultimately development in the AD still a remote possibility. In the interim, it is proposed that ICCs be helped in forming their own cooperatives in order for ICCs to have their economic arm to engage in business. As soon as the IPs of the tribes are confirmed, their cooperatives can later be registered as their IPOs.

Having a cooperative as the IPO allows the ICC to have more immediate access to government programs as cooperatives are the present preferred juridical personalities that the government uses to implement its programs for livelihood and poverty alleviation. A cooperative is also a familiar entity for business men. Business transactions and partnerships between the co- operative and a private company is more likely to happen since the private company knows how a cooperative works and hence knows who he is dealing with. The continuity and accountability which is established and known in the cooperative framework should create the stable and predictable business environment that will allow for more economic transactions thus more development activities within the ADs.

In 2015, 20 years after filing a claim for issuance of a Certificate of Title over its ancestral domain, the Bukidnon Tagoloanon Tribe of Malaybalay was given government recognition over its domain. The tribe's domain consists of 990 hectares. In terms of economic activity, there were few options other than those that could be entered into with the city government. Ten years ago, the city government of Malaybalay constructed a water impounding facility and a temporary waste disposal facility within the do- main. In return for the consent of the tribe to use portions of its domain for the said facilities for basic services, the city

government constructed a swimming pool facility which was supposed to be a part of a 4-hectare agro-tourism project which was to be given to the tribe as a livelihood program. It was only after 10 years that the pool was finally turned over to the tribe and is now one of the first livelihood activity of the tribe.

A few months after, the LGU of Malaybalay signed a Memorandum of Agreement with the tribe for the use of another eight-hectare portion of the domain as a new waste disposal facility for the city as the old open dump- site was ordered closed by the Department of Environment and Natural Resources. In return for th waste disposal facility, the LGU turned over the facilities of the old dump site which consisted of buildings, a fenced four-hectare covered up land fill, a bio-digester and a plastic liquefier. The Tribe had high hopes of creating jobs out of this facility which could process fertilizer from the biodegradable waste and building materials from the non-biodegradable waste that are brought in from the city. however, almost a year from the turn over, no jobs are created as the tribe has no financial capital to commercially operate such machineries.

In keeping with its culture and the intent of the IPRA, the council of elders formally adopted a policy to develop its domain through communal efforts and not subdivide it among its members. The elders were cognizant of the reality that it should create economic activities to be able to uplift the lives of its members but they also were determined to uphold their self-determination and not succumb to easy option of just leasing its lands. They realized that to be able to preserve the indigenous culture, they had to be the initiators, implementors, managers and owners of the economic activities in the domain. Only by doing so will

meaningful development be had, one that will preserve and develop the culture of the tribe.

CONCLUSIONS AND RECOMMENDATIONS

In order to promote economic development within the ADs, it is submitted that indigenous communities must be involved in the core businesses within the ADs. IPs should not only be regarded as landlords or lessors over their domains If we are to uplift the lives of the poorest sectors of our communities and maximize the potential for production in ancestral lands, the IPs must be given the tools to be able to develop their domains.

It is recommended that the NCIP refocus its efforts towards capacity building. In the last 20 years, NCIP has been perceived to be more of a regulating body. It is important that the NCIP continues to ensure that CADTs should be issued only to legitimate claimants. NCIP should continue to ensure that before any extractive or intrusive activity be undertaken within the domains the ICC has given its free and prior informed consent. However, in order for the ICCs to promote more meaningful development, the NCIP must now focus more on capacitating the communities to be able to initiate its own economic activities, exercise their priority rights in developing their domains.

Based on the IPRA and the implementing rules, economic activities can also be introduced within the domain even without a full blown FPIC. These processes are essentially for activities that are not considered as extractive or intrusive; are community initiated; or an exercise of priority rights of the community. These processes are theoretically faster and should enable the communities to

initiate and undertake economic activities other than those proposed by firms that seek to extract or utilize their resources for business and just pay them royalties or rents (i.e. quarry, mining and power plants).

If the tribes are given the equal opportunity to undertake business, there should be more meaningful development in their domains. But to truly give such equal opportunity to do business is not as simple as giving them business permits for the IPs are so situated that they do not stand in equal footing with other sectors who are already capacitated, learned and bankable. In furtherance of social justice, which is the heart of our Constitution, the asset reform agenda of IPRA must be complimented and supplemented by its relationship reform. From being landlords and lessors, IPs must be uplifted by the state to be able to rise to the status of business owners and business partners. From being mere cultivators or laborers of another company, IPS should not only be the recognized owners of the land but the cultivator and the owners of the crop.

In summary, in order to bring about more meaningful development within the domains the following need to be refocused on:

1. Strengthen and support cultural leadership.

2. Enable interfacing of the culture and mainstream legal systems by assisting tribes form and register their Indigenous Peoples Organizations prefer- ably cooperatives.

3. Capacitate IPOs by providing technical assistance in cooperative management and operation and providing marketing opportunities by matching tribes desired business or available crops with bona fide buyers.

4. Provide equal opportunity to access to financial capital by making policy shifts to give room for indigenous cooperative who are in much need of the equitable application of the law to give true meaning to social justice.

5. Provide financial assistance or funding source to enable the indigenous cooperative to function and administer the implementation of the tribes business plans for the initial gestation period.

The technical assistance towards building and empowerment to engage in their own development activities is invaluable.

UPDATE

This article was originally written in the early part of 2018. Since then there have been numerous developments.

The Loan Application of the Bukidnon Tagoloanon Tribe was finally approved by the Landbank of the Philippines sometime in the middle of 2018. As a proof of concept, the loan was granted even without any collateral since Ancestral Domains have no collateral value or cannot be used as a security for a loan. secondly, the usual requirement of submitting three (years of financial statements was waived. If banks only lend to those who have three years of good financial background, there would be no opportunity for start-ups like the Bukidnon Tagoloanon Mulahay hu Kabukalagan Agricultural Cooperative (BUKTAMACO) to access much needed financial capital. It would also in effect mean that only those who already have

money can borrow money. Fortunately, LBP approved the loan application of BUKTAMACO for the establishment of a 10 hectares cacao plantation. As of the writing of this update, the tribe has already established or planted 80% of the plantation within its Ancestral Domain.[11]

Today, BUKTAMACO has 19 employees from the province.[12] The cooperative has not only started the establishment of the cacao plantation, it has created other business activities like legal charcoal making, furniture shop, mini grocery, etc., which also provide livelihood to its members.

Through this activity, BUKTAMACO has been able to interface with two legal systems: the bank and the local government unit. Such interfacing has already provided many of our members with jobs and the potential to have sustainable source of income once the farms are established. The project also improves the ecology as it will mean the reforestation of about 110 hectares within the domain.

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[11] After attaining its new legal personality, BUKTAMACO was able to absorb substantial support from the Provincial Government of Bukidnon, thru the leadership of Gov. Jose Ma. Zubiri, Jr. the province allotted 30 million for three years to support the livelihood program of the tribe by establishing another 100 hectares of cacao, banana, and corn plantations.

[12] The 19 employees of BUKTAMACO are job order employees of the province who are also members of our tribe. Their salaries form part of the ₱ 30 million assistance which are received in kind, not in cash.

Retaking Unused Government-Owned Lands for Agrarian Reform

*Luis M. C. Pañgulayan**

THE CURRENT CHALLENGES OF THE AGRARIAN REFORM PROGRAM

Since 1988 with the passage of Republic Act (R.A.) No. 6657,[1] the Comprehensive Agrarian Reform Program (CARP) has covered at least 4.8 million hectares benefitting 2.8 million farmer- beneficiaries.[2] Now on its thirty-second year and after several extensions,[3] CARP still has not completely processed all the agricultural lands coverable under the program. A host of legal, technical, and physical challenges beset every stage of land acquisition and distribution.

There are protest actions on coverage and issues on the qualification of beneficiaries before the regional and central offices of the Department of Agrarian Reform (DAR) and

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* The author is currently the Undersecretary for Legal Affairs of the Department of Agrarian Reform.

[1] An Act Instituting a Comprehensive Agrarian Reform Program to Promote Social Justice and Industrialization, Providing the Mechanism for its Implementation, and for other Purposes.

[2] Ballesteros, Ancheta and Ramos. The Comprehensive Agrarian Reform Program After Thirty Years: Accomplishments and Forward Options. (Philippine Institute for Development Studies. 2018) 23.

[3] CARP started on June 10, 1988 with the passage of R.A. No. 6657 which pegged program completion in 1988. This was extended until 2008 with the passage of R.A No. 8532. R.A. No. 9700 extended the program until 2014. The CARPER deadline will be discussed later in this article.

before the Office of the President (OP).[4] There are tenurial disputes before the DAR adjudication boards (DARAB), as well as disputes on the just compensation of landowners before the DARAB and the special agrarian courts.[5] While the DAR has almost achieved a zero backlog of its cases in 2019[6], a significant number of the decisions on Agrarian Law Implementation (ALI) and those before the DARAB will still be challenged before the Court of Appeals and/or the Supreme Court.

In addition to the land acquisition and distribution (LAD) balance, another source of the impediments to program implementation is the generation and issuance of individual agrarian reform titles which are either in the form of the Emancipation Patent (EP) for awards based on Presidential Decree (PD) No. 27[7] and the Certificate of Land Ownership Award (CLOA) based on Republic Act (R.A.) No.

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[4] Sec 50 of R.A. No. 6657, As Amended, provides "The DAR is hereb vested with primary jurisdiction to determine and adjudicate agrarian reform matters and shall have exclusive original jurisdiction over all matters involving the implementation of agrarian reform, except those falling under the exclusive jurisdiction of the Department of Agriculture (DA) and the DENR."

[5] Section 57 of R.A. No. 6657, As Amended, Jurisdiction. —The Special Agrarian Courts shall have original and exclusive jurisdiction over all petitions for the determination of just compensation to landowners, and the prosecution of all criminal offenses under this Act. The Rules of Court shall apply to all proceedings before the Special Agrarian Courts, unless modifie

[6] On 17 February 2020 in a Press Conference at the Sulo Hotel in Quezon City, DAR Secretary John R. Castriciones announced that the Department through its Agrarian Legal Sector has achieved the following in terms of resolution of cases involving Agrarian Law Implementation (ALI) as well as cases before the DAR Adjudication Board (DARAB): ALI Cases filed before 2019: 100% resolved; DARAB Cases filed before 2019: 100% resolved).

[7] Presidential Decree No. 27. October 21, 1972. Decreeing the Emancipation of Tenants from the Bondage of the Soil, Transferring to them the Ownership of the Land They Till and Providing the Instruments and Mechanism Therefor.

6657, As Amended. Peculiar to the CARP, the DAR may issue collective CLOAs. At present, almost half of all agrarian reform titles issued by the DAR since the passage of R.A. No. 6657 are collective titles. While this is allowed by Law,[8] the existence of a collective CLOA prevents an agrarian reform beneficiary (ARB) from knowing the actual metes and bounds of his/her awarded land, as well as the amount of his/her amortization to the Land Bank of the Philippines (LBP). There are instances when the names of the owners of the awarded land are not annotated on the collective title. Within the landholding, certain portions are forested areas and are therefore neither alienable nor disposable land and should be excluded from the covered areas. Other collective titles have problems with regard to the technical description on the title. The resolution of these legal and technical problems must be addressed before the parcelization of the collective CLOAs can even commence.

Assuming that all legal and technical obstacles have already been surmounted, the difficulty now lies in installing the ARBs to their awarded lands. There have been instances when landowners would refuse representatives from the LBP and the DAR to enter the landholding and conduct the initial field investigation to determine the amount of compensation due the landowner. This process is indispensable to the issuance of the CLOA. There are still instances today when the landowner, the workers, or armed persons would

[8] In general, the land awarded to a farmer-beneficiary should be in the form of an individual title, covering one (1) contiguous tract or several parcels of land cumulated up to a maximum of three (3) hectares. The beneficiaries may opt for collective ownership, such as co-workers or farmers' cooperative or some other form of c for the issuance of collective ownership titles: Provided, That the total area that may be awarded shall not exceed the total number of co-owners or members of the cooperative or collective organization multiplied by the award limit above prescribed, except in meritorious cases as determined by the PARC.

physically prevent the actual installation of the ARBs to their awarded lands. There have been instances when armed men wearing hoods and masks would enter agricultural lands to forcibly oust the farmer-beneficiaries or actual tillers and occupants.[9]

The most significant concern in CARP implementation emanated from Congress with the passage of R.A. No. 9700 or the CARPER (Comprehensive Agrarian Reform Program Extension with Reforms) on 09 August 2009.[10] Under the said law, the issuance and service of the Notice of Coverage (NOC) ends on 30 June 2014. This is known as the CARPER deadline.[11] The NOC is the document which informs the registered owner of the agricultural land that the said property will be covered under the program. The NOC identifies the rights and obligations of the landowner under CARP. The NOC must be properly served to the registered owner and must be published and posted in accordance with the rules and regulations laid down by the DAR.[12] The

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[9] March 7, 2017 Joint Congressional Committee Fact-Finding Investigation conducted by the Committee on Justice and Human Rights of the House of Representatives on the Shooting Incident (which) Happened on 12 December 2016 in Tagum City, Davao del Norte. PNP Negros Occidental Police Provincial Office Report dated 21 October 2018 (Subjec Incident (which) resulted to the Death of Nine (9) Members of the National Federation of Sugarcane Workers in Sagay City, Negros Occidental).

[10] An Act Strengthening the Comprehensive Agrarian Reform Program (CARP), Extending the Acquisition and Distribution of All Agricultural Lands, Instituting Necessary Reforms, Amending for the Purpose Certain Provisions of R.A. No. 6657, Otherwise, Known as the Comprehensive Agrarian Reform Law of 1988, As Amended, and Appropriating Funds Therefor.

[11] Section 7 of R.A. No. 6657, As Amended, p coordination with the Presidential Agrarian Reform Council (PARC) shall plan and program the final acquisition and distribution of all remaining unacquired and undistributed agricultural lands from the effectivity of this Act until June 30, 2014.

[12] Sections 15 to 20 of DAR Administrative Order Number 7, Series of 2011: Revised Rules and Procedures Governing the Acquisition and

issuance and service of the NOC to the landowner is the very first act of the State, through the DAR, of subjecting the land under compulsory acquisition with proper regard to the tenet that no one shall be deprived of property without due process of law.

The passage of R.A. No. 9700 gave the impression to certain segments of the public and private sectors that CARP ended in 2014. Despite the current problems on program implementation and the CARPER deadline, CARP is not dead.

CARP IS A CONTINUING CONCERN OF GOVERNMENT

The CARP is a social justice measure sponsored by the State. It exists in compliance with the mandate of the 1987 Philippine Constitution. For so long as the Constitutional mandate exists, the CARP implementation continues, thus:

> "The State *shall, by law, undertake an agrarian reform program founded on the right of farmers and regular farmworkers who are landless, to own directly or collectively the lands they till or, in the case of other farmworkers, to receive a just share of the fruits thereof.*"[13]

The very law which imposed 30 June 2014 as the last day for the issuance and the service of the NOC contains provisions asserting that the CARP exists even after the CARPER deadline:

Distribution of Private Agricultural Lands Under R.A. No. 6657, As Amended.

[13] Article XIII, Section 4 of the 1987 Philippine Constitution.

> "Resolution — *Any case and/or proceeding involving the implementation of the provisions of Republic Act No. 6657, as amended, which may remain pending on June 30, 2014 shall be allowed to proceed to its finality and be executed even beyond such date.*"

The Supreme Court clarifies the scope of the afore-quoted provision:

> "The grant of authority upon t
> *conclude a "proceeding involving the implementation of the [agrarian reform law]" pending as of June 30, 2014 under Section 30 of RA No. 9700, like any statutory grant of authority, must be deemed to include all such powers, even those not expressly stated, that are necessary to effectuate the granted authority. This construction is justified by the doctrine of necessary implication.*
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> *No statute can be enacted that can provide all the details involved in its application. There is always an omission that may not meet a particular situation. What is thought, at the time of enactment, to be an all embracing legislation may be inadequate to provide for the unfolding events of the future. So-called gaps in the law develop as the law is enforced. One of the rules of statutory construction used to fill in the gap is the doctrine of necessary implication. The doctrine states that what is implied in a statute is as much a part thereof*

[14]Section 30 of R.A No. 9700.

as that which is expressed. Every statute is understood, by implication, to contain all such provisions as may be necessary to effectuate its object and purpose, or to make effective rights, powers, privileges or jurisdiction which it grants, including all such collateral and subsidiary consequences as may be fairly and logically inferred from its terms. Ex necessitate legis. And every statutory grant of power, right or privilege is deemed to include all incidental power, right or privilege. This is so because the greater includes the lesser, expressed in the maxim, in eo plus sit, simper inest et minus. (Emphasis supplied; citations omitted.)

'Accordingly, the authority of the trial to completion a proceeding for land acquisition and distribution initiated prior to June 30, 2014 must be deemed inclusive of a coordinate authority to continue exercising its quasi-judicial powers under Section 50 of RA No. 6657 with respect to agrarian reform controversies that may arise from such proceeding .[15]"

Even in a scenario where the DAR is able to cover the last landholding in its LAD balance, the CARP will not be terminated. R.A. No. 9700 obliges Congress to provide annual appropriations to finance the activities of the DAR in CARP implementation even after the completion of the LAD activities, thus:

[15]Robustum Agricultural Corporation versus Department of Agrarian Reform and Land Bank of the Philippines, G.R. No. 221484, November 19, 2018.

"Funding Source. The amount needed to *further implement the CARP as provided in this Act, until June 30, 2014, upon expiration of funding under Republic Act No. 8532 and other pertinent laws, shall be funded from the Agrarian Reform Fund and other funding sources in the amount of at least one hundred fifty billion pesos (P150,000,000,000.00).*

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'Provided, finally, That after t*he land acquisition and distribution component of the CARP, the yearly appropriation shall be* ***allocated fully to support services, agrarian justice delivery and operational*** *requirements* ***of the DAR and the other CARP implementing agencies****."*[16] *(Underscoring ours.)*

Clearly, CARP implementation continues to this very day as a matter of state policy. It will require an amendment of the Constitution and a revision of our agrarian reform statutes if one is to write *finis* to this social justice program. The Comprehensive Agrarian Reform Law (CARL), in the words of the Supreme Court, is recognized as a *"bastion of social justice of poor landless farmers, the mechanism designed to redistribute to the underprivileged the natural right to toil the earth, and to liberate them from oppressive tenancy."*[17]

It is against this backdrop that we see a recent executive

[16]Section 21 of R.A. No. 9700 amending Section 63 of R.A. No. 6657.

[17]Secretary of Agrarian Reform, et. al., versus Tropical Homes, lnc., G.R. Nos. 136827 & 136799. July 31, 2001.

fiat which breaks free from the debilitating effects wrought by the problems and challenges of Agrarian Reform program implementation.

PROBLEMS IN CARP COVERAGE OF UNUSED GOVERNMENT-OWNED LANDS

It was on 02 May 2018 during the distribution of CLOAs to ARBs in Mulanay, Quezon Province when President Rodrigo Roa Duterte announced the second phase of agrarian reform in the country. It primarily consists of the retaking of unused government-owned lands (GOLs) for acquisition and distribution to qualified beneficiaries. The President would like to broaden the base for coverage under the CARP. Aware of the restrictions imposed by the CARPER deadline, the President instructed the DAR to cover under CARP those agricultural GOLs which are no longer actually, directly, and exclusively used and necessary for the purpose of the concerned agencies which own said landholdings.

On 20 February 2019, the President issued Executive Order (E.O.) No. 75, Series of 2019 (*Directing All Departments, Bureaus, Offices and Instrumentalities of the Government to Identify Lands Owned by the Government Devoted to or Suitable for Agriculture for Distribution to Qualified Beneficiaries).*

E.O. No. 75, Series of 2019 is not the first of its kind in the inclusion of GOLs under the CARP. Firstly, the CARP coverage of unused GOLs is provided by law. Secondly, several Executive Orders were issued in the past to ensure compliance with the said statutory requirement.

Upon the inception of the current agrarian reform

program with the passage of R.A. No. 6657 in 1988, unused agricultural lands owned by the government through its agencies, instrumentalities, offices, and bureaus have been included in the scope. The following lands are included under the CARP, thus:

> "The Comprehensive Agrarian Refo
> *1989 shall cover, regardless of tenurial arrangement and commodity produced, all public and private agricultural lands, as provided in Proclamation No. 131 and Executive Order No. 229, including other lands of the public domain suitable for agriculture.*
>
> 'More specifically the followi
> *covered by the Comprehensive Agrarian Reform Program:*
> *(a) All alienable and disposable lands of the public domain devoted to or suitable for agriculture. No reclassification of forest or mineral lands to agricultural lands shall be undertaken after the approval of this Act until Congress, taking into account ecological, developmental and equity considerations, shall have determined by law, the specific limits of the public domain.*
> *(b) All lands of the public domain in excess of the specific limits as determined by Congress in the preceding paragraph;*
> ***(c) All other lands owned by the Government devoted to or suitable for agriculture**; and*
> *(d) All private lands devoted to or suitable for agriculture regardless of the agricultural*

products raised or that can be raised thereon.[18] *(Emphasis supplied.)*

The acquisition and distribution of unused GOLs is a priority in the implementation of the original schedule of the CARP under R.A No. 6657. This included *"all lands foreclosed by the government financial institutions; all lands acquired by the Presidential Commission on Good Government (PCGG); and all other lands owned by the government devoted to or suitable for*[19] *agriculture."*

It is on the basis of the inclusion of GOLs in the first phase of the original schedule for land acquisition and distribution under R.A. No. 6657 that President Corazon C. Aquino on 14 June 1990 issued Executive Order No. 407 designated as *"Accelerating the Acquisition and Distribution of Agricultural Lands, Pasture Lands, Fishponds, Agro-Forestry Lands and other Lands of the Public Domain Suitable for Agriculture."*

Under E.O. No 407, Series of 1990, the landholdings suitable for agriculture of Government instrumentalities, including but not limited to the following, are to be covered by CARP: government agencies, government-owned and controlled corporations (GOCCs), financial institutions *(GFIs such as the Development Bank of the Philippines, Philippine National Bank, and Republic Planters Bank*), Asset Privatization Trust (APT), Presidential Commission on Good Government (PCGG), Department of Agriculture, State Colleges and Universities, and the Department of National Defense. The landholdings also include improvements *(e.g. Irrigation systems, roads and bridges, buildings and other physical structures, warehouses, administration buildings,*

[18]Section 4 of R.A No. 6657, As Amended.

[19]*Ibid., Section 7.*

employees' housing facilities and the like) as well as chattel *(Agriculture processing machineries, post-harvest facilities, trucks and tractors, tools and agricultural supplies.)*[20]

E.O. No. 407, Series of 1990 has the following features:

1. The concerned agency, GOCC, or GFI shall execute the proper Deed of Transfer in favor of the Republic of the Philippines as represented by the DAR for the transfer of ownership of the agricultural landholding.

2. There is a Credit Memo Advice System to be developed by the DAR with the Department of Finance and the Department of Budget and Management (DBM) which is a payment scheme to government instrumentalities which are mandated to turn over the proceeds from the sale of their agricultural lands to the Agrarian Reform Fund pursuant to Section 63 of R.A. No. 6657.

3. The Land Registration Authority (LRA) shall submit to the DAR certified copies of all the certificates of titles under the name of each government instrumentality and the approved survey plans including the respective technical descriptions of each title.

4. Thirty (30) days from the registration of the ownership documents by the Register of Deeds in favor of the DAR, the Land Bank of the Philippines (LBP), pursuant to the rules approved by the Presidential Agrarian Reform Council (PARC), shall

[20]Section 1, E.O. No. 407 Series of 1990.

pay the government instrumentality the value of the land. In the case of the lands under the APT, PCGG, and other government instrumentalities which may opt for an alternative payment scheme, the DAR shall cause the issuance of the Credit Memo Advise from the Bureau of Treasury for such sale.

5. Pending valuation of the property, the DAR shall immediately commence the necessary activities for distribution to qualified beneficiaries upon receipt of the documents aforementioned, or issue the notice of allocation to qualified beneficiaries to give them usufructuary control over the land in the event ownership cannot as yet be transferred to them.

The efficacy of covering unused GOLs through E.O. No. 407, Series of 1990 is adversely affected by the fact that it is dependent on the execution of a Deed of Transfer between the agency, GOCCs, or GFIs, on one hand, and the DAR, on the other hand. The coverage of the GOLs is dependent on the consent of the agency, the GOCC, or the GFI. In the absence of the consent of the owner of the GOL, the DAR cannot include the GOL under CARP.

E.O. No. 407, Series of 1990 is likewise silent if the selected ARB shall pay the GOL.

E.O. No. 448, Series of 1991 entitled "*Amending* Executive Order No. 407, Series of 1990 *on the Acquisition and Distribution of Agricultural Lands, Pasture Lands, Fishponds, Agro-Forestry Lands and Other Lands of the Public Domain Suitable for Agriculture*" was issued on February 14, 1991. Under this Executive Order, the coverage was couched in general terms to ensure a broader scope in terms of coverage.

> "All lands or portions thereof *virtue of Presidential Proclamations for specific public uses by the government, its agencies and instrumentalities, including government-owned or controlled corporations suitable for agriculture and no longer actually, directly and exclusively used or necessary for the purposes for which they have been reserved, as determined by the Department of Agrarian Reform in coordination with the government agency or instrumentality concerned in whose favor the reservation was established, shall be segregated from the reservation and transferred to the Department of Agrarian Reform for distribution to qualified beneficiaries under the Comprehensive* Agrarian Reform Program"[21]

E.O. No. 448, Series of 1991 altered the process of coverage of a GOL. The execution of a Deed of Transfer with the agency, GOCC, or GFI, as the transferor, and the DAR, as the transferee, is no longer a requirement under this new Executive Order. At first glance, it may appear that the impediment for coverage (*The execution of a Deed of Transfer*) of GOLs has been taken out in the coverage process. Consent on the part of the government agency is no longer necessary. However, the execution of a Deed of Transfer has been replaced with a determination by the DAR in coordination with the agency or instrumentality concerned that the GOL is no longer actually, directly and exclusively used for its original public purpose. The process of joint determination is no different from the execution of a deed of transfer since the cooperation of the concerned government

[21]Section 1 of E.O. No. 448 Series of 1991.

agency is still indispensable in order for the GOL to be covered under the CARP.

The DAR could not proceed with its task of including unused GOLs under the CARP based on these executive orders. The concerned government agency, office, instrumentality, or bureau, which is the registered owner of the GOL, will not execute the deed of transfer or agree to participate in the determination of CARP coverage even if the GOL is no longer being used or necessary for its reservation.

In addition to this limitation, there is no criteria to establish the fact the GOL is no longer actually, directly, or exclusively used for a public purpose. There are also no provisions on the procedural and remedial measures available to a government instrumentality protesting the CARP coverage of GOLs.

President Corazon C. Aquino issued a third Executive Order on GOLs a year after she issued E.O. No 448, Series of 1991. The President issued on 18 February 1992 E.O. No. 506, Series of 1992, otherwise known as *Further Amending Executive Order No. 407, Series of 1990, Amended by E.O. No. 448, Series of 1991, "Accelerating Distribution of Agricultural Lands, Pasture Lands, Fishponds, Agroforestry Lands and Other Lands of the Public Domain Suitable for Agriculture."*

E.O. No. 506, Series of 1992 did not remove the requirement of the participation of the government agency, instrumentality, bureau, or office in the determination if there is a factual or legal basis for the acquisition of the GOL under the CARP. The Executive Order only excluded protected areas from CARP coverage, thus:

> "Except national parks and othe
> *areas, all lands or portions of the public domain reserved by virtue of proclamation or law for specific purposes or uses by departments, bureaus, offices and agencies of the Government, which are suitable for agricultural and no longer actually, directly and exclusively used or necessary for the purpose for which they have been reserved as determined by the Department of Agrarian Reform in coordination with the government agency or instrumentality concerned in whose favor the reservation was established, shall be segregated from the reservations and transferred to the Department of Agrarian Reform for distribution to qualified beneficiaries under the Comprehensive* Agrarian Reform Program."[22]

The basic limitation of the Executive Orders issued from 1990 to 1992 to cover GOLs under the CARP is that the completion of the entire process of coverage hinges on the consent or the participation of the concerned government agency in establishing the factual or legal basis for coverage. This limitation diluted the efficacy of these executive measures. In 2016, around 55 percent (2,625,547 hectares) of land distributed are private agricultural lands (PALs), while around 45 percent (2,116,033 hectares) are of non-private agricultural lands (Non-PALs). At that time, around 58 percent of the non-PALs consist of GOLs.[23] The DAR Field Operations Office reports that there are about 230,000

[22]Section 1 of E.O. No. 506, Series of 1992.

[23] *Supra, note 2, at 25, 28.*

hectares of unused GOLs which may still be covered under the CARP.[24]

THE NEW PROCESS OF RETAKING UNUSED GOVERNMENT OWNED LANDS FOR CARP

E.O. No. 75, Series of 2019 was crafted mindful of the limitations of the previous Executive Orders with regard to the capability of the DAR to acquire agricultural lands owned by government agencies which are no longer used for the purpose for which the reservation was made. The consent or the participation of the affected government agency, instrumentality, bureau, or office is no longer a requirement for the consummation of the acquisition activity. It provides well-defined concepts which lay down the legal and factual basis for coverage of GOLs. It streamlines the process of acquiring the GOLs.

E.O. No. 75, Series of 2019 was signed by President Duterte on 15 February 2019. It became effective on the date of its publication on the Official Gazette on 20 February 2019. The Implementing Rules and Regulations (IRR) of E.O. No. 75, Series of 2019, otherwise known as the Joint DAR-DOJ Administrative Order (A.O.) No. 07, Series of 2019, was signed by the DAR and the DOJ on 31 May 2019. It took effect on 15 June 2019, or ten days after its publication in two newspapers of general circulation.

The latest Executive Order on the acquisition of GOLs is based on the power of the President to exercise control of all executive departments, bureaus, and offices and on the duty of the President to ensure the faithful execution of

[24] Memorandum of Assistant Secretary Elmer N. Distor to Secretary John R. Castriciones on Inventory of GOLs dated June 4, 2020.

laws.[25] It is anchored on the Philippine Development Plan of 2017-2022. One of its objectives under the Development Plan is to ensure and protect the land tenure security of agrarian reform beneficiaries by completing land acquisition and distribution and by immediately installing the said beneficiaries to their awarded lands.

In addition to the Constitutional Mandate on Agrarian Reform,[26] E.O. No. 75, Series of 2019 derives its authority from the assertion in the paramount *duty of the State to enact measures that protect and enhance the right of all people to human dignity, reduce social, economic and political inequalities, and remove cultural inequalities by equitably diffusing wealth and political power for the common good.*[27]

The CARP coverage of unused GOLs through E.O. No. 75, Series of 2019 also derives its statutory anchorage from Section 4 of R.A. No. 6657, as amended, which provides that lands owned by the Government devoted to or suitable for agriculture are covered under the CARP and are to be acquired and distributed by the DAR, in coordination with the PARC, to the qualified beneficiaries thereunder.

The role of the DAR as the lead agency in CARP implementation is reiterated through E.O. No. 292, or the Administrative Code of 1987, which vests in the DAR the following mandates: Provide central direction and coordination to the national agrarian reform program extended to transform farm lessees and farm tenants into

[25] Article VII, Section 17 of the 1987 Philippine Constitution.

[26] Supra.

[27] Article XIII, Section 1 of the 1987 Philippine Constitution.

owner-cultivators of economic family-sized farms to improve their living conditions; formulate and implement policies, plans, and programs for the distribution and cultivation of all agricultural lands, including sugar and coconut lands, with the participation of farmers, farmworkers, landowners, cooperatives, and other independent; farmers and provide leadership in developing support services to tenant-owners, farm managers, and other cultivators, and render adequate assistance in finance, marketing, production and other aspects of farm management.

Under the streamlined process of E.O. No. 75, Series of 2019, the Department of Environment and Natural Resources (DENR) and the Department of Justice (DOJ) will be involved. Thus, the roles of the two agencies are also mentioned in its preamble. E.O. No. 292 directs the DENR to carry out the State's constitutional mandate to cor judicious disposition, utilization, management, and conservation of the country's natural vests in the DOJ the mandate to act as the principal law agency of the National Government, and to administratively settle and adjudicate all disputes, claims, and controversies solely between or among the agencies of the National Government, including government-owned or controlled-corporations.

The Executive Order provides that subject to the limitations and conditions provided under applicable laws, rules, and issuances, the DAR shall endeavor to acquire all lands devoted to or suitable for agriculture, which are owned by the departments, bureaus, offices, and instrumentalities of the Government, and which are no longer actually, directly, and exclusively used or necessary for the purpose for which they have been reserved, for the purpose of distributing the same to qualified beneficiaries.

The process of acquisition and distribution of GOLs differs from the process involving private agricultural lands (PALs). The law requires the issuance of a NOC and the payment of just compensation to the registered owner of the PAL. Upon the deposit to the LBP of the compensation in cash and in LBP bonds, the certificate of title of the landowner shall be cancelled and a new transfer certificate of title shall be issued in the name of the Republic of the Philippines which is eventually cancelled since the corresponding EPs or CLOAs are issued. Unlike GOLs, the issuance and the sending of the NOC to the owner(s) of the PAL are indispensable to the completion of the LAD process.[28]

> "Lest it be overlooked, agrar
> ***acquisition of private lands****, be it under PD 27 and its implementing issuances or RA 6657, is to some extent an exercise by the state of eminent domain and, hence, confiscatory in nature. Accordingly, notice must be given to the landowners of the fact that that their property is being placed under the OLT program, if this be the case. And this required notice has a purpose that is at once legal and*
> equitable."[29] *(Underscoring ours.)*

A government-owned land, under E.O. No. 75, Series of 2020, is a parcel of land owned by a department, bureau, office, or any of its instrumentalities, which has been acquired by purchase, grant, or through other modes of transferring ownership, and reserved in its favor by virtue of an executive fiat or legislative grant and is actually, directly, and exclusively used or necessary for a government

[28]Section 16 of R.A. No. 6657, As Amended.

[29]Conrada Almagro vs. Sps. Manuel Amaya. G.R. No. 179685, June 19, 2013.

purpose.[30] The GOL is considered to be actually, directly, and exclusively used for the government if the land is directly and immediately occupied, utilized, and applied for the purposes for which it was reserved or acquired. On the other hand, the GOL is necessary for the purpose for which the coverable GOL has been reserved or acquired if it is indispensable for the attainment of the mandate or the primary purpose of the said government unit.[31]

The process of acquiring GOLs in order to distribute these landholdings to beneficiaries has been laid down for the first time through E.O. No. 75, Series of 2019 and its IRRs. It basically comprises of the following steps:

A. Identification and Inventory

The process of CARP coverage of unused GOLs commences with the identification of the landholdings which are owned or reserved for a government agency, bureau, instrumentality, or office.[32]The said landholding must be actually devoted or suitable to agriculture and is no longer actually, directly, and exclusively used for the purpose of the reservation. The landholdings as identified and included in the inventory shall be coming from two sources. The first source is the agencies which shall voluntarily submit the requisite information, titles, and documents to the DAR. The second source is the DAR itself.

Within thirty (30) days from the effectivity of the Order or on 22 March 2019, all departments, bureaus, offices, and

[30]Section 3.1. of Joint DAR-DOJ Administrative Order No. 07, Series of 2019.

[31]Sections 3.2.1. and 3.2.2 of Joint DAR-DOJ Administrative Order No. 07, Series of 2019.

[32]Section 2 E.O. No. 75, Series of 2019.

instrumentalities of the Government are obliged to identify their lands devoted to or suitable for agriculture which are no longer actually, directly, and exclusively used or necessary for the purpose for which they have been reserved, and submit the list to the DAR. The agency must indicate the location and area, actual use, and legal basis of ownership. The certificates of title and other documents must also be submitted.

The failure of an agency of government to voluntarily inform the DAR about its coverable landholdings will not impede the process. The DAR can proceed with the inventory on its own initiative. The DAR, in coordination with the DENR, may cause the preparation of an inventory of GOLs devoted to or suitable for agriculture and no longer actually, directly, and exclusively used or necessary for the purpose for which they have been reserved. Agencies whose lands are covered by such inventory shall be furnished a copy thereof**.** There is nothing in the Executive Order which requires the consent of the agency in order for its landholding identified by the DAR to be included in the inventory.

The Inventory contains the list of landholdings which are to be subjected to validation.

B. Validation

The DAR shall create a Validation Committee and may seek the technical assistance of the Department of Agriculture (DA) and the DENR. The DA shall provide technical assistance to ascertain the suitability to agriculture of the GOL in accordance with applicable laws and issuances, upon request by the DAR.

The DENR shall provide technical data (e.g. location, land classification, and land use/cover) and technical

assistance to ascertain the coverability of the GOLs in terms of land classification and slope, in accordance with existing laws and issuances, upon request by the DAR. However, neither the participation nor the consent of the DA and the DENR is a requirement for the validation process under the Executive Order.

In the validation process, the DAR shall evaluate if the GOLs in the Inventory may be covered under the CARP by undertaking the following:

- Determination of the suitability of the landholding for agricultural purposes;

- Confirmation that the landholding is no longer actually, directly, and exclusively used for the purpose for which ownership was turned over to the agency;

- Confirmation that the landholding is no longer necessary for the purpose; and

- Determination that the inclusion of the GOL does not violate any limitations and conditions provided under applicable laws, rules, and issuances.

If the findings are all in the affirmative, the subject GOL is coverable under CARP as per E.O. No. 75, Series of 2020.

It must be noted that even if a GOL is not being actually, directly, and exclusively used for the original government purpose for the current period, it may still not be covered under CARP if it can be established by the

validation that the GOL is still necessary for government use. This is implied from the IRRs of the Executive Order.[33]

Thus, the DAR will not consider the GOL for CARP coverage even though it is not being actually, directly, or exclusively used by the said agency if the following are present:

- There is an existing development plan of the landholding approved by the Agency;
- The development plan has a stated period of implementation;
- The proposal for funding has already been submitted to the DBM or the appropriate funding office; and
- There is already a firm funding commitment from the grantor if the funding for the development plan is privately sourced.

C. Segregation

Segregation is the process of undertaking a survey to delineate the validated coverable portion from the non-coverable portion of the GOL by a licensed geodetic engineer accredited by the DAR.[34] The non-coverable portion will refer to those areas which are being actually, directly, and exclusively used by or are still necessary for the mandate of the government agency, office, bureau, or instrumentality. It may also refer to those areas which are not alienable or

[33] Section 5.2.1, Sub Section A(3). of Joint DAR-DOJ Administrative Order No. 07, Series of 2019.

[34]Section 5.2.1, Sub Section B of Joint DAR-DOJ Administrative Order No. 07 Series of 2019.

disposable. There will be two sets of plans which will be prepared after the segregation process. The first plan will show the technical description(s) in metes and bounds of the area which will be retained by the GOL, if any. The second plan will show the technical description(s) in metes and bounds of the area which will be covered under the CARP.[35] The outcome of the segregation process will only yield one technical plan if the entire area of the GOL is to be covered under the CARP. The technical description of the coverable portion is to be used as the basis for the issuance of the Deed of Transfer, if the concerned agency, office, bureau, or instrumentality agrees to execute one with the DAR. Otherwise, the said technical description will be used in the Notice to Proceed with Acquisition (NTPA). The Deed of Transfer and the NTPA will be discussed in the succeeding paragraphs. The technical description(s) of the coverable portion will not necessarily be the very data appearing on the certificate of land ownership award to be subsequently issued by the DAR. Such will only occur if the DAR will initially issue a collective CLOA.[36] If the coverable portion will be subdivided into individual lots, a subdivision survey will have to be prepared for the generation of the individual CLOAs.

1. *The Issuance of the Notice for the Execution of the Deed of Transfer*

Subject to restrictions under applicable laws, rules, and issuances, the DAR shall acquire the identified lands of concerned agencies and undertake the distribution thereof to

[35] *Ibid., Section 7.2.*

[36] The issuance of collective CLOAs are allowed under specific circumstances as per Section 25 of R.A. No. 6657, as amended by Section 10 of R.A. No. 9700.

qualified beneficiaries for cultivation or agricultural use.[37] This is preceding the validation made by the DAR that the GOL is no longer actually, directly, and exclusively being used or no longer necessary for the original purpose of the reservation, and the determination of the technical description of the coverable area. The DAR shall issue a "Request for Execution of the Deed to the department, bureau, office, or instrumentality which is the registered owner. If the concerned agency accedes to the request, the DAR and the owner shall sign the Deed of Transfer which becomes the basis for the transfer of the right of ownership and control over the validated and segregated GOL.[38] If the owner fails to act on the request or refuses to turn over the GOL, the acquisition process will not end at this juncture. Otherwise, the coverage of GOLs through this new Executive Order will suffer the same fate as the process under E.O. No. 407, Series of 1990. In the said earlier executive order, the acquisition activity is stalled when the owner of the GOL (i.e. the agency, bureau, office, or instrumentality) refuses to sign the Deed of Transfer which is the basis of the transfer action. Under E.O. No.75, Series of 2019, if the owner of the GOL ignores or fails to ac Execution of the Deed of Transfer," mode of acquisition from a voluntary action to a compulsory mode.

2. The Issuance of the Notice to Proceed Acquisition

In case the department, bureau, office, or instrumentality concerned refuses or fails to execute a Deed of Transfer within fifteen days from receipt of the request, the DAR shall issue a Notice to Proceed with the Acquisition

[37]Section 4 of E.O. No. 75, Series of 2019.

[38]Joint DAR-DOJ Administrative Order No. 07, Series of 2019. Sections 3.1 and 6.1

of the GOL or the NTPA.[39] The NTPA refers to the document issued by the DAR expressly notifying the concerned departments, bureaus, offices, and instrumentalities of the government that it shall proceed with the acquisition of the coverable GOLs in case of refusal or failure to execute the Deed of Transfer, in accordance with Section 1 of E.O. No. 75, Series of 2019, R.A. No. 6657, as amended, and E.O. No. 129-A, Series of 1987.[40] The NTPA commences the compulsory acquisition of GOLs by the DAR. The CARPER deadline under R.A. No. 9700 pertains only to the last day for the issuance of the NOC to owners of private agricultural lands. The deadline does not cover the compulsory acquisition of GOLs which is being undertaken for the first time under E.O. No. 75, Series of 2019. The DAR has been given additional powers and authority to ensure that coverable GOLs will be acquired and distributed. This time, the taking of GOLs for coverage under the CARP is no longer dependent on the owner giving its consent to the transfer (*i.e. E.O. No. 407 Series of 1990*) or participating and cooperating in a joint determination with the DAR (*i.e. E.O. No. 448 Series of 1991)* on whether the GOL is coverable under the CARP. Under the new Executive Order, the DAR may unilaterally cover an unused GOL under the CARP.

3. The Issuance of the Certificate of Land Ownership Award

Upon the execution of the Deed of Transferor the issuance of the NTPA, the DAR shall proceed with the process of land acquisition and distribution of the subject landholding in accordance with R.A. No. 6657 and other pertinent policies, rules, and issuances of the DAR.[41] This

[39]Ibid., Section 6.2

[40]Ibid., Section 3.5

[41]Ibid., Section 6.3

involves the process of identifying, screening, selecting, and installing qualified ARBs, and the conduct of subdivision surveys to subdivide the validated coverable GOLs into sub-lots for distribution to qualified beneficiaries.[42] This is the second instance under the process in E.O. No. 75, Series of 2019 when the DAR conducts a technical survey. The survey is conducted to identify in metes and bounds the actual area to be covered by the CLOA.

The Executive Order and its IRRs are silent on whether the title to be issued by the proper Register of Deeds as a result of the execution of the Deed of Transfer or the issuance of the NTPA will be in the name of the Republic of the Philippines or in the name of the selected beneficiaries in the form of an individual or collective CLOA. In any event, the land acquisition and distribution statutory process under CARP requires that a title in the name of the Republic of the Philippines (*RP Title or RPT*) must first be issued from which shall be derived the CLOAs.[43] Upon the issuance of the RPT, the ARBs selected by the DAR based on Section 22 of R.A. No. 6657, As Amended,[44] shall have usufructuary rights over the awarded land as soon as the DAR takes possession of such land, and such right shall not be diminished even pending the awarding of the CLOA

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[42]Section 3 and Section 7.1 of Joint DAR-DOJ Administrative Order No. 07, Series of 2019 refer to qualified beneficiaries as defined under Section 22 of R.A. No. 6657 as amended. However, additional beneficiaries may be included under E.O. No. 75 Series of 2019 by executive fiat, by supplemental implementing rules and regulations, or by statute.

[43] Section 24 of R.A No. 6657 as amended by Section 9 of R.A. No. 9700.

[44] Qualified Beneficiaries. — The lands covered by the CARP shall be distributed as much as possible to landless residents of the same barangay, or in the absence thereof, landless residents of the same municipality in the following order of priority:(a) agricultural lessees and share tenants; (b) regular farmworkers;(c) seasonal farmworkers;(d) other farmworkers;(e) actual tillers or occupants of public lands;(f) collectives or cooperatives of the above beneficiaries; and (g) others directly working on the land.

The rights and responsibilities of a beneficiary shall commence from the receipt of a duly registered CLOA and the actual physical possession of the awarded land. Such award shall be completed in not more than 180 days from the date of registration of the RPT. *Provided*, that the CLOA shall be indefeasible and imprescriptible after one year from its registration with the Office of the Registry of Deeds, subject to the conditions, limitations, and qualifications of R.A. No. 6657, as amended, the property registration decree, and other pertinent laws. The CLOA, which is being brought under the operation of the torrens system, is conferred with the same indefeasibility and security afforded to all titles under the said system, as provided by PD No. 1529, as amended by R.A. No. 6732.[45]

A Certificate of Land Ownership Award or CLOA is a document evidencing ownership of the land granted or awarded to the beneficiary by the DAR, and contains the restrictions and conditions provided in the CARL and other applicable laws.[46]

The rule on this jurisdiction, regarding public land patents and the character of the certificate of title that may be issued by virtue thereof, is that where land is granted by the government to a private individual, the corresponding patent therefor is recorded, and the certificate of title is issued to the grantee; thereafter, the land is automatically brought within the operation of the Land Registration Act, the title issued to the grantee becoming entitled to all the safeguards provided in Section 38 of the said Act. In other words, upon expiration of one year from its issuance, the

[45] Ibid.

[46] DAR v. Carriedo. G.R. No. 176549.October 10, 2018.

certificate of title shall become irrevocable and indefeasible like a certificate issued in a registration proceeding.[47]

All GOLs, which were acquired by a department, bureau, office, or instrumentality through purchase, shall be subject to payment of compensation or reimbursement by the DAR in accordance with the rules and guidelines to be formulated by the DBM, the Department of Finance, and LBP.[48]

Upon the completion of the acquisition process, the DAR shall focus on the distribution and installation of the CLOAs to qualified beneficiaries and the rendition of support services. The entire process under E.O. No. 75, Series of 2019, once completed, should result to the economic empowerment of the ARBs. However, it i indispensable that the lands acquired under this executive order must be accessible and with all the basic necessities in order to ensure the viability of the projected agricultural activities in the awarded area. The land must be arable and susceptible to agricultural activities. It must have the necessary roads and the facilities for irrigation. Aside from what is provided as support services to agrarian reform beneficiaries under Section 37 of R.A. No. 6657, as amended,[49] the beneficiaries

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[47]Estribillo v. Department of Agrarian Reform. G.R. No. 159674. June 30, 2006.

[48] Joint DAR-DOJ Administrative Order No. 07, Series of 2019. Section 18.

[49] The PARC shall ensure that support services to farmers-beneficiaries are provided, such as:(a) Land surveys and titling;(b) Liberalized terms on credit facilities and production loans;(c) Extension services by way of planting, cropping, production and post-harvest technology transfer, as well as marketing and management assistance and support to cooperatives and farmers' organizations;(d) Infrastructure such as access trails, mini-dams, public utilities, marketing and storage facilities; and(e) Research, production and use of organic fertilizers and other local substances necessary in farming and cultivation. The PARC shall formulate policies to ensure that support services to farmer-beneficiaries shall be provided at all stages of land reform.

must be provided with housing and other requirements for their support as provided under Article 194 of the New Civil Code.[50]

In a 2018 research paper of the Philippine Institute for Development Studies,[51] it cited the study of the World Bank in 2009[52] where it was observed that the lands bestowed to the DAR by government agencies (the GOLs) are generally of low productivity or poor quality. These areas, according to the study, were not yet developed and might not be easily accessible.

REMEDIAL MEASURES TO PROTEST THE RETAKING OF GOLS UNDER CARP

An action which seeks to challenge or protest the coverage of an agricultural land under the CARP involves a question of interpreting or enforcing agrarian reform laws. The challenge or protest results to an Agrarian Law Implementation (ALI) case. It is the DAR which has jurisdiction over ALI cases. The DAR is hereby vested with the primary jurisdiction to determine and adjudicate agrarian reform matters and shall have exclusive original jurisdiction over all matters involving the implementation of agrarian reform.[53]

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[50] Support comprises everything indispensable for sustenance, dwelling, clothing, medical attendance, education and transportation, in keeping with the financial capacity of the family.

[51] *Supra, note 2, at 28-29.*

[52] World Bank (WB). 2009. Land reform, Rural Development, and Poverty in the Philippines: Revisiting the Agenda. Technical Working Paper No. 49503. Washington, D.C.: The World Bank.

[53] R.A. No. 6657, As Amended. Section 50.

An ALI case is a form of administrative adjudication, thus:

1. It shall not be bound by technical rules of procedure and evidence, but shall proceed to hear and decide all cases, disputes or controversies in a most expeditious manner, employing all reasonable means to ascertain the facts of every case in accordance with justice and equity and the merits of the case. Toward this end, it shall adopt a uniform rule of procedure to achieve a just, expeditious, and inexpensive determination for every action or proceeding before it.

2. It shall have the power to summon witnesses, administer oaths, take testimony, require submission of reports, compel the production of books and documents and answers to interrogatories and issue subpoena, and subpoena duces tecum, and enforce its writs through sheriffs or other duly deputized officers. It shall likewise have the power to punish direct and indirect contempt in the same manner and subject to the same penalties as provided in the Rules of Court.

3. Responsible farmer leaders shall be allowed to represent themselves, their fellow farmers, or their organizations in any proceedings before the DAR: provided, however, that when there are two or more representatives for any individual or group, the representatives should choose only one among themselves to represent such party or group before any DAR proceedings.[54]

[54]Ibid.

A protest on the CARP coverage of a GOL under E.O. No. 75, Series of 2019 partakes the nature of an ALI case. The Secretary of Agrarian Reform exercises exclusive jurisdiction over all disputes, claims, and controversies involving the coverability of the GOLs.[55]

Decisions of the DAR Secretary may be reviewed by the Office of the President which in turn may be subjected to judicial review before the Court of Appeals and the Supreme Court. The DAR has a set of implementing rules and regulations on ALI Cases which is applicable to protest actions under E.O. No.75, Series of 2019.[56]

Under E.O. No. 75, Series of 2019, the DAR and the DOJ have been tasked to provide an expeditious procedure for the resolution of protests involving the validation and segregation of GOLs for coverage under CARP. This includes the mechanisms and procedures in the event of protests and appeals.[57] Based upon this fiat, the DAR and the DOJ included a mechanism for conciliation and mediation, the availment of which becomes a condition precedent for the commencement of an ALI case.

No protest action involving the coverability of any GOL shall be filed or instituted before the DAR Secretary unless there have been conciliation proceedings between the parties before the Dispute Resolution Committee (DRC), and that no settlement has been reached as certified by the DRC. By the mere inclusion of conciliation proceedings in the resolution of a protest action in the implementing rules and procedures of E.O. No. 75, Series of 2019, it is clear that the matter on

[55]Joint DAR-DOJ Administrative Order No. 07, Series of 2019. Section 8.

[56]Please see DAR Administrative Order No. 03, Series of 2017 otherwise known as "2017 Rules of Procedure for ALI Cas

[57] E.O. No. 75 Series of 2019. Section 5.

coverage of a GOL may be settled amicably by the DAR and the concerned agency, bureau, office, or instrumentality. The DRC is the conciliation body comprising of three members from the DOJ selected by the Secretary of Justice. Any department, agency, bureau, office, or instrumentality may file a request for conciliation before the DRC within fifteen days upon its receipt of the NTPA.

Upon receipt of the request for conciliation, the DRC shall conduct a maximum of three (3) mandatory conciliation conferences within a period of thirty (30) days to discuss the possibility of entering into an amicable settlement or compromise agreement. The representatives of the parties must be equipped with the necessary written authority to bind the principal in entering such a settlement or agreement. The DRC and the parties shall endeavor to arrive at a settlement or agreement. There are no parameters for settlement set forth under the rules. It may involve factual issues (*i.e. Whether the landholding is no longer actually, directly, and exclusively used by the owner for its mandate.*), technical issues (*i.e. Correctness of the Segregation Survey*), as well as legal issues (*i.e. The Law which created the government entity and which conferred ownership to the agricultural land is prohibited by the said law to convey the land to any entity*). In case a settlement or agreement is reached, the DRC and the authorized representatives shall sign the agreement or settlement which shall be immediately implemented by the DAR.

After the lapse of the thirty-day period, without a settlement agreement being reached, the DRC shall issue a certificate of no settlement of the parties. The period starts to run from the time the first conciliation conference is held.

A Petition before the DAR Secretary can only be filed if the Certificate of No Settlement issued by the DRC is attached

to the Petition. Otherwise, the Petition may be dismissed on the ground of prematurity of action. The Secretary of Agrarian Reform shall resolve the Petition within thirty working days. Appeals from the Decision of the DAR Secretary may be taken to the Office of the President within fifteen days from receipt of the Decision of the DAR Secretary.[58]

While an ordinary ALI case may be filed and heard by a Regional Director, it is the opinion of this author that a protest action of this nature must only be submitted to the Secretary of Agrarian Reform since the protestant is another agency or department, and it is the Secretary of the Department or the Head of the Agency who is the principal in the protest action.

It is likewise the opinion of this author that when the Decision of the Secretary of Agrarian Reform favoring coverage is elevated before the Office of the President, the DAR cannot proceed with the LAD activities on the CARP covered GOL until the Office of the President has acted on the appeal. The filing of the notice of appeal to the Office of the President stays the execution of the Decision of the Secretary of Agrarian Reform.[59]

The aforesaid provision on stay of execution does not run counter to the following provision of the CARL which is applicable only to lower courts and not to the Executive Branch, thus:

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[58]Sections 8-16 of Joint DAR-DOJ Administrative Order No. 07, Series of 2019.

[59]See Section 9 of Administrative Order (A.O.) No. 22, Series of 2011. "Prescribing Rules and Regulations Governing President of the Philippines".

"No Restraining Order or Preliminary Injunction. -Except for the Supreme Court, no court in the Philippines shall have jurisdiction to issue any restraining order or writ of preliminary injunction against the PARC, the DAR, or any of its duly authorized or designated agencies in any case, dispute or controversy arising from, necessary to, or in connection with the application, implementation, enforcement, or interpretation of this Act and other pertinent laws on agrarian reform."[60]

CARP REQUIRES A WHOLE OF GOVERNMENT APPROACH

E.O. No. 75, Series of 2019, which is the very first executive fiat on the Comprehensive Agrarian Reform under President Rodrigo Roa Duterte, was issued to address the current and persistent gaps in Agrarian Reform program implementation. Aware of the hindering effects in land acquisition and distribution as a result of the CARPER deadline which resulted to the statutory prohibition on the issuance of the NOC to cover private agricultural lands, the Chief Executive empowered the DAR to issue the Notice to Proceed with the Acquisition of unused GOLs. Every step of the process to cover the said landholdings owned by government in this Executive Order is made free of the usual legal and factual impediments in CARP. Under the Executive Order, the DAR, on its own initiative and guided by its mandate, expertise, and experience, undertakes the task of inventory, validation, and segregation. The Executive Order

[60] Section 55 of R.A. No 6657, as amended by Section 20 of R.A.No.9700.

provides the owners with the opportunity to voluntarily turn-over their unused GOLs to the DAR through the execution of the Deed of Transfer. If the said owners fail to comply, notwithstanding the fact that the coverage of the unused GOLs is a part of the commitment of the President to complete what he terms as the "Secon Reform," the President empowers the D compulsory mode of acquisition. Even after the DAR issues the NTPA, the President gives the Secretary of the Department or the Head of the Agency a final chance to cooperate with the program by conciliation proceedings before the DOJ through its Dispute Resolution Committee.

A successful and speedy outcome of each coverage activity by the DAR involving GOLs under E.O. No. 75, Series of 2019 is only secured if the concerned agencies, instrumentalities, offices, and bureaus will support the latest executive fiat on agrarian reform. One may go as far as refusing to amicably settle with the DAR on resolving the issue(s) on coverability before the conciliation body of the DOJ or challenging the correctness of the ruling of the Secretary of Agrarian Reform who, after all, is an alter ego of the President in an ALI case. However, an agency action which submits for judicial determination the correctness of the actions of the President affirming the decision of the DAR Secretary in covering the GOLs impedes the land acquisition and distribution process. It also dilutes the efficacy of the executive action to retake unused GOLs for coverage under the CARP.

The irony is that the threat of a program debacle may originate from the very implementers of this latest presidential policy directive on agrarian reform.

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From Cabins to Slash-Bins: Constitutionality of Old Search and Seizure Rules in the Age of New Technology

*Nadine Anne Escalona**

ABSTRACT

As ever renewing technologies permeate Philippine society, new ways of perpetrating crime enabled by these technologies also emerge. Human trafficking, the trade of dangerous drugs, money laundering, libel, and defamation are just some of the crimes made easier by the use of digital technology in their commission. The prosecution of these crimes, therefore, involve obtaining some form of digital evidence. While Search and Seizure has been one of the most dynamic areas of law and has undergone considerable evolution through time, the rapidity by which technology has advanced has not been kept up with by evidence legislation.

Whether digital devices may be searched beyond their physical form and the extent to which searches

* Nadine Anne Escalona is an associate at Puno and Puno Law Offices, where she practices in a variety of legal fields, such as tax, energy, and litigation. She graduated from the University of the Philippines (U.P.) College of Law. While in law school, she wo Institute for the Administration of Justice. She wrote Succession in the Internet Age: Dissecting the Ambiguities of Digital Inheritance (2016), which was published in the Philippine Law Journal.

within them may be done if allowed is still undetermined under current rules. The inclination of courts –both of the Philippines and of the United States, whose Fourth Amendment was the basis for the Philippine fundamental law on Search and Seizure –is to apply rules which were created contemplating tangible property to digital property. The practice of merely stretching the old laws, formulated at a time when digital property was not considered by legislators, resulted in inconsistent rulings on what consist valid searches and seizures in the modern world. The public right to privacy and right against unreasonable searches and seizures may be subject to violation absent clear guidelines for state agents on how and to what extent they may search and seize digital evidence.

This paper begins by discussing the current search and seizure law and the effects of the entry of digital evidence into the realm of criminal prosecution. It then demonstrates how US and Philippine courts have settled issues involving searches and seizures of digital evidence and discusses the problems that arose from the forced expansion of old rules to settle issues concerning new technology. Finally, it calls for action on the part of the legislature and the Supreme Court to modernize search and seizure rules and address the lack of reference to digital property. Reframing of certain exceptions to the search warrant requirement is also proposed as certain jurisprudential doctrines that allow doing away with a search warrant –the *plain view doctrine*, *consented search* or *waiver of right against warrantless search rule*, *search incidental to a lawful arrest doctrine*, and *exigent and emergency circumstances rule* –when applied to searches of digital property, may be too intrusive and therefore violative of the Constitutional proscription against unreasonable searches and seizures.

I. INTRODUCTION

A. The digital age and proliferation of computer-related crimes

Technological developments of the recent decades have transformed the ways people interact and communicate. Digital technologies – or the electronic tools, systems, devices, and resources that generate, store, and process data including social media, productivity and online applications, interoperable systems, and mobile devices – have brought helpful changes in the form of increased convenience and interconnectedness.[1] They have enhanced the speed by which transactions and processes are effected to an unprecedented rate. To take a grim perspective however, developments in digital technology have also led to new forms and more creative modes of perpetrating crime. The commission of data breaches, distribution of child pornography, money laundering, and drug transactions, among other unlawful activities, is made faster and easier by the use of digital devices and the internet.[2] Perpetrators of drug crimes may utilize computer databases to support drug distributions or keep records of illegal client transactions.[3] Advanced techniques of stealing computer data are enabled by new devices of which criminals may take advantage to either utilize stolen information for gain or simply to destroy or alter them as exemplified by

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[1] Couch, Leon W., "Digital and Analog Comm
Upper Saddle River, N.J.: Prentice Hall, 1997.

[2] Blackham, Anthony "Is the digital wo
laundering?"http://www.telegraph.co.uk/money/criminal-activities/is- technology-enabling-money-laundering/

[3] "The Internet and Drug Markets" Europea
Drugs and Drug Addiction http://www.emcdda.europa.eu/system/files/ publications/2155/ _FINAL.pdf

the creation of computer viruses.[4] Crimes against honor or even threats may be committed via social networking sites or other digital platforms. It may be validly claimed that every kind of crime in this modern age practically involves some form of digital evidence. With such proliferation of technology-driven crimes, state authorities have included digital devices and content among the effects searched and seized in the process of obtaining evidence in criminal prosecutions.

B. The FBI-*Apple* encryption dispute

In the prosecution of the 2015 *San Bernardino shooting*, the US District Court of Central California Magistrate ordered the smartphone company *Apple* to create a backdoor to its *iPhone* secure system and to disable its auto-erase function which deletes data after ten failed passcode attempts.[5] This was for the purpose of allowing the Federal Bureau of Investigation (FBI) to gain access in the *iPhone* and review his and his family's contacts to confirm alleged ties with ISIS, the infamous militant terrorist group.[6] *Apple* refused to comply with the order invoking privacy considerations. The government's argument is that if law enforcement may access people's homes with a warrant, it should be able to likewise

[4] *Creeper* virus of the 1970s, *I love you* virus of 2000, *Cryptolocker* of 2013, *My Doom* of 2004, and *Stormworm* of 2006, to name a few.

[5] Digital Trends Staff "Apple vs. the FBI: war over tech encryption" April https://www.digitaltrends.com/mobile/apple-encryption-court-order-news/

[6] The harrowing incident of December 2015 wherein two heavily armed individuals killed at least 14 and wounded 17 people in an act of terrorism at San Bernardino, California https://www.nytimes.com/2015/12/03/us/san-bernardino-shooting.html

smartphones.[7] The dispute went on for two years until the matter was terminated for mootness in 2017 after the US Justice Department and FBI were able to outsource the service and obtain the backdoor without *Apple*'s assistance. The dispute raised the still unanswered issue of how far state authorities may validly in digital device and with what means they may do so without compromising the right to due process, right to privacy, the right against self-incrimination, and the Constitutional protection against unreasonable searches.

C. *Microsoft* v. United States

In the 2016 legal battle between the US Government and *Microsoft*, the government's search w seizing emails in an account stored in *Microsoft*'s servers in Ireland was quashed in a split decision (four to four) by the US Court of Appeals.[8] Said Court stated that the government's citation of the Store (SCA), an old law enacted in 1986 internet technologies were not yet of existence and which of course did not contemplate the seizure of digital data, could not justify the desired seizure by the government of data stored in an American company's servers outside the US. Ultimately, the warrant was struck down on the ground of lack of extraterritorial application of the SCA. The State, as of this writing, is expected to appeal this decision and assert its right to the demanded data in pursuance of its prosecution of a New York drug-

[7] Former US President Barack Obama, in a statement given at the 2016 SXSW Conference, cited with the FBI on the matter. http://fortune.com/2016/03/12/obama-sxsw-apple-vs-fbi/

[8] *In the Matter of a Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corporation*, also known as the "Microsoft Ireland" case decided July 14, 2016. Docket No. 14-298. United States Court of Appeals for the Second Circuit.

trafficking case that started the dispute. The even split among the judges is perhaps demonstrative of the prevailing divisiveness on the issue of how far state intrusion into individuals' propert in the internet age. The four judges who opposed the prevailing decision wrote separate dissents, one of whom argued that emails stored in a phon pocket should be deemed stored in said pocket and not deemed located in a server elsewhere. The high court's disposition of the matter of situs of digital property stored in the internet will impact a wide range of technologies apart from emails, such as bitcoins, social networking and other website uploads, and other digital data.

D. Modern conflicts call for modern rules

The rising conflict between preservation of Constitutional rights vis-a-vis security interests of the state calls for the dynamism habitually demanded of the law for it to perform its role of administering justice in every era. Indeed, this requires more than just stretching old laws to fit new conditions. The goal should be to modernize the law on search and seizure such that, given changes brought about by new technology, both fundamental rights of the people and the security interests of the state are preserved.

Harmonizing legal rules with modern technology has in fact been a pursuit of legislatures worldwide. Digital technology has started to become less of a stranger to law, the latter advancing into the former's realm as laws concerning the digital domain began to be passed. Philippine Congress has taken part in the movement through several legislations enacted in the recent decades – Republic Act (RA) No. 8792 or the

Electronic Commerce Act of 2000, RA No. 10173 or the *Data Privacy Act of 2012*, and RA No. 10175 or the *Cybercrime Prevention Act of 2012*,[9] to name a few. The Supreme Court has issued AM No. 01-7-01-SC or *The Rules on Electronic Evidence of 2001* to provide for procedures for the use of electronic data messages in evidence. Despite these legislations, many issues relating to digital technology remain to be addressed by legislation.

E. Origins of Philippine Law on Search and Seizure

Search and seizure, as an aspect of both substantive and procedural due process, is an area in law that has undergone considerable evolution overtime. Philippine law on search and seizure developed almost simultaneously with its US federal law counterpart. This is understandably so as Article III Section 2 of the 1987 Philippine Constitution was derived almost verbatim from the US's Fourth Amendment.[10] As such, the Philippine Supreme Court often turns to pronouncements of the US Supreme Court in resolving search and seizure questions and such US high court pronouncements are "considered doctrinal jurisprudence."[11] Evolving judicial interpretations of the Fourth Amendment have been adopted by the Philippine Supreme Court in its interpretations of Section 2 of Article III of the 1987 Constitution and Rule 126 of the Revised Rules on Criminal Procedure covering search and

[9] Republic Act No. 10175 also known as An Act Defining Cybercrime, Providing For The Prevention, Investigation, Suppression And The Imposition Of Penalties Therefor And For Other Purposes. September 12, 2012

[10] Quoted in page 5.

[11] *People v. Marti*, G.R. No. 81561. January 18, 1991.

seizure.

Search and seizure law continuously develops consequent to judicial resolutions of new issues pertaining to the legality of state intrusions into new types of property. These developments notwithstanding, many issues on the search and seizure of digital property are still not addressed by the current rules on the subject – namely Sections 2 and 3, Article III of the 1987 Constitution, Rule 126 of the Revised Rules on Criminal Procedure, special laws, jurisprudence interpreting said laws and provisions, and police manuals on the conduct of searches and seizures.

This paper thus seeks to answer the following questions:

1. What is the current treatment of digital property in Philippine law –are they covered under the protection of Constitutional provisions and laws regulating state- conducted searches and seizures?; and

2. Do the current laws on searches and seizures, if applied to digital property, adequately meet the Constitutional requirements on what constitutes valid searches and seizures? Specifically, in view of their dissimilar nature, should existing rules, which were created contemplating tangible property, be made applicable to digital property without distinction? Or does digital property require new rules or the amendment of current rules for their search and seizure to be compliant with the fundamental law and the Constitutional guarantees against self-incrimination, unreasonable searches and seizures and violation of privacy of communication and correspondence?

This paper attempts to address these questions by, firstly, exploring current Philippine laws and rules on search and seizure. Secondly, by determining whether digital property are covered by the protection of such laws and if they are, when their search and seizure are deemed valid and reasonable.[12] The current protocol followed by Philippine police authorities with regard to handling computers or devices seized incidental to arrests or in the course of warranted searches will also be discussed. Proposals to address prevailing issues on the matter of search and seizure of digital evidence will then be offered in the final section.

F. Do Philippine search and seizure laws cover digital property?

The searchability of digital devices is, in the first instance, not itself manifest in current law. Much less established is the extent to which digital devices may be legally searched and seized. Whether a legal search would permit intrusion into the device only as a physical object or the search may be extended into its virtual contents is not provided for in law. Further, whether such internal search, if allowed, may cover only offline data or whether police authorities are permitted to look into even the owner's online information and accounts is unanswered by current Philippine legislation, jurisprudence, or executive guidelines.

While several Philippine and US Supreme Court

[12] The test of reasonableness is used in Philippine jurisdiction as the standard for legality of searches and seizures. *Pestilos, v Generoso,* G.R. No.182601, November 10, 2014; *People v Cogaed* G.R. No.200334, July 30, 2014; *Valmonte v. De Villa*, 258 Phil. 838, 843, 1989.

decisions[13] have already applied search and seizure laws on computer searches by analogizing digital devices to physical containers and virtual spaces to physical premises, thus showing that their coverage extend to digital property, this inclusion must be expressly reflected in rules on the subject instead of coming up with stretched out interpretations of old rules to accommodate new coverage. The difference in nature of virtual spaces from physical property – their ability to hold way more containers or spaces within their realm and to contain amounts of information way more tremendous than physical containers surely demands their different treatment in law. A smartphone, for instance, gives access to such amount of information that doubtfully could be found in a suspect's pockets o within his home. One's online bank records, social network accounts, and emails, all of which may be accessed via saved passwords in one mobile device contain personal information and records of exchanges or communication which may or may not be incriminating but could nevertheless be embarrassing. Another problem is that certain exceptions to the warrant requirement for searches and seizures laid down by the Supreme Court – the plain view doctrine, the search incidental to lawful arrest doctrine, consented search/waiver of right against warrantless search doctrine, and emergency and exigent circumstances doctrine –may prove problematic if applied to the search and seizure of digital property in view of its differences from the tangible objects contemplated in the

[13] Vivares v. St., G.R. No. 202666, Sept. 29, 2014; *Riley v California* (573 US 2014); *Enojas v People* G.R. No. 204894 March 10, 2014; *Rustan Ang v Court of Appeals* G.R. No. 182835, April 20, 2010; *Pacana, Jr. v. Pascual-Lopez* A.C. No. 8243, July 24, 2009

formulation of such exceptions. The author ultimately argues for the reform of rules on search and seizure as well as for reframing certain judicial doctrines on the subject to accommodate new technology.

II. Current Philippine Laws, Issuances, and Jurisprudence on Search and Seizure

A. Section 2, Article III of the 1987 Constitution and Rule 126 of the 2000 Revised Rules of Criminal Procedure

The Philippine fundamental law on the subject of searches and seizures of property is found in Section 2 of Article III ("Bill of Rights" Constitution. As previously mentioned, these provisions were copied almost verbatim from Amendment, to wit:

> United States Constitution's Fo
> *Amendment*
> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*
>
> *Section 2, Article III, 1987 Philippine Constitution*

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

Section 3 of the same Article III provides the effect of violations of Section 2. It embodies the *exclusionary rule* which provides that any evidence obtained in violation of the search warrant requirement –referred to by courts as *fruits of the poisonous tree* – shall be inadmissible in evidence. Section 3 likewise provides for the inviolability of the privacy of communication and correspondence absent a lawful court order or existence of public safety or public order situation that requires its infringement, to wit:

Section 2, Article III, 1987 Philippine Constitution:
The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise as prescribed by law.
Any evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding.

The 2000 Revised Rules of Court on Criminal

Procedure ("Rules") also contains search and seizure of property, specifically in Rule 126 Sections 1-14 thereof. Under the Rules, a search warrant is a condition precedent to a valid search and seizure, without which, the search will be held illegal and any evidence obtained pursuant to such illegal search shall be inadmissible in evidence in any proceeding.[14] Sections 1 and 3 of Rule 126 define a search warrant and the characteristics of properties which may be validly seized under it:

> *Section 1. Search warrant defined. –A search warrant is an order in writing issued in the name of the People of the Philippines, signed by a judge and directed to a peace officer, commanding him to search for personal property described therein and bring it before the court.*
>
> *Section 3. Personal property to be seized. –A search warrant may be issued for the search and seizure of personal property:*
>
> *(a) Subject of the offense;*
> *(b) Stolen or embezzled and other proceeds, or fruits of the offense; or*
> *(c) Used or intended to be used as the means of committing an offense.*

Pursuant to the Constitutional requirement under Section 2 of the Bill of Rights, Section 4 of the Rules also provide that a search warrant, to be valid, must be issued

[14] Stonehill v. Diokno, 20 SCRA 383 (1967); People v. Valdez, 341 SCRA 25 (2000); People v Cogaed G.R. No. 200334 (2014); People v Compacion G.R. No. 124442 (2001)

based on probable cause in connection with one specific offence to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce. It must particularly describe the place to be searched and the things to be seized which may be anywhere in the Philippines. In Section 5, the Supreme Court further required that the issuance of a search warrant must be based on a *personal* examination conducted by the judge of the complainant and his witnesses relating to facts personally known to them. Such personal examination must be in the form of searching questions and answers and must be in writing and under oa sworn statements and affidavits must be attached to the record of the examination. Under Section 6, once the judge is satisfied based on such examination that there is probable cause to believe that facts alleged in the application exist, he shall issue the search warrant in the form prescribed by the Rules and police authorities may then effect a valid search pursuant to it.

The Rules as written clearly contemplate searches of physical spaces and seizure of tangible property. Section 7 of the Rule allows the breaking of doors or windows to effect admission into premises sought to be searched if the owner refuses the officer admittance to it, while Section 8 requires the presence of at least two witnesses to effect searches of houses and rooms, to wit:

> *Section 7. Right to break door or window to effect search. – The officer, if refused admittance to the place of directed search after giving notice of his purpose and authority, may break open any outer or inner door or window of a house or any part of a house or anything therein to execute the*

warrant to liberate himself or any person lawfully aiding him when unlawfully detained therein.

Section 8. Search of house, room, or premises to be made in presence of two witnesses. –No search of a house, room, or any other premises shall be made except in the presence of the lawful occupant thereof or any member of his family or in the absence of the latter, two witnesses of sufficient age and discretion residing in the same locality.

Whether by analogy these provisions can apply to searches of computers and seizure of digital property – such as if the refusal of admittance into an email account allegedly used for drug trade warrants its hacking or if state authorities may require smartphone manufacturers to create backdoors into their security systems – as virtual equivalents of "breaking personal computers or devices can be likened to "rooms or "premises" such that their se require the presence of two witnesses – remain unanswered by Philippine law and jurisprudence. Although such situation is quite likely to arise in digital evidence procurement, no instance of its conduct has yet reached the Philippine Supreme Court that allowed the high court to settle the question of such applicability. Clear legal provisions on the matter can advance the bringing of such dispute before the courts.

B. Exceptions to the proscription against warrantless searches and seizures

Despite the above rules, there are, however, exceptions laid down under the law and jurisprudence

which allow for valid searches and seizures even absent the issuance of a judicial warrant as well as for the admissibility of evidence obtained pursuant to such warrantless search. Enumerated below are some of such exceptions which the author finds pertinent to searches of digital devices.

1. Search Incident to Lawful Arrest Exception

One of these exceptions is contained in Rule 126, Section 13 of the Rules which states:

> *Section 13. Search incident to lawful arrest. – A person lawfully arrested may be searched for dangerous weapons or anything which may have been used or constitute proof in the commission of an offense without a search warrant.*

What this signifies is that in the course of a lawful arrest, police authorities may, even absent a search warrant, conduct a full search of the person arrested as well as a limited search of his immediate surrounding area for dangerous weapons or evidence which may be easily destroyed by him if not immediately seized.[15] This was first used in the US Supreme Court decision *Chimel v California* wherein it was held that when an arrest is made, it is reasonable for an arresting officer to search

[15] People v. Aruta, G.R. No. 120915 April 3, 1998, People v. Racho, G.R. No. 186529, August 3, 2010, People v. Padilla, 269 SCRA 402 (1997), People v. Binad Chua, G.R. Nos. 136066-67, February 4, 2003; Posadas v. CA, 188 SCRA 288 (1990); Malacat v. CA, 283 SCRA 159 (1997); People v. Molina, G.R. No. 133917, February 19, 2001; People v. Racho, G.R. No. 186529, August 3, 2010; United

States v. Robinson, 414 U.S. 218, 235 (1973); Chimel v. California, 395 U.S. 752, 762-63 (1969).

the arrestee for dangerous weapons which he may use to resist the officer or effect his escape.[16] In addition, it was held to be entirely reasonable for arresting officers to search for and seize any evidence from the ar person to prevent its concealment or destruction. There is thus ample justification for a search of the arrestee's person and the "area within his immediate control," phrase being construed to mean the area within which the arrestee might gain possession of a weapon or destructible evidence. In the 2014 US case of *Riley v California*, the petitioner who was stopped for a traffic violation was subsequently arrested for gang violence involvement and weapons charges due to messages, photos, contacts, and other information obtained from his mobile phone which was seized without a warrant during his arrest.[17] When raised to the US high court, however, pieces of evidence seized for the latter offence were held inadmissible as the court saw no justification similar to *Chimel* present in the circumstances of the case so as to warrant the doctrine's ap Philippines, the warrantless search and seizure of an arrestee's possessions only if the person searched had been validly arrested either under a warrant or under Section 5 of Rule 113 permitting warrantless arrests in certain instances enumerated therein.[18]

[16] Chimel v. California, 395 U.S. 752, 762-63 (1969).

[17] Riley v California, 573 US 2014 (2014)

[18] Rule 113 Section 5. Arrest without warrant; when lawful. — A peace officer or a private person may, without a warrant, arrest a person: (a) When, in his presence, the person to be arrested has committed, is actually committing, or is attempting to commit an offense; (b) When an offense has just been committed, and he has probable cause to believe based on personal knowledge of facts or circumstances that the person to be arrested has committed it; and (c) When the person to be arrested is a prisoner who has escaped from a penal establishment or place where he is serving final judgment or is

Other exceptions to the general rule of requiring a judicial warrant for valid searches – the plain view doctrine, search of government computers, consented search/waiver of right against warrantless search doctrine, emergency and exigent circumstances doctrine, stop and frisk rule, tipped information doctrine, and inventory searches –were added by judicial decisions of the Supreme Court in various cases concerning warrantless searches and seizures.

2. The Plain View Exception

The Plain View Doctrine was first explained in the US Supreme Court decision in *Arizona v. Hicks*.[19] It allows for the warrantless seizure of evidence that are in the police authorities' plain views in the course of their conduct of their official duties. In *Arizona*, the US Supreme Court determined that if objects are in plain view, they do not involve any expectation of privacy that would prevent their viewing and seizure. Its invocation, however, had been rejected as the Court then required probable cause for police to seize items in plain view. In the subsequent case of *Horton v. California*, the US Supreme Court adopted a more lenient stance.[20] It applied the doctrine in admitting weapons found in the course of the search for proceeds of a robbery although such were not included in the items listed in the search warrant. The *Horton* decision likewise laid down the three-pronged test in deciding whether the plain view doctrine applies in a given discovery –i.e., (1) the officer must be lawfully present at

temporarily confined while his case is pending, or has escaped while being transferred from one confinement to another.

[19] Arizona v Hicks, 480 U.S. 321 (1987).

[20] Horton v California, 496 U.S. 128 (1990).

the place where the evidence can be plainly viewed, (2) the officer has a lawful right of access to the object, and (3) the incriminating character of the object is immediately apparent. The court in this case eliminated the requirement laid down by previous jurisprudence that the discovery of the evidence in plain view be *inadvertent*.

This doctrine, which provided an exception to the Fourth Amendment, was adopted by the Philippine Supreme Court in the adjudication of several cases concerning warrantless searches and seizures.[21] In *People v Aruta*, the Philippine Supreme Court laid down the following requisites for a valid warrantless plain view search and seizure: (a) a prior valid intrusion based on the valid warrantless arrest in which the police are legally present in the pursuit of their official duties; (b) the evidence was inadvertently discovered by the police who had the right to be where they are; (c) the evidence must be immediately apparent, and (d) "plain view justified mere seizure of evidence without further search.[22]

3. Search of Government Computers Exception

In the 2011 case of *Pollo v. Chair Constantino-David, et al. and the Civil Service Commission (CSC)*, it was held that an employee has no reasonable expectation of privacy in files stored in his government-issued computer used in the course of his employment.[23] In the said case, files obtained from the defendant's office computer were

[21] People v. Musa, 217 SCRA 597 (1993), People v. Doria, 301 SCRA 668 (1999), People v. Bolasa, 321 SCRA 459 (1999), People v. Evaristo, 216 SCRA 431 (1992), and People v. Valdez, 341 SCRA 24 (2000) to name a few.

[22] People v Aruta (1998)

[23] Pollo v Chair Constantino-David, et al and the Civil Service Commission (CSC), G.R. No. 181881, October 18, 2011

used by the government employer, CSC, as evidence of misconduct. These were held admissible in evidence in court. The CSC's office computer unequivocally declared that a CSC employee cannot assert any privacy right to a computer assigned to him. The Supreme Court cited relevant US Supreme Court jurisprudence –*O'Connor* v. *Ortega* and *US v. Simons* –as authorities for the view that government agencies, in their capacity as employers rather than law enforcers, may validly conduct searches and seizures in the governmental workplace even without meeting the probable cause or warrant requirements.[24] In *Simons*, it was further declared that a federal policy which allows the agency to monitor use of its computer resources forecloses any inference of reasonable expectation of privacy on the part of its employees. The US high court further held that a probable cause requirement for searches of the type such as the one in issue in the case would impose intolerable burdens on government employers as the delay in correcting the employee misconduct may lead to "tangible and often irreparable damage to the agency's work, and ultimately, to the public interest."[25]

With the foregoing decisions as basis, it seems that jurisprudence allows warrantless searches by government employers of government-issued computers, even of the employee's personal files therein, in view of legitimate regulations issued by agencies with regard to their computer resources and as long as the search is "justified at its inception by reasonable grounds to suspect that the search will turn up evidence that the

[24] O'Connor v Ortega, 480 U.S. 107 F. Supp. 2d 1987); US 703 (2000)

[25] *Id.* at 23

employee is guilty of work-related misconduct."[26] Such regulations, depending on their provisions, substantially reduce reasonable expectations of privacy with regard to data stored in government-issued computers. However, these pronouncements should be considered in light of provisions of the Data Privacy Act when it comes to "personal information" of individual employees.[27] The Act protects personal information of individuals in both the private and government sector. Just because a government agency's computer-use protocol allows for free access to third persons when it comes to government-issued computers, any processing of personal information should still be under the conditions specified under Section 12 and Section 13 of said Act as well as compliant with Section 11 thereof providing for the general data privacy principles in processing any legally seized personal data.[28] Likewise, O'Connor cited US case law in *Pollo,* teaches that an employee's expectation of privacy must be assessed in the context of the employment relation. While it is the nature of some government agencies to be so open that others – fellow employees, supervisors, and even the general public – have frequent access to an employee's office, such that no expectation of privacy is reasonable, it should remain a judicial consideration that "the constitut unreasonable searches does not disappear merely because the government has the right to make reasonable

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[26] *Id.*

[27] Section 3(g), Data Privacy Act of 2012 "
to any information whether recorded in a material form or not, from which the identity of an individual is apparent or can be reasonably and directly ascertained by the entity holding the information, or when put together with other information would directly and certainly identify an individual."

[28] Discussed more fully below under Subse
Privacy Act of 2012" of the article.

intrusions in its capacity as employer."[29]

4. Consented Search Exception/ Waiver of right against warrantless search doctrine

In the 2008 case of *Anonymous Letter-Complaint against Atty. Miguel Morales, Clerk of Court of MTC Manila,* Atty. Miguel Morales, as Clerk of Court of MTC Manila, was accused of "moonlighting" or consuming filing and attending to personal cases using court office supplies, equipment, and utilities. The Deputy Court Administrator conducted a spot investigation with four NBI agents, a crime photographer, and a support staff, and accessed Morales's personal computer. The investigating team then printed two documents stored in the computer's hard drive which tended to prove the accusations against the Clerk of Court, i.e., a Petition for Relief from Judgment and a Pre-trial Brief for cases not relating to his office as clerk of said MTC branch. Morales's computer was then itself seized and taken into custody by the OCA. Contesting the legality of the search and seizure of his office computer and digital files, Morales filed a letter complaint addressed to then Chief Justice Hilario Davide, Jr. against the Deputy Court Administrator and his companions for alleged conspiracy and culpable violation of his rights to privacy and against unreasonable searches and seizures under Sections 1, 2, and 3 of the Bill of Rights, Article III of the Constitution.[30]

The main defence of the searching officials against this allegation was that Morales allegedly consented to the search, thereby rendering the warrant requirement

[29] Justice Scalia's Concurring Opinion in O'C

[30] Article III, Section 1. No person shall be deprived of life, liberty, or property without due process of law.

dispensed with. The matter was elevated to the Supreme Court on the issue of the legality of the spot investigation which is decisive of whether the items obtained were admissible in evidence in the administrative proceeding against Morales. The Supreme Court, evaluating the search in view of provisions of Section 2, Article III of the Constitution and applying the exclusionary rule enshrined under Section 3 (2), Article III of the Constitution, held that the properties obtained under the spot investigation were inadmissible in evidence.

While recognizing that a consented search is one of the exceptions to the judicial warrant requirement, the Court held that such consent must and convincing evidence." To consti or waiver of the Constitutional guarantee against obtrusive searches, the Court held that the following must be shown: (1) that the right exists, (2) that the person involved had knowledge, actual or constructive, of the existence of such right, and (3) that said person had an actual intention to relinquish such right. It was held that court authorities who conducted the search were not able to prove the existence of these requisites and that mere inference of Morales's consent court administ that search did not suffice. With respect to personal information, the Data Privacy Act additionally provides that it mus specific, informed indication of will, whereby the data subject agrees to the collection and processing of personal information about him or her and shall be evidenced by written, electronic or recorded means. It may also be given on behalf of the data subject by an agent specifically authorized by the data subject to do so[31]. "

[31] Section 3(a), Data Privacy Act of 2012

While the consent exception was not applied in this case, the Court laid down the requisites in this jurisdiction for a valid consented warrantless search.[32] The consent exception doctrine was thereafter subsequently applied in several other cases.[33] Agents of the state may thus search a place or object without a warrant or even probable cause if a person with authority has voluntarily consented to the search. The authority to consent may be actual or apparent and the consent may be express or implied.[34] In *Garcia v Locsin*, the Philippine Supreme Court emphasized that mere peaceful submission to state agents' demand to search does not c search.[35] In US cases though, the only test as to the presence of consent and validity of a consented warrantless search is the "totality burden of proof being on the government to prove that consent was given voluntarily.[36]

5. Emergency and Exigent Circumstances Exception

The emergency and exigent circumstances exception to the proscription against warrantless searches and seizures, another derivative from US case law, applies when any one of the following circumstances is present: (1) evidence is in imminent danger of destruction, (2) a threat puts either the police or public in danger, (3) the police are engaged in hot pursuit of a

[32] Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973)

[33] People v. Malasigui, 63 Phil. 221 (1936); Alvarez v. CFI, 64 Phil. 48 (1937); People vs. Cuizon, 265 SCRA 325

[34] United States v. Buckner, 473 F.3d 551, 555 (4th Cir. 2007); United States v. Milian-Rodriguez, 759 F.2d 1558, 1563-64 (11th Cir. 1985)

[35] Garcia v Locsin, 65 Phil. 689 (1938)

[36] United States v. Matlock, 415 U.S. 164, 177 (1974)

suspect, or (4) the suspect is likely to flee before the officer can secure a search warrant.[37] In *US v Plavcak*, state agents were held to have appropriately seized a computer without a warrant when suspects ran from the house carrying the computer after being caught burning documentary evidence therein.[38] While there has still been no particular application of this doctrine by the Philippine Supreme Court, in the 2008 case of *People v Aruta*, the emergency and exigent circumstances doctrine was enumerated as one of the exceptions to the search warrant requirement. It is thus recognised and may be validly invoked by state authorities in the Philippines to justify a warrantless search.[39]

6. The Private Search Exception

In *People v. Marti*, the Philippine Supreme Court held that the prohibition under Section 2 and 3 Article III of the 1987 Constitution against warrantless searches and violations of the privacy of communication or correspondence applies only to state agents or authorities and not to private individuals.[40] This is so because the Bill of Rights was framed to provide restrictions to actions of the government but not of private individuals. Thus, a search conducted by a private person, even in the absence of a judicial warrant to authorize it –as long as it is shown that it was conducted under no command or interference from the government –is valid. The evidence obtained from such private search

[37] Georgia v. Randolph, 547 U.S. 103, 117 n.6 (2006); Brigham City v.Stuart, 547 U.S. 398, 403-06 (2006); Illinois v. McArthur, 531 U.S. 326, 331-33 (2001); Cupp v. Murphy, 412 U.S. 291, 294-96 (1973)

[38] US v Plavcak 411 F.3d 655, 664-65 (6th Cir. 2005)

[39] People v. Aruta, G.R. No. 120915 (1998)

[40] People v. Marti, 193 SCRA 57 (1991)

is thus admissible in evidence in court proceedings. In this particular case of *People v Marti*, Marti and his common law wife went to Manila Packing and Export Forwarders intending to ship four (4) wrapped packages to Zurich, Switzerland, which they claimed contained only books, cigars, and gloves. The company personnel, following their standard operating procedure, opened the packages for final inspection before they were delivered to the Bureau of Customs. A peculiar odor emitted from the packages and the gloves they contained were found filled with dried leaves. The forwarding company proprietor wrote a letter to the NBI and requested for a laboratory examination of the said leaves. They were found to be marijuana and were used as evidence to indict the common law spouses of violation of RA No. 6425 or the Dangerous Drugs Act. The spouses questioned the legality of the search and seizure of the evidence used against them but the Court upheld their admissibility, holding that they were products of a private search –to which the Constitutional restrictions under the Bill of Rights did not apply.

A. *Current protocol followed by police authorities in effecting searches and seizures*

The Revised Philippine National Police (PNP) Operational Procedures of 2013 on the conduct of searches and seizures consist of reiterations of the Constitutional provisions and Rules of Court sections on the procedure in applying for search warrants. Like the Rules of Court on search and seizure, the guidelines were likewise formulated contemplating searches and seizures of tangible property. There is again yet any reference to searches of computers or seizure of digital property. For instance, conduct of searches by virtue of a warrant are limited by the following proscriptions in the manual:

a. Houses, rooms, or other premises shall not be searched except in the presence of the lawful occupant thereof or any member of his family or, in the absence of the latter, in the presence of two (2) witnesses of sufficient age and discretion residing in the same locality.

b. Lawful personal properties, papers, and other valuables not specifically indicated or particularly described in the search warrant shall not be taken.[41]

Pursuant to the Rules of Court, the manual also expressly allows for the breaking open of doors, windows, or any part of the house searched to allow the police officer who was refused admittance after giving notice of his purpose and authority, to enter into the premises and implement a validly issued search warrant.[42]

Exceptions to the proscription against warrantless searches and seizures enumerated above are also embraced in police standards for valid state intrusions into property as reflected in the manual.[43] Specifically, the manual recognizes the following exceptions: Search Incidental to Lawful Arrests, Searches in Plain View, Consented Searches, Emergency and Exigent Circumstances Exception, Stop and Frisk Rule, Searches of

[41] Page 39, Section 14.6 of the Revised Philippine National Police (PNP) Manual of Procedures.

[42] Page 34, Section 13.4 of the PNP Manual

[43] Page 40 Section 14.8 of the PNP Manual

Moving Vehicle, and Tipped Information Searches.[44]

Whether these guidelines are useful in computer searches and digital property seizures is doubtful due to the lack of reference to such type of property in the manual. Similar to Rule 126 of the Rules of Court on the matter, the manual likewise contemplates the search and seizure of tangible property in its provisions. An application by analogy may again be resorted to but a clear laying down of rules pertaining to digital evidence would be recommended.

C. Special Laws Pertinent to Digital Search and Seizure

1. *Rule on Search and Seizure in Civil Actions for Infringement of Intellectual Property*

Administrative Matter No. 02-1-06-SC, issued by the Supreme Court on January 30, 2002, lays down the Rule on Search and Seizure in Civil Actions for Infringement of Intellectual Property (IP) which governs seizure of *documents* and *articles* in civil actions pertaining to violations of RA No. 8293 or the Intellectual Property Code of the Philippines, Article 50 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), and related laws and international conventions. While these rules govern search and seizure in civil actions and not criminal proceedings, it is a move toward addressing the lack of reference to computer searches in the current laws and rules enacted by the Supreme Court

[44] The Philippine Supreme Court has ruled in several cases that tipped information is sufficient probable cause to effect a warrantless search. (People v. Valdez, 363 Phil. 481 (1999); People v. Montilla, 349 Phil. 640 (1998); People v. Ayangao, 471 Phil. 379, 388 (2004)); Moving Vehicle Rule; Stop and Frisk Rule

and Congress. Section 13 of the issuance also requires the presence of the property owner, his representative, person-in-charge of the premises, or, in their absence, at least two persons of sufficient age and discretion residing in the same locality during the search.[45] However, the issuance still only contemplates the taking of the physical computer or device and of hard copies of documents tending to prove the violation of above laws. It doesn't make reference to the conduct of searching for digital property within the virtual space of a computer or the ways and means by which "entr-y" into protected domains or those which require internet connections may be effected. Section 15 of the issuance provides for the use of reasonable physical force to gain entry into the premises where the search warrant is to be enforced, indicating that the search contemplated will still be of the physical premises of a house, room, or building, rather than virtual spaces.[46]

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[45] Section 13. Search to be conducted in the presence of defendant, his representative, person in charge of the premises or witnesses. - The premises may not be searched except in the presence of the alleged infringing defendant, expected adverse party or his representative or the person in charge or in control of the premises or residing or working m therein who shall be given the opportunity to read the writ before its enforcement and seek its interpretation from the Commissioner. In the absence of the latter, two persons of sufficient age and discretion residing in the same locality shall be allowed to witness the search or in the absence of the latter, two persons of sufficient age and discretion residing in the nearest locality.

[46] Section 15. Use of reasonable force to effect writ. - The sheriff, if refused admittance to the premises after giving notice of his purpose and authority or in absence of the alleged infringing defendant or expected adverse party, his agent or representative, or person in charge or in control of the premises or residing or working therein who is of sufficient age and discretion, may use reasonable force to gain entry to the premises or any part of the building or anything therein, to enforce the writ or to liberate himself or any person lawfully aiding him when unlawfully detained therein.

Section 16 of the issuance impliedly contemplates going through the internal files within a computer device and the entry into and search within its digital domain as it allows the copying of contents of computer disks or storage devices as well as the printing out such contents, to wit:

> *Section 16. Seizure of computer disks, other storage devices. - The seizure of a computer disk or any storage device may be executed in any of the following manner:*
> *(a) by the physical taking thereof;*
> *(b) by copying its contents in a suitable device or disk provided by the applicant; or*
> *(c) by printing out the Contents of the disk or device with a the use of a printer.*
>
> *When the computer disks or storage devices cannot be readily removed from the computer to which they are fitted, the sheriff may take the subject computer from the custody of the alleged infringing defendant, expected adverse party or person in charge or in control of the premises or residing or working therein.*

2. The Anti-Wiretapping Law (RA 4200)

Another enactment that touches on the procurement of intangible evidence and the search through or within digital devices is Republic Act No. 4200 or *An Act to Prohibit and Penalize Wire-Tapping and Other Related Violations of the Privacy of Communication, and For Other Purposes*, otherwise known as *The Anti-Wire Tapping Act*. The law prohibits the tapping or secret overhearing, intercepting, or recording of any private

communication or spoken word without the authority of all parties to such communication. The law, specifically Section 1 thereof, enumerates the devices by which its violation can be perpetrated – namely, dictaphones, dictagraphs, walkie- talkies, tape recorders, and similar devices. In *Gaanan v IAC*, it was held that the use of a telephone extension in overhearing private communication without the particip constitute a violation of the law as such technology is not one of the devices contemplated in the enumeration under its Section 1.[47] The law successfully addresses the issue of legality of obtaining evidence via intercepting or recording private communications, which are common and convenient methods for law enforcement to obtain evidence against suspected criminals. The law touches upon the use of evidence in the form of digital recordings by prohibiting the unconsented use of digital devices in their obtainment. In a way, it adds to current search and seizure rules on the matter of using digital recordings in evidence by providing the requirement of prior consent to the recording to render such digital evidence admissible. Neither private individuals nor state authorities may thus record or intercept private communications using devices contemplated under the Act without consent or legal authority therefor.

3. The Rules on Electronic Evidence of 2001

The Rules on Electronic Evidence (otherwise referred to as "TREE") or A.M. No. 01-7-01-SC was promulgated on August 1, 2001 to allow the offer documents" and "electronic data me – as they

[47] Gaanan v IAC G.R. No. L-69809 (1986)

defined in TREE – as evidence in court proceedings.[48] It initially covered only civil, quasi-judicial, and administrative cases, until its expansion via A.M. No. 01-7-01-SC issued on October 14, 2002 which included criminal proceedings within its scope. In summary, it provides that when electronic data messages or electronic documents are offered as documentary evidence, they are required to be authenticated under Rule 5, Section 2 of TREE.[49] Such authenticated electronic data messages or documents then become "functional written documents for evidentiary purposes and are thus considered to have the same legal function as paper-based documents.[50] Such "functional equi

[48] Rule 2 Section 1 (g) "Electronic data mess generated, sent, received or stored by electronic, optical or similar means.; Rule 2 Section 1 (h) "Electroni information or the representation of information, data, figures, symbols or other modes of written expression, described or however represented, by which a right is established or an obligation extinguished, or by which a fact may be proved and affirmed, which is received, recorded, transmitted, stored processed, retrieved or produced electronically. It includes digitally signed documents and any print-out or output, readable by sight or other means, which accurately reflects the electronic data message or electronic document. For purposes of these Rules, the ter document" may be used interchangeably wi message".

[49] Rule 5 Section 2. Manner of authentication. – Before any private electronic document offered as authentic is received in evidence, its authenticity must be proved by any of the following means:

(a) by evidence that it had been digitally signed by the person purported to have signed the same;

(b) by evidence that other appropriate security procedures or devices as may be authorized by the Supreme Court or by law for authentication of electronic documents were applied to the document; or

(c) by other evidence showing its integrity and reliability to the satisfaction of the judge.

[50] Section 7, Electronic Commerce Act; MCC Industrial Sales Corp. v. Ssangyong Corp., G.R. No. 170633, October 17, 2007

approach enables such digital messages to enjoy the same level of legal recognition as corresponding paper documents performing the same function.[51] Rule 9 of TREE provides for the method of proving said electronic evidence, i.e., via affidavit evidence and cross-examination of deponent.[52]

4. Cybercrime Prevention Act of 2012

Touching particularly on the procurement of evidence from computer devices and allowing precisely for search and seizure of digital property is R.A. No. 10175 or *An Act Defining Cybercrime, Providing For The Prevention, Investigation, Suppression, and the Imposition of Penalties Therefor and for Other Purposes* otherwise known as the *Cybercrime Prevention Act of 2012*. R. A. No. 10175 allows for both searches and seizures of computer data under the strength of a search warrant and the warrantless collection of traffic data. Section 12 of the law provides for the real time collection of traffic data which allows state authorities to collect or record such data by electronic means even without a search warrant for as long as their conduct is supported by "due course"[53].

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[51] *Id.*

[52] Rule 9 Method of Proof: Section 1. Affidavit evidence. –All matters relating to the admissibility and evidentiary weight of an electronic document may be established by an affidavit stating facts of direct personal knowledge of the affiant or based on authentic records. The affidavit must affirmatively show the competence of the affiant to testify on the matters contained therein.

Section 2. Cross-examination of deponent. –The affiant shall be made to affirm the contents of the affidavit in open court and may be cross-examined as a matter of right by the adverse party.

[53] Section 13 also provides for the preservation of computer data for six (6) months from the date of the transaction it pertains to as well as within six (6) months from the date of receipt of an order from law enforcement authorities requiring its preservation, extendible once by state authorities for another six (6) months. Such required

Traffic data, as herein referred to, comprises only the message's origin, destination, rou
duration, or type of underlying service, but not its content or the senders or receiidentities. This particular provision was struck down as unconstitutional in the 2014 case of *Disini v Secretary of Justice* for being "too sweeping and lac[54] The Supreme Court was particularly averse to the phrase "due which has no precedent in Philippine law. It consequently exposes citizens to arbitrary leakage of their identity and other personal information and/or extorti
elements in (government) agencies" Section, need not even obtain a search warrant for collecting such real time date.[55] All other data to be used as evidence for prosecutions under R.A. No. 10175 require a search warrant for their collection or seizure, following the Constitutional and Rules of Court procedure on the procurement of a search warrant. Section 14 further allows state authorities, after the procurement of a search warrant, to require service providers, or anyone in possession of data to be used in evidence, to disclose such information within seventy-two (72) hours from receipt of a court order in relation to a valid complaint duly docketed and assigned for investigation.[56]

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preservation is in view of using such computer data as evidence in court proceedings.

[54] Disini v Secretary of Justice, G.R. No. 203335 (2014)

[55] *Id.*

[56] Section 14. Disclosure of Computer Data. — Law enforcement authorities, upon securing a court warrant, shall issue an order requiring any person or service provider to disclose or submit subscriber's information, traffic data or possession or control within seventy-two (72) hours from receipt of the order in relation to a valid complaint officially docketed and assigned for investigation and the disclosure is necessary and relevant for the purpose of investigation.

Section 15 of RA No. 10175 enumerates the powers and duties of law enforcement authorities pertaining to the search and seizure of computer data upon the issuance of a valid search warrant under Section 14, to wit:

> *(a) To secure a computer system or a computer data storage medium;*
> *(b) To make and retain a copy of those computer data secured;*
> *(c) To maintain the integrity of the relevant stored computer data;*
> *(d) To conduct forensic analysis or examination of the computer data storage medium; and*

Section 16. Custody of Computer Data. — All computer data, including content and traffic data, examined under a proper warrant shall, within forty-eight (48) hours after the expiration of the period fixed therein, be deposited with the court in a sealed package, and shall be accompanied by an affidavit of the law enforcement authority executing it stating the dates and times covered by the examination, and the law enforcement authority who may access the deposit, among other relevant data. The law enforcement authority shall also certify that no duplicates or copies of the whole or any part thereof have been made, or if made, that all such duplicates or copies are included in the package deposited with the court. The package so deposited shall not be opened, or the recordings replayed, or used in evidence, or then contents revealed, except upon order of the court, which shall not be granted except upon motion, with due notice and opportunity to be heard to the person or persons whose conversation or communications have been recorded.

Section 17. Destruction of Computer Data. — Upon expiration of the periods as provided in Sections 13 and 15, service providers and law enforcement authorities, as the case may be, shall immediately and completely destroy the computer data subject of a preservation and examination.

Section 18. Exclusionary Rule. — Any evidence procured without a valid warrant or beyond the authority of the same shall be inadmissible for any proceeding before any court or tribunal.

(e) To render inaccessible or remove those computer data in the accessed computer or computer and communications network.

The same Section even allows state authorities to request for a thirty (30)-day maximum extension of time to complete the examination of the computer data storage medium. This Section, in particular Subsection (d) thereof which allows state authorities to conduct a forensic analysis or examination of a computer subject of an investigation, indicates that search and seizure within the internal domain or the virtual space of a computer is indeed within the contemplation of current law.

5. The Data Privacy Act of 2012 (RA No. 10173)

A piece of legislation that substantially protects people's privacy rights in their personal information – in digital form or otherwise – is the Data Privacy Act of 2012.[57] Specifically, it protects individuals' *personal information* in information and communications systems in the government and the private sector, creating for such purpose the National Privacy Commission (NPC).

"Personal information" protected defined in Section 3(g) thereof as that identity of an individual is apparent or can be reasonably and directly ascertained by the entity holding the information, or when put together with other information would directly and certainly identify an individual."[58] To the extent that evidence desired to be obtained by law enforcement pertains to an indiv therefore, this law protects that

[57] Retrievable at https://privacy.gov.ph/data-privacy-act/

[58] Section 3, Data Privacy Act of 2012

data by limiting the allowable processing of his/her personal information to conditions specified under Section 12 of the Act, to wit:

> *SEC. 12. Criteria for Lawful Processing of Personal Information. – The processing of personal information shall be permitted only if not otherwise prohibited by law, and when at least one of the following conditions exists:*
> *(a) The data subject has given his or her consent;*
> *(b) The processing of personal information is necessary and is related to the fulfilment of a contract with the data subject or in order to take steps at the request of the data subject prior to entering into a contract;*
> *(c) The processing is necessary for compliance with a legal obligation to which the personal information controller is subject;*
> *(d) The processing is necessary to protect vitally important interests of the data subject, including life and health;*
> *(e) The processing is necessary in order to respond to national emergency, to comply with the requirements of public order and safety, or to fulfill functions of public authority which necessarily includes the processing of personal data for the fulfilment of its mandate; or*
> *(f) The processing is necessary for the purposes of the legitimate interests pursued by the personal information controller or by a third party or parties to whom the data is disclosed, except where such interests are overridden by fundamental rights and freedoms of the data subject which require*

protection under the Philippine Constitution.

Section 13, on the other hand, provides the conditions for the processing of sensitive personal information and privileged information, to wit:

> *SEC. 13. Sensitive Personal Information and Privileged Information. – The processing of sensitive personal information and privileged information shall be prohibited, except in the following cases:*
> *(a) The data subject has given his or her consent, specific to the purpose prior to the processing, or in the case of privileged information, all parties to the exchange have given their consent prior to processing;*
> *(b) The processing of the same is provided for by existing laws and regulations: Provided, That such regulatory enactments guarantee the protection of the sensitive personal information and the privileged information: Provided, further, That the consent of the data subjects are not required by law or regulation permitting the processing of the sensitive personal information or the privileged information;*
> *(c) The processing is necessary to protect the life and health of the data subject or another person, and the data subject is not legally or physically able to express his or her consent prior to the processing;*
> *(d) The processing is necessary to achieve the lawful and noncommercial objectives of public organizations and their associations: Provided, That such processing is only confined and related to the bona fide*

members of these organizations or their associations: Provided, further, That the sensitive personal information are not transferred to third parties: Provided, finally, That consent of the data subject was obtained prior to processing;

(e) The processing is necessary for purposes of medical treatment, is carried out by a medical practitioner or a medical treatment institution, and an adequate level of protection of personal information is ensured; or

(f) The processing concerns such personal information as is necessary for the protection of lawful rights and interests of natural or legal persons in court proceedings, or the establishment, exercise or defense of legal claims, or when provided to government or public authority.

"Consent", as referred to in Section 12 above, is specifically defined in Section 3 (a) of said law as "any freely given, indication of will, whereby the data subject agrees to the collection and processing of personal information about him or her.[59] It further specifies that such be evidenced by written, electronic or recorded means." "may also be given on behalf of the data subject by an agent specifically authorized by the data subject to do so." Such definition clearly prec of *implied* and *general* consent as constituting a condition wherein an individual's may be processed. Data subjects need to be informed specifically of what they are consenting to before any

[59] Section 3 (a), Data Privacy Act of 2012

processing of their personal information may be effected.

Under Section 4 of the Act, excluded from its scope are, among others, "information ne carry out the functions of public authority which includes the processing of personal data for the performance by the independent, central monetary authority and *law enforcement and regulatory agencies of their constitutionally and statutorily mandated functions*" as well as "information necessary fo financial institutions under the jurisdiction of the Bangko Sentral *to comply with the Credit Information System Act (RA 9510), the Anti-Money Laundering Act (RA 9160), and other applicable laws.*"[60] The exclusion, however, as clarified in Section 5 of the Implementing Rules and Regulations of the Act, is only to the minimum extent of collection, access, use, disclosure or other processing necessary to the purpose, function, or activity concerned. Further, the non- applicability of the Act does not extend to personal information controllers or personal information processors, who remain subject to the requirements of implementing security measures for personal data protection. Law enforcement, in order to seize any individual's personal da that either the digital property it seeks to obtain is not *personal information* as defined in Section 3 of the Act, that it falls under the excluded personal information enumerated in Section 4 to the minimum extent of collection, access, use, disclosure or other processing necessary to the purpose, function, or activity concerned, or that its processing of *personal information* satisfies the conditions under Section 12. Otherwise, the NPC may take steps under its authority under Section 7 of the law to enjoin any processing of personal information that is

[60] Section 4 (e) and (f), Data Privacy Act of 2012

violative of the Act, or recommend the prosecution of violators to the Department of Justice.

The above laws and issuances signify that digital information and property are indeed used in this day and age in the process of prosecuting offences in the Philippine judicial system. The above advances in legislation notwithstanding, search and seizure Rules of Court still contemplate search and seizure of tangible property. Likewise still wanting are specific guidelines as to the reasonable extent/scope of searches, allowable acts in case of security restrictions with respect to entry into devices, and Constitutionally sound procedures for searching and seizing digital property.

III. Applicability of Current Search and Seizure Rules on Digital Property

A. Are digital property "things" or "effects" protected by the Constitutional proscription against warrantless searches and arrests?

Section 2 of Article III of the 1987 Constitution protects *persons,* their *houses, papers,* and *effects* from unreasonable searches and seizures of whatever nature and for any purpose. A search is unreasonable and thus, everything seized pursuant to it is inadmissible in evidence pursuant to the exclusionary rule, if no valid judicial warrant based on a finding of probable cause had been issued authorising it. As discussed above, this rule is subject to exceptions, generally in circumstances when quick action is required from police authorities for the effective dispensation of justice.

The first question that must be answered in establishing the searchability of digital property in the process of procuring evidence for purposes of prosecutions and the rules which need to be observed in effecting such searches is whether such are included among those "things" or "effects" protected by Constitutional provisions allowing intrusions into private property.

"Seizure" is defined as "meaning a meaningful interference with an individual's possessory interest in that property" where a government official exercises dominion and control over the property or person.[61] Clearly, seized property, search and seizure occur when state authorities intrude into and seize property, which in Philippine law may be either tangible or intangible. In Philippine law, property is broadly defined in the New Civil Code as "everything which are or may be the object of appropriation. They are classified into real or personal property – the former referring to immovables enumerated under Article 415 of the Civil Code and the latter defined in Article 416 as (1) those movables susceptible of appropriation which are not included in Article 415, (2) real property which by any special provision of law is considered as personal property, (3) forces of nature which are brought under control by science, and (4) in general, all things which can be transported from place to place without impairment of the real property to which they are fixed.[63] Article 417

[61] Wex Legal Dictionary "Fourth Amendment" https://www.law.cornell.edu/wex/fourth_amendment

[62] Article 414, The New Civil Code

[63] Article 415, The New Civil Code Art. 415. The following are immovable property: (1) Land, buildings, roads and constructions of all kinds adhered to the soil; (2) Trees, plants, and growing fruits, while they are attached to the land or form an integral part of an immovable; (3) Everything attached to an immovable in a fixed

of the Civil Code likewise considers as personal property (1) obligations and actions which have for their object movables or demandable sums and (2) shares of stock of agricultural, commercial, and industrial entities, although they may have real estate. As can be seen in the enumeration, personal property may be tangible or intangible.[64] Seizure under the Rules of Court may be effected only with respect to personal property as this type of property may be transmitted from their location and taken into police custody.[65]

A "search", on the other hand, occur once "the state in which a person has a legitimate reasonable expectation of privacy".[66] Determining whether there exists "reasonable

manner, in such a way that it cannot be separated therefrom without breaking the material or deterioration of the object; (4) Statues, reliefs, paintings or other objects for use or ornamentation, placed in buildings or on lands by the owner of the immovable in such a manner that it reveals intention to attach them permanently to the tenements; (5) Machinery, receptacles, instruments or implements intended by the owner of the tenement for an industry which may be carried on in a building or on piece of land, and which tend to meet the needs of the said industry or works; (6) Animal houses, pigeon-houses, beehives, fish ponds or breeding places of similar nature, in case their owner has placed them or preserves them with the intention to them permanently attached to the land, and forming a permanent part of it; animals in these places included; (7) Fertilizer actually used on a piece of land; (8) Mines, quarries, slag dumps, while the matter thereof forms part of the bed, and waters either running or stagnant; (9) Docks and structures which, though floating, are intended by their nature and object to remain at a fixed place on a river, lake, or coast; (10) Contracts for public works, and servitudes and other real rights over immovable property.

[64] Article 416, 417 The New Civil Code

[65] Section 1, Rule 126 A search warrant is an order in writing issued in the name of the People of the Philippines, signed by a judge and directed to a peace officer, commanding him to search for *personal property* described therein and bring it before the court.

[66] United States v. Jones565 US (2012)

expectation of privacy" with regard the prevailing jurisprudential test in determining whether a state intrusion has occurred and whether, consequently, the warrant requirement applies.[67] In *Katz v US*, where the *reasonable expectation of privacy test* was first enunciated in the decision penned by Justice Marshall Harlan, it was held that such expectation of privacy "follows people not places."[68] In this case, the US Supreme Court held as inadmissible the phone-booth recordings which the state submitted in evidence to indict Katz for illegal transmittal of wagering information. Justice Harlan, speaking for the high court, wrote that the Fourth Amendment protects people rather than places – its reach thus does not depend on the presence or absence of a physical intrusion into any given enclosure. Thus, a search can be effected even without the physical entering of premises, just as in this case wherein state authorities managed to "seize" evidence through remote electronic surveillance. The "reasonable expectation of privacy" "people not places" principles have overturned the "trespass doctrine" enunciated in *Olmstead v United States* and *Goldman v United States* in which it was held that actual physical trespass gives rise to the application of the Fourth Amendment or the Constitutional proscription against unreasonable searches.[69] This "people not places" rule is followed and applied in subsequent jurisprudence, thus

[67] Kyllo v. United States, 533 U.S. 27 (2001); Dow Chemicals v. U.S., 476 U. S. 227 (1986); Katz v US 389 U.S. 347 (1967); U.S. v. Jones, 565 US (2012); Illinois v. Caballes, 543 U.S. 405 (2005); California v. Greenwood, 486 U.S. 35 (1988); Washington vs. Boland, 115 Wn.2d 57 (1990)

[68] Katz v US 389 U.S. 347 (1967)

[69] Olmstead v United States 277 U. S. 438; Goldman v United States 316 U. S. 129; United States v. Jones 565 US (2012)

establishing that any place a person goes, for as long as he has a reasonable expectation of pr
Constitutionally-protected.[70] This is an important consideration in the search and seizure of computers and computer data given that people carry around their devices anywhere. A reasonable expectation of privacy may be said to be had in one's com other properties or spaces.

The development of new technology has led not only to the evolution of the definition of the concept of "search" (pertaining to *places*) but also to new kinds of properties that may be seized in the process of obtaining evidence for prosecutions – in other words, in the concept of "seiz(pertaining to *things*) as well. In *Silverman v US*, which, as in *Katz v US*, recorded soundwaves were offered in evidence, it was held that the Constitutional protection against unreasonable searches "govern not only the seizure of tangible items, but extends as well to the recording of oral statements.[71] In *US v Jones*, data obtained from a GPS device were held inadmissible in evidence after the police were shown to have exceeded the allowable duration and territorial scope for the search stated in the warrant.[72] *Kyllo v United States* concerned the monitoring of heat levels at a suspected marijuana dealer's house through a thermal determine whether the amount of heat therein was consistent with high-intensity lamps typically used for indoor marijuana growth.[73] In *California v Ciraolo*, the US Supreme Court allowed the use of aerial photographs of

[70] *Id.* at 64

[71] Silverman v. United States, 365 U. S. 505

[72] *Id.* at 67

[73] Kyllo v United States 533 U.S. 27 (2001)

marijuana being grown at a person's from police-owned airplanes after holding that since these were visible to the naked eye while police authorities were in public airways, the warrant requirement did not apply.[74] With the onset of the use of cellphones and other computer devices, their contents have also become subject of state intrusions and led to indictments in courts. In *Riley v California*, abovementioned, the petitioner who was stopped for a traffic violation was subsequently arrested for gang violence involvement and weapons charges due to messages, photos, contacts, and other information obtained from his mobile phone seized during his arrest.[75] In the 2014 Philippine Supreme Court decision in *Vivares, et al. v St. Theresa's College*, the Court, speaking through Justice Presbitero Velasco, held that setting the privacy of uploaded content to "Public" precludes the grant of a Writ of Habeas Data as the uploader is deemed to have shed his 'reasonable expectation of privacy' over the content so uploaded.[76] In the abovementioned cases of *Anonymous Letter-complaint against Atty. Miguel Morals, Clerk of Court, MTC Manila* and *Pollo v Constantino-David*, data from searches of government employee's computers seized and used in evidence to prove charges against them in connection with their respective offices.[77] The fact that they are admitted in evidence in court proceedings as well as the express incorporation in several legislations of provisions pertaining specifically

[74] California v. Ciraolo, 476 U.S. 207 (1986)

[75] Riley v. California, June 25, 2014

[76] Vivares v St. Theresa's College, G.R. No.

[77] Pollo v Constantino-David G.R. No. 181881 (2011); Anonymous Letter-complaint against Atty. Miguel Morals, Clerk of Court, MTC Manila

to their search and seizure show that digital property are indeed within the purview of Constitutional and statutory provisions on search and seizure and are similarly protected by said provisions as are tangible property. The Supreme Court has thus provided for rules on their admissibility and authentication as those stated in The Rules on Electronic Evidence and jurisprudential rules contained in high court decisions on the matter. Yet this issuance on their admissibility and authentication, and adjudication on their actual use as evidence in cases notwithstanding, the 2000 Revised Rules on Criminal Procedure remain silent on search and seizure of digital property and still solely contemplate tangible property. Issues such as those mentioned abo password-protected domains and the recognized situs of these digital information – whether they are deemed to be contained in the internet comp physical computer from where they are accessible – for purposes of search and seizure, are unresolvable through current rules.

B. Current judicial treatment of the concept of digital property in relation to search and seizure

1. Computers or devices as containers

In their decisions, the US and Philippine Supreme Courts applied current search and seizure rules which contemplate physical property, by analogy, to virtual computer searches. Because of the incongruity between the rules' intended aps to which tion a they were applied, confusion arises as to the treatment of each and every case of digital property searches. In general, courts have agreed that computer devices can be

analogized to tangible closed containers.[78] As persons generally have a reasonable expectation of privacy in the contents of closed containers, they are also deemed to have reasonable expectation of privacy over data held within electronic storage devices.[79] Thus, a search warrant for obtaining a computer's stored data may include the computer for the legal seizure of its contents lest the state authorities conducting the search be found liable for infringing the owner's reasonable expectation in the information.[80] Different conclusions, however, were reached on whether a computer or other digital device should be classified as a single closed container or whether each individual file, folder, page, or account that may be accessed within and through said computer should be treated as separate closed containers or premises such that each and every one of them should be subject of a separate warrant or at least specified as a separate "place" in one warrant. Pursuant to the offence-one-warrant rule, it is likewise important to consider whether evidence found in a digital device which may be used to implicate the owner for a separate crime may be admissible although the warrant is issued for another offence.

In the 2001 case of *US v Runyan*, the US Supreme Court held that evidence obtained by the police through examining *additional* files after obtaining data pertaining

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[78] Trulock v. Freeh, 275 F.3d 391 (2001); United States v. Al-Marri, 230 F. Supp. 2d (2002); United States v. Reyes, 922 F. Supp. 818

(1996); United States v. Lynch, 908 F. Supp. 284 (1995); United States v. Chan, 830 F. Supp. 531(1993)

[79] United States v. Ross, 456 U.S. 798 (1982); United States v. Lifshitz, 369 F.3d 173, 190 (2004); United States v. Heckenkamp, 482

F.3d 1142, 1146 (2007); United States v. Buckner, 473 F.3d 551 (2007); United States v. Andrus, 483 F.3d 711 (2007)

[80] *Id.*

to child pornography from a private party were admissible in evidence to prosecute said owner for another offence and did not violate the warrantless search proscription.[81] The court analogized the whole storage device to one closed container and held that in examining more items within it, the government did not exceed its authority in conducting the search. In several other cases, the US Supreme Court held that once a warrantless search of a portion of a digital device or zip disk had been justified, the defendant no longer has a reasonable expectation of privacy with respect to the rest of the contents of the computer or digital device, thus allowing a comprehensive search thereof by state authorities.[82] In these cases, a computer or digital device containing multiple files is treated as a single container rather than each and every individual file being treated as multiple containers.

The other view has been to treat each and every individual digital file as a separate entity, necessitating the specification of each file sought to be searched in the judicial warrant.[83] Thus, going beyond the files indicated in the judicial warrant exceeds its scope and violates the Constitutional proscription against unreasonable searches. In *United States v Carey,* it was held that the government agent violated the Fourth Amendment when during a search for evidence of drug sales, he looked into other folders in the computer to obtain evidence of child pornography.[84] The US Supreme Court has since warned state agents that "because comput

[81] United States v. Runyan, 275 F.3d 449 (2001)

[82] United States v. Slanina F.3d 670 (2002); People v. Emerson 766 N.Y.S.2d 482 (2003); United States v. Beusch, 596 F.2d 871 (1979)

[83] Guest v. Leis, 255 F.3d 325 (2001)

[84] United States v. Carey, 172 F.3d 1268 (1999)

information touching on many different areas of a person's life, there is greater "intermingling" of documents and a of privacy when police execute a se[85]

2. Digital files uploaded to the Internet; Reasonable Expectation of Privacy therein

In Philippine jurisdiction, no Supreme Court decision has yet addressed the issue of whether to treat the whole computer containing multiple digital files as a one container or whether each and every file should be treated as separate "premises" or e case of Vivares v St. T, the Philippine Supreme Court had expressly adopted the US jurisprudence stance that while individuals generally retain a reasonable expectation of privacy in computers they own or possess, they lose this expectation with regard to information which they have made openly available.[86] In *Vivares,* as abovementioned, the Court held that a person, by setting the privacy of uploaded content to "Public", is deemed to have shed his reasonable expectation of privacy over said content. The same rules have been applied to documents which users have stored in computers available for public use in public libraries, information uploaded with no privacy restrictions on the internet, hard drives of university computers available for use of all students, and even conte

[85] United States v. Walser, 275 F.3d 981 (2001)

[86] Katz v. United States, 389 U.S. 347 (1967); Wilson v. Moreau, 440 F. Supp. 2d 81, 104 (2006); Wilson v. Moreau, 440 F. Supp. 2d 81, 104 (2006); United States v. Gines-Perez, 214 F. Supp. 2d 205 (2002); United States v. Butler, 151 F. Supp. 2d (2001); United States v. King, 509 F.3d 1338 (2007)

in one's laptop while it is connected to the internet.[87] The adoption of these US case law principles notwithstanding, the Philippine high court, in deciding the *Vivares* case in particular, should have considered pertinent provisions of the Data Privacy Act of 2012 requiring specific conditions under Section 12 thereof before any processing of personal information of individuals may be allowed. In its Advisory Opinion No. 2017-041, the National Privacy Commission has made it clear that the protection provided by provisions of the Data Privacy Act persists even over personal data made publicly available. Thus, personal information posted on social media sites and published in news articles, magazines and other reading materials made available to the public are equally protected by the Data Privacy Act. Any processing of such publicly available information is thus dependent for its validity on compliance with provisions of the Act, such that, as the Advisory provides, companies may only profile individuals and keep records of their publicly available personal information if the individuals to whom such information pertains has been informed of the desired processing and has given their consent thereto. Considering that the photos seized in evidence in the *Vivares* case were obtained *to identify* the students/individuals who participated in the prohibited act in question therein, such data consist "personal information" that fall under the Data Privacy Act of 2012. The use of such photos in evidence should have thus complied with Section 12 of the Act specifying the criteria for lawful processing of personal information. "Personal information" under the Act refer to those "from which the identity of the individual is

[87] Wilson v. Moreau, 440 F. Supp. 2d (2006); United States v. Gines-Perez, 214 F. Supp. 2d 205 (2002); United States v. Butler, 151 F. Supp. 2d 82 (2001); United States v. King, 509 F.3d 1338 (2007)

apparent or can be reasonably and directly ascertained by the entity holding the information, or when put together with other information would directly and certainly identify an individual."[88]

3. Exceptions to the warrant requirement; application to digital property searches

With regard to exceptions to the Constitutional proscription against warrantless searches, the doctrines of Plain View, Consented Search, Search Lawful to Incidental Arrest, Search of Government Computers are particularly relevant in the conduct of digital property searches.

a. Application of the Search Incidental to Lawful Arrest Doctrine

In the 2014 US Supreme Court case of *Riley v California*, the petitioner who was stopped for a traffic violation was subsequently arrested for gang violence involvement and weapons charges due to information obtained from his mobile phone seized during his arrest.[89] In this case, a police officer who effected the arrest accessed information on the phone and therein noticed the repeated use of a term associated with a street gang. Further examination of the smartphone at the police station led to the discovery of photographs and videos which showed the arrestee's involvement in a shooting which occurred a few weeks prior to his arrest. The state then charged and sought higher sentence on the petitioner for gang membership. The trial court and appellate court convicted Riley of the charge proved by

[88] Section 3, The Data Privacy Act of 2012

[89] *Id.* at 72

the digital evidence but the high court held in reverse. The decision did not seem conclusive however, leaving it to justices deciding subsequent cases to choose whether or not to apply the search incident to lawful arrest doctrine in searches of digital devices. Specifically, the US high court held that "the police *generally* may not, without a warrant, search digital information on a cellphone seized from an individual who has been arrested." A warrantless search is reasonable only if it falls within a specific exception to the Fourth Amendment's warrant requirement. however, the US high court did not find sufficient justification as that found in *Chimel v. California* wherein the exception was formulated, specifically the existence of dangerous weapons or susceptibility of certain evidence to destruction. The court emphasized that while allowing state agents to search an arreste substantial additional intrusion on privacy beyond the arrest itself when it comes to physical items, the same cannot be said when at stake is digital data where *substantial* privacy interests are involved. Chief Justice John Roberts, who penned the decision, added that allowing such immediate search without a warrant "may not make much of a different since "cellphone da would be vulnerable to remote wiping from the time an individual anticipates arrest to the time any eventual search of the phone is completed. who seizes the phone in an unlocked state might not be able to begin his search in the short time remaining before the phone locks and data b a concurring opinion, Justice Samuel Alito stated that the courts "should not mechanically a the pre-digital era to the search of a cellphone (as) they are capable of storing and accessing a quantity of information, some highly personal, that no person would ever have had on his person in hard-copy form." Th

application of the Search Lawful to Incidental Arrest Exception in the seizure of digital evidence thus remains to be seen.

b. Application of the Consent Doctrine

In *Pollo v. Chairperson Constantino-David, et al. and the Civil Service Commission* where it was held that no reasonable expectation of privacy can be had in government office-issued computers which are considered public property, the Consented Search Exception is considered to have been applied as government employees were deemed to consent to third party access to their files stored in office-issued computers by virtue of their character as public.[90] This conclusion was reached after the Court adopted the ruling in O'Connor v. Ortega, to wit:

> Public employees' expectations o
> *their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by* legitimate regulation. The em
> *expectation of privacy must be assessed in the context of the employment relation. An office is seldom a private enclave free from entry by supervisors, other employees, and business and personal invitees. Instead, in many cases offices are continually entered by fellow employees and other visitors during the workday for conferences, consultations, and other work-related visits. Simply put, it is the nature of government offices that others*

[90] *Id.* at 75

> *– such as fellow employees, supervisors, consensual visitors, and the general public –* may have frequent access to an *office. (It is settled) that "[c]onstitutional protection against unreasonable searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer," but some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable.*

As aforesaid, these pronouncements should be considered in light of provisions of the Data Privacy Act when it comes to "personal information of government employees. Any processing of personal information should be under the conditions provided under Section 12 and Section 13 of said Act as well as compliant with Section 11 thereof providing for the general data privacy principles in processing any legally seized personal data.

c. Application of the Plain View Exception

In the 2001 case of *US v Runyan*, where evidence obtained by the police through examining *additional* files after obtaining data pertaining to child pornography from a private party were admitted in evidence despite their non-inclusion in the warrant could be deemed an application of the Plain View Exception as the court proclaimed the additional evidence to have become subject to police seizure after an initial search of the folder or zip disk where they are contained has been made.[91] The defendant in such case is thus deemed to no longer have any reasonable expectation of privacy with

[91] *Id.* at 80

respect to the rest of the contents of the computer or digital device, thus allowing a comprehensive search by state authorities. While the plain view doctrine is not itself so cited as basis, the application is observable as the same principles were utilised to arrive at the conclusion of their admissibility.

IV. THE NEED FOR MORE PROTECTIVE RULES AND REFORM OF CERTAIN EXISTING RULES ON SEARCH AND SEIZURE

With the proliferation of computer-related crimes, prosecutors and law enforcement agents need to have clear guidelines on how to obtain evidence to prosecute such offences. Current search and seizure rules that were formulated contemplating tangible property are insufficient to resolve legal issues of the modern era as shown by the slew of cases where courts merely formulated analogies with properties of the tangible kind in order to settle issues regarding digital property. This band aid solution of stretching old laws disregards the legal lacuna begging for new rules to solve contemporary legal questions – from the situs of data, legality of obtaining security system backdoors from digital device manufacturers, application of the free speech clause to encryption technology, to the constitutionality of electronic surveillance, among others. This impasse may be addressed by the legislature through the creation of new law and by the Supreme Court through reforming the Rules of Court to a version that is suited to the internet era. It should be one that sufficiently guides prosecutors and police officers on the manner by which digital devices may be searched and digital property may be seized. Modernizing the law to ensure protection of the p u b l Constitutional rights to privacy and due process,

right against self-incrimination, and against unreasonable searches and seizures amidst the changing social landscape means, for the Congress and high court, creating new rules that fit the present and are protective of such rights while sufficiently ensuring public safety given the dangers of the present and future.

A. Reform of Rule 126 and specific legislation on digital property searches

Specifically, the author suggests (1) reforming Rule 126 of the Philippine Rules of Court to accommodate digital property within its scope, (2) the reframing or rethinking of certain jurisprudential exceptions to the warrant requirement, specifically the plain view doctrine, search incident to lawful arrest doctrine, consented searches, and emergency and exigent circumstances doctrine in view of the possible effects of their application to digital property that may be violative of Constitutional protections, and, ultimately, (3) the passing of a law that expressly provides for the manner and procedure of search and seizure of digital property both in cases of searches by virtue of a warrant and warrantless searches. The law should be more specific in implementing the Constitutional requirements for valid and reasonable searches and seizures and must thus specifically provide for the following:

1. The type of constitutional protection which digital property should receive –whether or not they may be obtained without a warrant and, consequently, without probable cause. Specifically, whether the exceptions to the warrant requirement may apply to their search and seizure. Properly classifiable as "things and effects" by Section 2 Article III of the 1987 Constitution under jurisprudential

definitions discussed above, it is the au
position that the same Constitutional protection requiring a warrant prior to a search must be observed with respect to the obtaining of digital evidence.

2. How far their searches may be effected without violating the Constitutional proscriptions against self- incrimination, rights to due process and privacy, and right against unreasonable searches and seizures. This means providing specifically for the allowable scope of searches –whether searches beyond the physical contents of the digital device may be made, i.e., of the virtual domain or the digital files within the device as opposed to the de
physical surfaces only. If such digital spaces may be searched, whether a search of only the offline files and data may be allowed or whether intrusion into one's online accounts should likewise be clear to state agents. If so permissible, whether those online accounts that are already open or require no inputting of passwords may be opened or whether intrusion into those password- or other security system-protected accounts may be allowed should be clarified. Once entry has been effected if allowed, it must also be clear whether state agents must stop when they observe nothing illegal in the readily-seen data, say a list of displayed e-mails, or whether they can open each and every email and its attachments and view the private communications contained therein to further search for incriminating evidence. After the agent opens the browser and sees among the saved recently-visited pages a website which may suggest illegal activity such as child pornography or drug trade, whether said agent may enter the website to discover whether

the owner keeps an account or has a saved password to enter the site must be considered. Legislation must also provide as to whether individuals may be compelled to surrender their passwords to state authorities if the 'last entry' into devices are restricted by such or other security features, in the same way that the police may break doors or windows if refused entry into physical spaces. Whether going to the service provider or device manufacturer in order to obtain backdoor entrance to the device is an option for state authorities must also be provided for. Proposed guidelines for dealing with these issues may be drawn from jurisprudence discussed in the next subsection.

3. Rules on the custody of digital property that should be followed upon their seizure should also be provided for. This is to ensure that there is neither tampering with nor altering of their contents or intrusions into any containers or accounts that are not connected to the crime for which he is indicted and which may be incriminating for the owner. Confidential banking or medical records which may blacken the reputation of the owner or violate bank secrecy laws should also not be intruded into. Whether the seized digital device and information may further be used for entrapment may also be provided for. For instance, whether contacts in one's mobile phone may be contacted to effect an investigation for another's involvement in the crime may be considered. How any seized digital device and data should be stored while in state custody should also be spelled out. An inventory of any digital property that were seized should be filed in court as is equally required for physical property that are seized by state authorities. Needless to say,

being different from tangible property usually used in evidence such as weapons and blood spatters, digital evidence must be treated differently. The United States Federal Bureau of Investigation (FBI) procedures may provide guidance. The chain of evidence begins with the hardware, i.e., the physical hard drive, the smartphone, or other tangible device that houses evidentiary digital data. Said hardware is then tagged and locked up and agents of law enforcement who wish access into it must be logged in and logged out with specific passwords. Beyond the hardware, the FBI also safeguards the data itself. Through tools such as a-way write b digital valve that permits investigators to examine and access data from a device, precluding the risk of altering it. To further protect data especially those stored in clouds or on the internet, the digital hashing or hashing function has been introduced in police forensic procedures. T considerably a digital fingerprint of the digital evidence which uses an algorithm to make a unique digital impression of a digital record. Any change to such digital record will result in a new hash, thereby allowing state authorities to monitor whether any digital evidence seized has been tampered. Its effectivity extends to recognizing even a single pixel change in a particular picture –the hash, upon such alteration, will no longer match the original.[92]

4. The manner of inspecting a suspe must also be specified. Rules on in-camera inspections of bank deposits laid down in *Marquez v*

[92] Standards and Guidelines, Forensic Science Communications, Federal Bureau of Investigation https://archives.fbi.gov; www.govtechworks.com/chain-of-custody

Desierto (2001), applying Republic Act No. 1405 or the Bank Secrecy Law, may serve as a guide in dealing with search of digital assets, considering that they are similarly protected by privacy laws although not outright declared *absolutely* confidential as are bank deposits.[93] In said decision, the Supreme Court held that the following requisites must be present before inquiry into one's bank account, which is not absolutely confidential, may be conducted:

i. There is a pending case before a court of competent jurisdiction.
ii. The account must be clearly identified and the inspection limited to the subject matter of the pending case.
iii. The bank personnel and the account holder must be notified and be present during the inspection, and such inspection may cover only the account identified in the pending case.

It is suggested that the above guidelines in inspecting bank accounts be adopted to ensure the constitutionality of digital property searches. In lieu of the requirement of a pending case (as searches may be conducted even before a formal charge), the existence of probable cause may be demanded. The requirement of particularity in describing the "place and things to be seized" to be seized must be maintained. This may be done through adopting the second requirement from *Marquez* referring to the clear identification of the particular accounts and folders that may be looked into in the course of the search applied for. It is also the reference to the third *Marquez* requisite, that the digital device owner be notified and be present during the search

[93] Marquez v Desierto G.R. No. 135882. (2001)

to ensure that it covers only the information or account identified in the warrant and gives him an opportunity to properly protest any invasion of privacy, violation of due process, or infringement of his right against unreasonable search. In case of password- protected folders or accounts, state agents may also request for his cooperation and obtain said password from the owner. Such request will not necessarily against self-incrimination especially if it is only to effect a warranted search and not to elicit a confession in open court. It has been held time and again by the Philippine Supreme Court that the privilege against self-incrimination may be invoked only at the proper time – that is, when a question calling for an incriminating answer is propounded. "This has to a question is asked, there would be no way of telling whether the information to be elicited from the witness is self-incriminating or not[94]."

5. The manner of authentication of electronic evidence provided by the Supreme Court in The Rules on Electronic Evidence discussed above may be incorporated in this prospected legislation.[95] Allowable forensic techniques that may be used in the search may be specified by the prospected legislation. Whether electronic surveillance of a

[94] Gonzales vs. Secretary of Labor, et al. G.R. No. L-6409 (1954), Suarez v. Tengco, G.R. No. L-17113 (1961), Bagadiong v. Gonzales, G.R. No. L-25966, People of the Philippines v Bacor G.R. No. 122895 (1999), Ladiana v People of the Philippines G.R. No. 144293 (2002)

[95] Rule 5, Section 2 of TREE: Before any private electronic document offered as authentic is received in evidence, its authenticity must be proved by any of the following means: (1) digitally signed by the person purported to have signed the same; (2) appropriate security procedures or devices as may be authorized by the Supreme Court or by law; or (3) evidence showing its integrity and reliability to the satisfaction of the Judge.

suspect over a lengthier period of time may be allowed or whether the ten-day period for validity of search warrants under the Rules of Court applies in such surveillance if permitted in Philippine jurisdiction, may be considered by legislators.[96]

6. Law-makers, in coming up with the required procedure for search and seizure of digital data, may likewise find guidance in the principles on general data privacy already found in Section 11, Chapter III of the Data Privacy Act. Under the said provision, speaking specifically of personal information, any obtained data must be (a) collected for specified and legitimate purposes determined and declared before, or as soon as reasonably practicable after collection, and later processed in a way compatible with such declared, specified and legitimate purposes only; (b) processed fairly and lawfully; (c) accurate, relevant and, where necessary for purposes for which it is to be used the processing of personal information, kept up to date; inaccurate or incomplete data must be rectified, supplemented, destroyed or their further processing restricted; (d) adequate and not excessive in relation to the purposes for which they are collected and processed; (e) retained only for as long as necessary for the fulfillment of the purposes for which the data was obtained or for the establishment, exercise or defense of legal claims, or for legitimate business purposes, or as provided by law; and (f) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were

[96] Rule 126 Section 10. Validity of search warrant - A search warrant shall be valid for ten (10) days from its date.

collected and processed.[97] Similar standards must guide law enforcement agents in effecting searches and seizures of digital property which more often than not take the form of personal information and are kept in individual 'personal' devices. To highlight, subsection (d) of the provision provides that the examination of data must not be excessive. To this end, state agents must not only ensure that they do not cover the owner's unrelated to the crime but also ensure that confidential information of disinterested third parties that may be stored in a searched device must not be subjected to examination. A filtering software or even a filtering team who may be entrusted with such segregation of excluded data may be formed, whose outputs may be reviewed by the defence to identify any items for which the defendant may wish to claim privilege.

B. Search and Seizure of Digital Evidence under the Authority of a Search Warrant; Proper Guidelines

For searches and seizures of computers under the authority of a search warrant, the Constitution provides adequate guidelines as to how and when such warrant may issue –what is required is an application supported by facts constituting probable cause that a crime has been committed and its effects may be found in the place sought to be searched. The determination of such existence may be conducted only by a judge. Such determination may be made only after examination under oath or affirmation of the complainant and the witnesses he may produce. A search warrant issued must

[97] Section 11, Chapter III of the Data Privacy Act of 2012.

particularly describe the place to be searched and the persons or things to be seized.[98] The Rules on Criminal Procedure likewise require that a search warrant must relate with one specific offence and should not have as its subject multiple offences.

Before drafting a search warrant application therefore, state agents must consider what kind of evidence they desire to procure from digital property. A digital device may assume different roles in the commission of an offence. For one, the digital device itself may be contraband as in the case where it was stolen property or where it was derived through fraudulent or deceitful means. It may also be a repository of information that is evidence of a crime such as spreadsheets recording dangerous drug trade transactions, documents evidencing falsification or fraud, or records showing involvement in money laundering and other offences. A digital device may also be the instrumentality of crime itself where it is solely used to accomplish illegal activity such as one used to record and store child pornography material, or to hack into websites, or to illegally publish copyrighted videos. Under jurisprudence, the probable cause requirement is met when an application shows "a fair probability that contraband or evidence of a crime will be found in a particular place."[99] State agents intending to search a digital device or folders and accounts therein must, therefore, establish through facts stated in their application that criminal evidence will probably be found in the device sought to be searched.

The problem with regard to searches of digital

[98] Article III Sec 2, 1987 Constitution

[99] Illinois v. Gates, 462 U.S. 213 (1983)

devices is that there are two possible conflicting treatments of such devices, i.e., they may be classified as a single closed container or each individual file, folder, page, or account that may be accessed within and through the same device may be treated as a separate closed container such that multiple warrants are required for each "place" at least require specification as separate "place" in the warrant. This distinction is important as it would determine the validity of a search made in a given "place" since only those places se warrant may be considered reasonable and compliant with the Constitutional requirements for valid state intrusion into private property. Validity of a search, in turn, is determinant of whether digital properties seized in the course of such search are admissible in evidence.

Analogizing the whole storage device to a single closed container would allow state agents to intrude into the vast space of the suspect's offline and online spaces and access to a tremendous amount of information which may or may not be related to the offence for which he is charged. This gives much leeway for the application of the plain view doctrine and may lead to indictment for an offence other than that for which a suspect is originally charged if evidence for a separate crime is discovered in the course of the search. This is demonstrated in the abovementioned case of *US v Runyan* where the US Supreme Court admitted additional files obtained by state authorities pertaining to the offence of possession of child pornography found in the course of a search for evidence for sexual exploitation of children.[100] The high court treated the whole computer as one closed container and held that examining more items within it did not exceed the authority granted the government to so

[100] United States v. Runyan, 275 F.3d 449 (2001)

search. In several other cases, the US Supreme Court held that once a warrantless search of a portion of a digital device or zip disk had been justified, the defendant no longer has a reasonable expectation of privacy with respect to the rest of the contents of the computer or digital device, thus allowing a comprehensive search thereof by state authorities.[101] On the other hand, treating each file, folder or account as separate or multiple containers would require the specification of each one as a place to be searched, and disallow the opening of any file that was not specified in the search warrant. This would obviously limit the scope which state agents may intrude into in the course of the search. The Philippine Supreme Court has yet to adjudicate specifically on the matter. While the previously discussed case of *Pollo v David* dealt with seizure of files from a (government) computer, it is not instructive on the matter as the search therein is, in the first place, not conducted pursuant to a search warrant and thus did not involve specification of places which were to be searched.[102] Neither did the decision mention whether the files admitted in evidence in the proceedings came from a single file or document or from separate folders opened computer.

In ruling on the matter or formulating rules therefor, the particularity requirement enshrined in the Philippine Constitution with regard to search and seizure by the state of private property should be considered. Time and again, the Philippine Supreme Court has frowned upon the conduct of "fishing expeditions" or issuance of "general warrants" or search war

[101] United States v. Slanina, 283 F.3d 670 (2002); People v. Emerson, 766 N.Y.S.2d (2003); United States v. Beusch, 596 F.2d 871 (1979)

[102] Pollo v David G.R. No. 181881 (2011)

sufficient particularity as to the places to be searched or things to be seized.[103] Evidence obtained pursuant to such "general warrants" were deemed to be of the poisonous tree and held inadmissible in evidence.[104] The treatment of the whole digital device as a single container would open the doors to state intrusion over a tremendous amount of information and such authority may be subject to abuse. Requiring the specification of each and every specific file sought for in a computer to be searched is more in consonance with the particularity requirement of the 1987 Constitution and would guard the public against unreasonable searches and seizures and violations of their privacy. However, different naming conventions used in naming digital containers and folders in reality may prevent law enforcement from effectively identifying contents that are truly useful in prosecution. The question therefore is whether this practical consideration should allow for a liberal treatment of applications for search warrants as well as of the warrants themselves. Weighing the constitutional guarantee against unreasonable searches and seizures with the need for law enforcement to obtain evidence, the fundamental right of the individual must prevail. In *People v. David*, where the Supreme Court struck down a search warrant that did not state with particularity the objects to be seized, thereby resulting to a fishing expedition, Justice Oliver Wendell Holmes was quoted for having declared: "it is best less evil that some criminals escape than that the government should play an ignoble part. Order is too high a price to pay for the loss of liberty."[105] Thus, "any warrant for search of digital

[103] Stonehill v. Diokno, 20 SCRA 383 (1967); People v. Valdez, 341 SCRA 25 (2000); Burgos v. Chief of Staff, 133 SCRA 800 (1984)

[104] *Id.*

[105] People v David G.R. No. 129035 (2002)

devices issued by a judge must describe the things to be seized with exact and precise language which instructs the executing officers how to separate the digital property subject to seizure from those excluded, such that nothing is left to the discretion of the officer executing said warrant. The description of the property subject to seizure must also be limited to the scope of the probable cause established in the application for the warrant. Likewise in consonance with the particularity requirement, the warrant may have to specify the time frame of the digital records or information which are sought to be searched and subjected to seizure so as not to intrude into those which are innocent or untarnished with crime and so as not to run the risk of being overbroad. This will ensure conformity with the requirements of Section 2, Article III of the 1987 Philippine Constitution on reasonable searches as well as make easier the determination of whether state agents who effected the search are guilty or not of violation of said provision.

C. Digital Property Searches and the Right Against Self-Incrimination

The next question that arises with regard to searches of digital devices is whether the right against self- incrimination may be invoked to refuse a request from state authorities to reveal disable any security feature impeding the execution of a search warrant.[106] As held in numerous cases decided by the Philippine Supreme Court, the right against self-incrimination may only be invoked once a question is propounded to an individual acting as a witness in a

[106] Sec. 17 Art. III "No person shall be com himself." 1987 Philippine Constitution.

judicial or quasi-judicial proceeding.[107] In other words, the right arises only when testimonial communication is sought from the suspect or defendant and such communication would lead to incrimination. This is likewise the rule in the United States whose Fifth Amendment, similar to the Philipp Section 17, Article III, provides for such right. In *US v Doe*, the US high court stated that an individual must show three things to fall within the protection of the Fifth Amendment: (1) compulsion, (2) a testimonial communication or act, and (3) incrimination.[108] In this case, unencrypted contents of the drives in his laptop computer and external hard drives were sought to be examined by state agents via issuance of a subpoena, for the purpose of using such data in his prosecution for child pornography. The court held that while the hard drives themselves are not testimonial, their contents may be considered so and at the very least, their production has some testimonial quality sufficient to trigger the Fifth Amendment *when the production will result to conveying a statement of fact*. In other words, if the act of conceding the existence, possession and control, and authenticity of the data itself will incriminate the person from whom such data is sought, such person may validly invoke his right against self-incrimination. In such case, therefore, wherein the act of production by itself would necessarily lead to the conclusion that the person producing the data is connected with or responsible for the commission of the offence, the person may refuse to produce the incriminating data on the basis of this constitutional right. State agents must therefore be

[107] Rosete v Lim G.R. No. 136051 (2006); People v Ayson G.R. No. 85215 (1989); People v Yatar G.R. No. 150224 (2004)

[108] In re: Grand Jury Subpoena Duces Tecum dated March 25, 2011 (United States v John Doe) Case No. 11-12268 (2012)

able to distinguish whether the act of production in a case will partake the nature of testimonial evidence or not and yield to the invocation of the right against self-incrimination in the former case in the event the person refuses the production sought. The *Doe* decision provides a guideline for this determinati touchstone of whether an act of production is testimonial is whether the government compels the individual to use 'the contents of his own mind' to communicate some statement of fact."[109]

For other forms of data which will not constitute testimonial evidence, state agents may be permitted to require the owner of a computer sought to be searched by virtue of a warrant to allow entry into such device. The single container versus multiple containers categorization is again important in this respect as in the former treatment, a warrant for the search of a computer may signify that all password-protected folders or accounts that may be accessed therein are covered in the authority to search such that state agents will have authority to obtain multiple passwords in pursuance of the same search warrant. In the multiple containers analogy, each file, folder, or account would need to be specified in the warrant of be subject of a separate warrant. Only if so specified can the password to such account, if any, be obtained from the digital device owner. In case of refusal, the situation may be analogized to that contemplated in Section 7 Rule 126 of the Rules of Court where an officer is refused admittance to the place of directed search after giving notice of his purpose and authority.[110] Under said Rule, the officer, to execute the

[109] *Ibid.*

[110] Section 7. Right to break door or window to effect search. — The officer, if refused admittance to the place of directed search after

warrant, may break open any outer or inner door or window of a house or any part of a house or anything therein. Entrance via inputting of password into a computer may be likened to entry via a door to a specified premises on a search warrant. In this sense, state authorities should be given permission to, in a similar way, force their way into the "pre
device through means at their disposal such as inputting multiple password attempts, employing the skills of its personnel to breach their way through security defences installed on the digital device, or to outsource the job such as what the government did in the FBI-*Apple* encryption dispute.

In case such force-in could not yield the desired entry, may state authorities compel the digital device manufacturer to provide the means for the desired search? Another question would be whether, if the manufacturer or service provider refuses to give away the backdoor to its security systems, may such companies instead be compelled to just deliver or provide the information or files sought to be seized from the inaccessible digital device? The answers, still likewise unanswered in US jurisdiction, may have to depend on the law applicable in the jurisdiction wherein the specific company concerned is located and whether they can be so compelled via Philippine court order to break into the specific device subject of the warrant or to provide the desired digital property or evidence. In the above-discussed issue concerning *Microsoft*, the answer may lie in the final adjudication in the high court as to the legal

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giving notice of his purpose and authority, may break open any outer or inner door or window of a house or any part of a house or anything therein to execute the warrant or liberate himself or any person lawfully aiding him when unlawfully detained therein.

situs of the electronic mails sought to be obtained by the FBI and whether a New York court has jurisdiction to issue a court order for their delivery to authorities despite Microsoft's claim that they are stored in a server located outside the United States.

D. Warrantless Searches and Seizures of Digital Property

There is likewise a need to rethink and adjust certain exceptions to the proscription against warrantless searches and seizures in consideration of their possible application to searches of digital property so as not to violate Constitutional rights, specifically the right to privacy and the right against unreasonable searches and seizures.

1. Rethinking the Plain View Doctrine

Under Philippine jurisprudence, the plain view doctrine applies when the following requisites concur: (1) the law enforcement officer in search of the evidence has a prior justification for an intrusion or is in a position from which he can view a particular area; (2) the discovery of the evidence in plain view is inadvertent; and (3) it is immediately apparent to the officer that the item he observes may be evidence of a crime, contraband, or otherwise subject to seizure.[111] This exception to the search warrant requirement is handy for state agents searching digital devices as it allows for the seizure of evidence which may not have been contemplated in the application for the warrant but which the agents

[111] Umil v. Ramos, G.R. No. 81567 (1991); People v. Lozada, 454 Phil. 241 (2003)

stumbled upon in the course of the search. Other crimes in which the device owner or suspect may have been involved become susceptible to discovery.

The author is of the view that this exception may very well apply to digital searches for as long as the jurisprudential requisites are strictly observed and, following the multiple container approach, no new container not contemplated in the warrant is opened in the process. Just as a warrant to search a certain dwelling does not allow officers to search another house they see in plain view for the sole reason that they suspect illegal activity in said house not subject of the warrant, so should state agents be able to open or "enter" separate account or folder in the computer that is not subject of the issued warrant. For instance, email account "A" is specified in the warrant and the state agents, in the course of the search, comes across a notification from say social networking site "B" which th potentially relating to illegal activity. Such should not permit them to open such social networking account for the mere suspicion aroused by the notification as search of the latter was not contemplated in their granted authority. Considering that a tremendous amount of excluded data will be in plain view in the course of a digital search, the doctrine should not be considered as unrestricted license by state agents to conduct a fishing expedition or an unqualified authority to look into each and every information accessible th digital device. In other words, the plain view doctrine should not be deemed to give state agents authority to open and view the contents of a container that they are not otherwise authorised to search. The individual should be deemed to still enjoy a reasonable expectation of privacy with respect to other containers into which the court did not allow intrusion. While practical

considerations may make it difficult for law enforcement to effectively identify contents that are truly useful in prosecution, such reality should not liberalize the strict scrutiny required to evaluate the validity of search warrants, considering the fundamental rights at stake.

In *United States v. Villareal*, it has been held by the US high court that suspicious labels plastered on opaque gallon drums, the contents of which were not visible in plain view, did not justify their warrantless search as "labels on a container are not invitations to search (them)."[112] This principle should very well apply to searches of computer files which may be contained in folders or accounts labelled suspiciously or which by any cause arouses suspicion. The multiple container approach would disallow state agents to invoke the doctrine to justify opening all other closed containers which they are not otherwise authorised to view. In a single container approach, such as that applied in abovementioned *US v. Runyan*, the search of a storage device was allowed to give basis to extensively search the whole computer even for files not related to the specific offence for which the warrant was issued, leading to indictment for a separate charge than that which gave rise to the original search.[113] The court held that the search of a portion of the digital device being proper, the suspect no longer retained a reasonable expectation of privacy as to the rest of the data contained therein or may be accessed therefrom. Settlement of the single container versus multiple containers approach in Philippine jurisdiction is obviously important in view of its consequence on the application of the doctrine of plain view.

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[112] United States v Villareal 963 F.2d 770 (1992).

[113] *Id.* at 80.

2. *Rethinking the Search Incidental to Lawful Arrest Exception*

The search incidental to lawful arrest exception codified in Rule 126 Section 13 of the Rules of Court allows state agents to search the immediate surroundings of the arrested person and, in US cases, to even open containers found in his person even absent probable cause therefor.[114] This exception is applicable in all cases of lawful arrests, whether warrantless or by virtue of an arrest warrant. In *United States v. Robinson*, a warrantless arrest for driving without a valid license led to conviction for a drug offence when the police officer, in the course of the arrest, made a full-body search of Robinson and discovered in his pocket a cigarette package containing heroin.[115] Here, a container within an arr was opened as part of a body search in the course of an arrest and led to the discovery of evidence for another charge. This permission to search without warrant incident to an arrest was further expanded in *New York v. Belton* wherein occupants of a car were arrested after the vehicle was stopped for speeding and the officer smelled marijuana on their persons.[116] After the occupants were removed from the vehicle, the police officer searched the passenger compartment of the car and therein found a jacket. The officer unzipped the j therein found cocaine. The US high court held the cocaine admissible in evidence, adopting the Robinson decision allowing the warrantless search of the arreste e seffects

[114] United States v Robinson 414 U.S. 218 (1973); applied in People v. Aruta, G.R. No. 120915 (1998), People v. Molina, G.R. No. 133917 (2001), People v. Racho, G.R. No. 186529 (2010).

[115] *Id.*

[116] New York v Belton 453 U.S. 454 (1981).

in the course of a valid arrest. Here, two openings were made of the car passenger compartment and the jacket pockets, respectively. This was further extended by the ruling in *Thornton v United States* where a full-scale search of the passenger compartment of a vehicle incident to the arrest of its "recent occupant" was allowed.[117]

Philippine decisions interpreting the doctrine follow the *Chimel v. California* ruling which states that what may be searched for are *dangerous weapons and effects related to the crime for which one is arrested*.[118] Likewise, such search is limited in the area within the arrestee's *immediate control*.[119] Courts specifically rejected the argument that state agents may search areas beyond that from which an arrestee could grab a weapon or destructible evidence. After all, the rationale behind the exception is that state agents making an arrest should be allowed to ensure their safety in so arresting by being able to confiscate any weapons or means of violence within the arrestee's likewise no. prevention is arrestee from disposing of any evidence of the crime which he may have in his person at the moment of the arrest. In *Valeroso v. CA* citing *People v. Estella*, it was stated that the phrase "within the area of his immediate control" means the area from which he might gain possession of a weapon or destructible evidence.[120] A gun on a table or in a drawer in front of one who is arrested, the decision states, can be as dangerous to the arresting officer as one concealed in the clothing of

[117] Thornton v United States 541 U.S. 615 (2004).

[118] Chimel v California 395 U.S. 752 (1969).

[119] People v. Cubcubin, Jr.,; People v. Leangsiri, Valeroso v CA G.R. No. 164815 (2009).

[120] Valeroso v CA G.R. No. 164815 (2009).

the person arrested. However, items which were seized from a cabinet in Valeroso's house him, was locked, was held to no longer be within his immediate control as there was "no way for him to destroy any evidence therein that could be used against h[121]

Applying these principles to the search of a digital device that may be seized in the course of a lawful arrest, the device must firstly be in the arrestee's person or area within his immediate control and must be for the purpose of preventing him from destroying any data therein that could be used against him in evidence. The application of the doctrine would thus seem to depend on the situs of the data in the digital device seized – i.e., whether they are deemed within the immediate control or elsewhere such that the exception won't apply. It may likewise be tak whether such digital data may be subject to the arres destruction in the course of the arrest such that its warrantless seizure should be allowed. With respect to the situs consideration, offline data within the device such as text messages, contacts, call logs, saved pictures, videos, and recordings (not in cloud or any online storage), mobile planner entries, notes, and the like may validly be considered situated only in the arr elsewhere. The author is of the view that these may be validly subject to a warrantless search to obtain evidence which may be related to the crime for which the individual was arrested. Permission given the police officer in *US v. Robinson* to open a container within the arrestee's pocket and obtain evidence found therein may be likened to opening a digital device such as a mobile phone in an arrestee's pocket and seizing evidence therein immediately seen. Such seizure is also in

[121] *Id.*

consonance and thus may be held as reasonable under the Philippine jurisdiction holding that the things seized in the course of the lawful arrest should be those in an area of immediate control of the arrestee. However, a similar conclusion may not be possible in the case of online digital property such as electronic mails, files saved in cloud, or other property uploaded in the internet as, again using situs as basis, these may not be considered to be within an area of immediate control of the arrestee. Their situs may be deemed to be elsewhere as is argued by software company *Microsoft* in *US v. Microsoft*. If the Microsoft view on situs prevails in the US high court, seizure of such property stored in the internet cannot then be said to fall within the incidental to lawful arrest exception.

The next consideration would be whether the property so seized consists of *things related to the crime for which one is arrested.* Specifically, jurisprudence requires that the property seized without warrant incidental to a valid arrest, to be admissible in evidence, must be within an area of immediate control of the arrestee and must consist of dangerous weapons and things related to the crime for which he is arrested. It may be validly stated that digital property will not qualify as dangerous weapons that may endanger the safety of the arresting officers. This leaves the test, as we choose to apply it, to the determination of whether the property seized are related to the crime for which one is arrested. Thus, an arrest for the crime of theft, for instance, must lead only to the search and seizure of those digital property related to the offence such as incriminating pictures of the stolen property, text messages which may prove conspiracy or participation in the crime, or recent call history reflecting contacts of others who are already suspected to be involved. Any other data not shown to

relate to the offence such as the arrestee's bank statements accessible through the device, medical records, or unrelated personal information should be excluded. An opposite interpretation that allows for the search and seizure of all information accessible through the device would give state agents unprecedented access to thousands of pages of personal information which may not be connected to an offence and even without any probable cause whatsoever. Such permission is highly subject to misuse, not to mention possibly violative of other statutes protecting privacy such as bank secrecy laws or the privileged nature of certain communications under the law. In developing new rules, the Supreme Court and legislature may have to require such limitations to unwarranted searches incident to lawful arrests to minimize the invasion of privacy among other rights granted to individuals under Philippine law.

3. Rethinking the Consented Search/ Waiver of Right against Warrantless Search Doctrine

a. Searches by virtue of express consent

With respect to consented searches of digital property, an issue may arise as to the specific extent of the consent given by the device owner. Specifically, whether consent to open a digital device amounts merely to a consent to search for evidence related to an offence for which he is charged or consent to open all folders and online accounts accessible therein may be specifically provided for in new rules to guide state agents as well as afford due process to individuals subject of the search. Different conclusions would result depending on which between the multiple container and single container treatment of digital devices is selected. In the former, consent may have to be obtained for each and every file,

folder, or account as a separate container or place. In the latter, treating the computer as one container would subject the whole storage device, as well as online pages accessible through it, to search by authorities to whom consent was given. Again, the author is of the belief that the multiple container treatment is more in consonance with the particularity requirement under the Constitution. If written or express consent of the owner is possible to obtain before or during the search as well as for each and every specific file sought to be opened, its scope may thus be clearly defined and state agents must respect those bounds.

With respect to tangible property, vis-a-vis the consent exception, the test applied in US jurisprudence is the *reasonable person test*, to wit: would the typical reasonable person have understood by the exchange between the agent and the person[122]? The court will thus have to look at, as a factual issue, whether it was reasonable for the state agent who conducted the search to believe that the scope of consent included the items seized. This is particularly significant in cases where state agents, having obtained consent to search a device for one reason, finds cause for and begins a search for such other cause –they must ascertain that the scope of the consent encompasses the additional search conducted. In some cases, the US high court had been lenient in granting a wide latitude of coverage for the consent given for a search. In *United States v. Marshall*, the court held that consent to search for stolen items, in prosecuting theft of video equipment, did not preclude searching and viewing video tapes found during

[122] Florida v. Jimeno, 500 U.S. 248 (1991); United States v. Reyes, 922 F. Supp. 818 (1996); United States v. Blas, 1990 WL 265179(1990)

the search.[123] In *United States v Raney*, it was held that consent to search for "machinery, materials i exploitation and child erotica" wa include seizure of homemade adult pornography.[124] In another case, however, *United States v Turner*, the US Supreme Court refused to admit in evidence photos of child pornography seized from a computer after state agents obtained the suspect's cons physical property for attempted sexual assault.[125] Said images were obtained when, while other officers searched for physical evidence, one detective looked into the defendant's personal computer in his home and discovered the evidence for child pornography. In his prosecution for the latter crime, the court held that the computer search conducted exceeded the scope of the consent given by the defendant. The they were conducting the search to obtain evidence for the assault supposedly limited the scope of the consent given to the kind of evidence which is connected to the offence declared. For courts to more easily ascertain the scope of the consent given by the defendant in a warrantless search, it may be good practice for state authorities to obtain a written consent from the device owner indicating specifically the folders or files which may be searched and excluding others that are not included in said express waiver.

b. Implied Consent to Seizure of Digital Property

Without obtaining the digital device from the owner to whom evidence sought pertains, it is possible to obtain

[123] United States v. Marshall, 348 F.3d 281 (2003)

[124] United States v. Raney, 342 F.3d 551 (2003).

[125] United States v. Turner, 169 F.3d 84 (1999)

certain evidence from the internet uploaded by either the owner himself or others. In the case of *Vivares v St. Theresa's*, it was held by the Philippine Supreme Court that setting the privacy of content uploaded to Facebook to "Public" precludes the grant of a Writ of Habeas Data as the uploader is deemed to have shed his reasonable expectation of privacy over the content so uploaded. Under the pronouncements in this case, state agents may validly obtain evidence from suspects' online social networking accounts so long as the evidence in the form of photos, videos, and the like are set to be viewable by the public, as opposed to those available for viewing only by "friends" or with similar audiences. This was clustered under the consent exception as the individual who uploaded his property to public may be said to have consented to its viewing by anyone including state authorities, who may use said content so viewed as evidence. State agents may, with respect to this type of evidence, make use of the authentication means provided in The Rules on Electronic Evidence. The author, however, reiterates her previous objection to the disposition of the issue in *Vivares* without abandoning acceptance of the consent exception, insofar as the high court failed to consider pertinent provisions of the Data Privacy Act of 2012 on the required conditions for processing of personal information. Considering that the photos seized in evidence in said case were obtained *to identify* the students/individuals who participated in the prohibited act in question therein, the seized data fall under the protection of the Act. They constitute data "from which the identity of an individual is apparent or can be reasonably and directly ascertained by the entity holding the information, or when put together with other information would directly and certainly identify an individual." Evidence in the forms described in Section 3(a) of the law is thus

required before any processing of personal information may be allowed.[126]

c. Consent by co-owners and co-users

Another issue pertaining to this exception arises in cases of shared computers or devices –for instance those used in common by families, employees, or spouses. Specifically, there may be a question as to whether a co-owner or co-user may consent to state intrusion into the computer for an offence for which another user is suspected to be involved. In line with the multiple containers approach, the author is of the view that one may only consent to the opening and seizure of those files or property over which one possesses ownership. Thus, if ownership of a particular file, folder, or account clearly pertains to only one of the computer's co-users, such may not be opened without said consent. However, for those files, folders, or other digital property which are "shared" or pertain to multiple owners, it is the author's view that any one of the established co-owners may give permission to search said property and state agents should be able to rely on such consent to search the common property. In this case, the co-owner may be deemed to have assumed the risk of discovery, use, or revelation of the shared digital property by the person/s with whom it was shared. The same principle as that in the case of *Vivares* may be applied – the audience, or in this case co-owners, with whom any digital property is shared, are allowed to view, use, or reveal said shared property.

Even in cases of physical property or premises, it has been held that one who has common authority over

[126] Section 3, The Data Privacy Act of 2012

premises or effects may consent to a search absent any objection from a present co-owner or even though a co-owner who is absent objects. In the US case *United States v Matlock,* the court held that it is reasonable to conclude that any of the co-inhabitants of a certain premises has the right to permit its inspection in his own right and that others should be deemed to have assumed the risk that one of their number might permit the search of the common area.[127] Under this ruling, another person with common authority over certain premises or property may consent to a search and state agents may view what is shared to said person giving the consent without violating the reasonable expectation of privacy of any co-owner who may have not given consent. This is qualified by the requirement that the search must be bound within the zone of the consenting party's authority. State agents require state agents to inquire into said consenting person's right of access to the premises and segregate parts of the "premises" which fall within common authority and those areas over which the consenting party has no authority or control.

However, where the target of the search is present and expressly objects to the search, it has been held by the US high court that state agents may not rely on one of the co-owners' consent to search if the latter expressly objected to.[128] The Court analogized the situation to one where a co-tenant wishes to open the door to a third party over the objection of a present co-tenant. The court held that such consenting co-tenant has no recognized authority in law or social practice to so insist on the third party intrusion in defiance of a present and objecting co-tenant. In case of secured files, folders, or accounts over

[127] United States v. Matlock, 415 U.S. 164 (1974)

[128] Georgia v. Randolph, 547 U.S. 103 (2006)

which two or more individuals possess the password which in effect is key to enter said containers, it has been held in US jurisprudence that such shared passwords signify the common authority required for any of those in its possession to allow state agents to search the property.[129]

d. Consent by private individuals to seize effects produced by private search

Another situation where the consent exception may apply is when a private individual, neither acting as an agent of the state nor by request of state agents, voluntarily informs authorities of an inadvertent discovery of evidence of illegal activity. Under Philippine jurisprudence, it is established that the warrant requirement does not apply when evidence is obtained or discovered not by state agents but private individuals.[130] This is so because the proscriptions laid down in the *Bill of Rights* or Article III of the 1987 Constitution are directed toward the state but do not impose limitations to actions of private individuals.[131] This includes the proscription against unreasonable searches and seizures in Section 2 of said Article III. In *People v Marti*, dried marijuana leaves which were found by the proprietor of forwarding company "Manila Packi Forwarders" were admitted as evide *individual acting in a private capacity* conducted the search and the contraband came int possession without it transgressin

[129] Trulock v. Freeh, 275 F.3d 391 (2001); United States v. Smith, 27 F. Supp. 2d (1998)

[130] *Id.* at 11, Zulueta v CA G.R. No. 107383 (1996)

[131] Villanueva v Querubin G.R. No. L-26177 (1972), quoted in People v Marti

against unreasonable search and seizure.[132] It should be noted that in this case, the evidence were contained in packages which the third party, from whose consent to view them was obtained, had to open –he removed the top flaps, styrofoam, and cellophane wrappers covering the contraband which were hidden inside gloves inside the package. He therein found the dried marijuana leaves and delivered them for inspection to the state.

Applying these principles, the same conclusion may be reached in case an individual having control or custody over certain digital devices invites state agents to view its contents in case he finds evidence of illegal activity therein. For instance, an owner of a computer shop who, in inspecting the contents of one of the computers he owns, finds evidence of gang violence involvement on the part of one of his customers. He may report such information to state agents. Likewise, he may allow state agents to obtain the evidence so discovered in the course of his inspection which may be considered as a private search.

e. Revocation of consent previously given

Another question with respect to the consent exception may arise: may consent already given be revoked before the search of the digital device concerned is completed? Considering that the exception is considerably a waiver by the defendant of his Constitutional right to refuse a search absent a warrant and is thus based on the liberality of the individual concerned, he or she must be permitted to make a last minute desistance and stop state authorities from continuing any pending search made pursuant to his

[132] *Id.* at 11

consent. In US cases *Mason v Pulliam* and *Vaughn v Baldwin* which involved searches of physical documents by virtue of the defendants' consen allowed the state agents to keep copies of documents made prior to the revocation of consent but ordered the return of copies made after consent given was revoked.[133] A similar rule should be applied to search of digital property in view of the analogous character of the property sought to be seized – personal property containing or representing information usable as evidence –and the principle of a valid waiver of rights as well as the fact that a defendant should be held to retain a reasonable expectation of privacy in parts of the device over which he or she had not consented to a search.

4. *Rethinking the Emergency and Exigent Circumstances doctrine*

The emergency and exigent circumstances exception to the warrant requirement is particularly useful to the state in case of digital property. Digital data may be easily deleted or destroyed, often leaving no trace of their existence. Such deletion may even be done remotely or through a device other than that seized. State agents would then highly benefit from a legal permission to immediately seize data while such is available for seizure. To invoke said exception, state agents must consider: (1) the degree of urgency involved in the situation, (2) the amount of time necessary to obtain a search warrant, (3) whether the evidence is about to be removed or destroyed, (4) the possibility of danger at the site of supposed search, (5) whether those in possession of the property sought to be seized know that the police are on

[133] Mason v. Pulliam, 557 F.2d 426 (1977); Vaughn v. Baldwin, 950 F.2d 331 (1991)

their trail, and (6) the ready destructibility of the property subject of the illegal activity.[134]

In *United States v Trowbridge*, the US high court upheld the seizure of certain computers even absent a warrant when it was shown that such seizure was conducted while agents were concerned for their safety during a fast- moving investigation and there was sufficient likelihood that computer evidence would be destroyed.[135] The author is of the view that, in applying this exception, state agents may follow the procedure suggested for searches by virtue of warrants. In consonance with how the exception is applied to physical property, the digital device in which the evidence sought to be preserved is suspected to be contained may be seized from the defendant or suspect even pending the procurement of a search warrant. After such seizure, state agents may open the device for the endangered evidence or, if the device is password-protected, may obtain cooperation from the defendant in the form of permitting entry into the device through inputting his password therein. In case of refusal, the same approach of either outsourcing the task of forcing their way into the device through password attempts or obtaining backdoors to the security system may be resorted to by the state.

Although the exception has substantial usefulness in prosecuting internet- or computer-related crimes, it is also likewise highly subject to abuse by state authorities and may be used to justify every unwarranted and unreasonable intrusion into private digital property. The

[134] United States v. Reed, 935 F.2d 641 (1991); United States v. Plavcak, 411 F.3d 655 (2005)

[135] United States v. Trowbridge, 2007 WL 4226385 (2007)

existence of such exigent and emergency circumstances that would warrant the invocation of this exception must thus be clearly shown by agents of the state in order for the evidence obtained to be admitted in evidence. State agents invoking the doctrine must thus, pursuant to the requisites laid down in jurisprudence, demonstrate that a high degree of urgency exists, that to wait for the issuance of a search warrant would lead to loss of evidence because evidence is in danger of imminent removal or destruction, that those in possession of the property sought to be seized know that the government is on their trail, and that the property subject of the illegal activity is readily destructible.

IV. Conclusion

The ability to obtain digital evidence and having clear guidelines in effecting such obtainment is indubitably beneficial for state authorities in prosecuting computer-related crimes. Much evidence in the modern world lie within the virtual realm stored in slash bins, clouds, and other digital storages. Therein, consequently, must state authorities conduct their searches to obtain property subject to seizures and offers in evidence. The usefulness of digital evidence in prosecuting crimes has been demonstrated in numerous cases decided in recent years both in US and Philippine jurisdiction. In the absence of rules that fit the circumstances of the contemporary era and the continued stretching of old rules to apply to issues not contemplated at the time of their formulation, the public may not be sufficiently protected from incidences of arbitrary searches and abuses of authority by state agents. On the part of government officers, they may be hesitant or uncertain in

dealing with cases involving digital evidence in the absence of clear rules as to their susceptibility to state search and seizure. In case of refusal of entry into digital devices, state agents who, under the Rules of Court are allowed to break into enclosed premises, should also be expressly provided with means on how to "enter" security system-protected virtual enclosures which require searching in pursuance of criminal justice. Issuance of The Rules on Electronic Evidence is commendable for its admission of digital data and messages in court proceedings as well as for providing the procedure for the authentication thereof.

More steps in Philippine jurisdiction need to be taken to address the issues emerging from the use of digital technology in the perpetration of crimes, apart from other numerous effects of new technology on the social landscape. In the area of search and seizure, a starting point may be the reform of Rule 126 of the Rules of Court into a version providing for the search of digital property and means for effecting entry in cases of refusal or inability to enter devices due to security system restrictions. The next solution may lie in creating legislation that provides for the inclusion of digital property among Constitutionally-protected effects, the extent and allowable scope of searches which may be effected on them without violating Constitutional proscriptions against violations of privacy and unreasonable searches, guidelines in applying for search warrants for their inspection, rules on their custody after seizure, the manner by which they are to be searched, and allowable forensic techniques in their inspection. Exceptions to the search warrant requirement which were formulated to apply to tangible property, as discussed above, should also be reframed and adjusted in consideration of their possible application to searches of

digital property.

In US jurisdictions, US attorneys have at least one assistant US attorney designated as a Computer Hacking and Intellectual Property (CHIP) attorney who receives extensive training in dealing with computer crime issues and provides expertise relating to seizures and uses in evidence of digital property. The US Child Exploitation and Obscenity Section also provides expertise in computer-related cases which involve child pornography and child exploitation. A Computer Crime and Intellectual Property Section (CCIPS) in the US Justice Command Center continuously provides assistance to state agents and prosecutors on issues related to computer-related crimes and assigns CCIPS attorneys to answer questions of police officers pertaining to the prosecution of such crimes. These practices may be replicated in Philippine jurisdiction to sufficiently provide the guidance needed in the effective administration of criminal justice as well as for public awareness of rights pertaining to o

Additionally, the Asia-Pacific Economic Cooperation (APEC) Cross-Border Privacy Rules (CBPR) System of 2011 and the General Data Protection Regulation (GDPR) of the European Union (EU) of 2018 further strengthen the protection provided over individual personal information. These two privacy regimes provide APEC and EU member states with sets of principles and guidelines in establishing effective privacy protections over their citizens' personal information while ensuring free-flow of information and trade within their spheres. They each set out self-assessment procedures, compliance review, recognition, and systems for dispute resolution and enforcement of privacy regulations.

As part of the APEC, the Philippines should take advantage of the CBPR to enforce Filipinos' constitutional rights to privacy as against possible violations thereof not only by state agents and third persons but likewise by tech-giants and ICT businesses, especially those which will participate in the System. Proper implementation of the principles under this regime in the Philippines will eliminate many issues on jurisdiction and enforcement as against foreign companies offering almost all of the available digital and online services in the country.

Any lacunae in Philippine privacy protection laws may also be supplemented by the CBPR as well as the principles under the GDPR to provide adequate protection over Filipinos' personal data in accordance with the incorporation principle enshrined in Section 2 Article II of the Philippine Constitution. Relevant to digital searches and seizures, the CBPR provides that obtainment of individuals' personal information should be limited to the kind that is relevant to the purposes of collection and should be obtained only by lawful and fair means, and, where appropriate, with consent of the individual concerned. These are consistent with the warrant requirements and privacy provision under the Philippine Bill of Rights laid out by the Constitution. Furthermore, it requires clear, prominent, easily understandable, accessible and affordable mechanisms for citizens to freely exercise choice in relation to the collection, use and disclosure of their personal information.

In case of inter-state or local transmission of any seized data, a personal information controller likewise needs to obtain the consent of the individual or exercise due diligence and take reasonable steps to ensure that the recipient person or organization will protect the

information consistently with the principles of the CBPR. These international regulations provide the framework on which Philippine legislation on the matter of digital search and seizure vis-à-vis the right to privacy and right against unreasonable searches and seizure should be formulated and enforced.[136]

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[136] Cross Border Privacy Rules System website http://www.cbprs.org/; Homepage of the European Union General Data Protection Regulation https://www.eugdpr.org/

The Evolution of Money Laundering Laws in the Philippines

*Benjamin R. Samson**

Money laundering became an offense in Philippine jurisdiction in 2001 or almost two (2) decades ago. The first Philippine law against money laundering clearly stated that it is the country's policy to ensure that it shall not be used as a money laundering site for the proceeds of any unlawful activity. Consistent with its foreign policy, the law also stated that it shall extend cooperation in transnational investigations and prosecutions of persons involved in money laundering activities.[1]

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* Visiting Professional, International Criminal Court, The Hague, The Netherlands (2015-2016); Most Outstanding Alumnus, China-ASEAN Legal Training Base; Visiting Research Fellow, China-ASEAN Legal Research Center, Chongqing, China; Especially Invited Member, China HuanYu-ASEAN Legal Cooperation Center, Hainan, China; Lecturer, International Kovalyov Readings, Yekaterinburg, Russia; Participant, First International Course for Junior Prosecutors, Siracusa, Italy; Director-General, International Forum on Crimes and Criminal Law in the Global Era; Trainer, Anti-Money Laundering Council (AMLC)/ International Development Law Organisation (IDLO) Training Course on Money Laundering; Trainer, AMLC/IDLO Training on Anti-Fraud and Anti-Drugs Courses; and Trainer, DOJ/Inter-Agency Council Against Trafficking (IACAT) Training Pool on Trafficking in Persons; formerly, Assistant State Prosecutor in the Department of Justice head office and, formerly, member of the following: Task Force on Financial Fraud Cases, Task Force on Bureau of Internal Revenue Cases, and Task Force on Bureau of Customs Cases; formerly, member of the Criminal Investigation and Detection Group (CIDG) Advisory Council; and, presently, Deputy City Prosecutor, Office of the City Prosecutor, City of San Pedro, Laguna, Department of Justice-National Prosecution Service.

[1] Rep. Act No. 9160 (2001), sec. 2

In our jurisdiction, the Anti-Money Laundering Council (Council) has the main task of enforcing our laws on money laundering. It is comprised of three members, namely, the Governor of the Bangko Sentral ng Pilipinas (BSP) as chair, and the Commissioner of the Insurance Commission (IC) and the Chair of the Securities and Exchange Commission (SEC) as members. By law, the Council is our country's financial intelligence unit.

Originally created in 2001 under Republic Act No. 9160,[2] the Council's powers have been enhanced to make it more effective against money laundering and, now, financing of terrorism. Since 2001, the laws against money laundering have been amended several times to include recent trends and techniques in transnational organized crimes and to enhance the Council's authority to prevent the Philippines from being blacklisted by the international Financial Action Task Force (FATF). Hence, Republic Act No. 9194,[3] Republic Act No. 10167,[4] Republic Act No. 10168[5], Republic Act No. 10365,[6] and, lastly, Republic Act No. 10927[7] were enacted. Below are the general descriptions of our laws on money laundering.

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[2] Anti-Money Laundering Act of 2001. Signed into law on September 29, 2001.

[3] An Act Amending Republic Act No. 9160. Signed into law on March 7, 2003.

[4] An Act to Further Strengthen the Anti-Money Laundering Law. Signed into law on June 6, 2012.

[5] The Terrorism Financing Prevention and Suppression Act of 2012. Signed into law on June 20, 2012.

[6] An Act Further Strengthening the Anti-Money Laundering Law. Signed into law on February 15, 2013.

[7] An Act Designating Casinos as Covered Persons. Signed into law on July 14, 2017.

To bring the Philippines 'regulatory regime on money laundering closer to international standards, Congress passed Republic Act No. 9160. Among others, the law made money laundering a criminal offense; prescribed penalties for specific offenses; formed the Council and enumerated its main functions; imposed requirements on customer identification, record keeping, reporting of covered transactions; relaxed bank secrecy laws; and provided for the freezing, seizure, forfeiture, and recovery of laundered money or property. The Implementing Rules and Regulations (IRR) of this law was likewise issued in 2001. The law expressly stated that its provisions shall not apply to deposits and investments made prior to its effectivity.[8]

The first amendment to Republic Act No. 9160 was made in 2003 with the enactment of Republic Act No. 9194, which was passed by Congress to address concerns, such as, the high threshold amount for covered transactions, the coverage of covered transactions, and the confidentiality provision under the Bank Secrecy Law. The amendments introduced by this law included lowering the threshold amount for covered transactions from Php4,000,000.00 to Php500,000.00, giving authority to the BSP to inquire into or examine any deposit or investment with any banking institution without court order in the course of a periodic or special examination, and removing the provision prohibiting the retroactivity of the law. The Revised IRR was approved by the Congressional Oversight Committee on 6 August 2003 and was implemented on 3 September 2003.

The second amendment to Republic Act No. 9160 came in 2012 with the passage of Republic Act No. 10167, which was intended to further strengthen the c o u n t a n t i - m o n e y laundering regime and to address the concerns of FATF. The

[8] Rep. Act No. 9160 (2001), sec. 23

amendments focused on the freezing of monetary instrument and the Council's authority to inquire into bank deposits. These amendments recognized the urgency of the issuance of the freeze order and the grant of authority to the Council to conduct bank inquiry within 24 hours from the filing of the petition with the Court of Appeals. The Revised IRR was approved under AMLC Resolution No. 84 dated 23 August 2012.

In 2012, Republic Act No. 10168 was passed by Congress. Although it deals with terrorism financing, it nevertheless revolutionized the Council's powers by expressly giving it authority to freeze property or funds that are in any way related to financing of terrorism or acts of terrorism or property or funds of any person, group of persons, terrorist organization, or association, in relation to whom there is probable cause to believe that they are committing or attempting or attempting to commit, or participating in or facilitating the commission of financing of terrorism or acts of terrorism.[9] The law also gave the Council authority to inquire into or examine bank deposits and investments without the need of securing an order from a court of competent jurisdiction.[10]

The third amendment to Republic Act No. 9160 came in 2012 with the enactment of Republic Act No. 10365. The significant amendments introduced by the latter include the expansion of the definition of money laundering, which was previously limited to the transaction of laundered funds or property, the inclusion of jewelry dealers in precious metals and stones when the transactions exceed Php1,000,000.00 and company service providers as covered persons, the increase of unlawful activities from 14 to 34, the authority of

[9] Rep. Act No. 10168 (2012), sec 11

[10] Rep. Act No. 10168 (2012), sec 10

the Council to require the Land Registration Authority and its Registry of Deeds to submit report to the Council for real estate transactions in excess of Php500,000.00, and the extension of the validity of the freeze order issued by the court from 20 days to six months.

The latest amendment to Republic Act No. 9160 was made in 2017 with the effectivity of Republic Act No. 10927, which included casinos as covered persons and declared a single casino transaction in excess of Php5,000,000.00 as a covered transaction.

As can be gleaned above, our money laundering laws have evolved over the years. In general, our laws on this subject may be categorized as follows:

1. Powers of the Council;
2. Definition of money laundering;
3. Covered institutions;
4. Covered transactions;
5. Suspicious transactions;
6. Predicate offenses;
7. Punishable offenses;
8. Authority to freeze;
9. Civil forfeiture; and
10. Authority to inquire into bank deposits.

The above categories will be discussed in seriatim.

I. POWERS OF THE COUNCIL

Under Republic Act No. 9160, the Council was mandated to act unanimously in the discharge of the following functions, viz:

"(1) To require and receive covere
reports from covered institutions;
"(2) To issue orders addressed to
Supervising Authority or the covered institution to determine the true identity of the owner of any monetary instrument or property subject of a covered transaction report or request for assistance from a foreign State, or believed by the Council, on the basis of substantial evidence to be in whole or in part, whenever located, representing, involving, or related to, directly or indirectly, in any manner or by any means, the proceeds of an unlawful activity;
"(3) To institute civil forfeiture
all other remedial proceedings through the Office of the Solicitor General;
(4) To cause the filing of complaints with the Department of Justice or the Ombudsman for the prosecution of money laundering offenses;
"(5) To initiate investigations
transactions, money laundering activities and other violations of this Act;
"6) To freeze any monetary instrument or property alleged to be proceed of any unlawful activity;
"(7) To implement such measures a
necessary and justified under this Act to counteract money laundering;
"(8) To receive and take action in
request from foreign states for assistance in their own anti-money laundering operations provided in this Act;
"(9) To develop educational progr
pernicious effects of money laundering, the methods and techniques used in money

laundering, the viable means of preventing money laundering and the effective ways of prosecuting and punishing offenders; and

"(11) To enlist the assistance of any branch, department, bureau, office, agency or instrumentality of the government, including government-owned and -controlled corporations, in undertaking any and all anti-money laundering operations, which may include the use of its personnel, facilities and resources for the more resolute prevention, detection and investigation of money laundering offenses and prosecution of offenders.[11]

When Republic Act No. 9194 became law, it amended Section 7(1)(2)(5)(6) of the original law by modifying the aforesaid powers of the Council and by adding a new one, as follows:

"(1) To require and receive covered or suspicious transaction reports from covered institutions;

"(2) To issue orders addressed to the appropriate Supervising Authority or the covered institutions to determine the true identity of the owner of any monetary instrument or property subject of a covered transaction or suspicious transaction report or request for assistance from a foreign State, or believed by the Council, on the basis fo substantial evidence, to be, in whole or in part, wherever located, representing, involving, or related to directly or indirectly, in any manner or by any means, the proceeds of an unlawful activity;

xxx

[11] Rep. Act No. 9160 (2001), sec. 7

xxx

"(5) To investigate suspicious transactions and covered transactions deemed suspicious after an investigation by AMLC, money laundering activities and other violations of this Act;

"(6) To apply before the Court of Appeals, ex parte, for the freezing of any monetary instrument or property alleged to be the proceeds of any unlawful activity as defined in Section 3(i) hereof;

xxx

xxx

xxx

xxx

(11) To impose administrative sanctions for the violation of laws, rules, regulations, and orders and resolutions issued pursuant thereto".[12] *(Underlining supplied)*

Noticeably, the amendatory law now included "suspicious transaction". It must also be noted that before the Council could investigate covered and suspicious transactions, there must first be an investigation that said transactions are suspicious. The law also made it clear that the freezing of money or property can only be made by applying an ex parte application before the Court of Appeals. Meanwhile, the imposition of administrative sanctions under Section 7(11) is an addition to the Council's already vast powers.

When Republic Act No. 10167 was passed, there was status quo in the Council's functions, but with the enactment of Republic Act No. 10168, the Council's power to inquire into and examine bank deposits and investments and its

[12] Rep. Act No. 9194 (2003), sec. 5

authority to freeze property of funds were expanded with respect to terrorism financing cases. However, with the passage of Republic Act No. 10365 in 2013, Section 7(6) was again amended as follows:

> "(6) To apply before the Court of Appeals, ex parte, for the freezing of any monetary instrument or property alleged to be laundered, proceeds from, or instrumentalities used in or intended for use in any unlawful activity as defined in Section 3(i) hereof; (Underscoring supplied)

The clause "laundered, proceeds fro used or intended for use" was inser the new definition of money laundering which was introduced by Republic Act No. 10365.

Aside from amending Section 7(6), the amendatory law also gave a new function to the Council, viz:

> "(12) To require the Land Registration Authority and all its Registries of Deeds to submit to the AMLC, reports on all real estate transactions involving an amount in excess of Five Hundred Thousand Pesos (₱500,000.00) within fifteen (15) days from the date of registration of the transaction, in a form to be prescribed by the AMLC. The AMLC may also require the Land Registration Authority and all its Registries of Deeds to submit copies of relevant documents of all real estate transactions."[13]

[13] Rep. Act No. 10365 (2013), sec. 6

Although Republic Act 10927 was passed later, it did not further amend Section 7 of Republic Act No. 9160.

Given the foregoing discussions, the amended powers of the Council may be summarized as follows:

> (1) To require and receive covered or suspicious transaction reports from covered institutions;
> (2) To issue orders addressed to the appropriate Supervising Authority or the covered institutions to determine the true identity of the owner of any monetary instrument or property subject of a covered transaction or suspicious transaction report or request for assistance from a foreign State, or believed by the Council, on the basis fo substantial evidence, to be, in whole or in part, wherever located, representing, involving, or related to directly or indirectly, in any manner or by any means, the proceeds of an unlawful activity;
> (3) To institute civil forfeiture proceedings and all other remedial proceedings through the Office of the Solicitor General;
> (4) To cause the filing of complaints with the Department of Justice or the Ombudsman for the prosecution of money laundering offenses;
> (5) To investigate suspicious transactions and covered transactions deemed suspicious after an investigation by AMLC, money laundering activities and other violations of this Act;
> (6) To apply before the Court of Appeals, ex parte, for the freezing of any monetary instrument or property alleged to be laundered, proceeds from, or instrumentalities used in or intended for use in any unlawful activity as defined in Section 3(i) hereof;

(7) To implement such measures as may be necessary and justified under this Act to counteract money laundering;
(8) To receive and take action in respect of, any request from foreign states for assistance in their own anti-money laundering operations provided in this Act;
(9) To develop educational programs on the pernicious effects of money laundering, the methods and techniques used in money laundering, the viable means of preventing money laundering and the effective ways of prosecuting and punishing offenders; and
(10) To enlist the assistance of any branch, department, bureau, office, agency or instrumentality of the government, including government-owned and -controlled corporations, in undertaking any and all anti-money laundering operations, which may include the use of its personnel, facilities and resources for the more resolute prevention, detection and investigation of money laundering offenses and prosecution of offenders;
(11) To impose administrative sanctions for the violation of laws, rules, regulations, and orders and resolutions issued pursuant thereto;
(12) To require the Land Registration Authority and all its Registries of Deeds to submit to the AMLC, reports on all real estate transactions involving an amount in excess of P500,000.00 within 15 days from the date of registration of the transaction, in a form to be prescribed by the AMLC. The AMLC may also require the Land Registration Authority and all its Registries of Deeds to submit copies of relevant documents of all real estate transactions;

(13) To investigate financing of terrorism and inquire into or examine bank deposits and investments without the need of securing an order from a court of competent jurisdiction; and

(14) To freeze property or funds that are in any way related to financing of terrorism or acts of terrorism or property or funds of any person, group of persons, terrorist organization, or association, in relation to whom there is probable cause to believe that they are committing or attempting or attempting to commit, or participating in or facilitating the commission of financing of terrorism or acts of terrorism.

II. DEFINITION OF MONEY LAUNDERING

The offense of money of money laundering, being a modern crime, has also evolved over the years. With the trends and techniques in transnational organized crimes changing globally, there is also a need for our jurisdiction to come up with a more realistic and responsive definition for the said offense.

Republic Act No. 9160 defined money laundering as a crime whereby the proceeds of an unlawful activity are transacted, thereby making them appear to have originated from legitimate sources. It is committed by the following:

> "(a) Any person knowing that any instrument or property represents, involves, or relates to the proceeds of any unlawful activity,

transacts or attempts to transact said monetary instrument or property.

"(b) Any person knowing that an instrument or property involves the proceeds of any unlawful activity, performs or fails to perform any act as a result of which he facilitates the offense of money laundering referred to in paragraph (a) above.

"(c) Any person knowing that an instrument or property is required under this Act to be disclosed and filed with the Anti-Money Laundering Council (AMLC),[14] fails

Although Republic Act No. 9194 also contained provisions on the definition of money laundering, it merely copied the original definition while both Republic Act No. 10167 and Republic Act No. 10168 also did not change the statutory definition of money laundering.

Then came Republic Act No. 10365, which defined money laundering as a crime committed by any person who, knowing that any monetary instrument or property represents, involves, or relates to the proceeds of any unlawful activity:

"(a) Transacts said monetary instrument or property;

"(b) Converts, transfers, disposes of, moves, acquires, possesses or uses said monetary instrument or property;

"(c) Conceals or disguises the true nature, source, location, disposition, movement or ownership of or rights with respect to said monetary instrument or property;

[14] Rep. Act No. 9160 (2001), sec. 4

"(d) Attempts or conspires to commit money laundering offenses referred to in paragraphs (a), (b) or (c);
"(e) Aids, abets, assists in or counsels the commission of the money laundering offenses referred to in paragraphs (a), (b) or (c) above; and
"(f) Performs or fails to perform any act as a result of which he facilitates the offense of money laundering referred to in paragraphs (a), (b) or (c) above".[15]

This new definition is radically different from the old law which only limited the commission of the offense to the transaction of laundered funds or property. The last five enumerations reflect the change of modes by which the offense can be committed. Obviously, the previous concept of limiting the definition to the mere transaction of laundered monetary instrument or property is now considered as just one of the six modes of committing the offense. Therefore, since 2013, this new definition is now controlling in absence of any amendment made by Republic Act No. 10927.

III. COVERED PERSONS

Republic Act No. 9160 initially used the term covered institution which refers to:

"(1) Banks, quasi-banks, trust entities, and all other institutions and their subsidiaries and affiliates supervised or

[15] Rep. Act No. 10365 (2013), sec. 4

regulated by the Bangko Sentral ng Pilipinas (BSP);

"(2) Insurance companies and institutions supervised or regulated by the Insurance Commission; and

"(3) (i) securities dealers, br investment houses and other similar entities managing securities or rendering services as investment agent, advisor, or consultant, (ii) mutual funds, close and investment companies, common trust funds, pre-need companies and other similar entities, (iii) foreign exchange corporations, money changers, money payment, remittance, and transfer companies and other similar entities, and (iv) other entities administering or otherwise dealing in currency, commodities or financial derivatives based thereon, valuable objects, cash substitutes and other similar monetary instruments or property supervised or regulated by Securities and Exchange Commission".[16]

The above enumeration remained the same until 2013 because Republic Act No. 9194, Republic Act No. 10167, and Republic Act No. 10168 did not amend the definition of covered institution.

With the enactment of Republic Act No. 10365, Section 3(a) of Republic Act No. 9160 was overhauled by removing the term covered institutions and correctly using the term covered persons to include natural and juridical persons, by lumping together the previous categories in accordance with the functions of the BSP, the IC, and the SEC, and by introducing four (4) new provisions relating to jewelry

[16] Rep. Act No. 10365 (2013), sec. 3(a)

dealers in precious stones and metals, and company service providers. The amendatory law also created a proviso excluding accountants and lawyers to address issues on client confidence and lawyer-client relationship, respectively.

In 2017, Republic Act No. 10927 further amended Section 3(a) of Republic Act No. 9160 to include casinos as covered persons.

Hence, at present, covered persons, whether natural or juridical, now refer to:

> (1) Banks, non-banks, quasi-banks, trust entities, foreign exchange dealers, pawnshops, money changers, remittance and transfer companies and other similar entities and all other persons and their subsidiaries and affiliates supervised or regulated by the Bangko Sentral ng Pilipinas (BSP);
> (2) Insurance companies, pre-need companies and all other persons supervised or regulated by the Insurance Commission (IC);
> (3) (i) Securities dealers, brokers, salesmen, investment houses and other similar persons managing securities or rendering services as investment agent, advisor, or consultant, (ii) mutual funds, close-end investment companies, common trust funds, and other similar persons, and (iii) other entities administering or otherwise dealing in currency, commodities or financial derivatives based thereon, valuable objects, cash substitutes and other similar monetary instruments or property supervised or regulated by the Securities and Exchange Commission (SEC);

(4) Jewelry dealers in precious metals, who, as a business, trade in precious metals, for transactions in excess of P1,000,000.00;
(5) Jewelry dealers in precious stones, who, as a business, trade in precious stones, for transactions in excess of P1,000,000.00;
(6) Company service providers which, as a business, provide any of the following services to third parties: (i) acting as a formation agent of juridical persons; (ii) acting as (or arranging for another person to act as) a director or corporate secretary of a company, a partner of a partnership, or a similar position in relation to other juridical persons; (iii) providing a registered office, business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement; and (iv) acting as (or arranging for another person to act as) a nominee shareholder for another person;
(7) Persons who provide any of the following services:
(i) managing of client money, securities or other assets;
(ii) management of bank, savings or securities accounts;
(iii) organization of contributions for the creation, operation or management of companies; and
(iv) creation, operation or management of juridical persons or arrangements, and buying and selling business entities.
Notwithstanding the foregoing, the term 'covered persons' shall exclude lawyers and accountants acting as independent legal

professionals in relation to information concerning their clients or where disclosure of information would compromise client confidences or the attorney-client relationship: Provided, That these lawyers and accountants are authorized to practice in the Philippines and shall continue to be subject to the provisions of their respective codes of conduct and/or professional responsibility or any of its amendments[17]; and

(8) Casinos[18], including internet and ship-based casinos, with respect to their casino cash transactions[19] related to the gaming operations[20]. Gaming operations refer to the activities of the casino offering games of chance and any variations thereof approved by the appropriate government authorities.[21]

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[17] Rep. Act No. 10365 (2013), sec. 1

[18] Casino refers to a business authorized by the appropriate government agency to engage in gaming operations:

(i) Internet-based casinos shall refer a casinos in which persons participate by the use of remote communication facilities such as, but not limited to, internet, telephone, television, radio or any other kind of electronic or other technology for facilitating communication; and

"(ii) Ship-based casinos shall refer to casinos, the operation of which is undertaken on board a vessel, ship, boat or any other water-based craft wholly or partly intended for gambling (Section 3(l)(1), Republic Act No. 9160, as amended by Section 3, Republic Act No. 10927).

[19] Casino cash transaction refers to transactions involving the receipt of cash by a casino paid by or on behalf of a customer, or transactions involving the payout of cash by a casino to a customer or to any person in his/her behalf (Section 3(l)(2), Republic Act No. 9160, as amended by Section 3, Republic Act No. 10927.

[20] Rep. Act No. 10927 (2017), sec. 1

[21] Rep. Act No. 9160 (2001), sec. 3(l)(3)

The list is exclusive. It may be expanded anew should there be another amendment to the original law addressing new trends in money laundering.

IV. Covered Transactions

Republic Act No. 9160 defined covered transaction as a single, series, or combination of transactions involving a total amount in excess of Php4,000,000.00 or an equivalent amount in foreign currency based on the prevailing exchange rate within five consecutive banking days except those between a covered institution and a person who, at the time of the transaction was a properly identified client and the amount is commensurate with the business or financial capacity of the client; or those with an underlying legal or trade obligation, purpose, origin or economic justification. It likewise refers to a single, series or combination or pattern of unusually large and complex transactions in excess of Php4,000,000.00 especially cash deposits and investments having no credible purpose or origin, underlying trade obligation or contract.[22]

When Republic Act No. 9194 amended the aforesaid law, it lowered the threshold amount to an excess of Php 500,000.00 and further lowering the transaction period to within one banking day.[23] This amendment was not changed until 2017 since Republic Act No. 10167, Republic Act No. 10168, and Republic Act No. 10365 did not introduce any amendment thereon.

[22] Rep. Act No. 9160 (2001), sec. 3(b)

[23] Rep. Act No. 9104 (2003), sec. 1

When Republic Act No. 10927 became law in 2017, it further amended Section 3(b) of Republic Act No. 9160. Thus, the provision on covered transactions now reads as follows:

> "Covered transaction is a transact
> other equivalent monetary instrument involving a total amount in excess of Php500,000.00 within one banking day; for covered persons under Section 3(a)(8), a single casino transaction involving an amount in excess of Php5,000,000.00 or its equivalent in any other currency".[24]

To emphasize, legitimate transactions, regardless of the amounts involved, can never be considered money laundering. However, not all illegitimate transactions below the threshold amount could make our money laundering laws inoperative. This point is discussed in the succeeding category.

V. SUSPICIOUS TRANSACTIONS

Only Republic Act No. 9160 and Republic Act No. 9194 are relevant in this category considering that Republic Act No. 10167, Republic Act No. 10168, Republic Act No. 10365, and Republic Act No. 10927 did not introduce any amendment therein.

It must be emphasized that Republic Act No. 9160 did not specifically create a provision on suspicious transactions. It merely defines what a transaction is all about. Thus:

[24] Rep. Act No. 10927 (2017), sec. 2

"Transaction refers to any act establishing any right or obligation or giving rise to any contractual or legal relationship between the parties thereto. It also includes any movement of funds by any means with[25] a covered

In view of the fact that Republic Act No. 9194 granted the Council for the first time the power to investigate suspicious transactions, it amended Section 3 of the original law by inserting between paragraphs (b) and (c) a new paragraph designated as (b-1) to read as follows:

"Suspicious transactions are tra
covered institutions, regardless of the amounts involved, where any of the following circumstances exist:

1. There is no underlying legal or trade obligation, purpose or economic justification;
2. The client is not properly identified;
3. The amount involved is not commensurate with the business or financial capacity of the client;
4. Taking into account all known circumstances, it may be perceived that the client's transaction is structured in order to avoid being the subject of reporting requirements under the Act;
5. Any circumstances relating to the transaction which is observed to deviate from the profile of the client and/or the client's past transactions with the covered institution;
6. The transactions is in a way related to an unlawful activity or offense under this Act that

[25] Rep. Act No. 9160 (2001), sec. 3(h)

is about to be, is being or has been committed;
or
7. Any transactions that is similar or analogous to any of the foregoing.[26]

If an illegitimate transaction is below the threshold amount, our money laundering laws would still apply if it is considered suspicious. Thus, money launderers could not evade the law even by transacting below the threshold amount.

VI. PREDICATE OFFENSES

In our jurisdiction, money laundering is an offense by itself. Thus, a person may be held liable for two separate offenses, namely: money laundering and the predicate offense or unlawful activity punished under a separate penal law. However, the former has no basis if the predicate offense is not included in the enumeration. The list is exclusive.

The word predicate comes from the Latin word *praedicatum*, which means something declared. Hence, if an offense is not in the list, the person can only be held liable for the offense punished in the separate penal law but not for money laundering.

Under Republic Act No. 9160, unlawful activity refers to any act or omission or series or combination thereof involving or having relation to the following:

[26] Rep. Act No. 9194 (2003), sec. 2

(1) Kidnapping for ransom under Article 267 of Act No. 3815, otherwise known as the Revised Penal Code, as amended;

(2) Sections 3, 4, 5, 7, 8 and 9 of Article Two of Republic Act No. 6425, as amended, otherwise known as the Dangerous Drugs Act of 1972;

(3) Section 3 paragraphs B, C, E, G, H and I of Republic Act No. 3019, as amended; otherwise known as the Anti-Graft and Corrupt Practices Act;

(4) Plunder under Republic Act No. 7080, as amended;

(5) Robbery and extortion under Articles 294, 295, 296, 299, 300, 301 and 302 of the Revised Penal Code, as amended;

(6) Jueteng and Masiao punished as illegal gambling under Presidential Decree No. 1602;

(7) Piracy on the high seas under the Revised Penal Code, as amended and Presidential Decree No. 532;

(8) Qualified theft under, Article 310 of the Revised Penal Code, as amended;

(9) Swindling under Article 315 of the Revised Penal Code, as amended;

(10) Smuggling under Republic Act Nos. 455 and 1937;

(11) Violations under Republic Act No. 8792, otherwise known as the Electronic Commerce Act of 2000;

(12) Hijacking and other violations under Republic Act No. 6235; destructive arson and murder, as defined under the Revised Penal Code, as amended, including those perpetrated by terrorists against non-combatant persons and similar targets;

(13) Fraudulent practices and other violations under Republic Act No. 8799, otherwise known as the Securities Regulation Code of 2000;

(14) Felonies or offenses of a similar nature that are punishable under the penal laws of other countries.[27]

When Republic Act No. 9194 amended Republic Act No. 9160 in 2003, the enumeration of unlawful activities remained the same except paragraph 2, referring to violation of Sections 3, 4, 5, 7, 8 and 9 of Article Two of Republic Act No. 6425 or the Dangerous Drugs Act of 1972. This must be so since in 2002, after the effectivity of Republic Act No. 9160 but before the enactment of Republic Act No. 9194, Republic Act No. 9165 or the Comprehensive Dangerous Drugs Act of 2002 already became law. Hence, there was a need to reflect the new changes brought about by the latter.

Despite the enactment of Republic Act No. 10167, the previous enumeration remained.

[27] Rep. Act No. 9160 (2001), sec. 3(i)

However, when Republic Act No. 10168 was passed in 2012, it included financing of terrorism under Section 4 and the offenses punishable under Sections 5, 6, and 7 therein as predicate offenses to money laundering.[28]

In 2013, the original list of 14 predicate offenses became 34 due to the amendment made by Republic Act No. 10365.

Thus, at present, the predicate offenses[29] for money laundering are as follows:

> (1) Kidnapping for ransom under Article 267 of Act No. 3815, otherwise known as the Revised Penal Code, as amended;
>
> (2) Sections 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of Republic Act No. 9165, otherwise known as the Comprehensive Dangerous Drugs Act of 2002;
>
> (3) Section 3 paragraphs B, C, E, G, H and I of Republic Act No. 3019, as amended, otherwise known as the Anti-Graft and Corrupt Practices Act;
>
> (4) Plunder under Republic Act No. 7080, as amended;
>
> (5) Robbery and extortion under Articles 294, 295, 296, 299, 300, 301 and 302 of the Revised Penal Code, as amended;

[28] Rep. Act No. 10168 (2012), sec. 17

[29] Rep. Act No. 10365 (2017), sec. 2, amending Section 3(i) of Republic Act No. 9160.

(6) Jueteng and Masiao punished as illegal gambling under Presidential Decree No. 1602;

(7) Piracy on the high seas under the Revised Penal Code, as amended and Presidential Decree No. 532;

(8) Qualified theft under Article 310 of the Revised Penal Code, as amended;
(9) Swindling under Article 315 and Other Forms of Swindling under Article 316 of the Revised Penal Code, as amended;
(10) Smuggling under Republic Act Nos. 455 and 1937;
(11) Violations of Republic Act No. 8792, otherwise known as the Electronic Commerce Act of 2000;

(12) Hijacking and other violations under Republic Act No. 6235; destructive arson and murder, as defined under the Revised Penal Code, as amended;

(13) Terrorism and conspiracy to commit terrorism as defined and penalized under Sections 3 and 4 of Republic Act No. 9372;

(14) Financing of terrorism under Section 4 and offenses punishable under Sections 5, 6, 7 and 8 of Republic Act No. 10168, otherwise known as the Terrorism Financing Prevention and Suppression Act of 2012:

(15) Bribery under Articles 210, 211 and 211-A of the Revised Penal Code, as amended, and

Corruption of Public Officers under Article 212 of the Revised Penal Code, as amended;

(16) Frauds and Illegal Exactions and Transactions under Articles 213, 214, 215 and 216 of the Revised Penal Code, as amended;

(17) Malversation of Public Funds and Property under Articles 217 and 222 of the Revised Penal Code, as amended;

(18) Forgeries and Counterfeiting under Articles 163, 166, 167, 168, 169 and 176 of the Revised Penal Code, as amended;
(19) Violations of Sections 4 to 6 of Republic Act No. 9208, otherwise known as the Anti-Trafficking in Persons Act of 2003;

(20) Violations of Sections 78 to 79 of Chapter IV, of Presidential Decree No. 705, otherwise known as the Revised Forestry Code of the Philippines, as amended;

(21) Violations of Sections 86 to 106 of Chapter VI, of Republic Act No. 8550, otherwise known as the Philippine Fisheries Code of 1998;

(22) Violations of Sections 101 to 107, and 110 of Republic Act No. 7942, otherwise known as the Philippine Mining Act of 1995;

(23) Violations of Section 27(c), (e), (f), (g) and (i), of Republic Act No. 9147, otherwise known as the Wildlife Resources Conservation and Protection Act;

(24) Violation of Section 7(b) of Republic Act No. 9072, otherwise known as the National Caves and Cave Resources Management Protection Act;

(25) Violation of Republic Act No. 653930, otherwise known as the Anti-Carnapping Act of 1972, as amended;

(26) Violations of Sections 1, 3 and 5 of Presidential Decree No. 1866, as amended, otherwise known as the decree Codifying the Laws on Illegal/Unlawful Possession, Manufacture, Dealing In, Acquisition or Disposition of Firearms, Ammunition or Explosives;

(27) Violation of Presidential Decree No. 1612, otherwise known as the Anti-Fencing Law;

(28) Violation of Section 6 of Republic Act No. 8042, otherwise known as the Migrant Workers and Overseas Filipinos Act of 1995, as amended by Republic Act No. 10022;

(29) Violation of Republic Act No. 8293, otherwise known as the Intellectual Property Code of the Philippines;

(30) Violation of Section 4 of Republic Act No. 9995, otherwise known as the Anti-Photo and Video Voyeurism Act of 2009;

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[30] Totally repealed by Republic Act No. 10883 or the New Anti-Carnapping Act of 2016. However, carnapping remains a predicate offense of money laundering.

(31) Violation of Section 4 of Republic Act No. 9775, otherwise known as the Anti-Child Pornography Act of 2009;

(32) Violations of Sections 5, 7, 8, 9, 10(c), (d) and (e), 11, 12 and 14 of Republic Act No. 7610, otherwise known as the Special Protection of Children Against Abuse, Exploitation and Discrimination;

(33) Fraudulent practices and other violations under Republic Act No. 8799, otherwise known as the Securities Regulation Code of 2000; and

(34) Felonies or offenses of a similar nature that are punishable under the penal laws of other countries.

The foregoing enumeration contains the recent list of predicate offenses considering that there was no specific provision introduced by Republic Act No. 10927 including transactions in casinos as a predicate offense, the reason being they are not considered gambling within the ambit of our laws.

VII. PUNISHABLE OFFENSES

Being a penal law, Republic Act No. 9160 must necessarily contain penal provisions. When the law was enacted, penalties for money laundering, failure to keep records, malicious reporting, and breach of confidentiality were all stated.[31]

[31] Rep. Act No. 9160 (2001), sec. 14

When Republic Act No. 9194 amended the original law, it retained Section 14, paragraphs a and b, but amended paragraphs c and d thereof. Regarding the provision on malicious reporting when the offender is a corporation, association, partnership, or any juridical person, the amendatory law used the phrase "all or by their gross negligence" instead of the phrase "k failed to prevent commission". This favorably for the Council or the prosecution since by jurisprudential fiat, knowledge is a state of mind. Thus, prosecuting this offense is now easier unlike before. The amendatory law also inserted a new sentence in paragraph d by stating that "in the case of a bre published or reported by media, the responsible reporter, writer, president, publisher, manager, and editor-in-chief shall be liable".[32]

Republic Act No. 10167, Republic Act No. 10168, Republic Act No. 10927 did not introduce any amendment to the penal provisions for money laundering. With respect to Republic Act No. 10168, although it contains penal provisions, it must be remembered that this law focused mainly on financing of terrorism and its related offenses. It inclusion as a relevant law for money laundering was only because of the revolutionary power it gave to the Council authorizing it to investigate financing of terrorism with the corresponding power to inquire into and examine bank deposits and investments without the need of securing an order from a court of competent jurisdiction and to freeze property or funds related thereto.

So, at present, the relevant amendments on the penal provisions for money laundering are the ones introduced by

[32] Rep. Act No. 9194 (2003), sec. 9

Republic Act No. 9194 and Republic Act No. 10365 which both amended Section 14 of Republic Act No. 9160. The last paragraph of Section 14 is an amendment introduced by Republic Act No. 10365, while paragraphs e, f, and g are entirely new provisions inserted by said law. Thus, the penal provision for money laundering may be summarized as follows:

> (a) Penalties for the Crime of Money Laundering. The penalty of imprisonment ranging from seven to 14 years and a fine of not less than Php3,000,000.00 but not more than twice the value of the monetary instrument or property involved in the offense, shall be imposed upon a person convicted under Section 4(a), (b), (c) and (d) of this Act. The penalty of imprisonment from four to seven years and a fine of not less than Php1,500,000.00 but not more than Php3,000,000.00, shall be imposed upon a person convicted under Section 4(e) and (f) of the Act. The penalty of imprisonment from six months to four years or a fine of not less than Php100,000.00 but not more than Php500,000.00, or both, shall be imposed on a person convicted under the last paragraph of Section 4 of the Act.
>
> (b) Penalties for Failure to Keep Records. The penalty of imprisonment from six months to one year or a fine of not less than Php100,000.00 but not more than Php500,000.00, or both, shall be imposed on a person convicted under Section 9(b) of the Act.
>
> (c) Malicious Reporting. Any person who, with malice, or in bad faith, reports or files a

completely unwarranted or false information relative to money laundering transaction against any person shall be subject to a penalty to six months to four years imprisonment and a fine of not less than Php100,000.00 but not more than Php500,000.00, at the discretion of the court: Provided, That the offender is not entitled to avail the benefits of the Probation Law.

If the offender is a corporation, association, partnership or any juridical person, the penalty shall be imposed upon the responsible officers, as the case may be, who participated in, or allowed by their gross negligence, the commission of the crime. If the offender is a juridical person, the court may suspend or revoke its license. If the offer is an alien, he shall, in addition to the penalties herein prescribed, be deported without further proceedings after serving the penalties herein prescribed. If the offender is a public official or employee, he shall, in addition to the penalties prescribed herein, suffer perpetual or temporary absolute disqualification from office, as the case may be.

Any public official or employee who is called upon to testify and refuses to do the same or purposely fails to testify shall suffer the same penalties prescribed herein.

(d) Breach of Confidentiality. The punishment of imprisonment ranging from three to eight years and a fine of not less than Php500,000.00 but not more than Php1,000,000.00 shall be imposed on a person convicted for a violation under Section 9(c). In case of a breach of confidentiality that is

published or reported by media, the responsible reporter, writer, president, publisher, manager and editor-in-chief shall be liable under the Act.

(e) The penalty of imprisonment ranging from four to seven years and a fine corresponding to not more than 200% of the value of the monetary instrument or property laundered shall be imposed upon the covered person, its directors, officers or personnel who knowingly participated in the commission of the crime of money laundering.

(f) Imposition of Administrative Sanctions. The imposition of the administrative sanctions shall be without prejudice to the filing of criminal charges against the persons responsible for the violation.

After due notice and hearing, the AMLC shall, at its discretion, impose sanctions, including monetary penalties, warning or reprimand, upon any covered person, its directors, officers, employees or any other person for the violation of the Act, its implementing rules and regulations, or for failure or refusal to comply with AMLC orders, resolutions and other issuances. Such monetary penalties shall be in amounts as may be determined by the AMLC to be appropriate, which shall not be more than P500,000.00 per violation.

The AMLC may promulgate rules on fines and penalties taking into consideration the attendant circumstances, such as the nature and gravity of the violation or irregularity.

(g) The provision of this law shall not be construed or implemented in a manner that will discriminate against certain customer types, such as politically-exposed persons, as well as their relatives, or against a certain religion, race or ethnic origin, or such other attributes or profiles when used as the only basis to deny these persons access to the services provided by the covered persons. Whenever a bank, or quasi-bank, financial institution or whenever any person or entity commits said discriminatory act, the person or persons responsible for such violation shall be subject to sanctions as may be deemed appropriate by their respective regulators.[33]

VIII. AUTHORITY TO FREEZE

Among the amendatory laws passed by Congress, the Council's authority to freeze money, property, and investments has been the most consistently amended provision. It would appear that in the Council's arsenal, it is the most powerful and the most potent weapon that would affect any respondent. Indeed, the immediate effect of the freeze order is more felt than that of civil forfeiture due to the lengthy nature of proceedings in the latter.

In this category, distinction must also be made between the Council's authority to freeze regarding covered and suspicious transactions and its authority to freeze with

[33] Rep. Act No. 10365 (2013), sec. 10

respect to terrorism financing cases. It must be emphasized that regarding the latter, Republic Act No. 10168 and not Republic Act No. 9160, as amended, is the one applicable.

Another important consideration is that Republic Act No. 10168 did not amend Section 10 of Republic Act 9160, as amended, hence, the provision in the former law respecting freezing of property or funds applies exclusively to terrorism financing cases. Thus:

> "The AMLC, either upon its own i
> the request of the ATC, is hereby authorized to issue an ex parte order to freeze without delay: (a) property or funds that are in any way related to financing of terrorism or acts of terrorism; or (b) property or funds of any person, group of persons, terrorist organization, or association, in relation to whom there is probable cause to believe that they are committing or attempting or conspiring to commit, or participating in or facilitating the commission of financing of terrorism or acts of terrorism as defined herein.
>
> "The freeze order shall be effec
> not exceeding twenty (20) days. Upon a petition filed by the AMLC before the expiration of the period, the effectivity of the freeze order may be extended up to a period not exceeding six (6) months upon order of the Court of Appeals: Provided, That the twenty-day period shall be tolled upon filing of a petition to extend the effectivity of the freeze order. Notwithstanding the preceding paragraphs, the AMLC, consistent with the Philippines' internatio
> shall be authorized to issue a freeze order with respect to property or funds of a designated

organization, association, group or any individual to comply with binding terrorism-related Resolutions, including Resolution No. 1373, of the UN Security Council pursuant to Article 41 of the Charter of the UN. Said freeze order shall be effective until the basis for the issuance thereof shall have been lifted. During the effectivity of the freeze order, an aggrieved party may, within twenty (20) days from issuance, file with the Court of Appeals a petition to determine the basis of the freeze order according to the principle of effective judicial protection.

'However, if the property or funds subject of the freeze order under the immediately preceding paragraph are found to be in any way related to financing of terrorism or acts of terrorism committed within the jurisdiction of the Philippines, said property or funds shall be the subject of civil forfeiture proceedings as hereinafter[34] provided."

For money laundering cases, the Council's authority t
freeze can be found in Section 10 of the original law which has been amended extensively by Republic Act No. 9194, Republic Act No. 10167, Republic Act No. 10365, and, lastly, Republic Act No. 10927.

Under Republic Act No. 9160, the Council was authorized to issue a freeze order, valid for 15 days, only upon determination of the existence of probable cause by the Council itself. It may be extended for 15 days upon order of the court; and only the Court of Appeals or the Supreme

[34] Rep. Act No. 10168 (2012), sec. 11

Court may issue a temporary restraining order or writ of injunction against the freeze order.

When Republic Act No. 9194 became law, it somehow clipped the Council's power by transferring issue freeze order to the Court of Appeals and only upon an application *ex parte* by the Council. From 15 days, the amendatory law increased the effectivity of the freeze order to 20 days unless extended by the court.[35] Since then, the Council was no longer authorized to issue freeze order on its own, but it must now resort to court proceedings to get one.

When Republic Act No. 10167 was passed, it amended the process by requiring the Council to file a verified *ex parte* petition instead of an *ex parte* application. The amendatory law also inserted a new provision which states as follows:

> "In any case, the court should ac
> to freeze within twenty-four (24) hours from filing of the petition. If the application is filed a day before a nonworking day, the computation of the twenty-four (24)-hour period shall exclude the nonworking days.
>
> "A person whose account has been frozen may file a motion to lift the freeze order and the court must resolve this motion before the expiration of the twenty (20)-day original freeze order.
>
> "No court shall issue a temporary restraining order or a writ of injunction against any freeze order, except the[36] Supreme Court."

[35] Rep. Act No. 9194 (2003), sec. 7

[36] Rep. Act No. 10167 (2012), sec. 1

When Republic Act No. 10365 took effect, the effectivity of the freeze order was changed again. This is the only amendment brought about by this law insofar as the freeze order is concerned. Thus:

> "xxx the Court of Appeals may iss
> order which shall be effective immediately, and which shall not exceed six (6) months depending upon the circumstances of the case: Provided, That if there is no case filed against a person whose account has been frozen within the period determined by the court, the freeze order shall be deemed ipso facto lifted: Provided, further, that this new rule shall not apply to pending cases in t[37]he courts."

The latest amendment to the Council's authority to freeze monetary instrument or property was made with the enactment of Republic Act No. 10927. As it stands, Section 10 of the original law now reads as follows:

> "Upon a *ex parte* petition by the AMLC and after determination that probable cause exists that any monetary instrument or property is in any way related to an unlawful activity as defined in Section 3(i) hereof, the Court of Appeals may issue a freeze order which shall be effective immediately, for a period of 20 days. Within the 20-day period, the Court of Appeals shall conduct a summary hearing, with notice to the parties, to determine whether or not to modify or lift the freeze order, or extend its effectivity. The total period of the freeze order

[37] Rep. Act No. 10365 (2013), sec. 8

issued by the Court of Appeals under this provision shall not exceed six months. This is without prejudice to an asset preservation order that the Regional Trial Court having jurisdiction over the appropriate anti-money laundering case or civil forfeiture case may issue on the same account depending upon the circumstances of the case, where the Court of Appeals will remand the case and its records: Provided, That if there is no case filed against a person whose account has been frozen within the period determined by the Court of Appeals, not exceeding six months, the freeze order shall be seemed ipso facto lifted: Provided, further, That this new rule shall not apply to pending cases in the courts. In any case, the court should act on the petition to freeze within 24 hours from filing of the petition. If the application is filed a day before a no working day, the computation of the 24-hour period shall exclude the nonworking days.

"The freeze order or asset preservation order issued under this Act shall be limited only to the amount of cash or monetary instrument or value of property that the court finds there is probable cause to be considered as proceeds of a predicate offense, and the freeze order or asset preservation order shall not apply to amounts in the same account in excess of the amount or value of the proceeds of the predicate offense.[38]

"A person whose account has been
file a motion to lift freeze order and the court must resolve this motion before the expiration of the freeze order.

[38] Rep. Act No. 10927 (2017), sec. 4

> "No court shall issue a temporary restraining order or a writ of injunction against any freeze order, except the Supreme Court."[39]

The latest procedures for the issuance of freeze orders clearly show that it is now a court-sanctioned order, a judicial process following specific court-issued guidelines.

IX. CIVIL FORFEITURE

Just like freeze orders, civil forfeiture for money laundering cases also follows specific guidelines issued by the Supreme Court.

Under Republic Act No. 9160, provisions on civil forfeiture, claim on forfeited assets, and payment in lieu of forfeiture were made.

When Republic Act No. 9194 was passed, it did not amend the forfeiture provisions but it declared in its transitory provision that "existing freeze orders issued by the AMLC shall remain in force for a period of 30 days after the effectivity of this Act, unless extended by the Court of Appeals".[40]

There was no amendment made by Republic Act No. 10167 and Republic Act No. 10927 while Republic Act No. 10168 stated that the procedure for the civil forfeiture of property or funds found to be in any way related to financing of terrorism under Section 4 and other offenses punishable

[39] The last two (2) paragraphs were introduced by Republic Act No. 10167 and were retained by Republic Act No. 10365.

[40] Rep. Act No. 9194 (2003), sec. 12

under Sections 5, 6, and 7 thereof shall be made in accordance with the AMLA, as amended, its Revised Implementing Rules and Regulations and the Rules of Procedure promulgated by the Supreme Court.[41]

Hence, the amendments made by Republic Act No. 10365, particularly on civil forfeiture and claim on forfeited assets, and the original provision on payment in lieu of forfeiture under Republic Act No. 9160 are the guiding provisions regarding civil forfeiture on money laundering cases.

It must be stressed that Republic Act No. 10365 practically overhauled the civil forfeiture provisions as found in the Section 12(a) of the original law. Moreover, the amendatory law used the term "judgment of forfeiture" instead of "judgment of conviction and order of forfeiture" found in the original law. Also, the word "finality" appears to highlight the new requirement that the order forfeiture must first attain finality before the verified petition can be filed in court. Finally, it must be reiterated that the provision on payment in lieu of forfeiture founder under Section 12(c) of the original law remains untouched. Thus, the provisions on civil forfeiture may be stated as follows:

> "(a) Civil Forfeiture. –Upon determination by the AMLC that probable cause exists that any monetary instrument or property is in any way related to an unlawful activity as defined in Section 3(i) or a money laundering offense under Section 4 hereof, the AMLC shall file with the appropriate court through the Office of the Solicitor General, a verified ex parte petition for

[41] Rep. Act No. 10168 (2012), sec. 18

forfeiture, and the Rules of Court on Civil Forfeiture shall apply.

"The forfeiture shall include those other monetary instrument or property having an equivalent value to that of the monetary instrument or property found to be related in any way to an unlawful activity or a money laundering offense, when with due diligence, the former cannot be located, or it has been substantially altered, destroyed, diminished in value or otherwise rendered worthless by any act or omission, or it has been concealed, removed, converted, or otherwise transferred, or it is located outside the Philippines or has been placed or brought outside the jurisdiction of the court, or it has been commingled with other monetary instrument or property belonging to either the offender himself or a third person or entity, thereby rendering the same difficult to identify or be segregated for purposes of forfeiture.

"(b) Claim on Forfeited Assets. –Where the court has issued an order of forfeiture of the monetary instrument or property in a criminal prosecution for any money laundering offense defined under Section 4 of the Act, the offender or any other person claiming an interest therein may apply, by verified petition, for a declaration that the same legitimately belongs to him and for segregation or exclusion of the monetary instrument or property corresponding thereto. The verified petition shall be filed with the court which rendered the judgment of forfeiture, within 15 days from the date of the finality of

the order of forfeiture, in default of which the said order shall become final and executor. This provision shall apply in both civil and criminal forfeiture.

"(c) Payment in Lieu of Forfeiture. – Where the court has issued an order of forfeiture of the monetary instrument or property subject of a money laundering offense defined under Section 4, and said order cannot be enforced because any particular monetary instrument or property cannot, with due diligence, be located, or it has been substantially altered, destroyed, diminished in value or otherwise rendered worthless by any act or omission, directly or indirectly, attributable to the offender, or it has been concealed, removed, converted, or otherwise transferred to prevent the same from being found or to avoid forfeiture thereof, or it is located outside the Philippines or has been placed or brought outside the jurisdiction of the court, or it has been commingled with other monetary instruments or property belonging to either the offender himself or a third person or entity, thereby rendering the same difficult to identify or be segregated for purposes of forfeiture, the court may, instead of enforcing the order of forfeiture of the monetary instrument or property or part thereof or interest therein, accordingly order the convicted offender to pay an amount equal to the value of said monetary instrument or property. This provision shall apply in both civil and criminal forfeiture [42] .

[42] Rep. Act No. 10365 (2013), sec. 9

X. AUTHORITY TO INQUIRE INTO BANK DEPOSITS AND INVESTMENTS

The Council was also given power to inquire into and examine bank deposits and investments by Republic Act No. 10168. The provision in said law is exclusive to financing of terrorism cases and must not be confused with money laundering within the ambit of Republic Act No. 9160 and its relevant amendments.

Under Republic Act No. 9160, the C
inquire into bank deposits was couched in this manner:

> "Notwithstanding the provisions of Republic Act No. 1405, as amended; Republic Act No. 6426, as amended; Republic Act No. 8791, and other laws, the AMLC may inquire into or examine any particular deposit or investment with any banking institution or non-bank financial institution upon order of any competent court in cases of violation of this Act when it has been established that there is probable cause that the deposits or investments involved are in any way related to a money laundering offense: Provided, That this provision shall not apply to deposits and investments made prior to the effectivity of this Act."[43]

When Republic Act No. 9194 was passed, it removed the non-retroactivity clause in the original law. It also clarified the phrase "the deposits or investment

[43] Rep. Act No. 9160 (2001), sec. 11

way" by stating that they must be activities as defined in Section 3(I) or a money laundering offense under Section 4, except that no court order shall be required in cases involving unlawful activities defined in Sections 3(I)1, (2) and (12). Further, it inserted a new provision to the effect that:

> "To ensure compliance with the Act, the Bangko Sentral ng Pilipinas (BSP) may inquire into or examine any deposit of investment with any banking institution or non-bank financial institution when the examination is made in the course of a periodic or special examination, in accordance with the rules of examination of the BSP[44]".

Under Republic Act No. 10167, the related accounts of any particular deposit or investment were included and the order of the court was required to be based on an *ex parte* application of the Council. The clause "and felonies or offenses of a nature similar to those mentioned in Section 3(i)(1), (2), and (12), which are punishable under the penal laws of other countries, and terrorism and conspiracy to commit terrorism as defined and penalized under Republic Act No. 9372" was likewise included. It must be noted that both Republic Act No. 9160 and Republic Act No. 9194 were passed by Congress prior to Republic Act No. 9372.

Republic Act No. 10167 also introduced the following new provisions, namely:

> "The Court of Appeals shall act on the application to inquire into or examine any deposit or investment with any banking

[44] Rep. Act No. 9194 (2003), sec. 8

institution or non-bank financial institution within twenty-four (24) hours from filing of the application.

xxx.

"For purposes of this section, 're shall refer to accounts, the funds and sources of which originated from and/or are materially linked to the monetary instrument(s) or property(ies) subject of the freeze order(s).

"A court order ex parte must first be obtained before the AMLC can inquire into these related Accounts: Provided, That the procedure for the ex parte application of the ex parte court order for the principal account shall be the same with that of the related accounts.

"The authority to inquire into or examine the main account and the related accounts shall comply with the requirements of Article III, Sections 2 and 3 of the 1987 Constitution, which are hereby incorporated by referen[45]

As already mentioned above, Republic Act No. 10168 gave a new revolutionary power to the Council by authorizing it to inquire into and examine bank deposits and investments without the need of an order from a court of competent jurisdiction[46]. However, it only applies to terrorism financing cases. At any rate, this topic is the subject of the author's separate article which extensively discussed said power in

[45] Rep. Act No. 10167 (2012), sec. 2

[46] Rep. Act No. 10167 (2012), sec 10

relation to our laws on secrecy of bank deposits and investments.

When Republic Act No. 10365 was passed, Congress did not amend Section 11 of Republic Act No. 9160. Nevertheless, to highlight the immense power that the Council has and the fact that the secrecy of bank deposits and investments must remain a tightly guarded fortress, it created an entirely new section in the original law as follows:

> "SEC. 21. The authority to inquire into or examine the main account and the related accounts shall comply with the requirements of Article III, Sections 2 and 3 of the 1987 Constitution, which are hereby incorporated by reference. Likewise, the constitutional injunction against ex post facto laws and bills of attainder shall be respected in the implementation of this Act[47]."

No amendment was made under Republic Act No. 10927.

Therefore, as can be gleaned from the above disquisitions, the Council's authority to inquire into bank deposits may be stated as follows:

> "SEC. 11. Authority to Inquire into Bank Deposits. – Notwithstanding the provisions of Republic Act No. 1405, as amended; Republic Act No. 6426, as amended; Republic Act No. 8791; and other laws, the AMLC may inquire into or examine any particular deposit or investment, including related accounts, with any banking

[47] Rep. Act No. 10365 (2013), sec 11

institution or non-bank financial institution upon order of any competent court based on an ex parte application in cases of violations of this Act, when it has been established that there is probable cause that the deposits or investments, including related accounts involved, are related to an unlawful activity as defined in Section 3(i) hereof or a money laundering offense under Section 4 hereof; except that no court order shall be required in cases involving activities defined in Section 3(i)(1), (2), and (12) hereof, and felonies or offenses of a nature similar to those mentioned in Section 3(i)(1), (2), and (12), which are Punishable under the penal laws of other countries, and terrorism and conspiracy to commit terrorism as defined and penalized under Republic Act No. 9372.

"The Court of Appeals shall act on the application to inquire into or examine any deposit or investment with any banking institution or non-bank financial institution within 24 hours from filing of the application.

"To ensure compliance with this Act, the Bangko Sentral ng Pilipinas may, in the course of a periodic or special examination, check the compliance of a Covered institution with the requirements of the AMLA and its implementing rules and regulations.

"For purposes of this section, 'records' shall refer to accounts, the funds and sources of which originated from and/or are materially linked to the monetary instrument(s) or property(ies) subject of the freeze order(s).

> "A court order ex parte must first be obtained before the AMLC can inquire into these related Accounts: Provided, That the procedure for the ex parte application of the ex parte court order for the principal account shall be the same with that of the related accounts.
>
> "The authority to inquire into or examine the main account and the related accounts shall comply with the requirements of Article III, Sections 2 and 3 of the 1987 Constitution, which are hereby incorporated by reference.[48]

Indeed, since 2001, our main law on money laundering has been amended four times already, excluding those introduced by Republic Act No. 10168. These amendments within a span of just two decades clearly show our country's commitment and adherence to international legal regimes and the recognition on the trends and techniques in combatting, and necessarily eradicating, money laundering within its jurisdiction lest we become blacklisted, thus, affecting our country's reputation in the international arena and, more importantly, our economy considering that about 10% of our Gross Domestic Product comes from remittances of Overseas Filipino Workers.

Challenges remain in our country's desire to keep our regulatory regime on money laundering up to international standards, but our Congress has been steadfast in meeting these challenges as can be seen by the number of amendments it made in Republic Act No. 9160. Thus, expect Congress to address anew the issues on Philippine Offshore Gaming Operators (POGOs) and real estate brokers or

[48] Rep. Act No. 10167 (2012), sec 2.

companies to be included as covered persons; amendment to present BSP issuances on cash smuggling; tax offenses as a predicate offense of money laundering; and criminalizing the financing of proliferation of weapons of mass destruction and making it a predicate offense of money laundering.

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